



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**ELECTION PETITION NO. 11 OF 2013**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)  
PETITION RULES 2013; RULES 4, 5, 6(1), 8,9,10,11,12,13,21,22,33 AND 38**

**AND**

**IN THE MATTER OF THE ELECTION OF MEMBER OF THE NATIONAL ASSEMBLY  
BARINGO CENTRAL CONSTITUENCY HELD ON THE 4<sup>TH</sup> DAY OF MARCH 2013**

**BETWEEN**

**HOSEA MUNDUI KIPLAGAT.....PETITIONER**

**VERSUS**

**SAMMY KOMEN MWAITA.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (IEBC).....2<sup>ND</sup> RESPONDENT**

**MOSES SIMIYU NYONGESA.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. On the 4<sup>th</sup> of March 2013, as was the case in the entire country, the voters of Baringo Central went to vote for among others their Member of the National Assembly. When the results were declared, the 1<sup>st</sup> Respondent was declared the duly elected Member of the National Assembly for Baringo Central Constituency.
2. The Petitioner and the 1<sup>st</sup> Respondent were among the six candidates who contested in the said elections. The Petitioner contested the seat on an Orange Democratic Movement Party ticket. The

results garnered by each of the candidates as declared by the 3<sup>rd</sup> Respondent were as follows:

- a. Sammy Komen Mwaita (1<sup>st</sup> Respondent) – 8,355
- b. Hoseah Mundui Kiplagat (Petitioner) - 6,352
- c. Chemwetich Langat - 179
- d. John Kiprono Chepkwony - 2,033
- e. Joshua Chepyegon Kandie - 3,733
- f. Manyariky Jelagat Leah - 5,377
- g. Raphael Kiptoo Kimosop - 97

### **The Petition**

3. Dissatisfied, the Petitioner filed this Petition dated 10<sup>th</sup> April 2013 to challenge the declaration of the 1<sup>st</sup> Respondent as the duly elected Member of the National Assembly for Baringo Central Constituency. The Petition is supported by the Affidavit of the Petitioner, sworn on 10<sup>th</sup> April 2013 and the Affidavits of the Petitioner's witnesses, Wilson Kimunge Chesire and Matthew Boit Ngetich, also sworn on 10<sup>th</sup> April 2013.
4. The Petitioner states that the elections for Member of National Assembly for Baringo Central Constituency were not fair for the reason that the 1<sup>st</sup> Respondent by himself or his agents engaged in electoral malpractices including voter bribery, intimidation and undue influence. The Petitioner details that the 1<sup>st</sup> Respondent's brother and cousin gave money to voters on the eve of the elections. Further, he states that the 1<sup>st</sup> Respondent's wife, who is a Human Resource officer used her position to induce voters particularly teachers on the promise of promotion and employment. The Petitioner further alleges that 1<sup>st</sup> Respondent used teachers as polling agents thus unduly influencing voters during polling. The Petitioner also states that his agents were obstructed and harassed in certain polling stations by Presiding Officers.
5. The Petitioner has also faulted the electoral forms used in that election for the reason that some Form 35 contained what he calls curious cancellations and alterations, which were neither countersigned nor justified. The Petitioner adds that certain electoral forms used were incomplete. He has detailed these allegations by stating that Form 36 was not signed by the Returning Officer, while in other forms, statutory comments by the Presiding Officer, signatures of Deputy Presiding Officers and party agents were missing. The Petitioner also claims that there was over 100% voter turnout in Riwo Polling Station.
6. In light of the above, the Petitioner prays that the election of the 1<sup>st</sup> Respondent be nullified, and the Certificate issued declaring the 1<sup>st</sup> Respondent be consequently quashed. He also prays that the 1<sup>st</sup> Respondent be held liable for the offence of bribery and costs of the Petition.

### **Responses**

7. Pursuant to **Rule 14(1)** of the **Elections (Parliamentary and County Elections) Petition Rules, 2013** (the Election Petition Rules 2013), the Respondents filed their respective Responses. The 1<sup>st</sup> Respondent filed a Response dated 30<sup>th</sup> April 2013 which is supported by his Affidavit of the same date. The 1<sup>st</sup> Respondent denies allegations of misconduct and electoral malpractices on his part or his agents. The 1<sup>st</sup> Respondent also faults the Petitioner for not particularizing the allegations of misconduct in the Petition. Simultaneously filed with the 1<sup>st</sup> Respondent's Response were the supporting witnesses' Affidavits of John Kiplimo Limo, Dinah Chelimo Jelal, Hilary Kipkorir Mwaita, Richard Chepkangor Kimurei, Erick Cheboi, Ezekiel Kiplagat Kipkeiyo, Augustine Kiptoo Koros, Rodah Chebor Rono, Stella Jepkoech Ruto, Joseph Kibowen Chemjor, Raphael Kiptoo Kimosop, all sworn on 30<sup>th</sup> April 2013.

8. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents also opposed the Petition by filing a joint Response dated 6<sup>th</sup> May 2013. The Response is supported by the Affidavit of Moses Simiyu Nyongesa, the 3<sup>rd</sup> Respondent herein, and the Returning Officer for Baringo Central Constituency sworn on 11<sup>th</sup> May 2013.
9. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents state that the elections were conducted in a free, fair and democratic manner and deny the allegation of voter bribery, intimidation and undue influence since none of the alleged complaints were reported to the Commission. The assertions of over 100% voter turnout, incompleteness of electoral forms and cancellations and alterations in the Forms are also denied. The Respondents further discounted the claim of obstruction and intimidation of the Petitioner's agents. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents pray for the dismissal of the Petition and for attendant costs.
10. At the hearing, three witnesses testified for the Petitioner's case including the Petitioner himself. The Petitioner relied on his Affidavit sworn on 10<sup>th</sup> April 2013 together with the annexures, that is Form 36 for the declaration of results for Member of the National Assembly for Baringo Central Constituency and Kenya Gazette Notice No. 3155. In his Affidavit, the Petitioner contested the results that were declared by the 3<sup>rd</sup> Respondent by relying on a copy of Form 36 dated 7<sup>th</sup> March 2013. He also averred that there were incidents of massive bribery of voters that he was informed about by his agents. The Petitioner testified that Forms 35 were altered and thus, the result could not be relied on.
11. The second witness, Mathew Boit Ngetich a resident of Sessia Quarry, is a registered voter in Baringo Central Constituency. In his Affidavit, he states that on 3<sup>rd</sup> March 2013 at Sessia Quarry, one Richard Kimurei together with Hillary Mwaita who are proxies of the 1<sup>st</sup> Respondent gave him and other quarry workers money to induce them to vote in favour of the 1<sup>st</sup> Respondent. He stated that they were each given Kshs. 100 and instructed to chant 'Mwaita tena' (meaning 'Mwaita again') when they turned up to vote on the polling day. The witness also stated that the 1<sup>st</sup> Respondent's agents assisted and marked for illiterate and elderly voters in voting, citing his elderly mother as one of such voters who were assisted by agents of the 1<sup>st</sup> Respondent.
12. The third witness for the Petitioner's case, Wilson Kimunge Chesire, also a registered voter in Baringo Central Constituency, produced his Affidavit in evidence in which he reiterates the averments by Mathew Boit Ngetich with respect to the bribery incident of 3<sup>rd</sup> March 2013 at Sessia Quarry. In fact, the witness states in his Affidavit that he is the one who received the money and distributed it among the people at the quarry with every person receiving Kshs. 100.
13. The 1<sup>st</sup> Respondent called 4 witnesses out of the 11 witnesses who were initially set to testify. Consequently, the Affidavits of the witnesses who did not testify in Court were expunged from the Court record. The 1<sup>st</sup> Respondent produced his Affidavit in evidence. He denied the allegations of voter bribery alleged by the Petitioner, and in particular denied appointing any persons to undertake bribery of voters on his behalf. The 1<sup>st</sup> Respondent in deed challenged the Petitioner to prove the alleged massive bribery of voters attributed to him in the run-up to the elections. Further, the Respondent denied that his brother, who he allegedly used to bribe voters was at Sessia Quarry at the material time.
14. While acknowledging that his wife is an employee of the Teachers Service Commission, the 1<sup>st</sup> Respondent denied that she holds the position of Human Resources Officer as alleged by the Petitioner and denied further that she exercised any undue influence over the voters by virtue of her position. He challenged the Petitioner for not giving detailed particulars of persons who were the victims of the alleged undue influence. With respect to the use of teachers as agents, the 1<sup>st</sup> Respondent stated that agents were appointed by the sponsoring party, in this case, the United Republican Party.

15. The 1<sup>st</sup> Respondent added that the issue of over 100% voter turnout in Riwo Polling Station was unfounded, since the records showed that 266 voters voted out of the 290 registered voters. He further stated that the Petitioner did not particularize the allegations of cancellations, alterations and incompleteness of Forms 35 and 36 and obstruction of party agents. In summation, the 1<sup>st</sup> Respondent stated that the Petitioner not only failed to prove his allegations but also did not show that the alleged irregularities and malpractices affected the outcome of the results.
16. The 1<sup>st</sup> witness for the 1<sup>st</sup> Respondent, Richard Kimurei is a registered voter at Kipkaech Sub-Location Baringo Central Constituency. On 4<sup>th</sup> March 2013, he was based at Sesya Primary School Polling Station as an agent on behalf of United Republican Party (URP). He denied the allegations of voter bribery and undue influence attributed to him by the Petitioner and his witnesses. He stated that on 3<sup>rd</sup> March 2013, he was at home and not with the 1<sup>st</sup> Respondent's brother as stated. The witness added that as a teacher, he was a public servant and did not support any candidate. He dismissed the Petitioner's witnesses as liars and untrustworthy.
17. The 2<sup>nd</sup> Witness for the 1<sup>st</sup> Respondent, Hillary Mwaita, is a brother to the 1<sup>st</sup> Respondent and a registered voter in Baringo Central Constituency. Relying on his Affidavit sworn on 31<sup>st</sup> April 2013, he denied the averments concerning him in the Petition. He stated that on the material day, he was in fact travelling from Mombasa. He testified that he left Mombasa for Nairobi on 3<sup>rd</sup> March 2013 between 10.00pm and 10.15pm and produced a bus ticket to this effect. He testified that he arrived in Nairobi between 5.00 am and 6.00 am and left for Nakuru from where he travelled to Baringo and arrived at about 3pm. By this testimony, the witness said that the averments of paragraph 4 of his Affidavit were in fact in error as he arrived in Nairobi on the morning of 4<sup>th</sup> March 2013 and not the evening of 3<sup>rd</sup> March 2013 as stated in his Affidavit. The witness added that as a public servant, he was aware of the prohibitions in the **Public Officers Ethics Act** and as such did not take part in political activities and campaigns
18. The 3<sup>rd</sup> Witness for the 1<sup>st</sup> Respondent, Eric Cheboi is a registered voter in Baringo Central Constituency and is the chairman of the Sessia Quarry Group, a group of quarry owners. He testified that on the day in question he was at the quarry and that he saw Mathew Boit Ngetich since his house is next to the quarry. He said that he never received any report of anyone having gone to give people money and neither did he witness any such incident. He also testified that neither the Petitioner nor the 1<sup>st</sup> Respondent ever came to seek votes at the Quarry. He insisted that he would have known of any incidents on the day in question since there is a Disciplinary Committee which would have taken action. He dismissed the Petitioner's witnesses as being liars and untrustworthy whose testimony ought not be relied on.
19. The 4<sup>th</sup> Witness, Sammy Mwaita is the 1<sup>st</sup> Respondent. He too produced his Response to the Petition and Affidavit sworn on 30<sup>th</sup> April 2013 as his evidence. He also produced a copy of Form 38 issued to him by the Returning Officer on 5<sup>th</sup> March 2013, a copy of Form 36 dated 5<sup>th</sup> March 2013 also issued to him at the Tallying Hall, and a report by ELOG. He was invited to comment on the two Forms 36, the one produced by the Petitioner and the one he produced. The 1<sup>st</sup> Respondent denied all the allegations of bribery attributed to him and allegations of undue influence attributed to his wife. He challenged the Petitioner to demonstrate the allegations with evidence. With respect to the use of teachers as party agents, the 1<sup>st</sup> Respondent averred that the appointment of agents was the prerogative of the sponsoring party, which in his case was done by the United Republican Party. He denied the allegation of over 100% voter turnout by stating that in Riwo Polling Stations, only 266 out of the registered 29 persons voted.
20. The 3<sup>rd</sup> Respondent, Moses Simiyu Nyongesa testified on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. He relied on two Affidavits sworn on 6<sup>th</sup> and 11<sup>th</sup> May 2013 together with the annexures. He denies the allegations leveled against the Commission and maintains that the elections were conducted in a free and fair manner. He also responds that the Presiding Officers countersigned

against any cancellations and alterations in Forms 35. The 3<sup>rd</sup> Respondent produced a Form 36 that he signed on 5<sup>th</sup> March 2013, and distanced himself from the copy produced by the Petitioner. He responded to some of the areas pointed out to him at the witness stand by Counsel for the Petitioner, concerning the cancellations and alterations. He conceded that not all were countersigned but denied that they were curious.

21. The Parties filed the following issues as agreed on 3<sup>rd</sup> June 2013 during the pre-trial conference:

- a. Whether the elections for Member of Parliament for Baringo Central Constituency held on 4<sup>th</sup> March 2013 were free, fair and credible,
- b. Whether the 1<sup>st</sup> Respondent by himself or through his agents or proxies engaged in voter buying or bribery of voters or committed any election malpractices as alleged in the Petition
- c. Whether the Petitioner has set out sufficient grounds for granting the reliefs sought
- d. Costs of the Petition

22. Subsequently, parties filed their respective written submissions and on 11<sup>th</sup> July 2013, the Petition came up for the highlighting of the submissions. The Petitioner was represented by Mr. Kanchory and Mr. Mutai. Mr. Adere, Mr. Mengich and Ms. Barasa appeared for the 1<sup>st</sup> Respondent, while Mr. Karanja appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

### **Preliminary issues for determination**

23. The learned Counsel for the 1<sup>st</sup> Respondent introduced two preliminary issues which I must address first before I delve into the main issues in the Petition. The two issues were first raised when the Parties came to Court for the highlighting of submissions earlier filed.

*(a) Whether the Affidavits sworn and filed in support of the Petition were Invalid for being commissioned by an unqualified Advocate and therefore, what was the consequence of a finding on their validity on the Petition?*

24. The 1<sup>st</sup> Respondent also brought in a Notice of Preliminary Objection to the effect that the Petition is incompetent, untenable and incurably defective for want of properly sworn Affidavits accompanying the Petition. The basis for this Objection is that Affidavits were commissioned by an unqualified Advocate. Therefore, the Affidavits do not comply with **Rule 10(3)(b)** and **Rule 12** of the **Election Petition Rules 2013**, and the **Oaths and Declarations Act**.

25. The 1<sup>st</sup> Respondent provided a letter from the Law Society of Kenya as proof of the fact that Mr. Timon Kosgei who commissioned the Affidavits of the Petitioner and his witnesses had not taken out a practicing certificate for the year 2013.

26. Under **Section 2** of the **Oaths and Statutory Declaration Act**, only practicing advocates may be appointed as commissioners for oaths by the Chief Justice. Under the **Advocates Act** in **Section 5** a person cannot be qualified to be a practicing Advocate unless:

*“(a) he has been admitted as an advocate;*

*(b) his name is for the time being on the Roll; and*

*(c) he has in force a practising certificate.”*

27. Possession of a practicing certification is a constant condition precedent before one can qualify to act as an Advocate in any respect including as a Commissioner for Oaths. On the validity of a practicing certificate the **Advocates Act** in **Section 24** provides that:

*“(1) Every practicing certificate shall bear the date of the day on which it is issued and shall have effect from the beginning of that day:*

*Provided that a practicing certificate which is issued during the first month of any practicing year shall have effect for all purposes from the beginning of that month*

*(2) The practicing year shall be from the 1<sup>st</sup> January to 31<sup>st</sup> December:*

*Provided that the Council of the Society, with the approval of the Chief Justice, may by order alter the practicing year, and the order may make such transitional provision in regard to incidental matters as may be expedient.*

*(3) Every practicing certificate shall expire at the end of the practicing year in which it was issued”*

28. It is not in dispute that Mr. Timon Kosgei who commissioned the Petitioner's and his witnesses' Affidavits was not qualified to practice as an Advocate going by the evidence presented by the 1<sup>st</sup> Respondent, which was not denied. The learned Counsel for the Petitioner did not deny this fact and only contended the manner and point at which this issue was raised. On this fact alone, the said advocate is in contravention of the **Advocates Act** and the **Oaths and Statutory Declarations Act**. In particular, the Advocate offends the provisions of **Sections 31, 33 and 34** of the **Advocates Act**. Consequently, the documents commissioned by an unqualified Advocate are not valid.

29. That being the case, what is the effect on the election Petition? **Rule 10(3)(b)** of the **Election Petition Rules 2013** requires that an election Petition shall be *“supported by an affidavit made by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on by the Petitioner.”*

30. **Rule 12** on the other hand requires the Petitioner to file Affidavits of witnesses the Petitioner may wish to rely on simultaneously with the Petition. Thus, the Petition would not be complete without, most importantly, the valid supporting Affidavits of the Petitioner himself. Similarly, the matters deposed to by the witnesses would have no effect where the same were not commissioned by a qualified advocate. An Affidavit commissioned by an unqualified advocate is as good as an Affidavit not commissioned at all, it is not complete without the attestation clause and is therefore void.

31. This matter has already come up for hearing severally and in fact before the Pre Trial Conference held on 3<sup>rd</sup> June 2013, parties had an opportunity to ventilate interlocutory issues which were heard and determined. By the time this matter was proceeding, parties were ready to prosecute their respective cases and indeed the same was done. Had the issue of the validity of the Affidavits been raised early on in the proceedings, the Court would have made the appropriate orders then. The other party will also have no opportunity to respond to the matters alleged. Furthermore, the deponents of the impugned Affidavits did testify and were cross-examined on their Affidavits. Having come this far, I will render the Court's finding on the issues affecting each party's case.

(b) Whether the Petition is valid in light of the date of filing of the Petition

32. Mr. Adere for the 1<sup>st</sup> Respondent in his submissions questioned, also for the first time in the proceedings, the validity of the Petition with respect to the date of filing. The learned Counsel submitted that the results of the disputed election were declared on 5<sup>th</sup> March 2013 and therefore the Petition was filed out of time having been filed on 10<sup>th</sup> April 2013. Drawing a comparison from the repealed Constitution, Mr. Adere noted that the present Constitution, unlike the previous one, did not donate any powers to Parliament to determine when time to file a Petition starts running. Mr. Adere faulted the Legislature for providing for the date of gazette, as the time

when the 28 days start running, thus usurping the Constitution, and arrogating itself powers which were not accorded by the Constitution

33. Mr. Adere referred to the provisions of **Section 44(4)(a)** of the **repealed Constitution**, which gives Parliament powers to fix time with regard to filing election petitions in the following words:

***“Parliament may make provision with respect to - the circumstances and manner in which, the time within which and the conditions upon which an application may be made to the High Court for the determination of a question under this section”***

34. Learned Counsel further reasoned that the Constitution, intrinsically has provisions on timeline for filing petitions and does not provide for any express powers to Parliament to fix the same. Therefore, Parliament acted outside its mandate in providing for the time to run from the date of gazettment, instead of declaration, thus going against the thread of the Constitution. He opined that declaration is the one done by the Returning Officer who is the only official of the Commission allowed to declare the result. Counsel therefore urged that having exceeded its powers in providing for gazettment, the provision is void by virtue of **Article 2(4)** of the **Constitution**.

35. The provision being challenged by Counsel for the 1<sup>st</sup> Respondent is **Section 76(1)(a)** of the **Elections Act** which reads:

***“A petition to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of presentation;***

It also provides in **Section 77(1)** that:

***“A petition concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Commission.”***

The provision under the Constitution is **Article 87(2)** which provides that:

***“Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.”***

36. This issue has come up in several cases, the latest of which was ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others, Court of Appeal at Malindi, Civil Appeal No. 12 of 2013***. In this case, the Court of Appeal found that the provisions of the Elections Act were not unconstitutional.

37. Suffice it to say that this issue ought to have been raised before the hearing. This issue was never in contention for the 1<sup>st</sup> Respondent, indeed it never arose during interlocutory proceedings. The role of submissions in a case is to canvass the issues raised during trial and therefore argue one's case supporting the facts with the law. It is inappropriate, for Counsel for the 1<sup>st</sup> Respondent to raise new matters, which are clearly overtaken by events during submissions.

### **Issues for Determination**

38. Before delving into the main issues in contention, I must set out the guiding principles on the standard of proof in election Petitions. Learned Counsels for the Respondents submitted in support of the principle that the burden of proof should rest on the Petitioner. Some of the allegations made in this Petition amount to election offences, acts which are criminal in nature. With this in mind, the respective learned Counsels for the Respondents submitted that, the standard of proof is above a balance of probabilities but slightly below the standard of beyond reasonable doubt. The

learned Counsels cited several authorities in support of these submissions.

39. Several pronouncements have been made regarding the burden and standard of proof in election Petitions. The **Elections Act** is silent in this regard. The burden of proof is on the Petitioner to prove the allegations he makes to satisfy the court that the elections as held were not free and fair. The Supreme Court in **Raila Odinga & 5 Others v The IEBC & 3 Others Election Petition No. 5 of 2013**,

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

And further that:

*“...it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting.”*

40. From this it is clear that the Petitioner has the duty to show that the breaches complained of went to the substance of the election. It is not enough to simply point out that there were breaches of the law, the twin elements must be established for a petition challenging an election to succeed. This obligation also points out to the standard of proof required. Again, several judicial pronouncements have given insight in this regard, most recently by the Supreme Court in the case of **Raila Odinga & 5 others v The IEBC & 3 Others** (Supra). The Court observed that:

*“...judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. ..”*

41. The degree of proof varies depending on the nature of allegations made. This is because where election petitions are concerned, certain allegations may only be of the civil kind, thus, the normative standard of balance of probabilities suffices. Whereas, where allegations made amount to criminal offences, being electoral offences under the laws, then the higher standard of proof is required.

42. I shall therefore consider the issues raised in this Petition in light of the principles set out above, taking into consideration the evidence placed before me in entirety.

*Whether the 1<sup>st</sup> Respondent by himself or through his agents or proxies engaged in electoral malpractices or committed any election malpractices as alleged in the Petition*

43. On the issue of voter bribery the Petitioner alleged that there were incidents of massive bribery attributable to the 1<sup>st</sup> Respondent and his agents. The Petitioner in his testimony confirmed that he himself did not witness any of those incidents directly but learnt of them from his agents. **PW2, Mathew Ngetich Boit and (PW3), Wilson Kimunge Chesire**, the two witnesses for the Petitioner alleged to have been bribed by the agents of the 1<sup>st</sup> Respondent. They both stated in their respective Affidavits and oral testimony that on 3<sup>rd</sup> March 2013 at Sesia Quarry, one Richard Kimurei together with Hillary Mwaita who are proxies of the 1<sup>st</sup> Respondent gave them and other

quarry workers money to induce them to vote in favour of the 1<sup>st</sup> Respondent.

44. Mr. Mengich and Mr. Karanja challenged the credibility of the evidence of the two Petitioner's witnesses drawing from their demeanor at the witness box during the hearing. In deed the learned Counsels urged this Court in their submissions to treat the two Petitioner's witnesses as accomplices, whose evidence needs to be corroborated. Learned Counsels further urged that the Court ought to consider this fact and the character of the witnesses in determining the weight to be accorded to their statements and testimonies in Court. Mr. Karanja further submitted that the two Petitioner's witnesses were principal offenders having committed the offence of receiving a bribe.
45. In this regard, Counsels referred me to several authorities including: *Kondavet Gurunath Reddy v V. Seshaiyah & Others* AIR 1966 APN, *Ndungu Kimanyi v Republic* 1976 – 1980 KLR 1444, *Shida Kazungu Baya & 4 Others v Republic Court of Appeal at Mombasa, Criminal Appeal No. 273 of 2006 - [2008] eKLR*, *Onesmus Mutua Kiilu & Another v Republic* [2006] eKLR, *Wilson Mbithi Mungutu v Patrick Makao Kingora & Another* [2013] eKLR and *Sambu v Genga & Another Election Petition No. 3 of 1998, [2008] 1KLR (EP) 396*
46. The Petitioner's case on voter bribery rests on the evidence of the two witnesses. I had the chance to observe their demeanor and I noted several contradictions in their testimonies and hesitance on their part to answer questions put to them especially during cross examination. **PW2**, who during cross-examination by Mr. Adere for the 1<sup>st</sup> Respondent, initially indicated that he did not understand English turned around and said he could read in English. He was also evasive in confirming whether or not he went to the office of Mr. Kanchory to sign the Affidavit and was not forthright in confirming how he came to record his statement.
47. **PW2** testified that he travelled with **PW3** and that they alighted at Nyamakima stage in Nairobi. He however could not explain comprehensively how they eventually arrived at the Advocates' office in Upper Hill area since this was their maiden trip to Nairobi. The witness was evasive as to who asked him to travel to Nairobi. Generally, I observed that the witness was difficult and kept on changing his testimony, on whether or not he knew it was an offence to receive money in the circumstances he described. He was also not forthright on the question as to whether he reported what he alleged to be bribery of voters. In his view the Kshs. 2,000 issued to voters at Sessia Quarry made the 1<sup>st</sup> Respondent win the elections. On cross-examination by Mr. Karanja for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the witness admitted to knowing that he received a bribe and that he realized it was a bribe when they were informed that the money was given to ensure the recipients voted in support of the 1<sup>st</sup> Respondent.
48. **PW3**, on his part, contradicted **PW2** with respect to their journey to Nairobi. He testified that they alighted at Country Bus station and not Nyamakima stage. He similarly, could not explain how they found their way to the Advocate's office where they encountered Mr. Kanchory and Mr. Kosgei who commissioned his Affidavit. The witness however, could not identify the said Mr. Kosgei. Instead he pointed at learned Counsel, Mr. Kanchory as the said Mr. Kosgei, Advocate. He too was not forthcoming in answering questions in Court. For instance, it was only after persistent prodding that he revealed that they were with the Petitioner on the day they swore their respective Affidavits on 10<sup>th</sup> April 2013.
49. Before I delve into the probative value of the witnesses' testimony I must first determine the question as to whether these witnesses should be treated as accomplices. If it is established that the said witnesses are accomplices, then the probative value to be accorded to their evidence is not in question. **Black's Law Dictionary 9<sup>th</sup> Edition** at page 18 defines an accomplice as,

***"1. a person who is in any way involved with another in the commission of a crime, whether as a principal in the first or second degree or as an accessory..."***

***2. A person who knowingly, voluntarily and intentionally unites with principal offender in***

*committing a crime and thereby becomes punishable for it.”*

An accomplice witness at page 1740 is defined as:

*“A witness who is an accomplice in the crime that the defendant is charged with. A co-defendant cannot be convicted solely on the testimony of an accomplice witness.”*

50. According to the Court in the case of **Watete v Uganda [2000] EA 559** an accomplice is a person who has participated in the commission of an offence as a principal or an accessory. The Court added that the clearest case of an accomplice is where a person confesses to the participation in the offence, or has been convicted of the offence, either on his own plea of guilty or on the court finding him guilty after the trial. The Court may also find a person to be an accomplice from the evidence recorded in Court.

51. With respect to principle offenders, **Section 20(1)** of the **Penal Code** provides as follows:

*“When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-*

- a. *every person who actually does the act or makes the omission which constitutes the offence;*
- b. *every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;*
- c. *every person who aids or abets another person in committing the offence”*
- d. *any person who counsels or procures any other person to commit the offence”*

52. **Section 64(1)(g)** provides for the various forms of voter bribery. It reads:

*“A candidate who—*

*being a voter, before or during any election directly or indirectly, in person or by any other person on his behalf receives, agrees or contracts for any money, gift, loan, or valuable consideration, office, place or employment for himself or for any other person, for voting or agreeing to vote or for refraining or agreeing to refrain from voting for a particular candidate at any election; commits the offence of bribery”*

I do observe that there is a minor drafting anomaly in this provision as it seems to imply that the acts described under **sub-section 1** relate to offences by a candidate. However, it is clear that **paragraph g** creates an offence attributable to a voter.

53. Having regard to the totality of the evidence and the above cited provisions of the law, I safely come to the conclusion that the two witnesses do fit the description of principal offenders and therefore were accomplices. The law does not distinguish between the person who offered and the one who received a bribe. The giver and the recipient are distinct offenders and both can be charged independent of each other as principal offenders. In this case, the two witnesses were principal actors according to **Section 20(1)(a)** of the **Penal Code** in the commission of the offence of receiving a bribe.

54. Having so determined, then their evidence cannot be wholesomely relied upon in reaching a determination as to whether indeed the 1<sup>st</sup> Respondent committed the offence of voter bribery. In this regard, I do wish to reiterate the words of the Court in the case of **Sambu v Genga Election Petition No. 8 of 2008 [2008] 1KLR (EP) 396**, where the court observed as follows:

*“More telling in our view, is the fact that all the three witnesses for the petitioner are persons who unashamedly told this Court that they received bribes. They are therefore accomplices in the commission of the offence of bribery, they, having in the words of section 10(f) of the*

*Elections Act ‘received money to the giving of their votes to a particular candidate’.....the Petitioner’s witnesses, apart from being shaky in the delivery of their evidence, were accomplices, whose evidence, though admissible is wholly unreliable without corroboration.”*

55.As I have noted here above, the two witnesses in their *viva voce* evidence and also in their Affidavits did acknowledge receiving money as an inducement to vote in favour of the 1<sup>st</sup> Respondent. They, however, came across as untrustworthy and untruthful and they indeed contradicted each other in their testimony.

56.The fact that they recanted some of the averments in their sworn Affidavits, and constantly kept on changing their positions, particularly **PW2, Mathew Boit**, casts doubt on the veracity of their evidence and on their credibility. In this regard, I find the words of the Court of Appeal in the case of *Ndungu Kimanyi v Republic 1976-1980 KLR 1444* instructive. The Court said:

*“we lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward 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 an unreliable witness which makes it unsafe to accept his evidence.”*

I submitted the evidence of the Petitioner’s witnesses, **Mathew Boit** and **Wilson Chesire** to the acid test in the case of *Ndungu Kimanyi v Republic* (Supra) and found that it failed the test of credibility.

57.Mr. Kanchory submitted that the two witnesses for the Petitioner could not be regarded as having committed an election offence pursuant to the provisions of **Section 64(2)** of the **Elections Act**. He reasoned that an act becomes an election offence where the recipient of a bribe votes or refrains from voting as required by the person administering the bribe. The said provision provides that:

*“Any person who in consequence of that person’s acceptance of any consideration votes or refrains from voting commits an offence”*

This section provides for a distinct election offence aside from that one of receiving a bribe under paragraph (g). Under **paragraph (g)** it is already an offence on its own to simply receive any consideration so as to vote for or refrain from voting for a particular offence.

58.That aside, allegations of voter bribery made against the 1<sup>st</sup> Respondent must be proved to the required standard. The Petitioner’s case is that the 1<sup>st</sup> Respondent committed the offence through his proxies Richard Kimurei and Hillary Mwaita. To rebut these allegations, the 1<sup>st</sup> Respondent relied on the evidence of Richard Kimurei, Hillary Mwaita and Eric Cheboi. The obligation on the Petitioner is to prove the offence of bribery of voters under **Section 64 (1) (a)(i)** of the **Elections Act** which reads:

*“ A candidate who directly or indirectly in person or by any other person on his behalf gives, lends or agrees to give or lend, or offers, promises or 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 other person in order to induce any voter to vote or refrain from voting for a particular candidate commits the offence of bribery.”*

This act is criminal in nature and the burden of proof lies with the Petitioner. That standard is high as already cited above and especially where criminal offences are alleged.

59.The allusion to massive voter bribery, when considered in the standard context, denotes widespread bribery of voters. Due to the twin requirements of the law on proof of irregularities, it was incumbent upon the Petitioner to show that this bribery substantially affected the outcome of

the elections.

60. The Petitioner only presented two witnesses who evasively testified that they, together with 18 other persons not in Court were given Kshs. 100 each in order to vote in favour of the 1<sup>st</sup> Respondent. The persons alleged to have committed the offence of bribery were one **Hillary Mwaita** and **Richard Kimurei**. These witnesses advanced alibi defences and denied the allegations made against them. **Hillary Mwaita** testified that on the 3<sup>rd</sup> March 2013, he was in Mombasa and he produced a bus ticket in this respect. **Richard Kimurei** testified that on the material date, he was at home and not at Sessia Quarry. Mr. Kanchory challenged their evidence by submitting that the witnesses had reason to lie as they admitted knowing that bribery is a serious offence. Learned Counsel also submitted that as clansmen of the 1<sup>st</sup> Respondent, the independence of the two witnesses would be in doubt and that the two supported the candidature of the 1<sup>st</sup> Respondent. With respect to the defence of alibi, Mr. Kanchory noted that Hillary Mwaita and Richard Kimurei are well known by the Petitioner's witnesses who confirmed that the two witnesses were at Sessia Quarry on the material day. Learned Counsel further questioned the credibility of the alibi defence by Hillary Mwaita, submitting that the witness contradicted himself by testifying that on his journey from Mombasa he was seated at seat number No. 23 while his ticket indicated his set was No. C2.

61. This Court is under a duty to examine the alibi defence. Once raised, it is the duty of the Petitioner to debunk the alibi. That is why it is important that the alibi defence is raised at the earliest. I note that with respect to Hillary Mwaita, the alibi was raised in his Affidavit that was part of the 1<sup>st</sup> Respondent's Response to the Petition. It is true that there is a discrepancy in the testimony of this witness. In his testimony he stated that he arrived in Nairobi from Mombasa on the evening of 3<sup>rd</sup> March 2013. In his oral testimony, he clarified that he travelled on the night of 3<sup>rd</sup> March 2013 and arrived in Nairobi early morning on 4<sup>th</sup> March 2013 and proceeded to Baringo where he voted. The bus ticket is dated 3<sup>rd</sup> March 2013 and indicates the departure time for Nairobi was 10.00pm. Richard Kimurei on his part stated that on the material day, being a Sunday, he was at his home.

62. The two witnesses raised their alibi defence early in the proceedings. Mr. Kanchory attempted to challenge the truth of the alibi during cross-examination. The duty, however, primarily rests on the Petitioner to dislodge the truth of the defence of alibi. In **Kiarie v Republic 1984 KLR 739**, the appellant urged among others that the Court failed to take into account his defence of alibi and failed to give cogent reasons for disbelieving the alibi. The Court reasoned:

***“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of the court a doubt that is not unreasonable.”***

63. I found the witnesses' alibi defence to be sufficient. The burden shifted to the Petitioner to dislodge that defence. Having raised the alibi, the 1<sup>st</sup> Respondent's witnesses did not assume any burden to prove it, rather, the burden rested on the Petitioner to show that the witnesses did not in fact have the alibi. Furthermore, the 1<sup>st</sup> Respondent's witness, **Eric Cheboi**, in his testimony stated that on the material day and time, he was at Sessia Quarry and he did not witness or hear of the bribery incident. This witness stated that on that day he did see one of the Petitioner's witnesses, who lives near the quarry. His testimony while corroborating that of Richard Kimurei was not rebutted by that of the Petitioner or any of his witnesses.

64. I therefore, find that the Petitioner has not in this regard, met his obligation satisfactorily to demonstrate that the voter bribery as alleged was committed by the 1<sup>st</sup> Respondent or by persons acting on his behalf. It was also incumbent upon the Petitioner to show that the malpractice complained of affected the outcome of the election substantially to his disadvantage. The margin of votes between the 1<sup>st</sup> Respondent and the Petitioner is 2003 votes. In addition, the two crucial

witnesses for the Petitioner were steadfast in their testimony that despite having been given the money, it did not influence the way they voted. They had no evidence that any of the other 18 persons who allegedly received bribes, voted any differently than they had intended to vote.

65. The sum total of the foregoing is that, first, I have before me the testimony of two witnesses who were not straightforward or credible in their testimony and second, even if there was voter bribery as alleged, and which I do not find to have been conclusively proved by the Petitioner, I am unable to find that such acts did in any way interfere with the free exercise of the voter's franchise in Baringo Central Constituency. Furthermore, the 'massiveness' of voter bribery alleged in the Petition has not been established by the evidence of the Petitioner. The two witnesses for the Petitioner who testified to having seen the alleged proxies of the 1<sup>st</sup> Respondent cannot be relied upon, in satisfying that the two proxies were at the Quarry as alleged and if so, that they were acting on behalf and at the behest of the 1<sup>st</sup> Respondent. The two, by their testimonies, have not effectively displaced the alibi of the two alleged proxies. It must be remembered that voter bribery is criminal in nature and a person who advances an alibi defence in answer to allegations to a criminal charge does not assume the burden of proof.

66. The **Halsbury's Laws of England 4<sup>th</sup> Edition Volume 15 in Paragraph 695** provides on proving of voter bribery as follows:

***"... 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"***

The Petitioner's witnesses did not give the Court any reason as to why they should be treated as truthful witnesses, whose testimony could be wholesomely credible in establishing the allegation of voter bribery.

67. Furthermore, had the Petitioner been serious about the allegations of voter bribery alleged which may have affected his performance in the impugned election, he would have been vigilant in taking appropriate action. Neither the Petitioner nor his witnesses made any complaint regarding the alleged massive bribery before, during or after the polling. The Petitioner did not honour his duty to report any conduct that was done in contravention of the **Electoral Code of Conduct** provided in the **Second Schedule** of the **Elections Act** to which he had subscribed as a contestant in the elections. He did not demonstrate any action on his part to follow up on the allegations of voter bribery.

68. I find that the Petitioner has not met the standard required in proving an allegation of an electoral malpractice. This standard, where a criminal conduct is alleged, is high and must meet the twin aspects of proving the commission of the offence by the person complained of in the election either directly or indirectly, and further that the irregularities complained of must have affected the outcome of the results.

69. This was succinctly captured by the Supreme Court of India in **Kondavet Gurunath Reddy v V. Seshaiiah & Others AIR 1966 APN 331** that:

***"...it may be remembered that in the trial of an election petition, the burden of proving that the election of a successful candidate is liable to be set aside on the plea that he was responsible directly or through his agents for corrupt practices at the election, lies heavily upon the applicant to establish his case, and unless it is established in both its branches, i.e. the commission of acts which the law regards as corrupt and the responsibility of the successful candidate, directly or through his agents or with his consent for its practice, not by mere preponderance of probability but by cogent and reliable evidence beyond any reasonable doubt, the Petition must fail. The evidence may be examined bearing this approach to the evidence in mind."***

70. The Petitioner must prove voter bribery by cogent, reliable evidence and establish the twin limbs – that the malpractice took place on the one hand and the criminal act was done by the Petitioner, directly or indirectly on the other hand. Thus, where the alleged act is said to have been done by agents of the person complained of, that connection must be comprehensibly established. It was not enough to show that the alleged proxies were the kinsmen of the 1<sup>st</sup> Respondent; the Petitioner had the duty to show that they indeed engaged in voter bribery and they did so agents of the 1<sup>st</sup> Respondent or with his consent. That, in my view, is a high standard, which the Petitioner has not met.
71. In view of the above, I must also reject the submissions made on behalf of the Petitioner that this Court ought to take judicial notice of the problem of voter bribery which is so endemic that it is a matter of general and local notoriety by dint of **Section 60 1)(o)** of the **Evidence Act**. The prevalence of an act, more so, a criminal act, does not automatically render the matter one that the Court ought to take judicial notice of. An allegation of voter bribery should be specifically proved. An alleged electoral malpractice cannot be established through inference; it must be specifically proved to its full elements. Were the Court, to go by the bold suggestion by the Petitioner in this regard, it would result in unfortunate situation of upholding and normalizing illegal acts instead of taking action to eradicate them.
72. Another complaint made against the Petitioner that would fall under the category of voter bribery is the assertion that the 1<sup>st</sup> Respondent's wife who is a Human Resource Officer at the Teachers Service Commission used her position to induce voters, particularly teachers, to vote for the 1<sup>st</sup> Respondent on the promise of promotions and employment. This assertion was denied by the 1<sup>st</sup> Respondent who countered that his wife did not even hold the position of Human Resource Officer as alleged.
73. The allegation falls under **Section 64 (c)** of the **Elections Act**. For this to be sufficiently proved, the person alleging must prove that the person complained of either directly or indirectly made:
- “offers, promises, or promises to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter.**
- (i) to vote for or refrain from voting for a particular candidate; or***
- (ii) corruptly does any such act on account of such voter having voted for or refrained from voting.”***
74. The Petitioner did not present any evidence concerning the allegations made against the 1<sup>st</sup> Respondent's wife nor tender any evidence with respect to the professional employment of the 1<sup>st</sup> Respondent's wife as alleged. He did not call any witness to show that he or she had been unduly influenced to vote in a certain way on the promise of a job, promotion or any other promise. I find those allegations therefore, to be without basis.
75. This allegation cannot stand proved by the mere assertion that the 1<sup>st</sup> respondent's wife was an influential person at the TSC. Even if the person complained of held the position alleged by the Petitioner, it could not, by that mere fact, be inferred that by virtue of holding that position, the person complained of influenced the free will of voters. Concrete proof must be presented of the specific acts of offers made to known voters. Furthermore, it must be established that the act complained of substantially influenced the outcome of that election.
76. Part of the Petitioner's case is also that the 1<sup>st</sup> Respondent and his party, the United Republican Party (URP) used teachers as agents in the disputed elections which had the effect of unduly influencing and intimidating voters to vote for the 1<sup>st</sup> Respondent.

77. Mr. Kanchory for the Petitioner submitted that the involvement of Mr. Richard Kimurei, and other teachers, had the unjust effect of influencing voters to vote in favour of the 1<sup>st</sup> Respondent and his party. In particular, it was submitted on behalf of the Petitioner that the fact that Richard Kimurei was an election official at the polling station where he heads the school, influenced the voters due to his commanding position in the society. Counsel for the Petitioner also underlined the fact that the use of teachers was unlawful under the **Leadership and Integrity Act** and the **Political Parties Act**, and their engagement negated free and fair elections.
78. Undue influence is categorized as an offence under **Section 63** of the **Elections Act**. Learned Counsel for the Petitioner submitted that teachers were unlawfully engaged to participate in the electoral process as agents, an action that affected the outcome of the results. I note that the Petitioner referred to one of the 1<sup>st</sup> Respondent's witness as an example to elaborate on this fact. The Petitioner's first duty is to present direct evidence before Court in support of the assertions made in the Petition. In this case, the Petitioner's pointing out one of the 1<sup>st</sup> Respondent's witness, Richard Kimurei, amounts to using the Respondent's case to prove his case. The Petition on its own did not point out particular persons who, by virtue of their position, influenced voters. The Petitioner did not, as was pointed out in the Respondents' submissions, list the names of teachers who were employed as agents and in particular with a view to giving the 1<sup>st</sup> Respondent an unfair advantage over the Petitioner. The Petitioner did not particularize details of any voter who could attest to these allegations.
79. The Petitioner has not demonstrated how the engagement of teachers influenced the voting patterns in any way. Even if indeed, Richard Kimurei who is a headmaster, was a Presiding Officer at a polling station, it was not shown that the said witness committed any unlawful act that resulted in gaining advantage for the 1<sup>st</sup> Respondent over the Petitioner in the said elections, or did any act which influenced the voters in any way by virtue of his position or acquaintance or relation with the 1<sup>st</sup> Respondent. Despite referring to the engagement of teachers as polling officials, the Petitioner did not give any particulars to support this allegation nor that those teachers committed any unlawful act that influenced the will of voters to elect a person of their choice. In the result I dismiss this ground for want of evidentiary basis.
80. The Petitioner through the testimony of **PW2, Mathew Boit** alleged that party agents belonging to the 1<sup>st</sup> Respondent's party assisted illiterate voters thereby compromising their free will to vote for their candidate of choice. In his Affidavit, the witness alleged that his mother was a victim as she was assisted by agents of the 1<sup>st</sup> Respondent and not by a person of her choice. He singled out an agent by the name of Fredrick Kandie as the one who assisted his mother to vote, but he conceded during cross examination that he did not know to which party that particular agent belonged. This goes to show that even in the one alleged incident of unlawful voter assistance, the witness could not establish any fault on the part of the 1<sup>st</sup> Respondent or his party. The Petitioner has therefore not shown how the law, particularly **Regulation 72** of the **Elections (General) Regulations 2012** with respect to assisted voters, was violated in any way. I therefore dismiss this assertion.
81. It was also the Petitioner's case that the Petitioner's party agents were harassed, obstructed or totally hindered by the Presiding Officers from performing their duties. Obstruction or harassment is an offence under **Section 67(1) (k)** of the **Elections Act**. The Petitioner did not call any witness to testify in support of this assertion. He did not in his own testimony mention the names of his agents so harassed neither did he particularize the polling stations in question where the harassment, obstruction or hindrance occurred. There being no basis upon which to find any truth in the assertion, I must dismiss it as I hereby do

*Whether the cancellations and alterations in Forms 35 were sufficient grounds to invalidate the election results*

82. The Petitioner alleges in his Petition that there were curious cancellations and alterations in Forms 35 which were neither countersigned nor justified. While cross-examining the 3<sup>rd</sup> Respondent, Mr.

Kanchory for the Petitioner particularized areas where electoral forms were cancelled. The 3<sup>rd</sup> Respondent indeed conceded that there were cancellations in the forms but denied that these were ‘curious’ as alleged. He attributed the alterations to human error which did not affect the outcome of the elections. The particular Forms 35 being referred to by the Petitioner were enumerated in the Petitioner’s submission and were with respect to the following polling stations: **Pemwai Primary School; Orokwo Primary School, Koisomo Nursery School, Kipsoit Primary School, Bakwanin Primary School, Kaplel Primary School, Kaptigen Cattle Dip, Kapsargon Nursery School, Kapropita Primary School, and KMTC Kabarnet.**

83. The manner in which the Petitioner sought the Court’s attention to address the issues cannot escape questioning. The Petitioner did not particularize the Forms 35 that he faulted as containing curious alterations in the Petition and only gave these details during the cross-examination of the 3<sup>rd</sup> Respondent. By so doing, the Petitioner failed in his obligation to discharge the burden of proof that rests on him. The evidential burden of proof only shifts once the Petitioner has established his part of the case. Instead the Petitioner has shifted the burden on the 3<sup>rd</sup> Respondent in the first instance.

84. Secondly, the Petitioner also failed in this regard by raising matters that can only be established by scrutiny. In order for the Court to look into allegations of unjustified alterations in electoral forms, and thereby determine the effect of the same, a scrutiny exercise must be done. The scrutiny must have been specifically requested for or the Court would have pursuant to **Section 84 of the Elections Act** on its own motion ordered for scrutiny. By consent of the parties during the pre-trial conference, the requirement for scrutiny was ousted. Even if this Court had been persuaded that scrutiny was necessary, which was not done, the same would not be merely founded on the basis that there exist cancellations. The purpose of scrutiny as discussed in the case of **Dickson Daniel Karaba v. Hon. John Ngata Kariuki, & 2 Others Civil Appeal (Application) No. 125 of 2008** is to ascertain whether there exists any material discrepancies between the results captured in Form 35 which necessitates the determination of the number of votes cast and obtained by each candidate. It is only after this exercise that the court can form an opinion whether the results obtained in the forms are correct.

85. The Petitioner, as Mr. Karanja rightly submitted, cannot introduce important issues in such a stealthy manner through the back door and expect the Respondents to effectively respond to them in any case. This Court is under no obligation to address them. A party is bound by his pleadings. This principle was exemplified in the case of **Mahamud Muhumed Sirat v Ali Hassan Abdirahman and 2 Others High Court Nairobi Petition No. 15 of 2008 [2010]eKLR** where the Court stated that:

***“...a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief.”***

86. With respect to the unexplained alterations and cancellations of Forms 35, the Petitioner relied on the words of Justice Kimaru in the case of **William Kabogo Gitau v George Thuo & 2 Others [2010] eKLR** where the Judge, stated that,

***“whereas the regulations did not specify what ought to be done where there are cancellations and alterations, common sense dictates that where there is a cancellation or alteration in a statutory form, the same should be countersigned by the concerned official. In the case of electoral documents, it is important that the statutory forms which contain results that will invariably be required to be verified by other parties, including the members of the public, should be written without any alterations or cancellations. The cancellations and alterations in the Form 16As produced in this court raised question regarding the veracity and authenticity of the said results. The said Form 16As cannot in the circumstances be said to contain valid results of the polling stations in question.”***

87. In the above-cited case, the learned Judge noted that the cancellations and alterations in Forms

16A, (which were replaced by the Form 35), produced in that Court raised questions regarding the veracity of results in those forms. Thus, the said forms could not be said *in the circumstances* to contain valid results. Similarly, the Petitioner has the duty to not only highlight cancellations and alterations in the forms but also show that those cancellations and alterations when considered in the context of the case have weight on the credibility of results contained therein. The circumstances in the cited case do not accord to the Petition herein and a similar inference cannot be reached.

88. The court cannot infer lack of credibility in results just because there are alterations in the electoral forms. It is also not possible for the Court to prescribe a uniform finding with respect to the effect of cancellations or alterations in electoral forms, or to draw an inference out of the same. The Court can only reach a finding emanating from such cancellations and alterations after examining them in the light of the circumstances surrounding the impugned elections. The Petitioner has not shown to this Court how the alterations referred to had the result of affecting the integrity of the results in the highlighted forms. He did not assert that the cancellations were intended to interfere with the actual results of the elections to his detriment or to the benefit of the 1<sup>st</sup> Respondent.

89. Were I to give any weight to the allegations regarding alterations in Form 35, I note that on the face value, the allegations by the Petitioner lack any basis. It is not true that the Petitioner had garnered the majority votes in the areas in respect of which alterations in the Form 35s were questioned. Both the 1<sup>st</sup> Respondent and the Petitioner received comparable number of votes in support of their candidacy. As rightly pointed out by the Petitioner, the alterations and cancellations were not countersigned by the Presiding Officers. However, all the Forms 35 used in the disputed elections were signed by the respective Presiding Officers, thus the question of their authenticity does not arise.

90. The Petitioner failed the litmus test of establishing the effect of the highlighted cancellations and alterations on the outcome of the elections being challenged. Thus, the 'curious' alterations alleged by the Petitioner did not in any way point towards a compromise of the results in those forms to the detriment of the Petitioner. Furthermore, as a matter of principle, it is not enough to say that since there were cancellations in electoral forms, the results contained in those forms were by that fact invalid. There must be solid evidence to show that the integrity of those results has been substantially compromised as a result. No such evidence was submitted to this Court. An election will not be vitiated merely because of minor irregularities which did not go to the root of or substantially affect the outcome of the election.

*Whether the incompleteness of the electoral Forms as alleged is a ground sufficient to vitiate the election results*

91. The Petitioner complained that Forms 35 and Form 36 were returned incomplete. In particular, the Petitioner alleged that Form 36 was not signed by the Returning Officer; while certain Forms 35 lacked statutory comments of the Presiding Officers, and that the signature of the Deputy Presiding Officers were missing as well as those of the party agents. The Petitioner submitted that in the circumstances, the elections could not be said to have been administered in an efficient, accurate and accountable manner within the meaning of **Article 81(e) and 86(a) and (c) of the Constitution**.

92. Learned Counsel for the Petitioner in his submissions referred me to **Regulations 79 and 83 of the Elections (General Regulations) 2012**. The referenced provisions read as follows:

Regulation 79:

***“(2): The presiding officer shall request each of the candidates or agent then present to append his or her signature;***

**(3): Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign**

**(5) Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence “**

93. There were two Forms 36 produced in court: the one produced by the Petitioner which was dated 7<sup>th</sup> March 2013 bearing the stamp of the Presiding Officer, and the other one that the 3<sup>rd</sup> Respondent relied on, which was dated 5<sup>th</sup> March 2013 and signed by the 3<sup>rd</sup> Respondent. Other than that, the contents of the two forms were the same and were not disputed by any of the parties. The 3<sup>rd</sup> Respondent also issued a Form 38 dated 5<sup>th</sup> March 2013 to the 1<sup>st</sup> Respondent which was bearing his signature and stamp of the Commission. The contents of Form 38 were therefore consistent with the contents of Form 36 produced by the 3<sup>rd</sup> Respondent. The Petitioner alleged that the copy of Form 36 in his possession was issued to him by the Commission. It however, bears a signature that the 3<sup>rd</sup> Respondent explained did not belong to him.

94. The 3<sup>rd</sup> Respondent explained that there could have been unsigned copies of Form 36 since he issued advance copies to party agents at the tallying hall so that they could confirm the figures before the final results were announced. The 3<sup>rd</sup> Respondent testified that he invited parties to raise any complaints regarding the tabulated results in those forms before he declared the final results. According to him, no complaints were raised. The 3<sup>rd</sup> Respondent distanced himself from the Form 36 produced by the Petitioner. Besides the highlighted variances, the results contained in those two forms were the same and the Petitioner, again, did not demonstrate that those variances affected the outcome of the results. In the result, I find the explanation by the 3<sup>rd</sup> Respondent satisfactory.

95. The Form 36 contains the aggregate of results received from all polling stations. The Election General Regulations do not specifically provide for Form 36 except in the Schedule. This Form is subsumed under the provisions of **Regulation 83** which requires the Returning Officer to tally the results from all polling stations. Only a Returning Officer can complete Form 36, and therefore, the Form 36 produced by the Petitioner cannot be relied upon as a verification of the results.

96. Mr. Kanchory relied on the case of ***Manson Oyongo Nyamweya v James Omingo Magara & 2 Others High Court of Kenya at Kisii, Election Petition No. 3 of 2008***, in support of his submissions that where the forms did not contain agent's signature and reasons for such failure, they could not be of any value and cannot be used to authenticate any declared results. Again, the circumstances in these two cases were different. Considered in context, the Court in this case found that the several breaches complained of were proved and were to the effect that the outcome of the elections was substantially affected. This is not the case before me.

97. Further, the Petitioner has faulted the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for not completing Form 36. Counsel for the Petitioner submitted that this fact was admitted by the 3<sup>rd</sup> Respondent. While citing the irregularities the Petitioner did not take a further step to show that the same affected the outcome of the results so substantially that it cannot be said that the election was free, fair and credible.

98. The absence of the highlighted information does not in itself render the elections invalid. This is acknowledged by the law vide **Regulation 79(5) (6) and (7) of the Elections (General) Regulations 2012**, which provide respectively that:

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

.....

**(7): The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under sub-regulation (2) shall not by itself invalidate the results announced.”**

These provisions considered together with **Section 83** defeat the submissions made on behalf of the Petitioner that lack of such information pushed the elections below the credibility standard.

*Whether the elections for Member of Parliament for Baringo Central Constituency were free, fair and credible*

99. Although this was cited as one of the agreed issues by the parties, it cannot be a ‘stand alone’ issue, rather when determined, it is a culmination of all issues that are raised in the Petition. In light of my reasoning on the malpractices and irregularities complained of by the Petitioner, I can only conclude with the authoritative words in the case of ***Morgan & Others v. Simpson & Another (1974) 3 All ER*** where the Court, in summing up the standard to be considered in determining whether or not an election should be declared invalid reasoned that,

***“...an election court was required to declare an election invalid (a) if irregularities in the conduct of elections had been such that it could not be said that the election had been conducted as to be substantially in accordance with the law as to election, or (b) if the irregularities had affected the results. Accordingly, where breaches of the election rules, although trivial, had affected the results, that by itself was enough to compel the Court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected...”***

100. These sentiments have been captured and are codified in our laws under **Section 83** of the **Elections Act** which provides that:

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

101. The Petitioner has not gone a step further to prove that any irregularities pointed out materially affected the outcome of the results that were declared by the 3<sup>rd</sup> Respondent. In spite of the complaints, the Petitioner has not made a case on how those alterations and cancellations affected the integrity of the results in any way. If there was non-compliance with the provisions and principles of the law, it must be established that such non-compliance affected the results in a substantial manner. I find that this has not been established in this case.

102. The yardstick for determining whether the impugned elections were held in a free, fair and credible manner is provided for by **Article 81(e)** of the **Constitution**. I cannot put it better than the words of Justice Musinga in the case of ***Manson Oyongo Nyamweya v James Omingo Magara & 2 Others*** (supra) where the learned Judge in considering whether an election was free and fair, stated that:

***“The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. In a democratic election the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official.”***

103. The Petitioner had the obligation of proving the allegations and going a step further to

demonstrate how he was substantially prejudiced as a result of the cited infractions. The Petitioner has not shown that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed to comply with **Article 86** of the **Constitution** and all other relevant provisions of the law in the conduct of the elections.

104. The law is alive to the fact that the holding of elections may not be picture perfect and errors may occur. The mere presence of irregularities does not vitiate an election. The burden remains on the person alleging to prove his allegations, and only then will the burden shift. This threshold was not reached by the Petitioner.

105. The objective of **Section 83** is to insulate the electoral process from abuse and frivolous claims and it is the duty of the Court to preserve the will of the electorate where it is shown that the elections were conducted in accordance with the law. Having considered all the above, I find that the elections in question did meet the credibility test. I also find that no election offence or malpractice has been proved against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Having so determined, then the next issue has been answered, the Petitioner has not demonstrated that he is entitled to the prayers sought in the Petition. Consequently, the Petition is dismissed. I declare that the 1<sup>st</sup> Respondent was validly elected as the Member of the National Assembly for Baringo Central Constituency. A Certificate under **Section 86** of the **Elections Act** shall accordingly issue.

#### Who is liable to pay costs?

106. This Court is empowered under **Rule 36** of the **Election Petition Rules, 2013** to make an order as to costs specifying the total amounts of costs payable and the parties liable to pay the costs. Mr. Adere and Mr. Karanja urged this Court to award costs on a higher scale, bearing in mind the time spent, efforts invested into the case and the extensive research undertaken. Mr. Adere urged this Court to consider that the 1<sup>st</sup> Respondent engaged three Counsels to represent him on this matter. Mr. Kanchory urged to the contrary that this Court adopts the emerging approach that where no irregularities are shown to exist, parties should bear their own costs.

107. The general principle is that costs will normally follow the event. In determining the award of costs, the Court must reasonably consider the circumstances of each case taking into consideration such factors as the conduct of the parties, the complexity and importance of the issues before Court, the time, effort and skills invested in prosecuting the case. Ultimately, the duty of this Court is to uphold the interests of justice to all. Having taken this into consideration, I respectfully differ with Mr. Kanchory's reasoning. The circumstances of this case do not present a situation where this Court should depart from the general principle. I therefore order that the Petitioner shall bear the costs of this suit. I am also of the view that an aggregate sum of Kshs. 2 million is adequate and reasonable as to costs for all parties. The 1<sup>st</sup> Respondent shall be entitled to an award of costs that shall not exceed Kenya Shillings 1 Million, while the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents together shall be entitled to an award of costs that is capped at Kshs. 1 Million. Costs shall be taxed by the Deputy Registrar.

108. I must now address myself to the issue of possible commission of electoral malpractices that arose during the hearing of the Petition. I noted earlier that the incidents of voter bribery as alleged may have occurred. The two witnesses for the Petitioner in their testimonies stated that they received money, although they were inconsistent in confirming the same. Under **Section 87** of the **Elections Act**, the Court is under a duty, upon the conclusion of an election petition to make a report to the Director of Public Prosecutions, the Commission and the relevant Speaker, indicating whether an election offence has been committed by any person in connection with the election, and the names and descriptions of the persons, if any, who have been proved at the hearing to have been guilty of an election offence. I have not conclusively established that the offence as alleged has been proved to the required standard. In this respect I wish to make further orders that the allegations of voter bribery be comprehensively investigated and appropriate action be taken.

109. Finally I wish to appreciate the resourcefulness and exemplary conduct of all learned Counsels

who appeared before me in this Petition. They were courteous and diligent thereby facilitating in the expeditious disposal of the Petition.

It is so ordered

**SIGNED DATED and DELIVERED in open Court this 9<sup>th</sup> day of September 2013**

**L. A. ACHODE**

**JUDGE**

In the presence of:

Mr. Kanchory and Mr. Mutai led by Dr. P.L.O. Lumumba for the Petitioner

Mr. Adere, Ms. Barasa and Mr. Mengich for the 1<sup>st</sup> Respondent

Mr. Karanja for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Andrew Omwenga Court Clerk