



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**ELECTION PETITION NO. 6 OF 2013.**

**DR. NOAH MAKHALANG'ANG'A WEKESA ::::::::::::::: PETITIONER.**

**VERSUS**

**MR. ALBERT ADOME**

**RETURNING OFFICER, I.E.B.C TRANS NZOIA )**

**THE I.E.B.C. ) ::::::::::::::: RESPONDENTS.**

**PATRICK SIMIYU KHAEMBA )**

**J U D G M E N T.**

In this petition filed on 8th April, 2013 by **Dr. Noah Makhalang'ang'a Wekesa** (herein, the petitioner), a declaratory order is sought as to whether the candidate whose election is in question was validly elected and as to which candidate was validly elected. A determination is also sought as to whether or not a fresh election for the Trans Nzoia gubernatorial seat should be held.

The petitioner was one of the five (5) candidates who contested for the seat of **Governor of Trans Nzoia County** in the General Elections held on 4th March, 2013 in which **Patrick Simiyu Khaemba** (herein, the third respondent) was returned as the duly elected candidate by the County Returning Officer, **Albert Adome** (herein, the first respondent), and declared the winner by the **Independent Electoral and Boundaries Commission (I.E.B.C.)** (herein, the second respondent) on or about the 7th March, 2013 having garnered **89,063 votes** against the petitioner's **37,988 votes**.

Being aggrieved with the said outcome, the petitioner filed the present petition on the basic ground that the respondents were in breach of the electoral laws by conducting an election which was neither free nor fair in that:-

**[1] The second respondent failed to properly carry out voter education and installed electronic machines which failed to work thereby causing voters to be easily misled and voting taking place in many places without registers.**

**[2] The second respondent failed to properly train its staff who failed to apply the law and carried out illegal activities.**

**[3] There was bribery/vote buying by the third respondent and/or his agents at Saboti Primary School and Mount Primary School polling stations among others in Saboti Constituency.**

**[4] There was violence and/or threats of violence meted out by the third respondent and/or his agents**

*within Kiminini Constituency where the petitioner's supporters were attacked and matter reported to the police.*

*[5] There was misconduct and breach of the law on the part of the first and second respondents in that they kept out the petitioner's agents from polling stations such that they did not witness the opening of voting nor the voting by assisted voters.*

*[6] In many areas particularly in Cherangany Constituency, the votes case exceeded the number of registered voters.*

*[7] The first respondent and the entire I.E.B.C. in collaboration with the third respondent and/or his agents with a view to undermining the system of voting laid down and to assist the third respondent, printed exactly similar ballot papers and had them dished out to the third respondent and his agents who manipulated and pushed them in polling stations or had them counted. Alternatively, the third respondent with assistance from others, printed for use parallel ballot papers which were similar in colour, symbols, names and pictures of candidates and which were for use to inflate the third respondent's votes to the detriment of the petitioner.*

*[8] The third respondent was a public servant in that he was working with the African Development Bank (ADB) in which the Kenya Government has shares and there is need to know whether he resigned from his post like other public servants.*

*[9] The staff and/or agents of the second respondent were in breach of the law and regulation in siding with the third respondent and assisting activities that favoured him.*

*[10] There were malpractices in many areas within the county such that it would be in the interest of justice for a recount or scrutiny of votes to be carried out to establish the results as supported by relevant materials and documents.*

All the foregoing allegations constitute the substance of the petitioner's case against the three respondents either jointly or severally. The allegations are supported by the averments and annexures contained in the supporting affidavits deponed by the petitioner and his witnesses on the 5th April, 2013 and filed together with the petition on the 8th April, 2013.

The petitioner and some of his witnesses viz **Arthur Akasa, Kennedy Okal, Nancy Chepkorir Sitienei, William Natwati, Tony Wafula Muyoti** and **John Simiyu Inyimuli** testified at the hearing of the petition through cross-examination by the respondents on the contents of their respective supporting affidavits which they relied on as their respective evidence in chief in the matter.

It may be noted that all the affidavits accompanying the petition and the response thereto by each of the respondents are the principle pleadings and evidence in this petition. Further affidavits were permissible with leave of the court only if they were incapable of altering the path of the original case. This explains the reason why the further affidavits filed herein by the petitioner were expunged from the record.

Be that as it may, the response to the petition by the first and second respondents was filed on the 26th April, 2013 and the response by the third respondent was filed on 25th April, 2013.

In their joint response, the first and second respondents contend that the third respondent was validly elected as the Governor of Trans Nzoia County and that the role of the first respondent was merely to declare the choice of the voters.

That, the elections held on 4th March, 2013 respected the sovereign will of the people of Trans Nzoia County and upheld the constitutional principles of free and fair election by being administered in an impartial, neutral, efficient, accurate and accountable manner. That, after the tallying process the third respondent garnered a total of 89,063 votes against the petitioner's 37,988 votes which results reflected the will of the voters as expressed in their votes and ultimately expressing a preference for the third

respondent as the people's choice for Governor, Trans Nzoia County.

It is denied by the first and second respondents that they committed election offences or malpractices or that they were influenced by the third respondent or any other person. They affirm that they were independent and impartial in the discharge of their mandate as guided by the Constitution and electoral laws and aver that they conducted voter education intensively leading to a huge unprecedented voter turn up of 86% nationwide. They contend that whereas the electronic voter identification device (EVID) failed, the voting and tallying was legally envisioned to be manual and be facilitated and not substituted by the failed technology. That, the manual backup served to ensure that the process went on smoothly leading to a credible election.

The first and second respondents deny that there was vote buying or vote bribery in any polling station and that the total number of registered voters was in excess in any polling station. They contend that all the parties and agents were afforded reasonable opportunity to scrutinize the results and ventilate any queries and that no alterations were made in Forms 35 and if there were any alterations these were duly countersigned by all the presiding officers and the forms 35 signed by all authorized agents.

The first and second respondents aver that only registered voters were allowed to vote thereby preserving the sanctity of the register and therefore, the petitioner's prayer for recount and scrutiny of votes is not based on any evidence but on mere apprehensions of the petitioner which have no basis in law.

It is further averred by the first and second respondents that all authorized agents were duly allowed access to polling stations. The first and second respondents deny any knowledge of any printed ballot papers and contend that the African Development Bank (ADB) is not a Government body such that the electoral provisions relating to civil servants did not apply to non-civil servants. They also contend that the election, polling and counting of votes was free, fair, accurate, transparent and credible such that the results declared by the first respondent reflected the will of the people of Trans Nzoia County. They (first and second respondents) aver that the process of counting and scrutiny of the votes cast was conducted transparently with the full involvement of the petitioner's agents in all polling stations and that the results entered in Forms 35 were duly approved by the petitioner's agents in each of the polling stations who also signed the said forms to confirm the accuracy of the said results and furthermore, the results were properly tallied into form 36 in the Constituency tallying centres and ratified by the petitioner's agents.

It is averred by the first and second respondents that all the candidates for election as Governor were duly satisfied with the entire process such that the petitioner's gripe is baseless, mischievous and unfounded.

The first and second respondents contend that at no polling station did the votes cast exceed the registered voters and that if there were any errors in the tallying process which is denied, the same were minor and typographical and did not materially affect the final outcome. That, the petitioner's agents were present in all polling stations and the counting of votes was done meticulously and mathematically in all polling stations with the full involvement of all agents including those of the petitioner who duly signed Forms 35 to confirm their satisfaction with the accuracy of the results.

It is contended by the first and second respondents that all votes cast were duly accounted for in favour of all candidates, inclusive of spoilt and rejected votes such that the results were verifiable.

The first and second respondents aver that the final tally of votes for Trans Nzoia County revealed that the petitioner had 37,988 votes and the third respondent had 89,063 votes hence the third respondent was declared validly elected as the Governor for Trans Nzoia County. The first and second respondents contend that this petition lacks merit and pray for its dismissal with costs and for a determination that the election was valid and that the third respondent was duly elected.

The response by the first and second respondents is supported by the facts contained in the replying affidavits dated 25th April, 2013 deponed by the first respondent and the Returning Officers responsible for the five (5) Constituencies forming Trans Nzoia County viz Vincent Kimelil (**Cherangany**), Kirui Kiplangat John (**Kiminini**), Joyce Namunyak (**Endebess**), Arnorld Mutwiri Njabari (**Kwanza**) and Farah

Abdi Ibrahim (**Saboti**). They all appeared in court and testified under cross-examination by the petitioner and the third respondent. They relied on the response to the petition as supported by their respective replying affidavits as their respective evidence in chief in this matter.

On his part, the third respondent states in his response to the petition that his return by the first respondent as the duly elected Governor of Trans Nzoia County was a true, clear and decisive reflection of the peoples' choice in the gubernatorial election held on 4th March, 2013. That, the third respondent received a total of 89,063 votes against the petitioner's 37,988 votes in an election which was substantially conducted in compliance with the requisite law and cannot in terms of section 83 of the Elections Act be declared void. That, the voter education and staff training perfected by the second respondent in the period preceding the said election was sufficient and that the use of the manual registers in the election after the failure of the electronic machines did not mislead the voters. That, people who registered and willing to vote did vote in the election.

The third respondent denies the allegations of bribery and vote buying made against him by the petitioner as well as the allegations of violence and threats of violence made by the petitioner and avers that it is untrue that the votes cast in many areas exceeded the registered voters as the results posted by the first and second respondents show that the voter turnout was less than the total number of registered voters.

The third respondent denies the allegations by the petitioner that he colluded with the first and second respondents to print fake ballot papers and avers that if the offence occurred it could have been reported to the police which was never done. The third respondent contends that there is no credible evidence relating to the alleged passing over and dishing out fake ballot papers to him or his agents nor is there credible evidence that such fake ballot papers were stuffed in the ballot boxes nor that his votes were inflated.

It is also denied by the third respondent that he has been a public servant or public officer in terms of the Constitution of Kenya 2010 as at the time of the election. He contends that the non-conformities or discrepancies complained of by the petitioner are extremely trivial considering the huge vote difference between them.

The third respondent therefore prays for a determination that he was duly elected for the seat of Governor of Trans Nzoia County and for a dismissal of the petition with costs. He supported his opposition to the petition on the basis of the facts contained in his replying affidavit dated 25th April, 2013 which was his evidence in chief and on which he was cross-examined by the petitioner as well as the first and second respondents.

The issues for determination were agreed by the parties during the pre-trial conference held on 14th August, 2013. These are two-fold and were derived from the foregoing pleadings and averments by the parties respectively.

They include:-

***[i] Whether the election of the third respondent as conducted by the first and second respondents was free and fair and in accordance with the provisions of the Constitution and Election Laws.***

***[ii] Whether the election of the third respondent as conducted by the first and second respondents was transparent, and free from violence, intimidation, unlawful influence or corruption on the part of the respondents.***

These issues are complementary such that a determination on either of them would invariably engulf the other.

Generally, an election is the mechanism whereby the choices of a political culture are known. These choices should normally be expressed in ways which protect the rights of the individual and ensure that each vote cast is counted and properly accounted for. The right of every eligible citizen to determine who

will represent them in Government without encumbrance is a basic cornerstone of any democracy and a pre-requisite for social cohesion and solidarity.

Thus, elections give voice to the political will of the people and must therefore be conducted in an atmosphere which is respectful to fundamental rights if they are to be truly free and fair. After all, they are the means through which citizens directly exercise their sovereign power.

**Article 21** of the Constitution requires the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.

**Article 38** of the Constitution, guarantees the right of every citizen to make his or her political choices freely and fairly and **Articles 48 and 50**, guarantees access to justice for all person and entrench the right of every person to have any dispute that can be resolved by the application of law decided in a fair hearing.

Any electoral process which fails to ensure the fundamental rights of citizens before or after the elections is definitely flawed as candidates should not be deprived of their right to stand for election and the citizens their right to vote for candidates of their choice through unfair manipulation of the process by electoral officials or any other person.

The entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people and the election procedures are meant to guarantee the secrecy of the ballot, the accuracy of the counting and the announcement of results in a timely manner.

Fairness and transparency must be adhered to in all stages of the electoral process.

It is however, a known fact that no single election can be absolutely perfect. Mistakes and errors will always occur but not every non compliance with the electoral laws would lead to the nullification of an election. The court has a duty to consider the gravity of the alleged transgression and whether the transgression was inadvertent or deliberate before coming to a decision whether or not to nullify an election (see, Ugandan case of **Judy Kabatsi Kafura Vs. Anifa Kawooya & Another Election Petition No. 25 of 2005.**)

Allegations of electoral malpractices, breaches of electoral laws and allegations of electoral irregularities have to be established to the required standard and election petitions being a special breed of cases, such standard is higher than on a balance of probabilities but lower than beyond reasonable doubt (see, **Muliro Vs. Musonye & Another (2008) 2 KLR (EP) 52.** However, with regard to election offences like bribery, the **Standard of Proof** is said to be beyond reasonable doubt (See, **Onalo Vs. Ludeki & Others (2008) 3 KLR 614.**)

In the Tanzanian case of **Mbowe Vs. Eliuforo (1967) EA 240**, the standard of proof in election cases was said to be proof to the satisfaction of the court and that the court cannot be said to be satisfied when it is in doubt.

As to the **burden of proof** in election cases, it lies on the petitioner (see, Ugandan case of **Col (Rtd) Dr. Besigye Kizza Vs. Museveni Yoweri Kaguta Election Petition No. 1 of 2001.**)

Herein, it was incumbent upon the petitioner to present sufficient and credible evidence to establish to the required standard and to the satisfaction of the court that the alleged irregularities attributable to the respondents not only affected the outcome of the gubernatorial election in Trans Nzoia County but also the integrity of the election so as to render the entire exercise null and void “**ab initio**”.

It would be difficult for an election court to invalidate an election unless the irregularities in the conduct of the election had been such that it could not be said that the election had been conducted as to be substantially in accordance with the electoral law or unless the irregularities had affected the results (see, English case of **Morgan Vs. Simpson (1974) 3 ALL ER 722.**)

Indeed, Section 83 of the **Election Act 2011** (herein “**the Act**”) 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 results of the election”.*

It was stated by the Supreme Court of Kenya in the famous case of **Raila A. Odinga Vs. I.E.B.C. & Others Petition No. 5 of 2013** that:-

*“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there had been non-compliance with the law, but that such failure of compliance did affect the validity of the election. 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. “Ominia 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 presumption of the law”.*

It follows therefore that general complaints in regard to allegations of electoral malpractices, electoral irregularities and breaches of electoral law would not be sufficient to invalidate an election.

Under **Article 81** of the Constitution, an electoral system must comply with the principle of free and fair elections which are by secret ballot, free from violence, intimidation, improper influence or corruption and which must be conducted by an independent body and administered in a transparent, impartial, neutral, efficient, accurate and accountable manner.

**Article 86** of the constitution requires the independent body (herein, the second respondent) to ensure that whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent and that the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station. Further, that the results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer and that the appropriate structures and mechanism to eliminate electoral malpractices are put in place, including the safe keeping of election

materials.

It may thus be said that the aforementioned Articles 81 and 86 of the Constitution are the barometer or instruments for measuring the credibility and integrity of any election exercise such as the material disputed gubernatorial election held on 4th March, 2013. The obligation to establish that the principals enshrined in the said Articles 81 and 86 with regard to the disputed election were flouted by the first and second respondents and by extension the third respondent lay absolutely with the petitioner.

**Article 87 (1)** of the Constitution, granted Parliament the power to enact legislation to establish mechanisms for timely settling of electoral disputes and in that regard, the Elections Act 2011 was enacted thereby giving rise to the **Elections (Parliamentary and County Elections) Petition Rules 2013** (herein, “**the Rules**”) and the **Elections (General) Regulations 2012** (herein “**the Regulations**”).

The said Act, Rules and Regulations are the substantial and procedural statutory laws for the conduct of any electoral process in this country. It was also the petitioner's obligation to establish that the said laws were substantially and significantly breached by the respondents to the extent that it could not be said that the disputed election was transparent and credible.

It is on the basis of the foregoing background that the issues raised herein may be determined.

With regard to **the first issue for determination**, the apparent complaints by the petitioner are that **firstly**, the second respondent failed in its statutory duty to properly carry out voter education and installed electronic machines that failed to work as a result of which voters were easily misled and many places voted without registers. **Secondly**, the second respondent failed to properly train its staff who failed to apply the law and carried out illegal activities. **Thirdly**, there was misconduct and breach of the law on the part of the first and second respondents in that they kept out the petitioner's agents from polling stations who therefore did not witness the opening of voting and did not witness the voting by assisted voters.

**Fourthly**, in many areas, the votes cast exceeded the registered votes and more so, in Cherangany Constituency. **Fifthly**, the first respondent and the entire I.E.B.C. in collaboration with the third respondent and his party or agents, before the election day and in collusion to undermine the system of voting laid down and to assist the third respondent and his party, printed exactly similar ballot papers and had them dished to the third respondent who dished them out to his agents and who through all means manipulated the papers and had them pushed in the polling stations or had them counted or alternatively, the third respondent with assistance of people who were printing, printed parallel ballot papers which were similar in colour, symbol, name and pictures of candidates to use and inflate his votes to the detriment of the petitioner. **Sixthly**, the staff and/or agents of the second respondent were in breach of the law and regulations siding with the third respondent and assisting activities that favoured him.

The six (6) complaints revolved around the first and second respondents' conduct of the election process and the evidence presented by the petitioner with a view to establishing the complaints is that contained in his supporting affidavit and the supporting affidavits of his witnesses. Only six of the said witnesses appeared in court for cross-examination. These included **Arthur Akasa (PW2), Kennedy Okal (PW3), Nancy Chepkorir Sitienei (PW4), William Natwati (PW5), Tony Wafula Muyoti (PW6) and John Simiyu Inyimuli (PW7)**.

The evidence by the petitioner and that of his witnesses and in particular those who appeared in court for trial may be regarded as providing the foundation and building blocks of the petitioner's case against all the three respondents. In as much as the rest of the petitioner's witnesses who deposed supporting affidavits were not availed in court for cross examination for purposes of testing the veracity of their averments, their evidence though forming part of the petitioner's case may be treated as being inconsequential and devoid of probative value. Such witnesses included **Sebastian Sakwa, Leah Moraa Msati, Patrick Musombe Makapila, Marina Machanga Vusikwa, Maureen Juma Numulet and Haron Kiprugut Meli**.

The petitioner, **Dr. Noah Makhalang'ang'a Wekesa (PW1)**, stated that the first and second respondent failed to discharge their Constitutional mandate to educate the voters and employed incompetent and/or unprofessional agents.

This allegation was bare and unsupported by any cogent evidence. Its origin may be attributed to sheer spite in view of the fact that the voter turn out in the County of Trans Nzoia was over 80%. Indeed, such a high turn out negated any allegation of the first and second respondent having failed to carry out voter education and/or having employed incompetent and/or unprofessional agents. The petitioner, in fact, conceded that voter education was conducted through the print and electronic media. This was a very effective means with a wide outreach. It is no wonder that the national voter turn out was also more than 80%. As regards the electronic voter identification device and related systems, it was conceded by the first and second respondents that the systems failed to work effectively throughout the country. However, they contended that the electoral process was not discredited by such failure as the electronic system was merely meant to facilitate and not to substitute the manual system which is the legally envisioned system. This contention is valid as the electronic system was indeed not a substitute but was rather intended to compliment the statutorily provided system. In any event, the use of the primary manual system of voting, counting, transmission, tallying and announcement of results was never challenged by those taking part in the elections, including the petitioner. The failure of the electronic system was therefore a side-issue of no significance since it was overtaken by events following the findings of the Supreme Court of Kenya in that regard in the case of **Raila Odinga vs. I.E.B.C. & Others (Supra)**.

On the allegation that the first and second respondents breached the law by locking out the petitioner's agents from polling stations, the petitioner relied on what he was told by his witnesses who were also his agents i.e. PW2, 3, 4, 5, 6 and 7. These agents in turn relied on information given to them on phone by the affected agents, none of whom was called to testify in court. The allegation therefore remained unproved and in any event, the agents confirmed that they were eventually allowed into the polling stations after confirmation of their status by the first and second respondents. The petitioner's chief agents who testified in court were not certain as to when their list of agents was submitted to the first and second respondents. This must have necessitated the confirmation of agent's status before being allowed into polling stations. Besides, **Regulation 62 (1)** of the Elections Regulations provides that the presiding officer may exclude any person from a polling station unless he/she is an authorized agent. Further, the presiding officer shall admit to the polling station not more than one agent for each candidate or political party (**Regulation 62 (2)**). Further, the absence of agents shall not invalidate the proceedings at a polling station (**Regulation 62 (3)**).

Herein, it cannot be said on the evidence available that the petitioner's agents were locked out of polling stations. What is apparent is that some of the agents were allowed into polling station belatedly due to logistics rather than any break of the law. The explanation given by the first and second respondents through the returning officers at Cherangany (DW1) and Kwanza (DW2) to the effect that not all agents could be allowed into a polling station and that some of the agents may have belatedly reported at the polling station was satisfactory.

None of the returning officers including the county returning officer (DW6) received substantive complaint in writing from the petitioner or his agents that their agents had been locked out of polling stations.

The county returning officer (DW6) stated that the issue was not the alleged locking out of agents but rather lack of space due to the number of agents already in the polling stations.

The complaint by the petitioner that his agents were locked out of the polling stations is clearly without merit and remains unproved. As to the allegation that the first and second respondents circulated and allowed the circulation of fake ballot papers in favour of the third respondent, there was no scintilla of evidence to that effect. The allegation was serious yet the petitioner deemed it fit to treat it in a casual manner. Not even a sample of the alleged fake ballot paper was exhibited and proved in court as having been a false document. Apparently, the witness who was expected to shed light on the issue was **Haron Kiprugut Meli** who deponed a supporting affidavit but was conveniently kept out of the trial thereby

making his evidence on the issue devoid of credibility and most likely than not based on gross falsehood. His absence from the trial was not a coincidence but a deliberate retreat to avoid imminent conflict with the electoral laws if not criminal laws. The lesser said about him, the better and safer for him but the court reserves the right to take any legal action against him.

The allegation by the petitioner that he was harassed and frustrated by the Trans Nzoia Deputy Officer Commanding Police Division (D/OCPD) is made at the wrong forum as the said police officer was not made a party to this petition and there was nothing to show that his alleged actions were attributable to any of the respondents herein or were in breach of the electoral laws. It is instructive to note that police officers were involved in the electoral process purely to maintain law and order and had the right to take any action against any person behaving in a manner likely to cause a breach of any peaceful order. However, in doing so, an officer was expected to act in a civil manner.

If the said deputy OCPD acted in a manner which was not civil to the petitioner, the remedy lay with his superior officer, the OCPD, if not the Inspector General of Police (IGP)

As to the allegation that breaking of ballot boxes seals occurred at some polling stations in Saboti and Kwanza Constituencies, the evidence in that regard was lacking. Indeed, the petitioner's deputy chief agent at Saboti, **Nancy Chepkorir (PW4)**, indicated that the breaking of seals was not an issue but the escorting of the ballot boxes to the tallying centre. She said that their agents were not allowed to escort the boxes but at the same time stated that their political party (ODM) organized the transportation of its agents to the tallying centre. This clearly showed that she really had no complaint with regard to the seals securing the ballot boxes or the transportation of the ballot boxes to the tallying centre.

The petitioner's chief agent at Kwanza Constituency **William Natwati (PW5)**, confirmed that they sealed the ballot boxes after counting of votes but retracted his statement by saying that he did not see any sealing of the ballot boxes and that the ballot boxes were not sealed.

He said that the ballot boxes were not sealed with ODM seals but did not say the reason for the omission or whether the boxes were sealed with any other seals provided by the I.E.B.C. or other political parties.

Natwati (PW5) was simply an unreliable witness such that whatever he stated regarding ballot boxes and the seals thereof was devoid of credibility and smacked of ignorance.

There was nothing in the form of tangible evidence showing that ballot box seals were broken and if there was any breaking that the breaking was deliberate, criminal with the intention of conferring an advantage to any of the candidates.

The allegation that seals were broken was too general and clearly arose from the ignorance of some of the petitioner's agents and so was the allegation that the votes cast in the election exceeded the number of registered voters.

The petitioner simply said that the votes cast across the county in the gubernatorial election exceeded the registered votes. This allegation was made without any particularity from the petitioner.

The attempt to give particulars and specifics came from the petitioner's witnesses such as **Arthur Akasa (PW2)**, **Nancy Chepkorir (PW4)** and **John Inyimuli (PW7)**.

From the evidence, the allegation emanated from Saboti and Cherangany Constituencies where Nancy (PW4) was the petitioner's deputy chief agent and Inyimuli (PW7), the petitioner's chief agent respectively.

The suggestion by Nancy was that there were discrepancies in the compilation of forms 35 and form 36. However, she failed to establish that the discrepancies were deliberate and intended to unlawfully deny the petitioner his votes or that the discrepancies in forms 35 affected the ultimate result as captured in the relevant form 36. It is instructive to note that the form 36 for Saboti Constituency was signed by the

petitioner's agent thereby confirming the accuracy of the results from the entire constituency and discrediting the allegation that the votes cast in that constituency exceeded the number of registered voters. The same could be said of the forms 35 from the polling stations. Most if not all of them were signed by the agents of the candidates thereby confirming the accuracy of the information contained therein.

**Farah Abdi Ibrahim (DW4)**, was the Returning Officer for Saboti Constituency. He credibly stated that form 36 which he prepared reflected the results as captured in forms 35 from the various polling station which forms were signed by the candidates or their agents thereby confirming the accuracy of the results. Farah clarified that the number of voters in a polling station could be reflected as exceeding the registered voters only if a presiding officer gives a single figure for the whole polling station instead of each stream where there existed several streams. He gave Trans Nzoia Primary School polling station as an example. In that polling station the total number of votes cast was reflected as 5004 instead of 3,037.

With regard to Cherangany Constituency, Inyimuli (PW7) stated that the votes cast and the rejected or spoilt votes did not tally with the total votes cast and also that the total votes for all candidates did not tally with the votes cast.

He (PW7) relied on a Form 36 to support the allegation but the form is not exhibited in his affidavit. He stated in cross-examination that he was at the tallying centre where he ascertained that the votes cast did not exceed the number of registered voters. His evidence was thus insufficient, contradictory and unreliable in showing that the votes cast in Cherangany Constituency exceeded the number of registered voters as alleged by the petitioner. In any event, the allegation was sufficiently disproved by the evidence of the Constituency Returning Officer, **Vincent Kimelil (DW1)**, who during cross-examination was taken through selected forms 35 and indicated that in some polling stations errors were noted, in that some cancellations and/or alterations were effected but not authenticated by the presiding officers as required. He also indicated that mathematical errors occurred in some instances.

He was however, firm in stating and confirming that the form 36 which he prepared and compiled did not have to come in a specific format and that it tallied with the results as reflected in the relevant forms 35.

Other than Saboti and Cherangany, the allegation of excessive votes extended to Endebess, Kwanza and Kiminini Constituencies as indicated by the petitioner's chief campaigner Akasa (PW2). He alleged that in some stations in Kiminini, the petitioner's votes were deflated and those of the third respondent inflated. He alleged that the form 36 for Endebess Constituency showed that the registered voters did not tally with the official voters register especially in Sabwani, Kiptum and Nai Primary Polling Stations.

Akasa (PW2) also alleged that in Kwanza Constituency at Ndalala polling station, the number of votes cast exceeded the number of registered voters. He exhibited copies of forms 36 for Endebess, Kiminini and Kwanza (Annexure "AA1") to lend credence to his allegations of excessive votes and inflation and deflation of votes in the said constituencies. However, the allegations were discredited during his cross-examination by the respondents and were sufficiently disproved by the evidence presented by the returning officers responsible for the said Kwanza, Kiminini and Endebess Constituency. These officers maintained that the elections in their respective constituencies were conducted in a free, fair and democratic manner in accordance with the Constitution and the electoral laws such that the results reflected the will of the Trans Nzoia County electorate.

**Arnold Mutwiri Njambai (DW2)**, was the Returning Officer for Kwanza Constituency. He acknowledged that inflated votes could be used to manipulate results but implied that such a thing did not happen under his watch. He also acknowledged that at Kobos polling station No. 005, the results in form 35 did not match those entered in form 36 and that some forms 35 contained alterations or cancellations not authenticated by the presiding officers. He further acknowledged that some forms 35 may not have been signed by agents. However, he contended that there was no inflation of votes as alleged and that the alterations or cancellations pointed out by the petitioner respecting certain polling stations were not substantial as to make the results unverifiable. He further contended that some of the errors pointed out were typographical and did not in any way alter the number of votes cast. He indicated that the errors

were not deliberate but normal human errors which did not affect the credibility and integrity of the elections. He further indicated that some agents may have left the polling stations before closure due to fatigue.

**Kirui Kiplangat John (DW3)**, the Returning Officer for Kiminini Constituency, indicated that the Form 36 which he prepared was in error in showing that the total number of votes received by all candidates was 41,247 and that the valid votes were 40808 thereby rendering a deficiency of 501 votes. He also indicated that the form 36 showed that the total number of votes cast was 42261 thereby rendering a deficit of 379 votes if the total number of votes was 41882. Nonetheless, he contended that the results were accurate and verifiable and that the errors pointed out were occasioned by fatigue which took a heavy physical toll on them such that some people dozed off. He also contended that the errors were human errors and did not affect the results. He stated that there was no complaint from the petitioner and clarified that the figure of votes for each candidate as reflected in the form 36 was correct but had an arithmetical error in the total number of votes cast such that instead of 41,247 the figure indicated was 40,808 thereby rendering a difference of 439 votes. He contended that none of the candidates was credited with the 439 votes.

In effect, **Kirui (DW3)** conceded that some errors did occur in the compilation of the electoral form 36 but was firm that the errors were not deliberate with a view to conferring a benefit to any of the candidates nor did they significantly alter or affect the results for Kiminini Constituency.

The Returning Officer for Endebess Constituency, **Joyce Namunyak (DW5)**, found herself caught up in an unpleasant situation which raised suspicion that she had gone to a local cyber cafe to alter the parliamentary elections and not gubernatorial elections results for Endebess Constituency. In cross-examination by the petitioner, she was taken to task over the form 36 prepared by herself in as much as it was in two parts whereby one part was signed by herself and the other part by her deputy. In other words, she generated two forms 36. One of the forms is annexed to her replying affidavit and the other is annexed to the affidavit of the petitioner's chief campaigner (PW2). The form exhibited in her affidavit was signed by her deputy while the one exhibited in the affidavit of the petitioner's chief campaigner was signed by herself.

In explaining the anomaly, she (DW5) contended that the results for Endebess constituency reflected the will of the people and stated that when she was caught up in the commotion at the local cyber cafe where she had gone to print the summary of the results in the company of her deputy, her ICT officer and some police officers, some politicians including the parliamentary candidate for Endebess Constituency one **Joshua Werunga** arrived at the scene and targeted her bag which contained the results intending to destroy the results so that they could not be released. However, unknown to the politicians, copies of the results were in the possession of her deputy and the ICT officer who hurriedly left the scene while she was held in captivity by the police officers at the instigation of the politicians. She said that the police held and told her that she was being rescued from the charged crowd which had gathered at the scene. She was thereafter taken to Moi's Bridge police station before being returned to Kitale at about 6.00 p.m. and arraigned in court at 7.00 p.m. for allegedly altering results relating to the National Assembly elections which charge was later withdrawn after being held in remand custody for some days.

The Returning officer (DW5) indicated that it was while she was held in custody that the results she had prepared were signed by her deputy. She contended that the form 36 in her affidavit was compiled from information derived from forms 35 and that it totally agreed with the form 36 signed by herself and exhibited herein by the petitioner's chief campaigner. She further contended that both forms bear the same results for Endebess Constituency and that she prepared one form 36 on 5th March, 2013 but could not present it to the County Returning Officer as she was held in police custody. She said that the forms 35 were signed by the candidate's agents and that none of them raised any complaints regarding the information contained therein. She went on to contend that the petitioner has not made any valid allegation of discrepancy in the conduct of the elections in Endebess and that the results she presented were a true reflection of the will of the people. The first respondent County Returning Officer, **Albert Adome (DW6)**, agreed as much and maintained that the subject gubernatorial election was conducted in a manner which was free, fair and credible. He said that he declared the results after the tallying of the

results from the forms 36 compiled by the constituencies returning officers and in doing so, no complaint was received from any of the candidates nor their agents.

The County Returning Officer (DW6) contended that the third respondent garnered the highest number of votes and was declared the winner on the 8th March, 2013 although the petitioner talked of 7th March, 2013. He (DW6) indicated that during the electoral process no complaints were made to him by the petitioner on his agents other than a concern that some of the petitioner's agents had been locked out of the polling stations. He made enquiries and noted that the real issue was lack of space due to the number of agents already in the polling station rather than the locking out of agents. He confirmed that no reports of chaos or breaking of seals were made to him. He said that the results from each polling stations were tallied by the respective constituency returning officers and that with regard to the results from Endeless they were the last to be received by him. He indicated that the returns from Endeless did not contain the aggregate of the results in words. Therefore, the returning officer (DW5) took them away for necessary inclusion of the aggregate in words. He later received a copy of the results signed by the deputy returning officer since the returning officer was caught up in a commotion at a cyber cafe and was held in police custody. He contended that there was no variance of the figures with or without the inclusion of the aggregate in words and in any event, no complaints of irregularity were received by him in any of the constituencies. He said that the allegation made to him verbally to the extent that the returning officer at Kiminini tallying centre had closed the centre and disappeared was not valid as he learnt upon enquiry that the centre was closed briefly after consultation with the candidates and/or their agents to allow the electoral officials take a health break after working without a break for three continuous days.

The County Returning Officer (DW6) clarified that the form 36 in his replying affidavit was an electronic version with an I.E.B.C. logo but without his signature as the results were at the time transmitted electronically. He contended that none of the forms 36 was at variance with the results and that the form 36 prepared by himself was accepted and signed by the candidate's agents. He also contended that the vote margin between the petitioner and the third respondent was approximately 52,000 votes such that the ultimate result could not have been upset or overturned even if errors occurred during the compilation of the electoral forms.

Indeed, this contention and others by the constituencies returning officers indicated hereinabove did not find any valid rebuttal in the evidence presented by the petitioner and his witnesses and at most remained unchallenged for the purpose of showing that the subject gubernatorial election as conducted by the first and second respondents was substantially free and fair and in accordance with the provisions of the Constitution and the electoral laws.

It goes without doubt that errors and/or irregularities may have occurred in some polling stations with regard to the completion of the electoral forms and in particular forms 35. These were essentially clerical, or arithmetical errors which were satisfactorily explained by the first and second respondents and which were attributable to human error precipitated by the complexity of the elections involving six (6) elective posts. This was an election like no other in this country. It was therefore easy to understand that due to the nature of the elections and the new electoral laws that went with them, mistakes and errors were bound to happen due to the fatigue arising from the tedious and demanding electoral exercise. However, in some instances the errors could be attributable to sheer carelessness and lack of due diligence on the part of some of the electoral officials who failed to appreciate that Forms 35 and 36 are vital documents in an election process as they give a summary of the results of an election and it is on the basis of their accuracy that the credibility of the election is rated.

A court is therefore required to consider objectively whether any of the error and/or irregularities noted on some of the electoral forms in some polling stations or tallying centres were deliberate and so grave as to lead to the conclusion that the election was not transparent, free and fair. Herein, the evidence has shown that the errors and/or irregularities detected were not deliberate neither were they so grave as to have a substantial effect on the ultimate result and lead to the conclusion that the subject election was neither transparent nor free and fair.

With regard to the **second issue for determination**, the complaints touching on the issue are mostly

made against the third respondent. These include **firstly**, that there was bribery and/or vote buying by the third respondent and/or his agents and in particular at Saboti Primary School and Mount Primary School polling stations. **Secondly**, that there was violence and/or threats of violence meted out by the third respondent and his agents in which the petitioner's supporters were attacked in Kiminini and the matter reported to the police. **Thirdly**, that the third respondent was a public servant and was working for the African Development Bank (ADB) in which the Kenya government has shares. It would therefore be necessary for the court to know whether he resigned like other public servants.

**Fourthly**, that there were malpractices in many areas within the county such that it would be in the interest of justice that a recount and scrutiny be carried out to establish the results supported by relevant materials and documents.

As to the allegation of bribery and/or vote buying there was no scintilla of evidence from the petitioner and/or his witnesses to establish and prove the allegation beyond reasonable doubt. The allegation therefore remained hearsay as was confirmed by the petitioner who did not even consider it fit to report the matter to the police or any other authority. The allegation of violence or threats of violence was related to an alleged attack of the petitioner's supporters at Kiminini. In that regard, the petitioner relied on information given to him by unnamed people. He did not witness the alleged violence or threats of violence against his supporters allegedly by the third respondent or his agents. The petitioner's chief campaigner (PW2) also relied on what he was told. He said that the alleged incident of violence occurred during the campaign period and was reported to him by their agent **Nancy Chepkorir (PW4)**. He said that the incident occurred on 1st January, 2013 and was entered in the police occurrence book (O/B). The chief campaigner (PW2) indicated that Nancy was a victim of the incident.

The irony is that, in her evidence, Nancy (PW4) stated that the victim of the incident was one Paul Sitati. She also insisted that the incident occurred on the 11th January, 2013 but contradicted herself by saying that she was in the company of the said Paul Sitati when the incident occurred on the 10th January, 2013. Interestingly, the petitioner's chief agent at Kiminini (PW6) indicated that there was no violence in Kiminini.

What emerges from the foregoing evidence is that the allegations of violence or threats of violence made by the petitioner against the third respondent were not credible and remained unproved. If any violence took place then it was during the campaign period and not during the election exercise and the perpetrators were unknown people.

The alleged incident of assault against **Nancy Chepkorir (PW4)** was not linked to the elections by any credible evidence and most likely than not, it was an ordinary criminal act which invariably had to be reported to the police and which was not in any way linked to the third respondent and/or his agents.

As to the allegation that the third respondent was a public servant or officer by virtue of having been an employee of the African Development Bank which is associated with the Kenya Government as one of its shareholder and while it is suspected by the petitioner that he (third respondent) may not have resigned from his employment like other public servants prior to the election, the evidence by the third respondent is that he was not a public officer as contemplated by the Constitution and that, in any event, he retired from public service on the 13th May, 2009 while serving as a Permanent Secretary in the Government of Kenya and that he resigned from the African Development Bank as its resident representative in Uganda in the month of December, 2012.

There is no dispute from the petitioner to the foregoing facts which have therefore satisfied the petitioner's curiosity.

Indeed, the third respondent has established that he resigned from the African Development Bank prior to the elections and in so doing, he was not doing what public servants or officers were doing since the said bank is not part of the Kenya Government although the Government may be part of its shareholders.

Article 260 of the Constitution defines a public officer as any state officer or any person other than a state

officer who holds a public office which means an office in the national government, a County government or the public service. Such definition would certainly not apply to a person employed by the African Development Bank (ADB) which may as well be a private company.

As to the allegation of malpractices which according to the petitioner may render scrutiny and recount of votes necessary, no credible or substantial evidence was led in support thereof. It is a general allegation devoid of proper basis and was most likely than not introduced herein for purposes of agitating for scrutiny and recount of votes whereas no proper basis has been laid for such an exercise.

Indeed, the petitioner's crave for scrutiny and recount is a strong indication that he does not believe that he was defeated in the election by the third respondent and should therefore be granted a second "**bite at the cherry**" to confirm the fact with the hope that the scrutiny and recount would reveal massive irregularities and malpractices thereby leaving the court with no option other than invalidating the election and ordering a fresh election.

Herein, scrutiny and recount of votes would undoubtedly be an exercise in futility considering the very huge vote margin between the petitioner and the third respondent. This was over 50,000 votes, more than double the total votes garnered by the petitioner.

There was no substantial evidence that votes were unlawfully inflated in favour of the third respondent or deflated to the detriment of the petitioner as alleged by the petitioner. But, even if it were taken that the petitioner unlawfully lost 13,000 votes to the third respondent as contended by himself, there would still have existed a significant vote margin between the two of approximately 25,075 votes as the petitioner would have gained 50,988 votes while the third respondent's votes would have been reduced to 76,063.

The third respondent would still have emerged as the candidate with the highest number of votes.

The failure by the petitioner to prove to the required standard the four complaints touching on the second issue for determination means that the election of the third respondent as conducted by the first and second respondents was transparent and free from violence, intimidation, unlawful influence or corruption on the part of the third respondent and indeed all the respondents.

In sum, the two issues for determination must and are hereby answered and determined in the affirmative in favour of the third respondent as the totality of the evidence adduced by the petitioner and highlighted in his written submissions with a view to showing otherwise was disproved and discredited by the respondents such that it became insufficient and insignificant for the purposes of invalidating the subject election and ordering a fresh election.

The ultimate result of the election as declared by the first and second respondents was a demonstration and clear reflection of the true will of the people of Trans Nzoia in electing the third respondent, **Patrick Simiyu Khaemba**, as their first governor in the present day Kenya.

In the end result, this petition is dismissed in its entirety with a declaration that the third respondent was validly elected as the Governor for Trans Nzoia County in the gubernatorial elections that were held on the 4th March, 2013.

The costs of the petition shall be borne by the petitioner but shall not exceed the sum of Ksh. 2 (two) million to be shared between the first/second respondents and the third respondent as may be determined by the deputy registrar of this court in his capacity as the taxing officer.

As a consequence of this decision, the notice of objection by the third respondent dated 24th July, 2013 no longer falls for determination as it has been overtaken by events.

Ordered accordingly.

**[Delivered and signed this 5<sup>th</sup> day of September 2013.]**

**J.R. KARANJA.**

**JUDGE.**