



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA DISTRICT REGISTRY
THE ELECTIONS ACT, 2011
ELECTION PETITION NUMBER 4 OF 2013

BETWEEN

GIDEON MWANGANGI WAMBUAPETITIONER

VERSUS

1. INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

2. KHATIB ABDALLA MWASHETANI..... 2ND RESPONDENT

3. JUMA MUSA (RETURNING OFFICER

LUNGA LUNGA CONSTITUENCY)3RD RESPONDENT

CONSOLIDATED WITH

ELECTION PETITION CAUSE NO. 9 OF 2013.

BETWEEN

HASSAN NJANYE CHARO.....PETITIONER

VERSUS

1. INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....1ST RESPONDENT

2. JUMA MUSA.....2ND RESPONDENT

3. KHATIB ABDALLA MWASHETANI.....3RD RESPONDENT

RULING

INTRODUCTION

1. This ruling is the subject of a Notice of Motion dated 6th August 2013 filed in this Court on 7th August 2013 by the petitioner in petition no. 4 of 2013, **Gideon Mwangangi Wambua**, (hereinafter referred to as the applicant. The said Motion seeks orders that:

1. **Scrutiny and recount of votes is ordered in respect of the following polling stations:**

- a. **Vanga Primary School Polling Station, Code 065;**
- b. **Kiruku Primary School Polling Station, Code 022;**
- c. **Mtsunga Primary School Polling Station, Code 060;**
- d. **Kanana Nursery School Polling Station Code 022;**
- e. **Bengo Primary School Polling Station, Code 024;**
- f. **Kikonde Primary School Polling Station, Code 041;**
- g. **Mgombe Primary School Polling Station, Code 030;**

With a view to establish in whose favour 393 valid votes cast as they are not credited to any candidate;

2. **Scrutiny and recount of votes is ordered in respect of the following polling stations:**

- i. **Shimoni Primary School Polling Station Code 001;**
- ii. **Majoreni Primary School Polling Station, Code 008;**
- iii. **Kikoneni Primary School Polling Station Code 014;**
- iv. **Mshiu Primary School Polling Station, Code 020;**
- v. **Mamba Primary School Polling Station Code 028;**
- vi. **Mwalewa Primary School Polling Station Code 070;**
- vii. **Mgombezi Primary School Polling Station Code 073;**

With a view to establish where 847 valid votes came from, noting that 25, 119 valid votes are shown on the return form to have been cast, yet the actual valid votes total is 26,285.

3. **The costs of this application are provided for.**

2. The said application was based on the following grounds:

- a. **25,119 valid votes are shown to have been cast, but a reckoning of valid votes allocated to the different candidates give a figure of 26,285;**
- b. **In the result 1,166 presumably valid votes were speciously added to the total tally of valid votes garnered by the different candidates;**
- c. **1,197 valid votes on the tally sheet are unallocated to any candidate;**
- d. **287 presumably valid votes in Vanga Primary School polling station are unaccounted for;**
- e. **804 valid votes in Mamba primary School polling station are excluded from the total of valid votes presumably cast for one of the candidates;**
- f. **393 valid votes have not been accounted for in Vanga (C.065)(287 votes); Kiruku (C.021) (45 votes); Kanana (C. 022) (28 votes); Mgone (C.030) (10 votes); Mtsunga (C.060) (10 votes); Kikonde (C.041) (10 votes); Bengo (C.034) (3 votes);**
- g. **The evidently poor collation and computation of votes in Lunga Lunga constituency was in breach of Article 86 of the Constitution, 2010 and section 83 of the elections Act, and indeed affected the final results of the election;**
- h. **Scrutiny and recount will explain away what became of valid votes which are unaccounted for in the final results, or speciously included in the tally of votes for some individual candidates;**
- i. **Scrutiny and recount will establish where excess valid votes came from;**
- j. **Scrutiny and recount will establish the validity of the excluded votes;**
- k. **The declared winner is unlikely to retain the lead after scrutiny and recount of votes in the aforementioned polling stations;**
- l. **The margin between the declared winner and runners up is small (i.e. 719 votes);**

m. **It is meet and just to grant scrutiny and recount in the limited polling stations.**

APPLICANT'S CASE

3. The application is supported by an affidavit sworn by the applicant on 6th August 2013.
4. According to the applicant 25,119 valid votes are shown to have been cast on the Votes tally Sheet for Lunga Lunga constituency but but a reckoning of valid votes allocated to the different candidates set out in the sheet give a total figure of 26,285. In the result 1,166 presumably valid votes were speciously added to the total tally of valid votes garnered by the different candidates while 1,197 valid votes on the tally sheet are unallocated to any candidate; 287 presumably valid votes in Vanga primary School polling station are unaccounted for; 804 valid votes in Mamba Primary School polling station are excluded form the total tally of valid votes presumably cast for one of the candidates; 393 valid votes have not been posted and accounted for in the following polling stations: Vanga (C. 065) (287 votes); Kiruku (C.021) (45 votes); Kanana (C. 022)(28 votes); Mgombe (C.030)(10 votes); Mtsunga (C.060)(10 votes); Kikonde (C.041)(10 votes); Bengo (C.034)(3 votes). It was was further deposed that 31 extra or excess valid votes have been included in the tally for unidentified candidates (s) in the following polling stations: Shimoni Pri School Polling Station (C 001) (2 excess votes); Majoreni Pri School Polling Station(C 008) (10 excess votes; Kikoneni Pri School Polling Station (C 014) (1 excess vote); Mshiu Pri School Polling Station, (C 020) (10 excess votes); Mwamtsefu Pri School Polling Station (C 063)(2 excess votes); Mwalewa Pri School Polling Station (C 070) (5 excess votes); Mgombezi Pri School Polling Station (C 073)(1 excess vote). Accordingly, the collation and reckoning of votes in Lunga Lunga constituency was neither simple, verifiable, accurate or transparent; nor fair or secure and this ultimately affected and rendered skewed, the final results of the election. It was therefore deposed that Scrutiny and recount will explain away what became of valid votes which are unaccounted for in the final results, or speciously included in the tally of votes for some individual candidates; establish where excess valid votes came from; establish the validity of the excluded votes and that the declared winner is unlikely to retain the lead after scrutiny and recount of votes in the aforementioned polling stations taking into account the fact that the margin between the declared winner and runners up is small (i.e. 719 votes) hence it is meet and just to grant an order of scrutiny and recount in the limited polling stations where I have identified glaring errors.
5. Based on legal advice the applicant deposed that the Votes Tally Sheet has glaring errors on posting and reckoning of votes and the only way the court can be able to make a finding on the veracity of the figures and glaring errors on the Votes tally Sheet is by ordering scrutiny and recount to establish where the extra valid votes included in the sheet came from; and what became of the omitted valid votes. To him, the extra votes alluded to in the foregoing paragraphs, and in the motion, are clearly evident from simple arithmetic in re-tallying of votes accredited to each candidate. While the total number of valid votes cast is given as 25,119, the actual valid votes accredited to the candidates total 26,285. The difference between the votes garnered by the declared winner and the runners up may very well be upset once scrutiny and recount is ordered given the number of unaccounted votes and the difference between the votes shown as cast and the actual votes allocated to the candidates and that an order of scrutiny and recount in the manner and at the polling stations mentioned in the motion is merited to narrow down issues, and clear the air regarding the specious votes included in the votes tally sheet.

PETITIONERS' SUBMISSIONS

6. In support of the application **Mr. Kimani**, learned counsel for the applicant submitted that the Motion is well founded not just on the affidavit evidence and facts therein but also on the evidence taken before the Court. He conceded that ordinarily the applicant would have to lay a foundation though the Court may on its own motion invoke its jurisdiction to order scrutiny and recount in appropriate cases. To him this is a tool which has a double edged purpose of harmonizing the issues before an election court and assisting the Court in verifying highlighted errors either in proceedings or in an affidavit in support of the petition. It was the applicant's case that despite service none of the respondents opposed or contradicted the affidavit evidence as they did not file

- any replying affidavit. Learned counsel therefore submitted that the applicant had laid a basis upon which the court can give directions particularly with regard to the highlighted stations. To him the guiding principle is that where the difference between the votes being considered is not large and the margin is narrow the scrutiny has in the past been readily granted.
7. He however submitted that where an application is made it is only fair that the affidavit evidence is read alongside other evidence and hence the reason why the hearing of the application was deferred to enable the Court have the benefit of the tested evidence. Counsel submitted that the applicant has highlighted in cross-examination sufficient number of instances which cry for scrutiny and recount one of which was the concession that the form which was used to declare the results was different from the one that was the correct one and which was never declared either to the candidates or the people of Lunga Lunga. Since there are several adjustments in form 36, it was submitted that the applicant's application is well grounded. Similarly, it was submitted that several areas were highlighted with respect to form 35s in which the errors were either arithmetical or type-outs or transfer of data by comparing the disputed votes and the margin between the winner and the first runner up.
 8. **Mr. Kimani** submitted that the law is deliberately worded so that the court is not boxed in the exercise of its discretion since apart from the objectives set out one other objective is to assist the Court expedite the hearing of the petition and in determining whether some votes were left out the Court would reach a fair determination. In his view the case for recount and scrutiny which can be ordered at any time before judgement has been made out.
 9. On behalf of the petitioner in petition no. 9 of 2013, it was submitted by **Mr. Asige** while association himself with **Mr. Kimani's** submissions that in paragraph 17 of his client's petition, the petitioner sought for recount and tallying in all the polling stations in Lunga Lunga Constituency. The same prayer appears in paragraph (e) of the said petition. According to him the application can be made at any time under section 82 of the *Elections Act, 2011* (hereinafter referred to as the Act) and Rule 31(1) of the *Elections (Parliamentary and County Election Petitions) Rules, 2013* (hereinafter referred to as the Rules). The guiding principle according to him is that the applicant should show sufficient reason which is to lay a basis while appreciating that in applying for recount one ought not to engage in a fishing expedition or expand the scope of the petition. In these two petitions, it was submitted that a basis has been laid and sufficient reason established to result into the Court granting the orders of scrutiny and recount. According to learned counsel, this is so in the evidence of the Independent Electoral and Boundaries Commission (hereinafter referred to as IEBC) in both petitions in respect of the integrity of form 35s which bring out so many contradictions which go to the root of the complaints in the Petition. To him it is appreciated that even the results announced by IEBC on 6th March 2013 have been abandoned as the same is not correct, credible and verifiable results and IEBC has produced amended results which was an exercise done and completed by the Returning Officer alone without being declared or announced. It was submitted that therefore even to the contestants and the people of Lunga Lunga the correct results are unknown as there is no power which allows the Returning Officer to unilaterally amend the results. As there is an admission that the results are incorrect, that lays a basis for a recount and in doing so the Court seeks to do substantive justice. According to **Mr. Asige** even one sufficient reason is enough for the purposes of recount and scrutiny and in this case the integrity of form 35s is in serious issue and requires interrogation which can only be obtained if a scrutiny and recount is undertaken. It was further contended that the Constitutional and Statutory threshold can only be attained by granting the order sought and reference was made to Mombasa High Court Election Petition No. 10 of 2013 between **Seif Ramadhan Seif Kajembe vs. The Returning Officer, Jomvu Constituency, Mombasa & Others** in which this Court identified the reasons for ordering scrutiny. In **Mr. Asige's** view, if there is a case in which an order for scrutiny is deserved, it is this case. **Mr. Asige** therefore prayed that the order ought to be made not only in respect of the stations mentioned in the application but for the entire Constituency.

RESPONDENTS' SUBMISIONS

10. On behalf of the 2nd respondent in petition no. 4 of 2013 (which is the lead file in the consolidated petitions), **Mr. Abed** submitted that the question at this stage is whether after hearing the

witnesses a basis has been laid for an order of scrutiny. In his view, no sufficient basis has been laid and the application for scrutiny is intended to extend the scope of the petitions since in all the grounds in the petitions none of them has an allegation concerning the number of votes. It was further submitted that there are no particulars of the counting as the petitions were solely based on allegations of bribery. To him the application for scrutiny is therefore a departure from the pleadings an issue which was dealt with in **Seif Ramadhan Seif Kajembe vs. The Returning Officer, Jomvu Constituency, Mombasa & Others** (supra). In his view the petitioners should confine themselves to the issues raised in the petition but ought not to expand its scope. In counsel's view the alleged irregularities such as whether or not a form was signed do not warrant an order for recount or scrutiny. He further submitted that the burden is on the petitioners to furnish particulars and not leave the Court to see what is strong and what is not and as the margin here is 719 votes the same cannot be said to be such a small margin since it is roughly 5% of the total votes cast and hence the application ought to be disallowed.

11. On behalf of the 1st and 3rd respondents in petition no. 4 aforesaid, it was submitted by **Mr. Simiyu** that if there is any case in which an application for scrutiny is undeserved it is the present case. In his view the statutory threshold for grant of such an order is wanting in this application since there has to be sufficient reason i.e. a basis has to be laid before such an order is made. According to him the petitioners have not tendered any grounds or particulars of the irregularities in the entire Constituency. Since the petitioners are bound by their pleadings and there are no particulars of irregularities indicated in the petition based on the said **Seif Ramadhan Seif Kajembe vs. The Returning Officer, Jomvu Constituency, Mombasa & Others** (supra) the present application ought to fail with costs.

APPLICANT'S REJOINDER

12. In his reply, **Mr. Kimani** submitted that the applicant has specifically impugned the results as announced by the Returning Officer which has to some degree been conceded. In his view given the facts complained of a basis for scrutiny which is an investigation to confirm the truth has been laid.

DETERMINATIONS

13. An order for scrutiny and recount are statutorily underpinned in Section 82 of the Act as read with Rule 33 of the Rules. Section 82(1) of the Act provides as follows:

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

14. By Rule 33 of the Rules, on the other hand provides:

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

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

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

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

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

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

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

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

(e) the packets of spoilt papers;

(f) the marked copy register;

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

(h) the packets of counted ballot papers;

(i) the packets of rejected ballot papers; and

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

15. As I held in **Seif Ramadhan Seif Kajembe vs. The Returning Officer, Jomvu Constituency, Mombasa & Others** (supra), it is clear from the foregoing provisions that whereas Rule 33 of the aforesaid Rules provide that a sufficient reason be shown before the Court can be satisfied that scrutiny or recount ought to be ordered, Section 82 of the Act on the other hand donates wide and unfettered discretion on the Court to make such orders in such manner as it may direct. Accordingly whereas in the exercise of its powers under Rule 33 of the Rules, the Court must be satisfied that there is sufficient reason before making an order for scrutiny or recount where the Court exercises its powers under section 82 aforesaid it is not a requirement that the Court must be satisfied that there is a sufficient reason as long as the Court is of the view that the circumstances of the petition warrant an order for recount. Such circumstances include but are not limited to the margin between the disputing parties. The margin here does not necessarily mean the number but in deciding whether or not the margin is narrow the Court takes into account the votes received by the parties, the votes cast as well as the number of registered voters. A difference of only two votes may not necessarily mean that the margin is narrow. Although the Court's discretion under section 82 of the Act is necessarily wide, as in all cases where the Court has to exercise its discretion, there must be some reasonable basis in fact or in law to warrant the orders made or it has to be exercised judicially and not whimsically or capriciously.

16. In the said decision I held while relying on Reuben Nyanginja Ndolo vs Dickson Wathika Mwangi & 3 Others [2008] eKLR that the basis for ordering recount and scrutiny are to investigate the truthfulness of the allegations made; to assist the court to investigate if the allegations of the irregularities and breaches of law complained of are valid; to assist the court to determine the valid votes cast in favour of each candidate that contested the parliamentary election; and to assist the court assess whether there would be just cause to limit the time within which the petitioner or any of the Respondents should complete his case.

17. In this case, however, the application for scrutiny and recount has been made by the petitioner hence the provisions of Rule 33 come into play. In Wavinya Ndeti vs The Independent Electoral and Boundaries Commission and 4 Others [EP NO. 12 of 2013], the Honourable Justice Majanja applied the principle set out in the case of William Maina Kamanda vs Margaret Wanjiru Kariuki Nairobi EP No. 5 of 2008[2008] eKLR where it was held that:

“it is now well established that an order of scrutiny can be made at any stage of the hearing before final judgment whether on the Court's own motion or if a basis laid requires so. It can be made if it is prayed in the petition itself...or when there is ground for believing that there were irregularities in the election process or if there was a mistake on the part of the Returning Officer or other election officials”.

18. The phrase “*if a basis is laid*” means the same thing as being “*satisfied that there is sufficient reason*” which is the wording employed in the Rules.

19. I have perused the petitions in these two cases. In petition no. 4 of 2013, it is pleaded in paragraph 4 thereof that the election was not valid, and was marred by rampant bribery, undue influence on voters and want of transparency and accountability on the grounds of bribery of voters, supply of

- school desks/lockers, supply of water tanks, supply of iron sheets, offer of cash, supply of *sufurias*, sinking of wells. In paragraph 7 it is pleaded that the elections were marred by irregularities as TNA agents were wrongfully excluded from a number of polling stations. The other issue was that the transmission of results from the polling stations was not transparent, nor foolproof. Further some voters were allowed to vote while their names were not in the register while in other cases voters' decisions were influenced by actions of certain individuals. It is only in paragraph 11 of that petition that the issue of scrutiny and recount is alluded to when it is pleaded that the scrutiny and recount will show that **Benson Mutisya Mwilu**, and not **Khatib Abdallah Mwashetani** was validly elected as member of the national assembly for Lunga Lunga constituency. That was the state of the pleadings that the petitioner in petition no. 4 of 2013 relied upon to seek inter alia an order for scrutiny and recount of votes.
20. On his part the petitioner in petition no. 9 of 2013 alleged that the results announced by the Returning Officer were not the same results as the ones announced at the polling stations. There were similar allegations of bribery and undue influence before and during the electioneering process. Further allegations related to the illegal acts of the 1st respondent in the said petition which comprised of attaching his computer to the frame of that one of the IEBC as well as failure by the IEBC to verify the correctness of the results submitted from the polling stations. Further allegations related to the barring of agents, failure to supply form 35s, tampering with results and giving agents a break before the process of counting. Again it was this state of pleading that the petitioner in petition no. 9 of 2013 relied upon to seek for an order for scrutiny, recount and re-tallying in the petition.
21. In Mombasa High Court Election Petition No. 6 of 2013 between **Nuh Nassir Abdi vs. Ali Wario & 2 Others**, I put the petitioners on notice that they should avoid the temptation to enlarge their cases outside the scope of their pleadings since it is trite that a party is bound by his pleadings despite the evidence while in **Seif Ramadhan Seif Kajembe vs. The Returning Officer, Jomvu Constituency, Mombasa & Others** (supra), I held that whereas the documents supplied to the Court under Rule 21(b) of the Rules are strictly speaking not the petitioner's evidence since the petitioner's evidence strictly speaking ought to be in form of affidavit, the Court cannot be prevented from relying on material which is patently on the face of the record in reaching a just decision.
22. However as was held in **Nelson vs. Attorney General and Another [1999] 2 EA 160**, the burden is heavy on him who assails an election, which has been concluded. In **William Maina Kamanda vs. Margaret Wanjiru Kariuki & 2 Others Nairobi HCEP No. 5 of 2008**, the Court held that the burden of proof is on the Petitioner and it is sufficient for the Respondent simply to deny the allegations and leave the rest to the Petitioner. In **Madundo vs. Mweshemi & AG Mwanza HCCM No. 10 of 1970**, the rationale for placing a heavier burden on the petitioner than in ordinary civil cases was given as follows:

“An election petition is more serious matter and has wider implications than an ordinary civil suit. What is involved is not merely the right of the petitioner to a fair election but the right of the voters to non-interference with their already cast votes i.e. their decision without satisfactory reasons. To require the petitioner to satisfy such standard of proof is not only fair but reasonable in the circumstances. Petitions, as the Act itself provides, should not be easily allowed by mere production of evidence which might probably prove the allegations and this is why it not enough merely to prove the allegations but also necessary to prove that the allegations affected the results of the election. No doubt a person who seeks to avoid an election result has the duty of leading evidence in support of this allegation and without doing so, his petition would fail, although the trial court is not bound to decide an election petition only on the petitioner's evidence.”

23. Accordingly, it behoves the petitioner who wants the Court to find that the elections were not conducted in accordance with the principles laid down in the Constitution and in the written law or that the noncompliance affected the results of the elections to adduce evidence in support of the said allegations. In **John Kiarie Waweru vs. Beth Wambui Mugo & 2 Others Nairobi HCEP No. 13 of 2008**, Kimaru, J held:

“in conducting the said elections, the electoral Commission is required to promote the principle of free and fair elections....The burden of establishing the allegations in an election petition regarding the conduct of the said election and the results announced thereafter is on the petitioner. The Court is aware of its duty to consider and determine the evidence adduced by the parties to this election petition after putting in mind the fact that the election that is sought to be nullified is in respect of an exercise of the right by the voters of Dagoretti Constituency to elect a representative of their choice. The court will not interfere with the democratic choice of the voters of Dagoretti Constituency unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and therefore subject to nullification. It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did occur: he must establish that the said electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the elections...Election petitions are no ordinary suits. Though they are disputes *in rem* fought between certain parties, election petitions are nonetheless disputes of great public importance and this is because when elections are successfully challenged by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents’ social and economic activities. It is for these reasons that election petitions should not be taken lightly. Generalised allegations are therefore not the kind of evidence required to prove election petitions but they should be proved by cogent, credible and consistent evidence.... As regards the standard of proof which ought to be discharged by the petitioner in establishing allegations of electoral malpractices, there is consensus by electoral courts that generally the standard of proof in election petition cases is higher than that applicable in ordinary civil cases i.e. that of proof on a balance of probabilities. The Standard is higher than proof on a balance of probabilities but lower than the standard beyond reasonable doubt required in establishing criminal cases. Allegations of electoral malpractices, like for instance bribery, require higher proof... The petitioner cannot be allowed to introduce new grounds in the course of adducing evidence in support of his petition. This court will not therefore address the issues raised by the petitioner regarding the validity of the Parliamentary Form 16As. The failure by a candidate or his agent to sign the Form 16As cannot invalidate the results contained in the said Form 16A and therefore the fact that the said Form 16As were not signed by the agents does not render any of the results from the various polling centres invalid... In the present petition it is clear that the petition made generalised allegations against the respondent with the hope that when the said allegations are considered in totality a picture would emerge that the elections were conducted in a manner that was not free and fair. It is conceded that some of the allegations raised by the petitioner established non-compliance with the law in relation to the conduct of the said elections. It is, however, held that the said non-compliance with the law were of such a minor nature as not to affect the overall results of the elections to determine the Member of Parliament of Dagoretti Constituency. In any event section 28 of the National Assembly and Presidential Elections Act bars the court from voiding a result by reason of non-compliance with any written law if such non-compliance did not materially affect the results of the election. It is held that the petitioner failed to establish to the required standard of proof that the irregularities evident during the conduct of the elections were of such a nature as to render the said elections not to be a true reflection of the expression of the will of the voters of Dagoretti Constituency.”

24.The legal presumption in election disputes is therefore that the elections were conducted in accordance with the law and it is upon the petitioner to shew evidence to the effect that they were not so conducted. Once it is shown that the same were not conducted in accordance with the law the onus shifts to the respondents to show that the said irregularities did not affect the outcome of the election in issue. Petitions should not be easily allowed by mere production of evidence which might probably prove the allegations and this is why it not enough merely to prove the allegations

but also necessary to prove that the allegations affected the results of the election. The court has a duty to consider and determine the evidence adduced by the parties to the election petition after bearing in mind the fact that the election that is sought to be nullified is in respect of an exercise of the right by the voters to elect a representative of their choice hence the court will not interfere with the democratic choice of the voters unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and therefore subject to nullification. It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did occur: he must establish that the said electoral malpractices were of such magnitude that it substantially and materially affected the outcome of the electoral process in regard to the elections.

25. In Hassan Ali Joho & 2 Others vs. Hotham Nyange & Another Civil Appeal No. 198 of 2007 [2008] 3 KLR, the Court of Appeal expressed itself *inter alia* as follows:

“The general rule in section 107 of the Evidence Act is that the burden of proof lies on the person who asserts the affirmative of the issue. The section lays down that if a person wishes the court to believe in the existence of a particular fact, the onus of proving that fact is on him, unless the burden of proving it is cast by any law on a particular person. The burden of proving that the election is liable to be set aside for corrupt practices is heavily on the petitioner because it is he who seeks to have the election declared null and void; the standard of proof has to be to the satisfaction of the court since the court cannot be deemed to be satisfied if it is in doubt...The learned judge, although engaging himself in tautology and legal semantics, was right in holding that the appellants had to prove their petitions to the satisfaction of the court, but, that the standard of proof required was not that beyond reasonable doubt presumably as in criminal cases; and that like in fraud cases, the standard of proof ought to be higher than on a balance of probabilities.”

26. As indicated above the aim of conducting scrutiny and recount is not to enable the Court unearth new evidence on the basis of which the petition could be sustained. Its aim is to assist the court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings. In other words a party should not expect the Court to make an order for scrutiny simply because he has sought such an order in the petition. The petition ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support thereof in order to justify the court to feel that there is a need to verify not only the facts pleaded but the evidence adduced by the petitioner in support of his pleaded facts. Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to Rule 21 of the Rules, the Court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition.

27. This is not to say that the Court on own motion cannot rely on the said documents to arrive at a just decision. As I held in Nuh Nassir Abdi vs. Ali Wario & 2 Others, (supra):

“To the contrary it may assist the Court in determining the question whether or not the principles under Article 81 of the Constitution were adhered to. However, the petitioner is put on notice that he should avoid the temptation to enlarge his case outside the scope of his pleadings since it is trite that a party is bound by his pleadings despite the evidence.

Section 80(1) of the *Elections Act* provides:

An election court may, in the exercise of its jurisdiction—

- a. *summon and swear in witnesses in the same manner or, as nearly as circumstances admit, as in a trial by a court in the exercise of its civil jurisdiction and impose the same penalties for the giving of false evidence;*
- b. *compel the attendance of any person as a witness who appears to the court to have been*

concerned in the election or in the circumstances of the vacancy or alleged vacancy;

(c) examine a witness who is compelled to attend or any other person who has not been called as a witness in court, and examined by a party to the petition and after examination the witness may be cross examined by or on behalf of the petitioner and respondent or either of them; and

(d) decide all matters that come before it without undue regard to technicalities.

Dealing with a similar provision under repealed *Elections Act*, Musinga, J (as he then was) held in Simon Nyaundi Ogari & Another vs. Hon. Joel Omagwa Onyancha & 2 Others Kisii Election Petition No. 2 of 2008:

“Section 23(1)(d) of the National Assembly and Presidential Elections Act stipulates that in the exercise of its jurisdiction, an election court shall decide all matters that come before it without undue regard to technicalities. Section 23(1) also empowers the court to compel the attendance of any person or witness who appears to it to have been concerned in the election...It is regrettable that many election courts have, in deciding several applications and petitions disregarded the spirit and tenor of section 23(1)(d) by allowing parties to resort to undue technicalities. While every effort must be made to follow rules of procedure as stipulated under the Act and the Election Petition Rules, the same should not be interpreted in a narrow and restrictive manner that may give undue advantage to some of the parties in an election petition. An election court should endeavour to do substantial justice without allowing unnecessary clogs and fetters to be placed along the path of justice...Section 34 of the Act gives the Electoral Commission power to make regulations for the better carrying out of its mandate. Some of those regulations provide for the manner in which the ballot boxes are handled before and after conduct of the elections and that includes sealing of the ballot boxes...In its quest for truth and just determination of an election dispute, an election court is not limited to examining only the documents referred to in Rule 19 of the Election Petition Rules but can examine any public document that is shown to be relevant...Section 23(b) of the Act also empowers the Election Court to summon the District Elections Co-ordinator and once summoned the witness has to swear an affidavit and deliver to court sufficient copies thereof as provided for under rule 18(4) of the Election Petition Rules.”

In the present petition as opposed to the afore cited decision of the Supreme Court deponents of the affidavits filed have been cross-examined on amongst others the report of the scrutiny and the recount. In Wildlife Lodges Ltd. vs. Jacaranda Hotel Ltd. Civil Appeal No. 249 of 1999, the Court of Appeal held that nothing is immaterial that helps justice to be done; nothing is extraneous which helps prevent injustice being done. Article 159(2)(d) of the Constitution enjoins the Courts and the Tribunals to be guided by the principle that justice shall be administered without undue regard to procedural technicalities. If I understood the respondents’ objection correctly, the direction taken in cross-examination is not objected to on the ground that the said documents can never be the subject of the cross examination rather that the same are not properly before this Court. In other words the procedural rules relating to election petitions have not been complied with in order for the same to properly form part of the record of this court. No prejudice has been alluded to at all.”

28.It is clear from the summary of the grounds of the petition set out hereinabove that apart from seeking orders for scrutiny and recount there were no sufficient pleading and particularity of the facts upon which the order for scrutiny was sought in both petitions. Whereas the Court is entitled to take into account the discrepancies highlighted in arriving at its ultimate decision, those discrepancies unless they formed the petitioners’ cases as pleaded cannot be the sole basis upon

which an otherwise unmerited petition would be upheld.
29. As I held in Seif Ramadhan Seif Kajembe vs. The Returning Officer, Jomvu Constituency, Mombasa & Others (supra),

“scrutiny is meant to enable the Court arrive at a just determination of an election petition and in deciding to do so the Court must look at all the circumstances of an election petition including the margin between the petitioner and the respondent who was declared to have won the election as well as the evidence presented before the Court. The Court however cannot out of the blue without considering the said circumstances make an order for scrutiny. Where therefore there are no circumstances which warrant a scrutiny to be conducted the Court will not make such an order simply because allegations are made in the petition. Where there is no evidence, the petitioner should not expect the Court to order for scrutiny in the hope that in the course of the conduct of such a process some evidence may come to light on the basis of which the petition may succeed. As was stated by Majanja, J in Wavinya Ndeti vs The Independent Electoral and Boundaries Commission and 4 Others (supra) *“although scrutiny is within the court’s discretion, the applicant must establish sufficient basis for the court to order scrutiny. Further, the petitioner must not be permitted to launch a fishing expedition under the guise of an application for scrutiny in order to discover new evidence upon which to foist his or her case to invalidate an election.....An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error”*. In the said case the learned Judge cited with approval the decision of Kimondo, J in *Kakuta Hamisi vs. Peris Tobiko and Others Nairobi High Court Election Petition No. 5 of 2013* (unreported) in which it was stated that *“Courts are ill-equipped to carry out a recount. It is a laborious and time consuming exercise. The polling stations provide a better forum, soon after close of polls, and in the presence of agents or candidates. In that scenario a fairly smaller number of votes would be recounted.”* The learned judge went ahead to state that *“the petitioner bears the responsibility in ensuring that her agents carry out their responsibilities. The candidates’ agents are the responsibility of the candidate and their failures cannot be imposed on the IEBC or any other party absent evidence to the contrary.”* Whereas where it is proved that the petitioner’s agents were locked from the polling station it would be unreasonable to hold that the agents ought to have requested for a recount, in this case, there is no evidence at all that the deponents of the affidavits in support of the petition herein were accredited agents of the petitioner.”

30. Whereas I agree that the Court may *suo moto* make an order for scrutiny in appropriate cases, for example where the margin is very narrow, in this case the declared margin is over 700 votes. In Joho –vs- Nyange & another [2008] 3 KLR, for example the court found:-

“...with a margin of 1061 votes in this petition I am not persuaded that an order of scrutiny and recount should be made before a foundation is laid.”

31. On my part I have not been persuaded based on the pleadings as they stand that circumstances exist in this case which would warrant the Court in ordering recount and scrutiny *suo moto*. A party who seeks recount and scrutiny ought to be specific on the disputed polling stations to avoid the impression that he is on a fishing expedition taking into account the fact that the petitioner may have obtained more votes in some polling stations than the declared winner. As was stated in Phillip Osore vs. Michael Aringo & 2 Others Busia High Court Petition No. 1 of 2013:

“The petition and the affidavit in support should disclose the petitioner’s cause of action and a cursory look at the two should reveal the petitioner’s case. For a petitioner to deserve an order for scrutiny then, as a starting point, the petition and the affidavit in support must contain concise statements of material facts upon which the claim of impropriety or illegality of the casting or counting of ballots is made.”

32. Accordingly the prayer for scrutiny by the petitioner in petition no. 9 of 2013 cannot be sustained apart from the fact that that petitioner has not made any application seeking the said orders but has instead sought to rely on the application made by the petitioner in petition no. 4 of 2013 to seek a general scrutiny as opposed to a specific scrutiny.
33. I must however, emphasise that in deciding the petition itself the Court is properly entitled to consider the discrepancies highlighted during the hearing of the petition in order to make a determination whether or not the results reflect the will of the electorates of Lunga Lunga Constituency. As was held in Hassan Ali Joho & 2 Others vs. Hotham Nyange & Another Civil Appeal No. 198 of 2007 (supra).

“Section 28 of the National Assembly and Presidential Elections Act, Chapter 28 of the Laws of Kenya 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 that written law, or that the non-compliance did not affect the result of the election. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it did affect the result, then the result is vitiated..... The clear interpretation of section 28 of the Act means therefore that irregularities in the conduct of an election will not vitiate the result unless the irregularities either were so serious that the election was not in accordance with principles laid down in the law or the irregularities affected the result. Again, the overriding objective of the Act is to promote the right to vote and this requires that the Act should be interpreted in such a manner as to provide citizens with every opportunity to vote. The primary duty of the court is to give effect to the will of the electorate. Also reasonable compliance as opposed to strict or absolute compliance with the procedures set out in the legislation is the modern jurisprudence when considering procedural matters. Much of the law points out that the obligations imposed by election statutes on election officials such as a returning officer, are directory as opposed to mandatory. The difference is that, if mandatory provisions are not complied with then the thing done is invalid or void, while it is sufficient, if a directory enactment is obeyed or fulfilled substantially.... The courts will strive to uphold an election as being substantially in accordance with the law, even where there has been serious breaches of the Rules or of the duties of the election official providing that the result of the election was unaffected by those breaches.”

34. Similarly in Mbowe vs. Eliufoo Arusha HCCC No. 12 of 1965 [1967] EA 240, the Court expressed itself as follows:

“Section 99 of the National Assembly (Elections) Act, No. 11 of 1964 states four grounds and says that the election of the candidate as a member shall be declared void on any of the following grounds which are proved to the satisfaction of the court. It is clear that the burden of proof must lie on the petitioner rather than on the respondent, because it is he who seeks to have this election declared void. And the standard of proof is one which involves proof to the satisfaction of the court. These words in fact mean the same as satisfying the court. One cannot be satisfied where one has doubt and therefore where a reasonable doubt exists, it is impossible to say that one is satisfied. The standard of proof must be such that one has no reasonable doubt that one or more of the grounds set out in section 99 have been established..... No parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary election rules if it

appears to the tribunal having cognisance of the question that the election was so conducted as to be substantially in accordance with the law as to elections, and that the act or omission did not affect its results..... In the phrase “affected the result”, the word “result” means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.”

35.The basis for consideration of all the circumstances surrounding an election process was disclosed by the Court of Appeal in **James Omingo Magara vs. Manson Onyongo Nyamweya & 2 Others Civil Appeal No. 8 of 2010**. In that case, the Court held *inter alia* that an election is not a matter solely between the winner and the losers as all the voters in the constituency have a valid interest in it. It further held that when interpreting legislation relating to elections, one may reasonably conclude the primary purpose is to ensure that we have a free, open and properly conducted democratic elections and if there have been irregularities, these should be exposed to the view of the general public.

36.It must always be remembered that whereas elections revolve around numbers, the process of arriving thereat must reflect the Constitutional principles enunciated under Article 81(e) of the Constitution that 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; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.

ORDER

37.I accordingly am not satisfied either that a basis has been laid or that there is sufficient reason to order scrutiny and recount of all the votes cast in Lunga Lunga Constituency or any of the polling stations therein. Accordingly, the application for scrutiny and recount fails and is dismissed with costs to the respondents.

Dated at Mombasa this 3rd Day of September 2013

G.V. ODUNGA

JUDGE

Delivered in the presence of

Mr. Asige for Mr. Kimani for the Petitioner in Petition No. 4 of 2013.

Mr. Asige for the Petitioner in Petition No. 9 of 2013.

Mr. Mohamed for the 2nd Respondent.

Mr. Simiyu for the 1st and 3rd Respondents.