



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

ELECTION PETITION NO.1 OF 2013

CHARLES ONG'ONDO WERE.....PETITIONER

VERSUS

JOSEPH OYUGI MAGWANGA.....1ST RESPONDENT

THE RETURNING OFFICER

KASIPUL CONSTITUENCY.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

JUDGMENT

On 4th March 2013 Kenya held its first general elections under the constitution of Kenya, 2010. The Petitioner and the 1st Respondent were candidates for Member of the National Assembly for Kasipul Constituency in Homa Bay County. The 2nd and 3rd Respondents organized that election pursuant to their mandate under Article 88(4) of the Constitution and section 4 of the Independent Electoral and Boundaries Commission Act 2011.

On 6th March 2013 the 2nd Respondent declared the 1st Respondent the winner with 18650 votes while the Petitioner came second with 14947 votes. The Petitioner was not satisfied with that declaration and on 6th April 2013 he filed this petition and sought orders as follows:

- a. **Nullification of the election of the 1st Respondent.**
- b. **An order compelling the 3rd Respondent to conduct a fresh election free of any irregularities.**
- c. **In the alternative, an order for a recount of all the votes cast in the Parliamentary elections.**
- d. **That the Respondents pay the costs of this Petition.**

He based his Petition on the following grounds:

- i. **That the number of votes cast in several polling stations exceeded the number of registered voters in those polling stations thereby raising doubts to the credibility of the process.**
- ii. **That dead persons were allowed to cast ballots so as to inflate the ballots cast for the 1st Respondent.**
- iii. **That the 1st Respondent with the help and active support of the 2nd and 3rd Respondents**

allowed massive manipulation of voters at the polling stations against the set regulations and the code of conduct.

- iv. **That the details contained in Form 35 are not tallying thereby raising doubts of the whole process.**
- v. **That his agents were never allowed to sign and retain Form 35 as required by regulations.**

In support of these grounds he swore an affidavit dated 8th April 2013 and a further affidavit dated 20th May 2013. He also called 4 witnesses who were his agents at various polling stations. Their evidence in chief is contained in their affidavits filed together with the petition. They were all cross examined by the Advocates for the Respondents. In summary the Petitioner testified that there were irregularities in all the 68 polling stations in the constituency. He cited those irregularities as casting of ballots by deceased persons and gave the names of 2 deceased persons, Joseph Adek Akumu and Mary Aoyi Arago as having cast ballots at Dol primary School and Ombek Primary School respectively. He tendered their burial permits.

The second irregularity was the falsification of Form 35s and the refusal of the 3rd Respondent's officials for his agents to sign those forms. Three of his witnesses, Chrispine Okello (PW2), Jennifer Omiti (PW4) and Joan Achieng Okoth (PW3) deposed that the Presiding Officers in the polling stations they were stationed at did not give them Form 35 to sign.

Chrispine Okello (PW2) further gives evidence that at Agawo Primary School the scrutiny, tallying and counting of votes was riddled with secrecy and unnecessary strictness and that he was not allowed to look at the particulars of the person for whom a vote had been cast. Evidence was also given that at Opondo polling station Philemon Imbo, the Presiding officer left the station unmanned to go and vote. Joan Achieng Okoth (PW3) testified that he left the station at around noon saying that he was going to vote only to return after 2 hours. She testified that he broke his own rule that nobody was to leave the station to go vote elsewhere. She contended that in his absence those who needed his help to vote were left stranded and that it was irregular for him to leave the station under the care of polling clerks and agents. For this reason she refused to sign Form 35.

The Petitioner also cited as an irregularity the hiring of one Lamek, an appointee of the 1st Respondent to the Constituency Development Fund (CDF) as a trainer of Presiding officers. He stated that this gave the 1st Respondent an advantage. He produced a letter dated 21/02/2013 in which he together with other candidates complained about this to the 2nd Respondent. He claimed also that the presiding officers were previously campaigners of the 1st Respondent. He stated that in effect the election was not free and fair and that the ballots announced for the 1st Respondent were not genuine.

There was also allegation of people voting without proper identification documents. Chrispine Okello (PW2) who was an agent at Agawo Primary School cited one Okoto as having been allowed to vote without any of the legally recognized identification material.

Bribery was also cited and Jennifer Omiti (PW4) testified that she witnessed one Micki Ojongi who was an agent of the 1st Respondent bribing voters at Ranyenya Primary School.

Nicodemus Bala (PW1) on his part testified that he was an agent at Buoye Primary School and that there the number of votes cast exceeded the number of registered voters. He testified that when he reported to the polling station that morning he inquired the number of registered voters from the Presiding Officer and was told they were 337. However, as voting progressed he discerned that more than 300 voters had cast their ballots yet the line was still long. He asked the Presiding officer how many registered voters there were in that polling station and this time he said they were 390. That made him suspicious.

The Petitioner contended that the effect of all these irregularities was that the election was not transparent, free, fair and credible and was manipulated by the 2nd and 3rd Respondents to favour the 1st Respondent.

The 1st Respondent's case

The 1st Respondent has in his Response and Replying affidavit sworn on 26th April 2013 denied all the allegations set out in the Petition, the Petitioner's affidavits and those of his witnesses. He categorically denies that there were anomalies in the electoral process that can justify nullification of his election as member of the National Assembly for Kasipul Constituency. He contends that there is no cogent evidence of dead people voting and also contends that even in the first place the Petitioner was not qualified to be a candidate in that election. He conceded however that there was variance in the tallying sheet obtained from the Independent Electoral and Boundaries Commission, IEBC (3rd Respondent) by his agent and which sheet he annexed to his response and the one exhibited in court by the 3rd Respondent. He stated that that variance was small.

He conceded that the witnesses called by the Petitioner were indeed the Petitioner's agents. Regarding his own candidature he stated that the Orange Democratic Movement (ODM) nominations were marred by chaos but that he was nevertheless declared a candidate through the nomination process when he went to court.

Regarding the late Joseph Adek he stated that the deceased was not a registered voter. He called Phillip Oluoch Adek (RW2) who testified that he was a son of the deceased and that his father having been bedridden never went to register as a voter. That the Petitioner obtained the burial permit from him on the pretext that he was going to get a benefactor for the family.

As for Mary Aoyi he called her son, Leonard Ondiek Arogo (RW3) who testified that she was his mother and although she was a registered voter she died before the elections and so she never voted.

He conceded that he had appointed Lamek as the CDF secretary but denied that he played any role on his appointment by the 3rd Respondent as a Trainer. He stated that IEBC is an independent commission and recruited its staff through a competitive process.

Referring to a list of agents annexed to his response he denied that Micki Ojongi was his agent and contended that he did not even know him and further that he could have been working for anybody.

He accused the Petitioner of perpetrating violence during the election and stated that several complaints were filed at Oyugi's Police Station. He cited an incidence where a The National Alliance (TNA) motor vehicle was almost burnt and contended that the matter went to Oyugis court but he did not know if it was finalized. He stated that he wrote several complaints to IEBC Headquarters but they seem to have been overwhelmed. He contended that the results were announced at Agoro Sawe Tallying Centre on 5th March 2013 between 3am and 4am contrary to the Petitioner's assertion that there never was a declaration of results. He stated that he was among those present and opined that other agents must have left upon realizing that their candidates had lost.

His chief agent, Kennedy Okoth (RW1) cast doubt on the nomination of the Petitioner to contest the election and stated that his certificate was not genuine. He denied allegations that the Returning Officer was whisked away to the police station before he could announce the results. He stated that there were provisional results and final results and that the final tally gave the 1st Respondent 18,650 votes and the Petitioner 14,947 votes. The 1st Respondent urged the court to dismiss the petition with costs.

2nd and 3rd Respondents case

The 2nd and 3rd Respondents also opposed the petition. They relied on the Response and Replying affidavit sworn by Michael Mwose, the Returning Officer for Kasipul Constituency on 29/4/2013. They also called four witnesses who were all cross examined by the Advocates for the Petitioner and the 1st Respondent. They dispute that the number of votes cast exceeded the number of registered voters in any polling station. They also deny that their servants, agents and/or employees allowed dead persons to vote so as to inflate the ballots for the 1st Respondent. They contend that they are unaware of the manipulation of voters at the polling stations and deny that they aided or were in any way party to such manipulation.

They contend that all agents were allowed to sign Form 35 and where they did not it was out of choice. They further contend that in any event, omission to sign Form 35 does not invalidate the result.

Further that the election was wholly or at least substantially compliant with the law and the results were a reflection of the will of the voters. They also contend that the matters raised by the Petitioner regarding their conduct prior to the elections should have been taken up by him at the 3rd Respondent's committee or tribunal set up to deal with such issues in accordance with section 74 of the Elections Act 2011 and Article 88 (4) (e) of the Constitution of Kenya 2010.

The evidence in chief of the 2nd Respondent as was with the other witnesses is contained in his affidavit sworn on 29/4/2013. He told the court that he was employed by the 3rd Respondent as the Elections Coordinator for Kasipul Constituency and the Returning Officer for the constituency. As such his role was to oversee the election right from the registration of voters to the actual voting. He conceded that the Form 36 issued to the 1st Respondent by his office had nothing to show it was from IEBC but explained that that was because it was printed from a soft copy which had no format. He stated that only printed forms had the IEBC logo. He further stated that by the time they printed the form they were hard pressed to come to Homa Bay to present the results for Governor and then to go to Kisumu so they could fly to Nairobi to present the Presidential results. It was because of that pressure that he did not sign the Form 36 given to the 1st Respondent. Moreover, what it contained were the provisional results. He stated that the final results are contained in the Form 36 (**Annex MFI-1**) annexed to his affidavit sworn on 29th April 2013. That the form does not have an IEBC logo either but it has a rubber stamp and his signature, he contended that had he been asked to he would have produced a Form 36 with the IEBC logo. He further stated the omission to date the form does not affect the results. He explained that the procedure was to first announce the results as they came in then fill the Form 36 and thereafter compute it. That the form need not have been signed by anybody else and he need not have dated it. He disputed that he was under any pressure from the 1st Respondent. Regarding Buoye Primary School he stated that the variance in the number of registered voters arose from the different figures in the Biometric Voters Register (BVR) and in the hard copy register (Green Book), that some names were not in the BVR but were in the Green Book hence the 2 columns. He stated that when the Electronic Voter Identification (EVID) failed in Buoye as in many parts of the country he was instructed to use the Green Book or manual Register which has since been submitted to Nairobi for use in the Presidential Election petition. He stated that Buoye was recorded as having 390 registered voters and that the Petitioner emerged the winner there.

Regarding the allegation that dead people voted he stated that one had to be physically present to vote. He could not tell whether the 2 alleged deceased persons in fact voted but stated that it was never reported to him. That that being an election offence he would have reported it to the police.

He admitted that the matter of the hiring of the CDF secretary as a trainer was reported to him and after a meeting with the candidates he advised them to put the complaint in writing. Once they did so and delivered the letter to him he dealt with the matter by removing Lamek Okeyo. He nevertheless stated that although the said Lamek had been trained as a trainer he never trained the Presiding Officers. He also stated that he had nothing to do with the appointment of Lamek as it was done in Kisumu and that it was not deliberate.

He testified that it was only at Nyangoa Primary School that he was required to do a recount but because that polling station was not a subject of this petition he did not bring his report to court. He contended that the margin between the Petitioner and the 1st Respondent was over 3000 votes and even had the Petitioner been given the votes at Buoye and Nyangoa that would not have affected the result. He contended that the margin is a reflection of the will of the people of Kasipul and prayed that this petition be dismissed with costs.

Peter Otieno Abuto (2RW1), the Presiding Officer at Buoye Primary School testified that there the Petitioner garnered 171 votes, Dancun Owuor- 0, Joseph Magwanga (1st Respondent)- 120 votes and Samuel Ochullo- 57 votes and that he saw nothing wrong in terms of numbers. He stated that Nicodemus Bala (PW1), the Petitioner's agent signed Form 35. He explained that if one's name was in the Green

Book (Hard copy Register) he was regarded a valid voter even though it did not appear in the Biometric Voter Register. In the case of Buoye he was not aware that the figure of registered voters in the Green Book was in variance with the BVR. He however agreed with the explanation given by the 2nd Respondent. He denied there was any interference with Form 35 as it was being taken to the Agoro Sawe Tallying Centre.

Rose Anyango Apondi (2RW2), the Presiding Officer at Agawo Primary School stated that everything went on well save that the battery of the EVID went on and they had to resort to the manual identification. She denied that she allowed one Okoto to vote without identification papers and contended that Chrispine Okello (PW2), the Petitioner's agent signed Form 35. She stated that she was employed by IEBC on merit after an interview and her employment was not influenced by the 1st Respondent. She testified that the only time she sent away people was when a crowd followed someone who was bringing an agent some food. She too was certain that Form 35 was not interfered with on the way to the tallying center.

Grace Awino Odambo (2RW3) testified that she was the Presiding Officer at Ranyenya Polling Station. That Jennifer Omiti (PW4) signed Form 35. That she gave the form to her to sign and that she also pinned one Form 35 on the door. She contended that she had no reason to refuse to give Jennifer Omiti Form 35 to sign. That she had an Occurrence Book where she recorded whatever happened in the polling station and that she recorded the failure of the EVID. She also recorded the number of the seals she gave to the agents as some did not come with seals. She stated that she did not know Micki Ojongi.

Philemon Imbo Nyangweso (2RW4), the Presiding Officer at Opondo Polling Station testified that Joan Achieng Okoth (PW3), the Petitioner's agent in that polling station signed Form 35. He was however confused as to whether she was an agent for ODM but prodded further he stated that he could not maintain she was an agent for ODM as the candidate for ODM was the 1st Respondent. He stated that there was no space provided for Parties in Form 35. In his affidavit he denied that he left the Polling station as alleged by PW3. Like the other presiding officers he maintained that IEBC hired him on merit but not on the influence of the 1st Respondent.

SUBMISSIONS

The parties filed their written submissions which they highlighted on the 17th July, 2013.

THE PETITIONER'S SUBMISSION:

Mr. Nyauke learned counsel for the petitioner submitted that the results in respect of the 68 polling stations were not verified, announced and confirmed. That there were no comments on Form 35 and at Dol Primary School Polling station there was no Form 35.

It was learned counsel's submission that one **Mary Aoyi Arogo** who had died on 5th January, 2013 cast her ballot at Ombek Primary School.

He further submitted that the electoral process was riddled with voter bribery which is an election offence.

That the number of votes cast at Buoye Primary School exceeded the number of registered voters and that the petitioner's agent at the said polling station was not allowed to collect Form 35 by the Presiding Officer and that the signature that appears on the Form 35 was a forgery.

He contended that persons whose names were not in the register were allowed to vote.

He submitted that the **BVR kits** to be used in the exercise failed hence the use of the manual process.

He submitted that it was clear that the voting process, counting and tallying of the votes was marred with irregularities which go to the very core of whether the election exercise was credible.

On the academic qualification of the petitioner, **Mr. Nyauke** submitted that the qualification of the petitioner for election as a Member of the National Assembly has been overtaken by events and is not an issue before the court, and that the 1st Respondent and his witnesses have not done much to rebut the allegations raised by the petitioner and his witnesses, and that they have failed to demonstrate to the court that the elections as conducted were free, fair and credible.

Further, he submitted that the 2nd and 3rd Respondents did not discharge their duties as prescribed in law.

It is further his submission that the magnitude of the electoral irregularities and anomalies coupled with the election offences are of such a high magnitude that would greatly affect the credibility of the Kasipul Parliamentary Elections.

THE 1ST RESPONDENT'S SUBMISSION:

On his part, the learned counsel for the 1st Respondent **Mr. G.S. Okoth** submitted that the petition and/or supporting affidavit does not state the result of the election i.e. the votes garnered by the candidates especially the parties to the election petition.

Further, he submitted that the petition is ambiguous as to what election it is challenging and the results it purports to be challenging. He submitted that the petition is headed 'in the matter of Parliamentary Elections of Kasipul Constituency for 2013 ' and yet the 2013 parliamentary election consisted of the election for a seat in the National Assembly and a seat in the Senate.

Counsel cited Rule 10(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 and submitted that the rule is couched in mandatory terms hence obliging any person filing an election petition to observe its provisions.

Mr. Okoth further relied on the case of **Muthutho v. Kihara and 2 Others (2008) KLR 10** where the Justices of the Court of Appeal held as follows:

1. **“Rule 4(1) of the Presidential and Parliamentary Elections Regulations expressly provided that an election petition should state when the election was held, the result of the election, and should state briefly the facts and grounds relied on in support of the petition.**
2. **With regard to announcements of election results, the marginal note to regulation 40 suggested that the result was not confined to just declaring who won. Rule 4(1) of the Election Petition Rules envisaged a detailed result when it provided that date of the election, the results and the grounds relied on must be stated. It did not merely connote stating the name of the winner as suggested by the Respondent.**
3. **It was clear from Rule 4(1)(b), that the issue in any election petition was the result of the election. The result did not go to form but to the content of the petition; Rule 4(1), was specifically concerned with content while Rule 4(2), (3) and (4) was concerned with form.**
4. **Regulation 40 implied that where the results were not included in the petition, it would be incomplete as the basis for any complaint would be absent and whatever complaints a petitioner had about an election would be regarded as having no legal basis. The law set out what a petition should contain, and if any of the matters supposed to be included was omitted, the petition would be incurably defective.**
5. **The election law had no provision for amendment of pleadings after the 28 days stipulated for lodging petitions. It followed then that the term “shall” as used in Rule 4, had to be read as having a mandatory import. Reading it otherwise would render the provisions of that rule otiose.**
6. **Election petitions were special proceedings with a detailed procedure and by law, they had to be determined expeditiously considering the fact that the legality of a person's representative is in issue.**
7. **Particulars furnished only count if the petition was competent as they were normally furnished to clarify issues and not to regularize an otherwise defective pleading. Consequently if a petition did not contain all the essentials of a petition, furnishing of**

particulars would not validate it. Section 20 of the Act was clear that any amendment of a petition could only be legally done within 28 days.

- 8. Since the petitioner had failed to state the results, any findings on the issues raised would serve no useful purpose. Any evidence to be adduced would be intended to show that certain irregularities affected the outcome of the election and hence without the result it would be impossible to relate the irregularities to the result.**

He submitted that the above cited decision of the Court of Appeal leaves no doubt about the fate of the instant petition. Further, having failed to include the results of the election in the petition, the same became incomplete and hence incurably defective.

On the ambiguity of which election is being challenged by the petitioner, counsel relied on the words of **Kimondo J.** in the case of **Steven Kariuki v. George Mike Wanjohi & 2 Others in Nairobi Election Petition No. 2 of 2013** where he expressed himself thus:

“When a petitioner comes to our Courts to challenge an election, it is important to specify the election that is contested. The voters of Mathare Constituency cast their votes in relation to six electoral seats. The Court takes judicial notice that Mathare Constituency is in Nairobi. In that County, and in Mathare, there were elections conducted simultaneously for Member of the National Assembly, Senate and Governor for example. The prayers should thus be specific that the orders relate to the National Assembly seat for Mathare Constituency.....The prayers in view of the ambiguity of the contested office are couched in such generality that the recount or re-tallying or inspection of documents may extend or apply to any of the elections that took place on 4th March 2013 in Mathare or what the Petitioner called “Mathare Parliamentary elections.....”

It is his submission that it is a cardinal rule of law that a party to a civil action should state his case with clarity and precision with full particulars and details, with understanding of the law, an insight into the substantive rights of the parties and intelligent anticipation of how the case of the party will need to be prepared and presented to the Court. Further, the drafting of a pleading is the equivalent of laying a foundation on which to build a claim.

He submitted that such a foundation is shaky in the instant petition and therefore the ‘building’ must collapse or be pulled down. He contended that at this juncture this petition cannot be withdrawn and must therefore inevitably be dismissed.

On whether the petitioner has locus standi and competent to be a candidate, counsel submitted that when the petitioner’s capacity to be a candidate was challenged, the burden of proof lay on the petitioner to prove satisfactorily that he had the required prescribed educational qualifications. It is **Mr. Okoth’s** submission that no effort was made to prove that fact in terms of the provisions of **Sections 109 of the Evidence Act, (Cap. 80).**

He submitted that on being questioned about his education the petitioner answered as follows: **“my level of education is past diploma level”**. Counsel submitted that such answer is not satisfactory to prove compliance with section 24(1) (b) of the Election Act as read with Section 22(1) (b) of the same.

Further, **Mr. Okoth** submitted that the petitioner failed to prove the claims made in the petition to the required standards. He stated that the standard of proof in election petitions has been held by election courts to be higher than that applicable in ordinary civil cases, which is, on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases. He further stated that one has to go an extra mile to prove election offences if alleged in the petition.

He further submitted that it is a cardinal principle of law that an election Court will not interfere with election results unless it is established to the standard of proof required that there were such irregularities and electoral malpractices that renders the said elections null and void and subject to nullification.

On whether the 1st Respondent was duly and validly elected as a Member of Parliament, **Mr. Okoth**

submitted that the 1st Respondent having been nominated contested in the Elections held on March 2013 and polled 18,650 votes defeating the petitioner who polled 14,957 votes by a margin of 3,953 votes.

On the allegation that dead voters were allowed to vote, Counsel submitted that in the case of **Joseph Adek Okumu**, the witnesses gave contradictory evidence as to whether he voted at Dol Primary School Polling Station or Ombek Primary School Polling Station. He further stated that in both cases no evidence was adduced to prove that the said deceased persons were registered voters and whether they had actually voted and that the evidence adduced was partly hearsay or were uncorroborated allegations.

He submitted that in the case of **Mary Aoyi Arogo** the date of death on the register of death conflicted, 5th January, 2013 and 25th December 2012 respectively.

He further submitted that it was notable that at Kotieno Polling station the 1st Respondent only got 167 votes whereas **Samuel Ochillo** got 268 votes, and therefore the 1st Respondent was most probably not the beneficiary of any such anomaly even if it had been proven to be true.

On the allegation that the number of votes cast exceeded the number of registered voters, counsel submitted that it was absolutely not proved. He stated that even at Buoye Primary School polling station which the petitioner chose as an example did not disclose such evidence.

It is his submission that the complaint about Form 35 is the most frivolous, and that the few Form 35 filed in this petition by all the parties are all signed by agents and despite the attempts by some of the agents to denounce their signatures thereon, they did not advance any credible evidence to prove that they did not sign the copies and that copies were not given to them. Further that it is noted that in all the Form 35 produced in evidence no remarks giving reasons for not signing were written on the forms. He stated that **Chrispine Okello Okech** contradicted his fellow witnesses when he admitted that he and all other agents duly signed Form 35.

On the allegation of bribery, he submitted that **Jennifer Omiti**, the petitioner's witness failed lamentably to prove her allegation and her demeanor in Court portrayed her as a vindictive liar who was bent to perjure so as to defend the petitioner.

Mr. Okoth submitted that the credibility of the petitioner and that of his witness **Jennifer Omiti** were greatly shaken when it transpired that the affidavits sworn by them were apparently not signed or sworn by them personally before the Commissioner for Oaths but by persons who impersonated them.

Counsel urged Court to hold that the petition was not supported by an affidavit of the petitioner as required by **Rule 10(3) (b) of the Elections (Parliamentary and County Elections) Petition Rules, 2013.**

On whether the election for the 1st Respondent as a Member of Parliament for Kasipul Constituency was conducted in a free, fair and credible manner, **Mr. Okoth** submitted there is no credible evidence that there was manipulation of the election process by the 2nd Respondent and further no evidence exists to show that details in Form 35 were false or falsified or that the same were not signed by the agents.

He submitted that even if the same were proved not to have been signed by the agents, such failure would not in any way cause the invalidation of the results of the election. He relied on the provision of **Section 83 of the Elections Act** which stipulates thus: **"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."**

He submitted that the petitioner has not demonstrated through the evidence adduced by him and his witnesses that any provisions in the **Elections Act, 2011** and the rules made thereunder has not been complied with or has been violated by the Respondents.

He stated that the petitioner has not discharged the burden of proof and the petition must fail.

On who shall bear the cost of the petition, counsel cited Section 84 of the Elections Act and so the Petitioner must bear the costs of the 1st Respondent. **Mr. Okoth** further urged the court to certify that this suit involved a lot of care, labour, perusal and complexity and deserves supernormal costs.

THE 2ND AND 3RD RESPONDENTS' SUBMISSIONS:

On whether the number of votes cast exceeded the number of registered voters, **Mr. Otieno** learned counsel for the 2nd and 3rd Respondents submitted that the petitioner presented absolutely no evidence to show what the number of voters was and how many votes were cast so as to invite the court to determine this issue in his favour.

With regard to whether deceased persons were in fact allowed to vote, he submitted that the only evidence in this regard is in the affidavit and further affidavit of the petitioner.

On whether there was manipulation of the election process by the 2nd and 3rd Respondents in order to aid the 1st Respondent, counsel submitted that the evidence on record shows that the 2nd and 3rd Respondents acted fairly and within the law in the manner in which they conducted the process in the Constituency.

Further, on whether the details contained in form 35 were false, whether the petitioner's agents were denied an opportunity to sign Form 35 and if so, whether that omission should cause invalidation of the results, **Mr. Otieno** submitted that all Form 35s in the contested polling stations were signed by the agents of the petitioner. He submitted that given that the forms bear the signatures of the agents of the petitioner at the affected polling stations, the agents by denying those signatures are suggesting their signatures were forged.

He stated that it cannot be their word against the Respondents' word, and that they were served with the affidavits to which were annexed Form 35s bearing their signatures. He submitted that they were put on notice, and it was their duty to prove that the signatures were not theirs.

With regard to the petitioner's competency as a candidate, it is **Mr. Otieno's** submission that the petitioner had no right to contest the poll for the reason he had committed an election offence or offences especially under **Sections 62, 63, 64 and 65 of the Election Act**. Further, he had also contravened **The Electoral Code of Conduct** promulgated by the **Elections (Amendment) Act No. 31 of 2012**.

On whether the 1st Respondent was duly and validly elected as Member of National Assembly for Kasipul Constituency, learned counsel submitted that the petitioner lost by over 3000 votes and it is not possible for the petitioner to bridge the gap even if the specific issues were to be decided in his favour.

He submitted that no election is to be nullified if the court is clear in its mind that it has been conducted in accordance with the principles laid down in law. He cited **Article 81 of the Constitution of Kenya** which lays down the principles that must underpin every election for it to be upheld by the court.

He submitted that the election of the 1st Respondent as Member of the National Assembly for Kasipul Constituency met the criteria.

He submitted that our courts had established that where an election is so conducted that it is substantially in accordance with the law as to elections, it is not to be vitiated by a breach of the rules or a mistake at the polls provided it did not affect the results, citing **Murgor vs. Ingonga & Another – (2008) eKLR (EP)**.

Mr. Otieno further submitted that an election court in **Joho vs. Nyange & Another (No. 4 of 2008) 3 KLR (EP) 500** was quite clear that generalized allegations will not wash in an election petition. They require cogent, credible and consistent evidence. He submitted that the court further stated that the burden

of proof in election petition lies with the petitioner as he is the person who seeks to nullify an election.

He submitted that it was in the opinion of the court that an election will be nullified if it is not conducted substantially in accordance with the law as to elections. That it will also be nullified even though it is conducted substantially in accordance with the law as to elections, if there are errors or mistakes in conducting it which, however trivial, are found to have affected the result of the election. He stated that the court noted that in an election there are errors which are nothing more than things always likely to arise in the conduct of human activity. If the errors are not fundamental they should be excused or ignored.

He submitted that the petitioner has clearly failed to meet the tests aforesaid. He stated that on numerous occasions when faced with difficult questions arising from his testimony, the petitioner and some of his witnesses simply said that their Advocate will deal with those issues.

It is his submission that if there were errors or mistakes, the petitioner was unable to demonstrate that they were so fundamental as to affect the result.

Further that the petitioner's approach was simply that because he had pointed one or two mistakes, the court should infer that there must have been other errors and mistakes justifying the nullification of the election. Counsel stated that the petitioner clearly misunderstood his obligation and the burden of proof.

Mr. Otieno urged court to consider the character of the petitioner highlighted by the following facts:

- a. The evidence of **Jeniffer Omiti(PW4)** from which it emerged that her signatures in her purported affidavit was forged and no explanation was offered to explain the source of the signature.
- b. The fact that the petitioner procured burial permits and an extract of the Register of Death that he used in this petition through acts of fraudulent misrepresentations with the one of Mary Aoyi appearing to be a case of outright doctoring of a public document.
- c. The petitioner's going back and forth on whether the signatures appearing in his affidavit and further affidavit were indeed his signatures.
- d. The fact that the petitioner appears to have appended his signature on the letter dated 21-2-2013(**Annexure "COW3"**) after it had been submitted to the 2nd Respondent minus his signature.

Finally, Counsel submitted that this petition is for dismissal and prayed that it be dismissed with costs to the 2nd and 3rd Respondents.

FINDINGS

The Burden of Proof in an election petition lies with the Petitioner. He must establish all the allegations leveled against the Respondents regarding the conduct of the election and the results announced thereafter. In arriving at its determination this court must also bear in mind the provisions of section 83 of the Elections Act 2011. As such not only must it be established that the irregularities occurred it must also be established that the said irregularities were of such a magnitude that they substantially and materially affected the result of the election. Nowhere is this better explained than in **Murgor v. Igenya & Anor (2008) IKLR (EP) pg 191** where it was held:-

"...

2. Where an election is conducted so badly that it is not substantially in accordance with the law as to elections, the election is vitiated irrespective of whether the result was affected or not.

3. Where, as in this case, the election is so conducted that it is substantially in accordance with the law as to elections it is not so vitiated by a breach of the rules or a mistake at the polls provided it did not affect the result of the elections.

4. However, even though an election is conducted substantially in accordance with the law as to

elections, nevertheless if there is a breach of the rules or a mistake at the polls and it did affect the result then the election is vitiated.”

These principles were upheld by Maraga J, as he then was in **Joho v. Nyange & Another [2008] 3KLR EP 500** where at page 507 he emphasized the need for cogent, credible and consistent evidence.

As for the standard of proof it is now settled that it is a standard higher than in ordinary civil suits i.e. proof on a balance of probabilities but lower than proof beyond reasonable doubt in criminal cases. See **John Kiarie Waweru v. Beth Mugo & 2 Others [2008] eKLR p85 and Raila Odinga & Others v. IEBC & Petition No. 5 of 2013 Others.** Allegations of election offences on the other hand call for a very high degree of proof. It is against this set standard as well as the provisions in The Constitution and the written law that this court must examine the assertions made by the Petitioner.

Issues for Determination

At the pretrial conference the court framed agreed issues and the following remain to be determined:-

1. **Whether the election for member of the National Assembly for Kasipul Constituency was free, fair and credible. In other words was the election conducted in accordance with the law?**
2. **Whether the Petitioner has the locus stand to bring this petition and whether in the first place he was qualified to be a candidate in that election.**
3. **Whether this court is the right forum to decide issues arising before the election such as issue 2 above.**
4. **Whether the 1st Respondent was duly and validly elected as the Member of the National Assembly for Kasipul Constituency.**
5. **Who shall bear the costs of this petition?**

Issue No. 1

A free and fair election is one that complies with Article 81 ((a)-(e) of the Constitution of Kenya 2010. The election must comply with the principles of universal suffrage based on the aspiration for fair representation and equality of vote. It must be 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. Article 86 of the Constitution sets out the parameters within which the IEBC should conduct elections when it states:

“At every election, the Independent Electoral and Boundaries Commission shall ensure that-

- a. **Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;**
- b. **The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;**
- c. **The results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and**
- d. **Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”**

The election must also be in conformity with the principles, rules/regulations and procedures in the Elections Act 2011.

To prove that the election was not free, fair and credible the petitioner cited the irregularities aforesaid.

The Petitioner also alluded to falsified entries in Form 35 and to manipulation of voters at polling stations. He even contended that his agents were not allowed to sign Form 35.

However during cross examination it transpired that all the agents who testified in this case in fact signed Form 35. When confronted with the Form 35s which the 3rd Respondent filed in court pursuant to rule 21(b) of the Election Petition Rules he conceded that his agent at Ombek Primary School signed form 35. He indeed stated that many agents had signed the forms but now took issue with the number of signatures in the form. It was his contention that some forms were signed by 6 or 7 agents whereas there were only 5 candidates in the elections. He referred to the extra signatories as strangers and said that was proof that something fishy was going on. However his own witness Jeniffer Omiti (PW4) later on testified that at Ranyenya Primary School where she was stationed, the Petitioner had 2 agents. He cannot therefore be taken seriously on that allegation.

Chrispine Okello (PW2), the agent at Agawo Primary School and who in his affidavit- paragraph 7- deposed that he was not given form 35 to sign nor to take to the Petitioner conceded upon cross examination that he in fact signed form 35. He told the court that he was present when the votes were counted and announced. Just to quote him he stated as follows when cross examined by Mr. G.S. Okoth, Advocate for the 1st Respondent:- **“ I cannot recall how many votes my candidate got but I can remember very well they were counted and announced. They were written on form 35. I signed. I know how form 35 looks like. This is where I was, I am number 4 in the list at the back, I put my signature.”**

Pushed further he then changed tune to say that he signed against his will. That he had reasons not to sign but he was not given time to state those reasons and that the form was placed before him without the part on which the results were entered. Clearly this is a witness who could not be trusted. He contradicted his own testimony in the affidavit and contends that he signed form 35 blindly despite being trained as an agent for 2 days. He claimed that the scrutiny and counting of votes was shrouded in secrecy yet he admits it was all done in the hall in his presence.

As for Jennnifer Omiti (PW4), the agent at Ranyenya Primary School, she maintained her position that she did not sign and was never given a copy of form 35. However, it turned out that she never even signed the affidavit in which that deposition is to be found. In other words she should not have been called as a witness in the first place. When Mr. Otieno, Advocate for the 2nd and 3rd Respondents showed her the signature she said it was not hers. She went further to state that she had never set foot in Homa Bay town where the affidavit is alleged to have been sworn at on the day it is alleged she signed it. The rules provide that only witnesses whose affidavits have been filed can testify for the parties. Clearly, therefore Jennifer Omiti does not qualify to be a witness but even if she was it is my finding that she was not a credible witness. In her affidavit she avers that form 35 was not given to her to sign but in cross examination she stated that other agents signed the form and those who wished to take copies were given copies. Grace Awino Odambo (2RW3), the presiding officer in her station testified that she had no reason to single her out and refuse to give her the form. It is clear from Jennifer's own testimony that it is she who refused to sign the form and also refused to take a copy of the same. She told the court that she was bitter because the Petitioner did not win in that station. That she loved him but loathed the 1st Respondent. In court she could not bring herself to read figures which she herself had written because the 1st Respondent was leading. She avoided this by telling the court that although she could write she could not read. Again I found her evidence untrustworthy.

It also turned out that Joan Achieng (PW3) signed form 35 although she had denied it in the affidavit and in cross examination. Since the omission to sign form 35 does not by itself invalidate the results (see Regulation 79(b) of the Elections (General Regulations 2012) I see no reason for the presiding officer to lie that PW3 signed the form. I will also show shortly that she too was not a credible witness. Enough said about the allegation that the Petitioner's agents were not allowed to sign form 35. Regarding the allegation that his agents were refused copies of form 35 it is worth noting that none of the agents maintained this during cross examination. For one PW4 stated that those who wished were given copies. PW3 stated that agents were given form 35 while PW2 testified that the presiding officer said that those who wanted to get the forms could follow him to get one. As for PW1 his evidence was that the presiding officer at his station said the forms were few but they (agents) could photocopy the one he had pinned on the door.

The other allegation regarding this form was that details contained in the form were not tallying. No iota of evidence however was adduced to prove this.

Other than dead persons voting the other serious accusation was as regards voter bribery. This was made by Jennifer Omiti (PW4) who as I have stated was not even competent to be a witness as she had not filed an affidavit. However, even had she been a competent witness does her evidence prove that allegation to the standard required? Bribery is an election offence. Halsbury's Laws of England, 4th Edition Vol 15on Elections paragraph 695 states as follows regarding bribery;

“ Due proof of a single act of bribery by or with knowledge and consent of the candidate or by his agents, however insignificant that act may be is sufficient to invalidate the election.....For this reasons, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient and the confession of the person alleged to have been bribed is not conclusive. A corrupt motive must in all cases be strictly proved.....”

In Joseph W. Khaoya v. Eliakim Ludeki& Another EP12 of 1993 (unreported) it was held as follows:

“Election offences are serious matters with grave penalties. They amount to criminal charges which should be proved. The proof should be to a very high degree for the charges to be sustained before a court of law...”

PW4 testified that she did not clearly see what Micki Ojongi was doing because the voters were standing very near to each other. She stated that one could not even tell what was happening. If she did not see clearly, why did she conclude that what was happening was bribery of voters? Much as I do not agree with the submission that she ought to have stated who was bribed, or who those who were bribed voted for I find that her evidence did not establish that there was bribery. Her evidence amounted to no more than suspicion since she did not see clearly what was happening. Indeed, she admitted that although there were 2 police officers in the polling station she did not report the matter to them which is what would have been expected of a diligent agent. I do not believe that this is an agent who could have been forced to keep quiet as she alleges. Her zeal for the Petitioner which manifested in her demeanour in court would certainly have made her to speak up. The Returning officer confirmed that he got no report of voter bribery and no such report was made to the police. It is noteworthy that Section 4 of the IEBC Act 2011 gives the commission the powers to investigate and prosecute electoral offences by candidates, political parties or their agents and such a report would not have been in vain.

The issue regarding Buoye Primary School was explained by the Returning officer, 2nd Respondent. The computation of the votes cast shows more than 337 people voted. According to the Returning officer there was a variance between the figures of registered voters in the Biometric Voters Register (electronic register) and the Green Book (hard copy). He explained where a voter's name was found in the Green Book they would be allowed to vote even if their name was not in the electronic register. That their record had 2 columns one showing the total number of registered voters in the electronic register in this case 337 and in the Green Book, in this case 390. That there was therefore nothing sinister in more than 337 people voting in that station. Indeed, PW2 did not establish that anybody voted at Buoye whose name was neither in the electronic register nor in the hard copy register.

Although nothing in the Elections Act and the IEBC Act prevents a presiding officer from leaving his station it would be unethical to do so. It would also be a breach of Clause 4(a) & (c) of the Code of Conduct for members and employees of the Commission which requires them to not only perform their duties in a manner that maintains public confidence in the Commission but also to discharge all their duties in a professional, timely and efficient manner and in line with the Rule of Law. However the allegation made by Joan Achieng (PW3) that the Presiding Officer for Opondo Primary School left the polling station at the mercy of agents and polling clerks for 2 hours was not proved. This is because upon cross examination she told the court that the Presiding officer had a Deputy and that when he left the Deputy Presiding officer took charge. That even those who needed assistance to vote were assisted by the Deputy Presiding Officer. If this was the case then there was no irregularity as there is nothing in the Regulations that requires a Presiding Officer to remain in the polling station at all times. That he left to go

and vote for the 1st Respondent was not proved as a fact.

Regulation 69 (1) (a) makes it mandatory for one to produce an identification document before one is issued with a ballot paper. The Regulation goes further to state that the identification document must be the same one used at the time of registration as a voter. It would therefore have been irregular to allow Okoto or anyone else for that matter to vote without a proper identification document. PW2 who alleges to have seen Okoto voting without any identification did not have cogent evidence of this in his testimony in court. He sought to give the full names of the said Okoto as Peter Otieno Ogal and one wonders why he did not state this name in his affidavit. If it was intended to give his evidence some credibility it failed. Moreover this is a witness who denied that he signed form 35 when he in fact had. He is therefore not a truthful witness.

As for the hiring of an appointee of the 1st Respondent to the CDF as a trainer for presiding officers I do accept the explanation by the Returning officer that it was not intentional and that as soon as he got that complaint he removed him. This fact was admitted by the Petitioner. I also believed the Returning officer that even though the CDF secretary had been trained as a trainer he had not trained any of the presiding officers. I believed him because the Petitioner did not produce proof that by the time he was removed he had embarked on the exercise. By removing him the Returning officer was acting on the written complaint he had received from the candidates. Had his intention been to favour the 1st Respondent he would not have acted with such speed. At the hearing the Petitioner admitted that the Returning Officer indeed acted.

The Petitioner also alleged that those who campaigned for the 1st Respondent ended up being presiding officers to the advantage of the 1st Respondent. That was not proved. It was but a mere allegation. All the presiding officers who testified said they were recruited competitively. That they responded to an advertisement in the dailies, were interviewed and then recruited without any influence by the 1st Respondent. The Petitioner did not prove otherwise.

In regard to dead people voting the Petitioner produced burial permits as proof that those persons were indeed deceased. What he did not prove was his allegation that election officials cast votes for those deceased persons in order to inflate ballots for the 1st Respondent. As I have stated the onus was upon him to establish that fact and this being an election offence under section 58(1) and section 59 (1) (1) the standard of proof required is higher. It is not enough to assert that it happened. It must be strictly proved. Asked how he knew that they voted he stated that he got this information from a “**kachero**” (informer). In the case of Mary Aoyi he went further to state that when he heard of it he went to Kotieno Primary School where it had happened and as he passed by he saw her name crossed as having voted. Asked if he looked at the register he was emphatic that he did not. I do not think that he expected this court to believe that he could have had sight of the register as he passed by. That is practically not possible without physically looking at the register. I think the truth of the matter is that he heard this through rumours. He is on record as saying that when rumours of dead people voting started spreading through FM radio stations many people including the 1st Respondent went round collecting burial permits. He did not explain the circumstances under which he himself obtained the burial permits of the two deceased persons but in both cases the court was told that it was upon the pretext that he was going to assist the bereaved families. Clearly it was not because he had proof that election officials had cast ballots in their names. He was evasive when asked to give the name of his informer. Instead, he stated that because the voters’ register was not in court he had no way of verifying whether Mary Aoyi was a registered voter or even whether dead people voted. He said that he wanted the court to verify if Joseph Adek voted at Ombek Primary School. He clearly had no evidence that dead people had voted. It is clear that he relied on rumours which amount to no more than hearsay evidence. Given that the onus of proof lies with him his attempt to shift that burden to the court or to the Respondents must fail. In **Raila Odinga & Others v. IEBC & Others- Petition No. 5 of 2013** the Supreme Court Judges expressed themselves thus on this issue at page 72 (paragraph 197):

“...while it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person

who thus alleges to produce the necessary evidence in the first place and thereafter, the evidential burden shifts and keeps shifting.”

In this case, the Petitioner made generalized allegations which he did not adduce evidence to prove. As was stated in **Wanguhu Ng’ang’a & Another v. George Owiti & Another-EP No. 41 of 1993** election petitions should not be taken lightly and generalized allegations will not do. This position was upheld by Maraga J, as he then was, in **Joho v. Nyange [2008] 3KLR EP 500** where he stated:

“.....Generalized allegations as the ones made in this petition are therefore not the kind of evidence required to prove election petitions. As I have said, they should be proved by cogent, credible and consistent evidence.”

The evidence adduced by the Petitioner to prove that the elections were not free, fair and credible and hence not in conformity with the law falls far short of the standard required. As I have shown it was contradictory, inconsistent and untrustworthy. He also appeared to shift the burden of proof to the court and the respondents. His advocate also shifts the burden of proof when he submits that the 1st Respondent and his witnesses failed to demonstrate that the elections were free, fair and credible and instead went on a mission to assassinate the character of the Petitioner. He also submitted the 2nd and 3rd Respondents’ witnesses were mechanical in their evidence and did not seek to unravel or dispute the allegations raised by the Petitioner. As I have stated one must establish a prima facie case before calling on the other person to make a rebuttal.

Mr. Nyauke’s submission that there was evidence that the 2nd and 3rd Respondents allowed voters registers to be manipulated to the advantage of the 1st Respondent whose agents cast votes using the names of dead persons is not borne by the record. No such evidence was tendered either in the affidavits or in cross examination. The Petitioner’s own evidence was that the votes were cast by election officials. It is to be deprecated that an advocate would try to fill in gaps in his client’s evidence by giving evidence from the Bar. No cogent evidence was offered that dead persons voted.

Not only has the Petitioner dismally failed to prove that fact but he has not proved the other allegations either. His Advocate put the respondents’ witnesses to task during cross examination but those witnesses remained firm and unshaken.

No election can be said to be free of irregularities and in this case we heard that at Agawo Primary School, the Electronic Voter Identification Device (EVID) malfunctioned. This however was not unique to that station. It is now common knowledge that the failure occurred countrywide.

Section 83 of the Elections Act, 2011 requires that the Petitioner must not only prove the breaches he alleges but must also show that the same affected the result of the election. In this case not only has he not proved the irregularities but even had he done so he did not set out to prove that they affected the result of the election.

Issue No. 2 and 3

It was the 1st Respondent’s evidence that the Petitioner was not qualified as a candidate and hence had no locus to file this petition in the first place. The reasons he gave was that the Petitioner did not meet the academic qualifications set out in the law and indeed when he was cross examined on this he was evasive and merely stated that his qualification was post diploma. The other reason was that he was not properly nominated as a candidate because he decamped from ODM to The Independent Party (TIP) after the window for nominations had closed. I do not however agree with the submission that this court is the right forum to adjudicate those issues. Those were pre election issues and under section 74 of the Elections Act the same should have been ventilated before the IEBC Dispute Resolution Committee. Those who went there were heard and some like the 1st Respondent himself even went to court thereafter and obtained orders. It is by that mechanism that the 1st Respondent should have objected to the Petitioner’s candidature. Once he was cleared by IEBC and ran and lost and felt aggrieved he had a right

to file this petition. As for his academic qualifications I would agree with Ochieng J in **Bernard Chege Mburu v. Clement Kungu Waibara & 2 Others [2011] eKLR p15** when he states:-

“This court was not the forum at which proficiency of candidates was to be determined. The proficiency or otherwise of persons intending to be nominated as candidates in the elections was to be determined by the Proficiency Examinations Board set up by the Electoral Commission of Kenya.”

Moreover the law is that he who alleges must prove and the 1st Respondent being the one who alleges that the Petitioners education was below par should have proved that fact.

Issue No. 4

Whether the 1st Respondent was validly elected? The Petitioner did not adduce cogent, credible and consistent evidence to prove the irregularities cited in the petition. There was no proof of dead persons voting, manipulation of voters, Form 35s not tallying, bribery, persons voting without identification documents and favouritism of the 1st Respondent by election officials. The witnesses called by the 2nd and 3rd Respondents were clear in their minds on how the election was supposed to be conducted. They were all recruited through a competitive process and without the influence of the 1st Respondent. It was not shown through cogent evidence that any of them campaigned for the 1st Respondent before the election of 4th March 2013. They testified that they duly opened their stations at the appointed time and that voting went on well save for the EVID failure which failure was not unique to that polling station as it occurred throughout the country. After the polling had ended they counted the votes in the presence of the party/candidates agents, tallied and then announced the results as required by the law. This was confirmed by the witnesses of the Petitioner during cross examination.

Accordingly, I find that the election was substantially conducted in conformity with the Constitution and more so Article 81 and 86 and the written law and that the 1st Respondent was validly elected as the Member of the National Assembly for Kasipul Constituency

Issue 5: Who shall bear the costs of the petition?

The Petitioner having dragged the Respondents to court and failed to prove the petition to the threshold required must bear the costs of this petition. While I acknowledge that this was a matter of great public interest I have taken cognizance of the pace at which this petition proceeded thereby saving costs to the parties and have declined to certify supernormal costs.

Other Issues

Mr. G.S. Okoth, Advocate for the 1st Respondent had urged this court to dismiss the petition on the ground that the petitioner has not stated the results of the election. It is indeed correct that election courts hearing petitions under the old regime of law held a very grim view of this matter. For instance in **John Michael Njenga Mututho v. Jayne Njeri Kihara (2008) eKLR**, the court struck out the petition on that ground. There the court found that the term “shall” used in Rule 4 (1) of the National Assembly Elections (Election Petition) Rules 1993 was mandatory. That where the results were not given, any findings on the issue would serve no useful purpose. However several courts are now in agreement that the previous law has now been cured by rule 21 (b) of the Elections (Parliamentary and County Elections) Petition Rules 2013. I am on this matter much persuaded by the decision of Lessit J in **Meru Election Petition No.5 of 2013- Mercy Kirito Mutegi v. Beatrice Nkatha Nyaga & IEBC** where she held as follows:

“The position of the court in the Mututho case is that the court was not able to relate any irregularities alleged in the petition with the results because the results were not stated. I have reviewed the law in operation at the time. There was no requirement under that law for the Electoral Commission to avail copies of the results to the court. The court was therefore not able to assess the validity of the election where these were not availed. The provision in Rule 21 cures this.

The court is able to assess the allegations in the Petitions against the results that are availed to it by the Electoral Commission. In my humble view, there is therefore no prejudice that is occasioned to the Respondents where the results are not stated in the Petition.”

In **Machakos Election Petition No.4 of 2013- Wavinya Ndeti v. IEBC & Others** Majanja J held as follows:

“I am satisfied that in these circumstances no injustice has been occasioned by the failure of the petitioner to set out the result of the election in the Petition. The fact that elections disputes are sui generis governed by special regime of rules does not exonerate the court of its prime obligation to deliver substantive justice. It is the primary duty of the court to entertain grievances and to resolve them. Technical matters must not be allowed to defeat the broad issue of justice as between litigants’ particularly electoral justice.”

The failure to state the results would likewise not have prejudiced the Respondents as the results were availed to the court.

It was also submitted that the Petitioner was not clear on what parliamentary seat he petitions and that in itself was sufficient reason to dismiss the petition. I agree with Mr. Okoth and I indeed upheld that submission in the ruling on the petitioner’s application for recount and scrutiny. In that ruling I agreed with the finding of Kimondo J quoted at length by Mr. Okoth. However it is clear from the petition that the result petitioned is for Member of the National Assembly. The prayer for recount and scrutiny was however not properly framed. Therefore, that would not be ground enough to dismiss the petition.

On Mr. Otieno’s submission that it was doubtful that the petitioner signed the affidavits supporting the petition all I can say is that it was not proved. He who alleges must prove and the burden of proof must also be higher than a balance of probabilities but lower than beyond reasonable doubt.

As for Jennifer Omiti’s affidavit I have in this judgment dealt with it and come to the conclusion that as she admitted to not having signed the affidavit then she is not a competent witness and her evidence must be ignored.

Accordingly, this court makes the following orders:

1. That the petition is hereby dismissed.
2. That the 1st Respondent was validly elected.
3. A certificate under section 86(1) of the Elections Act 2011 to issue.
4. That the Petitioner shall bear the costs of this petition.
5. That the costs shall be taxed by the Deputy Registrar but the same not to exceed Kshs. 500,000 for each Respondent.

E. N. MAINA

JUDGE

Signed, dated and delivered in open court at Homa Bay this 2nd day of September, 2013.

In presence of:-

Mr. Nyauke Advocate for the Petitioner

Mr. G. S. Okoth Advocate for the 1st Respondent

Mrs. Onyango Advocate for the 2nd and 3rd Respondents

