



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ELECTION PETITION NO.35 OF 2008**

**IN THE MATTER OF: THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS  
ACT CAP 7**

**AND**

**IN THE MATTER OF: THE PRESIDENTIAL AND PARLIAMENTARY ELECTIONS  
REGULATIONS**

**AND THENATIONAL ASSEMBLY ELECTIONS (ELECTION PETITION) RULES 1993:**

**AND**

**IN THE MATTER OF: THE ELECTION PETITION FOR KAMUKUNJI CONSTITUENCY**

***BETWEEN***

**IBRAHIM AHMED.....PETITIONER**

**AND**

**SIMON MBUGUA.....1<sup>ST</sup> RESPONDENT**

**PRISCYLLAR A. WAMIRU**

***(Returning Officer for Kamukunji Constituency)....2<sup>ND</sup> RESPONDENT***

**THE ELECTORAL COMMISSION OF KENYA.....3<sup>RD</sup> RESPONDENT**

**Representation**

**And**

**Pre-trial Procedure**

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

**1. Appointment**

1.1 This election court was appointed on the 29<sup>th</sup> October 2010 by gazette Notice No.1322 dated the 5 November 2010.

## **1.2 Representation**

(a) Ibrahim Ahmed.....Petitioner appoints

M/s S. O. Owino and Associates as advocates on 28 August 2008

S. Owino represented him in court assisted by A. M. Yusuf (partially)

M. Rachier (one day)

(b) Simon Ng'ang'a Mbugua .....1<sup>st</sup> respondent appoints M/s Kinoti, Kibe & Co. Advocates

(i) K. Mugai,

represented him in court

and assisted by:

aa) M. Chelegat

(who may have formerly represented interested parties Mwaura Waihiga & 14 to 15 Civic Councilors Kamukunji Constituency in HC. Misc. application Case 13/08 – Judicial Review. Advocate argued most applications before Ochieng J. was not permitted by 1<sup>st</sup> respondent from representing him as an assistant to K. Mungai.

bb) Isaac K. Bitok

From 16 November 2010

(consistent in court)

cc) J. Gaita (partially)

(ii) The understanding is as a lead advocate K. Mungai would leave his assistant in court during his absence, when need arises for him to be absent.

(c) Pricyllar A. Wamiru - Returning Officer for Kamukunji Constituency .....  
.....2<sup>nd</sup> respondent

(d) The Electoral Commission of Kenya .....3<sup>rd</sup> Respondent

The latter two appoint M/S Adere & Co. Advocates to represent them.

S. Adere acts for them.

## **2. Pre-trial**

### **Procedure & directions**

## **Election Petition**

### 2.1 Appointment of Hon. Judge

#### **AA) RAWAL J**

Appointed to hear election petition by Hon. The Chief Justice on 2 October 2008

2.2 The 1<sup>st</sup> respondent raises a preliminary objection by way of a Notice of Motion dated 24 July 2009 that the electoral Commission of Kenya now no longer exists and is defunct.

2.3 On 24 July 2009, the petition is referred to the Hon. The Chief Justice, who appoints a two Judge Bench to hear the matter.

#### **BB) RAWAL, ARONI JJ**

are appointed to hear the issues raised in the application of 24 July 2009.

2.4 Hearing held on;

3 November 2009

5 November 2009

6 November 2009

11 November 2009

2.5 Ruling delivered 16 December 2009 held that the Independent Interim Electoral Commission was the correct person to be sued in place of the Electoral Commission of Kenya.

2.6 The application was dismissed.

The cost was assessed at a higher scale against the 1<sup>st</sup> respondent.

#### **CC) RAWAL J**

2.7 The 1<sup>st</sup> respondent files application on 26 January 2010 requesting for particulars.

2.8 Hearing dates for the petition is taken by consent. Hearing 16, 17, 22, 23, 24 and 25 February 2010 at 2.15 p.m. and 26 February 2010 at 11.00 a.m.

2.9 The hearing scheduled for 16 February 2010 is not held because the 1<sup>st</sup> respondent questions the issue of service upon him. He prays for the striking out of the petition.

2.10 On 17 February 2010 the 1<sup>st</sup> respondent issues a notice to cross-examine one Willis Ogari, a process server.

2.11. Willis Ogari was cross examined on the 22, 23 and 24 February 2010.

2.12. An application dated the 12 February 2010 by the 1<sup>st</sup> respondent seeking to strike out the petition is dismissed.

2.13. 1<sup>st</sup> respondent file a Notice of Motion dated the 9 March 2010 seeking orders of stay of proceedings pending appeal.

2.14. The 1<sup>st</sup> respondent's application Notice of Motion dated 9 March 2010 is dismissed on 25 May 2010.

2.15 By consent of parties new hearing dates fixed for April, 12, 13, 15, 16, 19, 20, 27, 28, 29 in the year 2010 (a period covering the Easter vacation).

2.16 The 1<sup>st</sup> respondent files a new application dated 12 April 2010 (Monday) to strike out the Petition for failure to disclose the results of the elections for Kamukunji Constituency.

2.17 Petitioner requests orally for an inventory of the ballot boxes.

2.18 Application granted for the inventory of the ballot boxes 14 April 2010.

2.19 Ruling dated 18 May 2010 declines to strike out petition on grounds of want of results not stated in the petition.

2.20 The 1<sup>st</sup> Respondent files application for stay of proceedings on the 18 May 2010 ruling.

2.21 application of 24 May 2010 where court orders that the ballot boxes be opened to check compliance of the electoral rules No.19 Cap 7.

2.23 New hearing dates set for 7, 8, 9, 15, 16, 17, 21, 23, 24 June 2010 at 2.30 p.m.

2.24 On 31<sup>st</sup> May 2010, the 1<sup>st</sup> respondent files application to strike out the application of 24 May 2010.

2.25 Court hears the application of 24 May 2010 and reserves ruling for 2 June 2010

2.26 On 2 June 2010 the Hon. Judge disqualifies herself and steps down from hearing the petition.

2.27 On 2 June 2010 the Hon. The Chief Justice appoints a new judge.

#### **DD) OCHIENG J**

Appointed Judge to hear the election petition.

2.28. New dates for hearing fixed for 15 June 2010.

2.29. Hon. Judge fixes 15 June 2010 a new hearing date.

2.30. The Hon. Judge orders that the ballot boxes be opened and the exercise of confirming the contents of the boxes, proceed day to day with effect from 21 June 2010.

2.31. That the Deputy Registrar is to file a report as to his findings.

2.32. New hearing dates set for 12 to 16 July 2010 and 6 September 2010 to 9 September 2010 were fixed.

2.34. On 15 June 2010, the 1<sup>st</sup> respondent files an application for stay of proceedings pending an appeal to the court of appeal against the ruling delivered on 18 May 2010 by Rawal J, refusing to strike out the

petition.

2.35. On 28 June 2010 the 1<sup>st</sup> respondent files an application dated 22 June 2010 and filed on Friday 26 June 2010 seeking to review and or set aside the orders of Rawal J dated the 16 April 2010 permitting the taking of the inventory inside the ballot boxes.

2.36. Ochieng J sets the application for hearing dated 22 June 2010 for the 8 July 2010.

2.37. On 8 July 2010, the application is heard and the 1<sup>st</sup> respondent requests the court to stop counting/ verification of the ballot boxes.

2.38. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent state, that there has been inordinate delay in bringing the application s the counting had already commenced with five of their officers from 16 April 2010 to 22 June 2010.

2.39. The Petitioner stated that the exercise was complete and the matter has been therefore overtaken by event.

2.40. The court reserves ruling to 19 July 2010.

2.41. On 12 July 2010 the 1<sup>st</sup> respondent files an application dated 14 June 2010 seeking stay of proceedings to the ruling dated 15 May 2010 delivered by Rawal J.

2.42. On the 12 July 2010 the ruling given was;

aa) That the hearing of the petition was to proceed.

bb) The application by the 1<sup>st</sup> respondent of 14 June is to be heard on 16 July 2010. That the petitioner 2 and 3 respondent be given leave to file affidavits. That submission be 35 minutes for 1<sup>st</sup> respondent 15 minutes for 2<sup>nd</sup> and 3<sup>rd</sup> respondent and 35 minutes for the petitioner respectively.

2.43. The trial commences. The petitioner on being sworn produces his sealed affidavit that has been kept by the Registrar with copies to the other parties.

2.44. The 1<sup>st</sup> respondent raises objection on the grounds that the affidavit presented to court was NOT “a certified copy” as required under rule 18(4) That the court do strike out the affidavit of the petitioner.

2.45. The court in its ruling dismissed the application to strike out the affidavit. The ruling being dated 12 July 2010. (Ochieng J.).

2.46. Affidavit read out by the Petitioner.

2.47. The 1<sup>st</sup> respondent questions how relief in the Petition was sought.

2.47. Court adjourns to allow the 1<sup>st</sup> respondent time to put his thoughts together. Adjournment to 14 July 2010.

2.48. The dates of 6 to 8 September 2010 vacated. The new dates being 4, 6, 7 and 8 October 2010.

2.49. On 16 July 2010, the hearing of the application dated 14 June 2010 seeking a stay of proceedings and brought by the 1<sup>st</sup> respondent. The application being signed by M. Chelegat for the 1<sup>st</sup> respondent.

2.50. The ruling reserved for 23 September 2010.

2..51. Ruling of 22.6.10 dismisses application (seeking to set aside Rawal J order on the ballot boxes).

2.52. The ruling of 19 July 2010 delivered.

2.53 The report of the Deputy Registrar now read concerning the inventory of the ballot boxes. “The copies (of the report) is to be prepared by Mr. Bidali” are to be made available to the parties.

2.54. On 23 September 2010 the ruling was read. New dates for the hearing confirmed for 4 to 7 October 2010 except the date of 5 October 2010.

2.55. Before the due hearing date the 1<sup>st</sup> respondent files an application on 1 October 2010 raising a preliminary objection (that the Attorney General be served). Objection to the Hon. Judge hearing the election petition on grounds that Judges are yet to be vetted pending the constitutional reference. Petition No.57/2010 to be awaited. Court fixes matter for hearing on 6 October 2010 and 7 October 2010.

2.56. Application by the 1<sup>st</sup> respondent that the Hon. Judge do disqualify himself.

2.57. Ruling for 8.10.10 at 10.00 a.m. The application that the Hon. Judge do disqualify himself “as there has been no vetting of Judges that has been done.”

Application dismissed.

2.58. 18 October 2010 reasons for dismissal read out by the Hon. Judge.

2.59 On 25 October 2010, the 1<sup>st</sup> respondent cross examines the petitioner.

2.60 The court orders the exchange of photos and vide clips to be relied on. Hearing 27 October 2010.

2.61. On 28 October 2010. The Hon. Judge disqualifies himself from hearing the petition at the request and or option of the 1<sup>st</sup> respondent due to utterance by the petitioner.

EE) **ANG'AWA J**

Appointed Judge to hear the election petition.

2.63. Formal mention on 11 November 2010 to hear directions.

2.64. Court orders (direction No 1.) hearing day to day with effect from 16 November 2010 subject to another case by the advocate for the 1<sup>st</sup> respondent in the Court of Appeal on 15 November 2010

2.65. 16 November 2010 all parties present to court except the 1<sup>st</sup> respondent.

2.66. Advocate for the 1<sup>st</sup> respondent J. Bitok holding brief for his firm.

2.67. Court directions No.3.

All the proceedings of the trial re-read to the parties from the start. (note the 1<sup>st</sup> respondent absent) but advocate in court.

2.68. All the parties confirm the proceedings are the correct record of the court.

2.69 Court adjourn case to allow the lead advocate for the 1<sup>st</sup> respondent to personally attend court.

2.70. By consent of all the parties, hearing day to day from 22 November 2010.

2.71. The 1<sup>st</sup> respondent files an application dated 22 November 2010 presented to the court on the same date, that the court disqualifies itself from hearing this petition due to the method of appointment by the Hon. The Chief Justice.

2.72 Ruling No.1 held that rule 20 of the Election petition rules invoked. Hearing dates were taken by consent.

2.73. Hearing on cross-examination of the 1<sup>st</sup> respondent proceeds from 22 November 2010 to 7 December 2010 when the petitioner closed his case after calling one other witness.

2.74. Within this period the 1<sup>st</sup> respondent made oral and later written request to have the ballot box opened and scrutinize the contents.

2.75. The application was declined twice.

2.76. No evidence was called by the 1<sup>st</sup> respondent but substantial submission and participation in this petition was made.

2.77 The 2 and 3 respondents called only two witness, the Deputy Assistant returning officer and the OCS Shauri Moyo.

2.78 The court called the assistant returning officer. None of the respondents cross examined him.

### **3. Preamble**

#### **Observation**

### **3. Preamble**

#### **3.1 Observation**

This petition was partly heard, at the time this court was appointed.

Rawal J heard applications and made some pretrial orders. Ochieng J not only made further pretrial orders but had proceeded to the stage of the petitioner's cross-examination by the 1<sup>st</sup> respondent. I made the following observations, that some orders bind this court in the conduct of these proceedings.

#### **I. Annextures from previous proceedings**

When I perused the petitioner's affidavit and annexures, I noted

that it relied extensively on affidavits deposed to by the chair of the Electoral Commission of Kenya, S. Kivuitu; the Returning Officer, Priscyllar A. Wamiru and the affidavit of the first respondent that had been originally filed in the case of;

**Republic**

**Versus**

**i) The Returning Officer Kamukunji Constituency**

**ii) The Electoral Commission of Kenya**

**(Exparte Simon Mbugua)**

**(HC. Misc. Application 13/08)**

**(Nairobi)**

3.2 In this petition, the 1<sup>st</sup> respondent had raised a preliminary objection dated 24 July 2009 under rule 23 of the Constitution of Kenya in which he stated that:-

***“The Petition herein was annulled and or superseded by the coming into force of the Constitution of Kenya (Amendment) Act No.10 of 2008 on 29 December 2008.”***

***ii. The Petition herein became incompetent upon the commencement of the Kenya (amendment) Act No.10 of 2008 which dissolved and or removed the 2<sup>nd</sup> and 3<sup>rd</sup> respondent for purposes of Rule 2 of the National Assembly Elections (Election Petition) Rules 1993 with effect from 29 December 2008.***

***iii. The Constitution of Kenya (amendment) Act No.10 of 2008 does not empower the Interim Independent Electoral Commission to replace the 2<sup>nd</sup> and 3<sup>rd</sup> respondent as respondent for purpose of Rule 2 of the National Assembly Elections (Election Petition) Rules 1993 in respect of the election petition herein which was pending when the said Constitutional amendment came into force on 29<sup>th</sup> December 2008.***

3.3 This is the application heard before Rawal, Aroni JJ.

3.4 In order to support this application, the said 1<sup>st</sup> respondent filed on 12 October 2009 an affidavit in support of his preliminary objection dated 24 July 2009. The said affidavit had annexures that included the judgement and order of Nyamu, Wendoh JJ in HC Misc. C. application 13/08 dated 29 July 2008.

3.5 I therefore applied section 34 of the Evidence Act Cap 80 that permits one court to rely on the proceedings and judgement of another court without having to recall the witness/evidence to court again, more so when the proceedings are between the same parties or their representatives interest. The section reads as follows:-

***“Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding, or at a later stage in the same proceeding for the purpose of pursuing the facts which it states-***

**(a) \_\_\_\_\_**

and where in the case of a subsequent proceedings –

***(b) The proceeding is between the same parties or their representatives in interest: and***

***(c) \_\_\_\_\_***

***(d) The question in issue were substantially the same in the first as in the second proceeding”***

***(2) -***

***(a) -***

***(b) - “***

***(emphasis supplied)***

3.6 I therefore adopted the Judicial Review file Misc.13/08 (supra) to these proceedings. On 23 November 2010, all the parties agreed reference be made to it.

## **II. Ballot boxes – Report A**

3.7 On or about the 14 April 2010, Rawal J ordered that the contents of the ballot boxes brought to court be examined by the Deputy Registrar in the presence of parties. This meant that the seals of all the 157 boxes would be broken, the contents examined, an inventory taken and a report be made to court. This oral request made by the petitioner was in order to confirm whether rule 19 had been complied with of the National Assembly and Presidential Election Act Cap 7. The application was met with resistance by the respondents.

3.8 Rule 19 required that the returning officer “shall” deliver to the Registrar not less than 48 hours before the date fixed by the election court for the trial the following documents-

***“a) The written statements made by the presiding officers under the provisions of regulation 34 of the Presidential and Parliamentary Election Regulations;***

***b) A written complaint of the candidates and their representatives,***

***c) The packets of spoilt papers***

***d) The marked copy registrar***

***e) The packets of counterfoils of used ballot papers***

***f) The packets of counted ballot papers.***

***g) The packets of rejected ballot papers***

***h) The statement showing the number of rejected ballot papers***

***i) Repealed by L.N.78/07***

3.9 It transpired during the case for 2 and 3 respondents that the custom for many years was to place all these required packets and written statements into the ballot box and seal the box. This was for ease of transport.

3.10 The Deputy Registrar was ordered to do take an inventory by Ochieng J on 10 June 2010 with effect from 21 June 2010. This exercise continued up to 1 July 2010 and the said Deputy Registrar produced a report that copies were given to all the parties at the court's order. This Report and inventory was marked "A" for ease of reference.

### **III. Document marked B**

3.11 On 15 February 2010 all 157 ballot boxes were brought to the High Court of Kenya by Pricyllar A. Wamiru the returning officer, a security officer Corporal Bernard Okoth No.34500. The CEC Kamukunji, IIEC one Joseph Masinde and handed to the Executive Officer, High Court of Kenya Joseph Getange.

3.12 The observation was noted on a schedule prepared of all the ballot boxes received. Ballot boxes No.85916, 85919, 86285 and 86156 had numbers that were not clearly visible. The latter ballot box was empty. It had no documents inside and was found open with the lid inside.

### **IV. Video Evidence**

3.12 On 26 October 2010 in the middle of cross-examining the petitioner, the 1<sup>st</sup> respondent made oral application to cross-examine on video evidence before Ochieng J. This oral application was granted. When the parties then appeared before me they put in the two video discs by consent and without calling the maker thereof. Both the video disk for the 1<sup>st</sup> respondent and the petitioner were played extensively before this court and the petitioner cross examined on both videos. The evidence of the video were taken into account.

## **4. PROCEDURE OF ELECTIONS**

### **4. Procedure of Election in Kenya**

4.1 Kenya holds three elections simultaneously in any given election year. These are:-

- i) The Presidential Election
- ii) The Parliamentary Elections and
- iii) The Civic Elections.

#### **A. Procedure**

4.2 I thought it would be useful and important in this petition to refresh our minds in the procedure that Elections are held in Kenya as stated in the National Assembly and Presidential Elections Act, Cap 7; The former constitution of Kenya; and insights gained from the Report of the Independent Review Commission, commonly known as the Kriegler Commission, dated the 17 September, 2008 and Previous submission made elsewhere by K. Muigai Advocate.

4.3. Under section 59(2) of the former Constitution, the President dissolves parliament.

## **B. Parliament**

4.4 The speaker of the National Assembly would issue writs within 14 days of the dissolution of the said National Assembly addressed to each of the returning officer of each constituency in which an elected member is to be returned Sections 13 (1) and (2) National Assembly and Presidential Elections Act Cap 7 herein referred to as the Act.

## **C. Electoral Commission of Kenya**

4.5 The writs are delivered to the Electoral Commission of Kenya (as it was then) (and herein referred to as the ECK) who:-

- a. Within two days after receipt of the said writ, would transmit the writ to the returning officer whom it is addressed.
- b. Cause to be published in the Gazette a notice in the prescribed form which shall specify
  - i. The day or days upon which each political party shall nominate candidates to contest parliamentary elections in accordance with its constitution or who which shall not be more than 21 days after the date of publication of such notice;
  - ii. The day for the nomination of candidates for the parliamentary election;
  - iii. The day or days on which the poll shall be taken for the parliamentary election, if it be necessary, which shall not be less than fourteen days after the date fixed for nomination.

Provided that where more than one writ is issued a composite notice may be published.

(Section 13 (3) of the Act.)

4.5. It is then that the Electoral Commission shall cause to be published in Gazette a notice of the holding of a Presidential Election [Section 12 of the Act] that each returning officer shall proceed to hold presidential elections in terms of the notice and the Regulations.

4.7 The Parliamentary elections is held upon receipt of the writ under Section 13 by the returning officer according to the terms of the relevant notice published (section 13 (3) ) and in accordance with the Regulations. (Section 14).

4.8 The Presidential Elections are to be held at a ***“general parliamentary election and as nearly as may be at the same time as the writs for the parliamentary election are issued.”***

(Note:- where the office of the President becomes vacant an election is held; where an election court for Parliamentary seat determines a matter, a one month notice to issue writs by the speaker, is given)

## **D. Electorate**

4.9 Under the act, there is the National Assembly, Elections (Registration of voters) Regulation. This regulation provides for the ECK to divide an area into constituency for purpose of preparing registers of elections. Registration Officer are appointed [Regulation 3(1)]. A notice in the Kenya Gazette is published notifying electors to register within a specific period (Regulation 4 (1)).

***Upon the closing date for registration, the Registration officer then prepares his or her particular registration unit. The names of the persons registered in the register of elections “shall” be arranged in such order and shall be numbered in such manner as the ECK shall direct. [regulation 5 (3)].***

*An electors card is then issued [regulation 6).*

4.10 The register of elections is then published by making it available for inspection at the District officer office.

4.11 Provision for claims, appeals on claims objections, the determination of objections amendments of register is provided. A certification of the register and notice thereon is also provided.

4.12 The ECK would thereafter compile a registers of elections from each of the several registration units. A Kenya gazette and or principal newspaper would contain a statement from the ECK on the issue of revision of the register (Regulation 15 (1) and (2)).

4.13 Revision and the mode of revision of the register is then made.

(regulation 17).

4.14 Correction of the register may be caused out on the decision of the registration officer and or the court [regulation 22 and 23].

4.15 On the day set aside for the elections voters proceed to their respective polling stations to vote.

#### **E. Preliminaries**

4.16 Prior to voting, the ECK appoints a returning officer for the respective constituencies (constituencies means one of the constituencies into which Kenya is divided under section 42 of the (former) Constitution. Kenya shall be divided into such number of constituencies having such boundaries and names as may be prescribed by order made by the Electoral Commission (now repealed) (Act 10/08).

4.17 The appointment is published in the Kenya Gazette (regulation 3) (The presidential and Parliamentary Elections Regulations Cap 7.) The ECK may appoint a Deputy Returning Officer of each constituency. The deputy returning officer would be under the control of the Returning officer and may have all the power and perform the duties of the Returning Officer.

4.18 The ECK would establish polling areas which are normally a polling area and station no most often being schools to be, used free of charge. (Regulation 6 and 7).

4.9 Each polling station would be published in the Kenya gazette (Regulation 6(1)(d))

4.10 The Returning Officer in consultation with the Electoral Commission would appoint a presiding officer at each polling station and such deputy presiding officer provided that they are not previously been employed by a candidate (regulation 10).

4.11 Therefore, the ECK staff would consist of

*i) Returning Officer*

*ii) Deputy Returning Officer*

iii) *Presiding Officer*

iv) *Deputy Presiding Officer*

v) *Clerks*

vi) *Interpreters*

4.12 [In these proceedings the court witnessed the position of the District Electoral Coordinator and the position of Assistant Deputy Returning officer].

4.13 The ECK would have completed nominations of the Presidential and Parliamentary candidates in order for their names to appear on the ballot papers.

4.14 Each presiding officer would be provided by the returning officer with equipment, namely;

**i) *Ballot boxes that are to be different in colour with Presidential and Parliamentary election respectively, having different serial numbers Regulation 22 (1) [LN 172/02].***

**ii) *Material to enable elections mark their ballot papers.***

**iii) *Instrument for stamping the official mark on ballot papers.***

**iv) *Indelible ink (amended to have card impressed with seal of ECK) (LN 172/03).***

**v) *A copy of the register of elections or such part thereof as contains the names of the electors entitled to vote at the polling station”***

The numbers of persons admitted to the polling station is to be regulated by the presiding officer (Reg. 23).

4.15 A Returning Officer may preside at a polling station and be deemed to be the presiding officer of that station.

4.16 The ECK therefore publishes in the Kenya gazette all the polling stations. (regulation 6(1)) Thus a constituency would have polling centre polling station.

For example

In the city of Nairobi.

A constituency known as Kamukunji is assigned No. 002. The electoral ward known as Muthurwa/Shauri Moyo – No. 0001.

Thus the polling station within the electoral ward known as the centre would be assigned a number of stations.

Kamukunji, Muthurwa/Shauri Moyo would appear:

002/0001/002/001

Muthurwa Primary School – 002/001

The stations are 6.

Therefore the last digit would read 1 to 6 to represent the polling station. That is 002/001/001

## **F. Voting**

4.17 A voter would then proceed to where he has registered. He will present his voters card and identification card that would be shown to the presiding officer holding the register. The voter is issued with a stamped ballot paper for the three elections, namely Presidential, Parliamentary and Civic. The voter would proceed to the booth and there mark his ballot papers secretly and cast the votes into the three separate ballot boxes.

4.18 The said ballot boxes had to be ascertained prior to voting to have been empty and thereafter sealed. The prospective candidates would have agents having an insignia to identify them to be at the polling station. Others also at the polling station would be the observers the media both print and electronic (representative) Persons assisting the blind and incapacitated voters; Police officer on duty (regulation 23).

## **G. Close of Voting**

4.19 According got the Independent Review Commission. Once the voting is complete, *“party agents at the polling station may check that the ballot box serial numbers are identical to those registered at the opening of the poll.”* “Physical space is found and counting starts of the votes cast. This is done in the “presence of the party agents. Ballots are unfolded by the counting clerk (assistant) and sorted out by candidates names, the counting clerk/presiding officer showing each ballot to the party agents before placing it in the correct pile for the candidate in question. Valid votes are bundled in 50’s and counted. Rejected and disputed ballot are kept separate and stamped but disputed ballots are treated as valid until the returning officer has declared that they are disputed. Ballots are bundled separately according to candidates.

The counting clerks count the valid votes for each candidates and the presiding officer announces the results of each presidential;

[and each parliamentary candidate and each of the civic elections.]”

## **H. Results**

4.20 It is the counting clerk who completes two form 16A

**i. Presidential – 16A**

**ii. Parliamentary – 16A**

**iii. Civic – 8**

4.21 [The] party agents one then invited to check the correctness of the figures and confirm by signing the forms.

4.22 The Presiding Officer is also required to sign the forms *“copies of the forms are then provided to the party agent.”*

“If an agent declines to sign the form [which they may] the presiding officer must try to establish a reason and if they decline to sign, he must state accurately what occurred”.

“agents should then be given a copy of the relevant forms, copies of [the forms is] to be affixed where they are easily accessible to the parties”

“all sensitive material is then packed, sealed and transported to the constituency tallying centre accompanied by party agents who so wish [and can find transport]”.

“At the constituency tallying centre the Returning Officer received the material from the polling station [checks] that all the material [is] there and then assume control ...”

“The Returning Officer then announces the result from each of the polling station as the presiding officer submitted them and these results are then entered in the relevant cells in the large form 17A.”

Once this was [is] done for all the polling station in the constituency... the results [are] added up [column wise] and the resulting figures:-

For Presidential candidates [are] entered on form 16

For Parliamentary candidates [are] [entered] on the last page of Form 17A.

For Civic candidates [are entered] on the last page of form 9.”

“When this is done [the] results are announced orally and (a) certificate of results is issued:-

[For] Parliamentary [results]

Winner ..... Form 17

[For] Civic [results]

Winner ..... Form 18C

**4.23 “The returning officer was to then proceed to telephone or fax the [information in Form 16 being the votes for each candidates and the number of rejected votes] to the National Tallying Centre in Nairobi. [There would be] a specifically assigned “verification table” [that would] capture the information on a special form. [The person] [at the table] would check [the results] by calling back and verify the returning officers identity and by rechecking the information. The hand written information was then handed to the information technology department and the key data was entered into the computer. A print version was brought back to the table...”**

**The returning officer [would proceed to the National Tallying Centre [in 2007 it was the Kenyatta International Conference Centre [KICC] and hand over all the results relevant [although requirement**

*states within two days].*

*[This would include] the tallying forms from the constituency [and] original Form 16. Upon arrival [the returning officer] was to certify the content of the printed form produced by the Information Technology department, are identical to what [the results] [are] on the original statutory Form 16 for the constituency.*

4.24 An ECK commissioner announces the results (upon) the information data is complete.

4.25 It is then that the results are changed from “**provisional**” to “**final**”.

4.26 It is important to note that when the presiding officer delivers the results to the returning officer, those results are sealed and placed in a ballot box used for transportation. The returning officer would open the sealed ballot box used, reads the results, files form 17A and 9 declares the valid votes cast. No copies of Form 16 is given to any party agent (presidential results) Form 17A is for parliamentary results and Form 18 for Civic results.

4.27 The gazette notice of all the names of those validly elected is done.

5. Background to Election Petition

## **5. Background to Election Petition**

5.1 The National Assembly and Presidential Elections were held on the 27 December 2007. The Election Petition herein concerns the Kamukunji Constituency (herein referred to as the constituency).

5.2 The Constituency is situated within the City of Nairobi. It was assigned Seven Electoral area/ward; 23 polling centre and 157 polling station, (the latter being disputed). There were a total of 119,075 registered voters and a total of 25 aspirants who participated as candidates, of whom two were also presidential candidates.

5.3 Ibrahim Ahmed (herein referred to as the Petitioner) (ODM Candidate) and Simon Mbugua (herein referred to as the 1<sup>st</sup> respondent) (PNU candidate) are two out of the 25 candidates who participated in the polls.

5.4 The Tallying Centre for the constituency was Shauri Moyo YMCA Hall. Ballot boxes from respective polling station were being delivered to this hall. There, the returning officer, one Priscyllar A. Wamiru (herein referred to as the 2<sup>nd</sup> respondent) was in charge of the Tallying of the results. On the 28 December 2007, as the results and the ballot boxes were coming in, she made announcement of the tallying she had made so far. This was described as “**provisional results**”

5.5 The results and or announcement she made was, that the 1<sup>st</sup> respondent had about 9,524 votes. The Saturday Standard newspaper of 29 December 2007 reported that the 1<sup>st</sup> respondent had won the election with 9,524 votes.

5.6 When the 2<sup>nd</sup> Respondent made this announcement of “the provisional results”, both the agents and or supporters disrupted the tallying exercise. The 2<sup>nd</sup> respondent is alleged to have disappeared. She was not seen again until the 29 December 2007, when she returned with the District Elections Co-ordinator (DEC) and appeared in public to say that she had gone to consult the chair of the Electoral Commission of

Kenya but was unable to find him and or to contact him.

5.7 The 2<sup>nd</sup> Respondent disclosed that she had no results to announce for Kamukunji constituency. She stated this in the presence of most candidates, the Assistant Returning Officer and the District Elections Co-ordinator DEC (a video was provided to court of this scene and others by the parties.) The whole group decided to proceed to the Kenyatta International Conference Centre, where the National Tallying Centre was situated for the 2007 elections more so where the chair of the Electoral Commission of Kenya (ECK) was believed to be at the time. On arrival to the city centre, the candidates, the returning officer, the District Elections co-coordinator (DEC) and the Petitioner marched in quite protest to KICC. The 1<sup>st</sup> respondent appeared emerging from the KICC gate passed the police and went to join the group showing his solidarity in the protest.

5.8 They were all not permitted into the KICC precepts and gate as they were stopped by armed security officers and one with a police dog. It was said later that the District Elections co-ordinator DEC, the two presidential candidates were permitted to finally enter KICC and present the candidates grievances.

5.9 An announcement by the Electoral commission of Kenya (ECK) was made from KICC at the said 29 December 2007, stating that there would be a repeat of the Elections at the Kamukunji constituency.

5.10 All the candidates appeared to be happy with this. On the 30 December 2007, the ECK gazetted the results of the Presidential Elections, Parliamentary elections and the Civic elections by way of Legal Notice 12615/07. The Parliamentary election result showed the duly elected member of the National Assembly. The result for the constituency of Kamukunji was left blank. The gazette notice of countermand elections excluded the constituency of Kamukunji.

5.11 It is Public knowledge that post election violence broke out in Kenya due to the disputed Presidential Elections.

## **J. Judicial Review Proceedings**

5.12 On 16 January 2008, the 1<sup>st</sup> respondent, Simon Mbugua filed, at the High Court of Kenya Judicial Review Proceedings, seeking leave to bring the Judicial Review proceedings against the Electoral Commission of Kenya in High Court Miscellaneous Application NO. 13/08:

### **Republic**

#### **Versus**

#### **i) Returning Officer Kamukunji Constituency**

#### **ii) Electoral Commission of Kenya**

#### **(Ex parte Simon Mbugua)**

5.13 This application before Nyamu Judge (as he then was) came on the 17 January 2008. The Hon. Judge commented in his ruling for leave that he was doubtful if he had any jurisdiction<sup>3</sup> to hear the matter, but after submissions put to him, he was convinced that he did have jurisdiction.

Leave was granted on 17 January 2008 and the 1<sup>st</sup> respondent herein/original applicant was given 21 days to file a Notice of Motion. This notice of motion was filed on the same day of 17 January 2008. Unfortunately, the returning officer was not traced. Leave to service by way of substitutive service was granted on 8 February 2008, by way of a newspaper advertisement that was also was granted by Nyamu J (as he was then).

5.14 The interested parties who responded to those proceedings were:-

(a) **The Petitioner**

Represented by S. Owino instructed by S. O. Owino and associates advocate [affidavit in Reply 6 February 2008].

(b) **David Mwaura Wahiga**

A parliamentary candidate,

*Agano party [LN 11595 – 28.11.2007]*

Represented by Chelegat for

Mwaura & Mwaura Wahiga & Co. Advocates (affidavit in reply jointly

14 February 2008

with civic candidates. )

---

<sup>3</sup>*Rangal Lemeiguram & others versus ECK & others*

(c) **Civic candidates**

Total of 15 including Kithinji Desmus having authority to bring matter on behalf of other candidates.

Represented by Chelegat for

Mwaura & Mwaura Waihiga

(affidavit in reply jointly

14 February 2008).

(d) **DR P.L.O. Lumumba parliamentary candidate**

*Chairman cha Uzalendo party*

*(LN 11595 – 28 November 2007)*

Represented by Kaluma for

Lumumba, Mumma & Kaluma Advocate

(affidavit 18 February 2008)

(e) **Pastor Pius Muiru**

Presidential

& Parliamentary

Candidate.

*Kenya Peoples Party*

*(LN 11595- 28 November 2007)*

Represented by

M/s Kagiri & Associates,

Advocate

No affidavit in reply seen on file

(f) **1<sup>st</sup> & 2<sup>nd</sup> Respondent**

(Returning Officer & E.C.K.)

Represented by J. Keli

For M/s Jemimah Keli &

Co. Advocates

Affidavit in

Reply 18 February 2008.

(g) The 1<sup>st</sup> respondent in that Judicial Review proceedings had, in Summary herein, asked that:-

Whereas, the Electoral Commission

of Kenya had no powers to cancel

or nullify the

[election] results

[only the High Court

could do so].

Whereas the authority to hold elections vests

in the Returning

officer [to have]

votes counted and

publicly announced

Whereas the Returning Officer

is duty bound

to complete the

Tallying exercise,

(h) The 1<sup>st</sup> respondent prayed that the Returning Officer be directed to complete the tallying exercise, the winner announced and the results published in the Kenya gazette. That the decision to cancel the elections be quashed and further to stop any – repeat elections.

(g) The advocate Kaluma asked that a bench of more than one Judge be constituted. This was granted and the Hon. The Chief Justice appointed **Hon. Mr. Justice Nyamu** with **Hon. Lady Justice Wendoh** to preside and hear the application.

5.15 The interested parties filed replying affidavit in which they stated:-

5.15 (a) **Petitioner**

Affidavit 6 February 2008

aa) That there were irregularities noted

bb) The returning officer never announced provincial results

cc) Chaos broke out resulting to the documents and ballot boxes papers being shredded, destroyed or missing.

dd) The forms annexed in the 1<sup>st</sup> respondent/applicant in the Judicial review proceedings had discrepancy.

5.15 (b) **David Mwaura Wahiga**

of Agano Party,

Parliamentary Candidate together with

5.15 (c) **Civic Candidates for Kamukunji Constituency** being 15 in number with Kithinji Desmus representing the other civic Candidates with authority filed an affidavit dated the 14 February 2008.

aa) Their main argument was that the Judicial Review court had no jurisdiction to determine the issue before it.

bb) The returning Officer and the electoral commission of Kenya experienced interruption.

There were riots and open violence and administrative difficulties.

The chair had the power to start or restart the elections and or voting process at the earliest practical moment.

Under regulation 25A of the National Assembly & Presidential regulations Cap 7.

5.15 (d) **DR PLO Lumumba**

no affidavit seen.

5.15 (e) **Pastor Pius Muiru**

no affidavit seen.

5.15 (f) **The Returning Officer And The Electoral Commission of Kenya**

Affidavit: 4<sup>th</sup> March 2006

aa) Voting was interrupted by rowdy supporters.

bb) The action to restart elections was within the law.

cc) The returning officer disclosed that she was requested to make a report and tallying what she had.

dd) That the report was signed by the said Returning officer, Deputy Returning officer, Assistant Returning officer that disclosed the results for Presidential Parliamentary and Civil elections.

ee) The Parliamentary results being :-

(i) The 1<sup>st</sup> respondent original applicant in High Court Misc Application Judicial Review No. 13/08 case .....22, 614.

(ii) The petitioner/Original interested party in High Misc App. Judicial Review No. 13/08 Case ..... 16, 604.

(iii) Y. Hassan ..... 7663.

5.15 (g) On 3<sup>rd</sup> April, 2008, the petitioner filed a Notice of Motion seeking the returning officer and the Electoral Commissioner of Kenya to produce, upon oath, all the Form 16A that was in their possession and or permitted by the court to inspect the Form 16A and take copies. That the returning officer be examined on her affidavit of 4<sup>th</sup> March 2008.

5.15 (h) An argument arose in reply that the subject matter suit could only be determined in an election petition. Under Order LIII Civil Procedure Rules, it does not provide for the cross-examination of witnesses, discovery or interrogatories. This lies wholly with the election court, not with the Judicial Review bench.

5.15 (i) The interested party could therefore not challenge the respondents being the returning officer and the Electoral Commissioner of Kenya but may only challenge and reply to the ex parte applicants' application (the 1<sup>st</sup> respondent herein).

5.15 (j) On the 29<sup>th</sup> May 2008 the Judicial Review bench, in its ruling held that it had:-

***“No jurisdiction to engage (the) court in cross-examination of the (Returning officer) and inspection of FORM 16A, as the duty is reserved for the Election Court.”***

5.15 (k) The application was duly dismissed.

## **K. JUDGMENT**

5.16 The decision of the two Judge bench, held in summary that:-

(a) *“[There existed] no gap in enforcing the rule for law and the constitution.*

(b) *[That the] Judicial Review bench [had] a role in the electoral process.*

(c) *[Though there was the] absence of an identifiable decision, it was not fatal to a Judicial Review application.*

(d) *[That the] Electoral Commission of Kenya had no power to postpone/cancel or nullify elections which [had] taken place.*

(e) *[An] Imperfect election [was] better than no election at all – as the cure for an imperfect election is an election court.*

(f) *“side shows” by interested parties [are] not to be entertained by a Judicial Review court [as] it is a function of an Election Court.*

5.18 *[The] respondents, [the returning officer and the Electoral Commission of Kenya], ordered to comply with regulation 40 and 41 of the relevant Electoral Regulations to finally perform their statutory duty.*

5.19 The Judicial Review court granted the prayers for:-

5.19 (a) Mandamus

*to compel the returning officer to tallying results from polling station and publically declare who won. Regulation 40, 41 & 34.*

5.19 (b) Mandamus

*to compel the Electoral Commission of Kenya to publish a notice in the Kenya Gazette showing the name of the persons so elected as member of parliament.*

5.19 (c) Certiorari

*to quash the Electoral Commission of Kenya’s decision to cancel or nullify the parliamentary election for Kamukunji constituency.*

5.19 (d) Prohibition

*to restrain the electoral Commission of Kenya to order a repeat of the parliamentary Elections in Kamukunji Constituency until the returning officer completes her statutory duties regulation 40 and 41.*

5.19 (e) Prohibition

*to restrain the returning officer and the electoral commission of Kenya from holding, directing and*

***supervising repeat parliamentary elections.***

5.20 Thus, the Electoral Commissioner of Kenya was ordered to comply with the law. That the “decision, order, direction at KICC on [the] 29 December [2007] is hereby brought into this court and forthwith quashed.”

5.21 The Returning officer, the Electoral Commission and all the participating interested parties were ordered to pay costs to the 1<sup>st</sup> respondent herein, original applicant party.

5.22 An appeal was filed to the Court of Appeal which appeal is till pending to date.

5.23 On the 11<sup>th</sup> August 2008 the Returning Officer, in the presence of the Deputy Returning Officer and the Assistant Returning Officer announce the results of the Kamukunji constituency being the parliamentary results as:-

**“1<sup>st</sup> respondent ..... 22,614**

**Petitioner ..... 16,604**

**Yussuf Hassan..... 7,663”**

5.24 The results were figures identical to the internal report relied on by the Returning Officer and the Electoral Commission.

5.25 The 1<sup>st</sup> respondent is declared the winner of the Kamukunji Constituency parliamentary seat.

5.26 The Electoral Commission then publishes a Kenya Gazette notice Simom Ng’ang’a Mbugua as appointed member of parliament Kamukunji Constituency.

5.27 On 28<sup>th</sup> August 2008, by notice of same date, Ibrahim Ahmed files an election petition, the subject of this Judgment.

6. The Evidence

Trial

**6. THE TRIAL**

**Introduction**

6.1 In Election Petition in Kenya it is the Petitioner who depones to an affidavit together with his witnesses and presents each respective affidavits, that would contain their intended evidence, 48 hours before the time set for the trial of the said Election Petition (Rule 18). The other party upon the affidavit being read by the petitioner would proceed to cross-examine the witness.

6.2 Though the Petitioner had several witnesses to call, he restricted this to himself and two other witnesses. Out of the said two witnesses, one was strongly opposed as he was in every sense a Respondent and therefore ought not to be called except by the Respondent. This court upheld the objection raised with the understanding that the Respondent would call the witness, failure to the Respondent calling the witness, the court would treat him as a court witness and allow his evidence to be given.

6.3 The two witness in question were Sammy Wachira Mubea, a PNU agent in the election (an opposition party to that of the petitioner) and the other Joseph Kortum, an Assistant Returning Officer in the employment of the 3<sup>rd</sup> Respondent during the elections. It was he who was finally a court witness. None of the Respondents, as stated earlier, asked him any questions.

6.4 The 1<sup>st</sup> Respondent and his proposed witness gave no evidence, though there is an affidavit on record in the Judicial Review case and in the annexure of the Petitioner's affidavit.

6.5 The 2<sup>nd</sup> Respondent, a key witness in this petition was never called to give evidence. Her presence to court was rare as the court was made to believe that she resides out of Nairobi and due to logistic reasons does not always attend court. The representative of the 3<sup>rd</sup> Respondent Alex Khalakuli who was the Deputy Returning Officer gave evidence to court together with the Officer Commanding Station (OCS) Shauri Moyo, as a second witness for 2 and 3 Respondents.

## **II The Petitioner's Case**

6.6 The petitioner stated that he was indeed a Parliamentary Candidate for Kamukunji Constituency together with 24 others that included the 1<sup>st</sup> Respondent. Though voting in the Constituency proceeded well with a few discrepancy that one would not pay attention to, he knew he was winning the elections from the information he obtained from his various agents. His major complaint was that the returning officer left her station and was not seen again until the following day of 29 December 2007. She informed the candidates that she had no results/documents to complete the tallying.

6.7 It was therefore his opinion that the elections for the Constituency was not carried out in accordance with the provisions of the Act and or regulations, and principles laid down. That the vote tallying was not accurate nor correct.

6.8 He also complained that the Kamukunji Constituency had an extra 8 polling stations from the allocated 149 polling stations.

6.9 There was quite a substantial of irregularities that he thought out during his cross-examination.

6.10 When the candidates were reassured by the chair of the Electoral Commission that the elections for Kamukunji Constituency would be returned, he took no action expecting that another election would be called or restarted again at the earliest possible time.

6.11 Instead, he and others were surprised at the filing of the Judicial Review proceedings 15 days later, that granted the 1<sup>st</sup> Respondent prayers that the Judicial Review court orders the Electoral Commission of Kenya to complete the tallying that was disrupted.

6.12 It was agreed by all concerned in their various affidavits in these proceedings and the Petition before court that, as soon as the returning officer announced what one would call the "provisional results" that chaos broke out. This may explain the returning officer's absence soon after. It is without a doubt, that the documents she intended to rely on were torn, burnt and scattered all over the compound at the tallying centre.

6.13 The chair of the Electoral Commission objected to the Judicial Review proceedings. In his affidavit he stated in part, that

***“To announce the winner without the results from all [the] polling stations would neither be free nor fair.”***

6.14 The first Respondent then put in a report prepared by the returning officer and signed by her, the Deputy And Assistant Returning Officer. This report was again put in by the 2<sup>nd</sup> Respondent herself. Both reports are contained in the Petitioner’s affidavit/annexture.

6.15 The report asked for by the chair of ECK was entitled

***“Report on the final tallied results for Kamukunji Constituency.”***

6.16 A meeting had been held in the ECK boardroom on 25 January 2008. (Note that the Judicial Review proceedings, Notice of Motion was brought on the 17 January 2008 and accordingly served on ECK.) The chair had a file that contained some Forms 16 A. The purpose of the report was to assist ECK:-

***“to come up with a decision on the results of Kamukunji Constituency for the 2008 General Elections.”***

6.17 The analysis of the report only dealt with the top three candidates for Presidential and the top three candidates for Parliamentary elections. The civic candidates reflected the top two candidates in each of the seven wards.

6.18 In that report, there was confirmation that for the Parliamentary election results, there were initially missing 39 polling stations results out of a maximum of 157 polling stations. The file given to the returning officer by the chair produced a further 17 polling stations results. Despite this information, it meant that 22 polling stations out of 157 were missing.

6.19 Unlike the Presidential elections, results where the returning officer advised the commission

***“That it [was] within the provisions of the Laws of Kenya that [the presidential results be validated]. The results for the parliamentary seat stated in her opinion, if it is assumed 400 voters turned up to vote, then there would be 8,800 votes which may be used to apportion evenly amongst the parliamentary candidates. If this is done then 352 votes would be given per candidate and thus the 1<sup>st</sup> Respondent “would still” be in the lead.”***

6.20 In the civic elections their comments was

***“Generally, the candidates who won” [using the format for the Presidential and Parliamentary election results] are clearly indicated though we had not yet reached the point, of declaring any winner since we were still in the process of tallying the results and completing the appropriate statutory forms.”***

6.21 To conclude their report, the returning officer stated

***“We wish to report that we have Form 16 A and Form 8 for all the above results. We also wish to confirm all but about 3 or so ballot boxes that we were issued are intact, and a copy of the results for specific polling station should be inside the box.”***

***The ballot papers are intact.”***

6.22 It was this report that was used in the Judicial Review proceedings to convince that court to compel

the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to complete the tally. All they [ECK] implied in this report was that the returning officer merely refused to announce the winner as they have the said documents 16 A and 8 intact.

6.23 In his evidence in Cross-examination and Re-examination the Petitioner attempted to show the court that the tallying exercise was disrupted. It was never completed due to the distraction of vital documents. He also tried to show that if, for example, the tally sheet contained in the report by the 1<sup>st</sup> Respondent and compare with the report by the 2<sup>nd</sup> Respondent, there are vast difference in the polling station.

6.24 He then went Form 16 A, displayed by the 1<sup>st</sup> Respondent in his annexure to the Judicial Review proceedings and was able to show that indeed these forms had discrepancies too. Not all the centres, stations, records of results were disclosed.

There were some records that did not give results of all the 25 candidates. The records were far from accurate.

6.25 The Electoral Commission (ECK) failed in its duties. Some of these duties covered in his advocate's submission is the under staff at the polling stations; Forms 16 A clearly shows (one presiding officer may MAN more than one polling station); Lack of adequate seals to be used, lack of register of elections in some stations; failure to deliver ballot boxes, especially for Zawadi and Biafra station/centre in time. Unreliable form 16A.

6.26 The Petitioner's witness PW2, Sammy Wachira Mubea took everyone by surprise. This was because he was an agent for the PNU party of the 1<sup>st</sup> Respondent, giving evidence in support of the Petitioner. The reason he did this was that after the Presidential elections results were announced, he saw people being killed when ODM rejected those results. He ceased to be a member of PNU. He got SAVED in the Presbyterian Church of East Africa (PCEA). That on seeing the killings he repented and got saved. He then approached one of the other candidates called David Waihiga, but he declined stating he did not wish to have anything to do with the elections and or was tired. The witness then volunteered himself to the petitioner to give evidence. He himself was not able to file a petition due to the expenses.

6.27 He informed the court that he was in charge of all the agents in the Constituency Area. He was the "Super Agent" and would deal with any reports and problems encountered by other agents in the same PNU party.

6.28 Persons approached him to have the 1<sup>st</sup> Respondent and the presiding officers talk on how the elections could be secured for 1<sup>st</sup> Respondent. He complied and arranged meetings between the 1<sup>st</sup> Respondent and the presiding officers to discuss the elections.

6.29 The challenges facing them was at the polling stations. Persons who were not on the voters register would come to vote. Arrangements was to show bias to certain ethnic groups in preference of voting. There was also a black book.

6.30 Ballot boxes at Zawadi was left behind. All the security personnel and others accompanied the boxes inside the vehicle, that there was no room to collect all the ballot boxes. It was partly on seeing this ballot boxes coming late from Zawadi being six in number that chaos began on 28 December.2007 at 10.30 a.m.

6.31 Any Form 16 A he had, he surrendered to another known as H. A Kamau. Later he was called to convene the presiding officers. He was then given a blank Form of 16A which he filed. His communication was by phone but unfortunately he had since misplaced the phone. He was told, the Forms 16 A were required by ECK.

6.32 The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' witness Alex Khalakumi stated that he was a deputy returning officer for the Kamukunji Constituency during the 2007 elections.

6.33 Attached to his affidavit was a sample Form 16 A and the actual alleged Form 17 A. He admitted that the polling stations were increased but this was so done for the good of the public and as a request by the candidates and voters alike.

6.34 As far as he knew, there was no complaint that arose. If so, it should have been in writing of which he saw none. That no one in his knowledge was turned away and denied the right to vote.

6.35 Where there was a problem of vote register he himself personally attended to this one incident being Zawadi station where he carried with him the master register and the black book, where missing names of voters were traced. They were permitted to vote.

6.36 The incident of the polling stations opening late was agreed upon but that this was attributed to the setting up of the respective station. Time was extended for voting to compensate.

6.37 This witness stated that it was he and the OCS Shauri Moyo who went to collect the abandoned ballot boxes from Zawadi to Shauri Moyo tallying centre. The OCS did come to give evidence and agreed that they both went to collect the ballot boxes in two separate vehicles. The OCS Shauri Moyo in cross-examination admitted the members of public shouted at him ***“thief thief”*** in reference to the ballot boxes.

6.38 As to the stamp used on the documents by the presiding officers on form 16 A, Alex Khalukumi said this made no difference and may have been used intelligently.

6.39 When questioned about Form 17 A that was annexed to his affidavit, Alex Khalakumi admitted that there were discrepancies with the document to that of the tally sheet that was attached to their report to the chair used to determine the number of voters used to state the

1<sup>st</sup> Respondent was leading in votes.

6.40 This witness also admitted that the registered voters on some forms were more than envisaged. He explained that after a meeting with the chair and Member of Parliament it was agreed to increase the polling stations so that the number of votes would be about 500 or so registered per stations.

6.41 His explanation in cross-examination was that

***“This could be the hand writing or typing [error] on the figures left out without any knowledge.”***

***“There are 3 other polling stations left out. It is a mistake I see the mistake.”***

***“I do not know why [there is] discrepancy in the results.”***

***“to polling station No.10 there are no results at all it. Its blank.”***

6.42 The court witness Jonathan Kortum, the Assistant Returning Officer, stated to court that he had been assigned administrative duties of recruitment of both presiding officers, clerks and deputy returning officers, polling clerks and accounting clerks for the Kamukunji station. He was also concerned with the elections and dealt with complaints and would receive phone calls. He admitted that there was “so much anomalies” in the stations. Some being stations not opening on time, missing registers, names in alphabetic orders. In some instances the registers were not at the stations as required as late as 3 o’clock in the afternoon.

6.43 So many complaints had arisen including clerks not signing the forms; ballot boxes delayed, some being brought as late as

11.00 a.m., following morning to the tallying centre. Some aspirant thought that was rigging. Some boxes were broken down and contents spilt out. By 28 December 2007 mid day the ECK tallying centre at KICC requested they be given results. The returning officer used the phone and gave the results. Some

aspirants insisted on wanting to know the results she had relayed. She gave the results. The PNU candidate were celebrating and shouting and singing, whilst the ODM party were singing and shouting. They were unable to control the crowd. Boxes that were being brought into the compound by good Samaritans were broken down. Another team of aspirant from the PNU came demanded to be re-read the results as given to the KICC tally centre. By 6.00 p.m., it was not possible to control the crowd. The returning officer left to consult from the offices at Nyayo House, the District Electoral Co-ordination (Dec). The witness remained behind to tally but was halted from doing so until the returning officer came back. She did so at 8.00 - 8.15 p.m. on 28 December 2007. She was not permitted to reach the table. The OCPD and OCS asked they stop. The aspirants and supporters said everything should be left as it was on the table. The police took the computer and the two left for the Shauri Moyo police station, then to their residence at around midnight. All along Alex Khalakumi had disappeared together with another officer called Sila. The District Coordinator accompanied them back from Nyayo House to the Shauri Moyo centre. The people would not permit them in, nor listen. They went to KICC.

6.44 In January they were called to a meeting at the head office by the Commissioner. This was 15 January 2008. The question being, "How were they able to obtain results from the Kamukunji Constituency?" They were asked to pluck the results sheets from the doors of the station, to pluck some from on top of the ballot boxes. A few forms were salvaged and in January 2008, they presented to the chair results save 32 odd polling stations were missing.

6.45 It was during this time that form 17A, 17, 16 and 16 A was filled and the documents handed over to the chair

6.46 In August 2008, (the witness gives the date as 20 or 21 but this may have been an error). He stated they were called and informed, as the 1<sup>st</sup> Respondent had filed a case, the court ordered there be tallying to be done.

They were told to say

***"There was no results to be made as the results were salvaged but were not tallied results."***

6.47 The boxes were then collected and taken to Shauri Moyo. There they were told by the ECK chair to read the report given to the chair. If anyone is not satisfied they go to court.

6.48 The 1<sup>st</sup> Respondent and to some extent, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent dwelt, on the issue of Form 16 A. The petitioner had prayed in his petition that:-

***a) A scrutiny of the votes [be undertaken]***

***b) A scrutiny of rejected votes and spoilt ballot papers.***

***c) Scrutiny of counterfoils of votes case.***

***d) A recount of ballot papers case.***

***e) That the elections held on 27 December 2007 be determined, declared null and void.***

***f) That the 1<sup>st</sup> Respondent was not validly elected.***

***g) That the 1<sup>st</sup> Respondent was not validly elected as a member of the National Assembly for Kamukunji Constituency.***

***h) The election officers be reported to the speaker.***

## **i) Costs”**

6.49 They were surprised when the Petitioner withdrew his first four prayers. This meant that he was shying away for there to be scrutiny of the ballot casts to know who actually won the elections.

6.50 The 1<sup>st</sup> Respondent also spent a considerable time at the video to emphasize that there was violence on the part of the Petitioner, his agents and supporters. A presiding officer (and also an acquaintance to Alex Khalakumi) was thrown down violently. A chair was raised towards the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent was shown exchanging vulgar language.

6.51 Form 16 A was an important aspect in this case. This means that the Petitioner, in running away from scrutinizing of the ballot boxes, his case fails and that his petition must be dismissed.

6.52 The 1<sup>st</sup> Respondent still maintained that he was the winner of the Kamukunji Constituency elections. The disruption that occurred during tallying was so done on purpose in order that there be no results. The Petitioner has not come to court with clean hands.

## **7. OPINION**

### **7. Opinion**

7.1 This election petition for Kamukunji constituency is not only unique but historic apart from the decision if:

#### **R & Another**

#### **Versus**

**Kimani Wanyoike & Others**<sup>1</sup>

**Kipkalya Kiprono Koros**

**CA 94/05**

**(Omolo, Okubasu Githinji JJA)**

The High Court of Kenya, Judicial Review bench issued orders of Mandamus, Certiorari and Prohibition to the effect that the Electoral Commission of Kenya do complete a tallying exercise of the elections for the constituency and pronounce the winner.

7.2 The Electoral Commission of Kenya had on the 29 December, 2007 ordered a restart of the paid election (***“to start a new, to resume or to resume [as an activity] after interruption”***)<sup>2</sup>

7.3 It was therefore the stand of the Electoral Commission of Kenya that

***“the declaration of results of 11 August 2008 was not a voluntary act of the Commission or the Returning Officer.” “It was a declaration in obedience [to a] court order.”***

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<sup>1</sup> *The parties aggrieved by the ECK commission by nominating a wrong person in error, to have the seat*

*vacated by way of a judicial review proceedings court of appeal held – judicial review proceedings not available but only an election petition.*

<sup>2</sup> *Cambridge Advance Hearness Dictionary.*

7.4 The evidence from the deputy retiring officer and the assistant deputy returning officer was in response to directive to compile a report, they went and removed Form 16A from on top of the ballot boxes; from notices of FORM 16A placed on door posts or thereabouts at the station and came up with what they foresaw as a result. To this end 39 to 22 stations had no results. The 17 stations results were obtained from the file held by the chair of ECK. (In evidence, the contents of the form 16A was given to the chair by a supporter of the 1<sup>st</sup> respondent). The deputy returning officer said he did not rely on those results. If that being the case, then 17 of 39 station may not have had results.

7.5 For the parliamentary seat at Kamukunji constituency, ECK, through the returning officer announced that the results of the three top candidates were:-

**i) Simon Nganga Mbugua ..... 22,614**

**ii) Ibrahim Ahmed ..... 16,604**

**iii) Yusuf Hassan .....7,663**

based on the report given to ECK Chair in January 2008.

7.7 I wish to first go back in the evidence on the material day of 28 December 2007. The returning officer Priycillar A. Wamiru was at the constituency tallying centre, Shauri Moyo YMCA hall, where she was awaiting the ballot boxes as they came in, she would tally the results.

What was very clear in the law was that she was to await for all the ballot boxes to arrive at the tallying centre before she made an announcement of who the final winner.

7.8 The returning officer made a grave error and announced the results she had received so far. Chaos broke out at the tallying centre at this stage. The results she announced was interrupted to be that of the winner of the elections. This was seen as stated in the Standard newspaper of the following day, 29 January 2007, a Saturday and so reported by the Standard Newspaper team as follows:-

***“In Kamukunji, Mr. Simon Mbugua of PNU won with 9,524 votes to beat a long field that included two Presidential candidates Ms Nazlin Umar and Pastor Pius Muiru. Former M.P. Norman Nyagah only managed a partly 799 votes”***

7.9 It was this newspaper report that the 1<sup>st</sup> respondent, (inter alia) used as part of his affidavit of 15 January 2008 to convince that court that he won the elections.

7.10 The explanation in this petition, given by the deputy returning officer and assistant returning officer was that the computer they had to relay the information of the incoming results was not working. They were given money for airtime in order to use their mobile phone to transmit the information. The returning officer, 2<sup>nd</sup> respondent, was under pressure to hand over the presidential results to KICC national tallying centre. She gave the results over the phone in the hearing of the candidates. Pressure then mounted from the candidates that she releases their results at once. She gave in to this pressure and announced that Simon Nganga Mbugua had 9,524 notes so far.

7.11 According to the Independent Reviews Commission **Provision results** are results completed. I repeat from above the procedure the returning officer was to use to come to what is termed as a provision result:

*7.11.1 “At the constituency tallying centre the returning officer (received) the material from the polling station (checks) that all the material [is] there and then assumes control...”*

*“ The returning officer then announces the results from each of the polling station as the presiding officer submitted them and these results are then entered in the relevant cells in the large FORM 17A” once this [is] done for all the polling station in the constituency ...the results [are] added up [column wise] and resulting figures:-*

*For Presidential candidates are entered on FORM 16*

*For Parliamentary candidates [are] [entered] on the last page of FORM 17A*

*For Civic candidates [are] [entered] on the last page of FORM 9”*

*7.11.2 When this is done the results are announced orally and [a] certificate of results is issued:-*

*[For] parliamentary [results] winner .....FORM 17*

*[For] Civic [results] Winner ... Form 18C*

*7.11.3 The returning officer was to then proceed to telephone or fax the [information in Form 16 being the votes for each candidates and the number of rejected votes] to the national TALLYING centre in ..... Nairobi. [There would be] a specifically assigned “verification table” [that would] capture the information on a special form. [the person at table] would check [the results] by calling back and verify the returning officers identity and by rechecking the information. The hand written information was then handed to the information technology department and the key data was entered into the computer. A print version was brought back to the table....*

*7.11.4 The returning officer [would] proceed to the national tallying centre. [In 2007, it was the Kenyatta International Conference centre [KICC]] ... and hand over all the results relevant [although requirement states within two days]. [this would include] the tallying forms from the constituency and original form 16. Upon arrival [the returning officer] was to certify the content of the printed form produced by the information technology department are identical to what [the results][are] on the original statutory Form 16 for the constituency.*

*7.11.5 An ECK commissioner announces the results (upon) the information data [being] complete*

*It is then that the results are changed*

*from “provisional” to final [results].*

7.12 In Kamukunji constituency as of 28 or 29 December 2009, these steps were never undertaken. The

reasons being that Chaos erupted in that station. The information available to the returning officer was deprived her. What then should be the next steps for her to take?.

7.13 Under regulation 25 a presiding officer may postpone or adjourn the proceedings at the polling station.

***“Where they are interrupted by a riot, open violence flood, natural catastrophe, shortage of equipment or other materials at the polling station or other administrative difficulty or other cause but where he does so, he shall start or restart the proceedings “at the earliest practicable moment”***

7.14 The Electoral Commission under a new Section 25A may postpone the elections for serious breach of the peace that is likely to occur [inter alia].

7.15 The evidence before this court was that the returning officer, the District Electoral coordinator together with the candidates were not able to access the Chair, Electoral Commission immediately at the National Tally Centre.

7.16 According to the 1<sup>st</sup> respondent the elections was completed. It was only the tallying that was remaining. It was this tallying that he sort the Judicial Review bench to order its restart not the elections.

7.17 The respondent No.2 from the video evidence before court stated she had no result. It was therefore not possible to provide this information as at the 29<sup>th</sup> December, 2007, two days after the casting of votes and she had not filled form 16 nor 17A required to declare a winner. There was technically no results.

7.18 One could therefore understand why ECK in its Legal Notice 12614 did not include the Kamukunji Constituency on the list of Local Government elections that had been countermanded; (on grounds that the ballot papers were invalid).

7.19 Countermand is defined to formally mean

***“to change an order that has already been given, especially by giving a new order”.***

7.20 In this petition, no order had been given by the returning officer to be changed by way of countermand.

7.21 The decision by the Electoral Commission of Kenya

***“to postpone the election and to appoint another date for the holding of the postponed election was within the powers of the commission chair.”***

I say so because the 2 and 3 respondent advocate convinced this court that there are two principle areas of election:-

***i. When voting takes place***

***ii. When tallying announcement and a winner is declared.***

7.22 Voting did take place, although the petitioner brought evidence to show the various irregularities that had occurred. The tallying was interrupted. Due to the grave error by the returning officer who may have succumbed to pressure to announce results before all the ballot boxes were receive, had most certainly compromised the integrity of the said Elections at Kamukunji Constituency.

7.23 I would agree with the principles brought out by the 2 and

3 respondent. That all an election court requires to establish is that the elections were ***legally sufficient; people voted; results counted and results declared***. In the petition before me no results were declared prior to the Judicial Review Case, as there was non to declare.

7.24 I would also agree that Elections are held not in absolute obedience to the law but only requires to be ***“legally sufficient”***. This phrase was used in the decision of:-

**Morgan & Other**

– Versus –

**Simpson and another**

(1975) 1QB151

Lord Denning, M.R., Stephenson and Lawton JJ.

***“a breach of the rules will not automatically invalidate an election for the rules are directory and NOT mandatory and it is sufficient if they are fulfilled” “substantially because they deal with the mode of performing a duty and not the law itself.”***

7.25 In the above case law it further states that:-

***“... if a substantial non- compliance with the law, as to elections is shown, an election will have to be declared void...”***

7.26 Mr. Adere referred this court to the two decision from Tanzania:-

i) **Bura – vs – Sarwatt**

(1967) E.A. 234

(Georges CJ & Bannerman J).

ii) **Mbowe – vs – Eliufoo**

(1967) E.A. 240

(George CJ & Bannerman J) where elections irregularities did not effect the outcome of the votes cast for the winner.

7.27 The same principles were applied and held in the following

Election Petition:-

i) **Joho – versus – Nyanje & another** No. 4

(2008) E P 500

Maranga J. (Mombasa)

ii) **John Kiarie Waweru**

**versus**

## **Beth W. Mugo & 2 others**

### **EP 13/08**

Kimaru J (Nairobi)

7.28 Section 28 of the National Assembly and Presidential Act, Cap 7 states:-

***“No election shall be declared to be void by reasons of a 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 written law, or that the non-compliance did not affect the result of the election.”***

7.29 Did the non-compliance of the Returning officer to tally and announce the results effect the elections in Kamukunji constituency?

7.30 The Petitioner raised various issues of irregularities under taken by the ECK and returning officer, through the presiding officer, being namely:-

#### **i) Polling Station**

a) ECK was required to publish the number of polling stations in the constituency.

They gazetted 149 polling station, later added 8, more without subsequently publishing a gazette notice to this effect. (Reg 6) (of the Act) an explanation was given that there was a gazette notice, but non was provided.

#### **ii) Embossers or seal**

a) The Embossers or seal failed to work. The presiding officer was not well equipped. (Reg. 23 (3)(a) of the Act).

#### **iii) Register of Elections**

There were some polling stations that missed a voters register (Regulation 22 (3) (c) of the Act)

#### **Explanation**

The deputy returning officer would wish to the effected station with a master register and a black book to ensure the electorate voted.

#### **iv) Security**

The presiding officer failed to keep order. (Regulation 24 (1) & (2) of the Act)

#### **vi) Ballot Boxes**

Not all the ballot boxes were delivered together with the sealed packets.

#### **vii) Agents/Form 16A**

The agents did not sign form 16A, nor give their reasons why they did not do so, nor were they given a copy of form 16A, that declared the results. (Reg 35 A of the Act).

7.31 Although it is not mandatory that agents sign form 16A, (Reg. 35A,(5) (6)) it is important that the

presiding officer records the reasons of their refusal to sign the forms confirming the results of the election in each centre, before the results are transmitted to the Constituency Tallying Centre.

7.32 The Independent Review Commission confirmed the irregularities raised by the petitioner. It confirmed that

***“ECK lacked functional efficiency and [was] incapable of properly discharging its mandate”***

7.33 They noted that there was serious defects in the voters register that impaired the integrity of the 2007 elections. A **“permitted irregularity”** was the introduction of ***Black books “in which names of voters had been entered at the time of registration to be used in certain circumstances and for double registration to be allowed to vote, contrary to previous regulations”***. The ECK staff proved to be ill prepared for their task of receiving, verifying, tallying, tabulating and announcing the votes.

7.35 The Independent Review Commission further noted that

***“Though ECK is primarily responsible for the flaws in the 2007 General Elections, Kenyan Society (had) long condoned, if not actively connived [the] preservation of the Electoral process”***.

7.40 I wish to now deal with the Scrutiny of the Ballot boxes.

7.41 In prayers ‘a’ to ‘d’ of the petition, the petitioner had called for scrutiny of the ballot papers and possible recount. During his evidence in re-examination, he indicated to the court that he was no longer interested in persuing the said four prayers.

7.42 Both the 1<sup>st</sup> respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> respondent cried foul. They took issues with this and claimed that by not calling for a scrutiny of the ballot papers, it brought a different perspective to the case. It meant that all of the evidence by the petitioner before this court was hearsay. It also meant that there was no evidence to prove this petition and it should therefore be struck out.

7.43 An attempt by way of two applications, belatedly filed, sought for this court's leave by the 1<sup>st</sup> respondent to access the ballot boxes and later the Form 16A, allegedly said to be inside the ballot boxes. Both requests were declined by this court.

7.44 It has been held in other authorities that scrutiny of the ballot papers cast, can be asked and undertaken at any time of the proceedings. See **Joho’s case** Maraga J.

(Supra).

In the case law of

**William Kabogo Gitau**

**versus**

**George Thuo and 2 others**

(Supra) Kimaru J.

The court declined to scrutinize the ballot boxes on the following reasons:-

**“This could have evaluated the anomaly contained in the results in the said form 17A with the actual ballots cast if it could have been in a position to order for the scrutiny and recount of ballots. Unfortunately, as stated earlier this court could not possibly have ordered for the said ballots to be scrutinized when the integrity of nearly a third [66 out of 231] of the ballots boxes had been seriously brought to question.”**

7.45 The respondents tried to bring out the point in that case the ballot boxes had been tampered with and were more ballot boxes than in this case. Only one box was empty.

7.46 I recall seeing the video and the returning officer say she had 5 to 6 ballot boxes missing despite her having no results. In February 2010, two months and 3 years almost after the polls were held, the ballot boxes were delivered to court. One ballot box numbers was not legible (PA 8,591?). The Deputy Registrar was ordered to go into these boxes together with the parties to verify compliance of Rule 19. To my mind this exercise that was undertaken in both this case and in the Ndolo's case (supra) ought not to have been undertaken under the election petition. The only time the said ballot boxes should be accessed is at the time of the scrutiny of ballot boxes. Apart from there being 39 to 22 results missing, the other issue was that all the 157 ballot boxes were opened, no scrutiny was done but a record of all that was in the box was made. This record revealed that not all the boxes had Form 16A. In the Joho's case, Maraga J recommended that the sealed packets, as required in rule 19, should be placed in a separate and empty ballot box for ease of transportation.

When the rules changed, being that the Returning Officer should not count the votes at the tallying centre but each presiding officer should count the votes at the respective stations, seal the same and place them in a ballot box (empty) and deliver the same to the returning officer; the returning officer would open the sealed ballot boxes for those results only. He or she did not recount the votes but only tallied the results.

7.47 I have diligently gone through the Deputy Registrars, report marked Document "A" and which was presented to Ochieng J and copies given to each party.

7.48 I found about 34 ballot boxes contained packets that were not sealed. Some contained civic and presidential papers and or materials, nothing to do with the parliamentary election (PA 86084; PA85988; PA86093; PA86132)

One sample ballot box No.PA 86138 had no stream or polling station disclosed. It had no seal at all when delivered to the courts although in the exercise before the Deputy Registrar, new seals were placed. This ballot box also had Presidential documents referred to Eastleigh Social Hall. Another sample ballot box PA 85913 had no sealed packets. There was enclosed untouched ballot boxes seals for ballot papers for 2007 December Civil Seals. Form 1B, 11 Muthurwa Polling Centre used ballot papers. There was no stream indicated. There was no results at all in this ballot box.

7.49 I am persuaded by the William Kabogo Gitau case (Supra) that the integrity of the ballot boxes before this Election court had been compromised.

7.50 **The second principle** stated; in election, is that of tallying announcement and a winner is declared. Unless this second process is complete, one cannot interpret this to mean that the voting exercise is over? This second phase is as important as the first phase. It is at the stage of counting the votes before the presiding officer that a recount may be called for but not more than twice. It is later at the tallying of the results an announcement including who the winner is, that an aggrieved party is entitled to move the court.

7.51 Before these two phase are complete and if there is anything "a miss" it is the Electoral Commission who must take decision under Regulation 25A (LN 178/07) depending on the circumstances that arises, and stated thereon. The presiding officers, as stated earlier above, have similar powers within their respective polling stations.

7.52 The original decision of the Electoral Commission of Kenya to postpone the elections for Kamukunji Constituency, that was to be later called at "***the earliest practicable time,***" had been the correct decision

7.53 I now turn to the issue of there being "**no results**" pleaded in the petition. According to the National Assembly Elections [Election Petition] Rules Rule 4(1) states:

***"An election petition shall-***

- a) State whether the petitioner is entitled to petition under Section 44 of the (former) constitution, and*
- b) State when the elections was held and results of the elections and shall state briefly the facts and grounds relied in or support of the petition.*

7.54 Before the trial of this petition began, the 1<sup>st</sup> respondent had argued an application before Rawal J on the grounds that this petition be dismissed for want of results. By her ruling of 18<sup>th</sup> May 2010, the Hon. Judge declined to strike out the petition. Although that decision/ruling is before the Court of Appeal, the 1<sup>st</sup> respondent asked I revisit the matter as I have now heard the full evidence. The former court did not have the advantage of hearing the full evidence.

7.55 The issue arose from another decision of the Court of Appeal Election Petition of:

**John Michael Njenga Muthothu**

**Versus**

**Jayne Njeri Wanjiku Kihara & 2 Others**

Election Petition No. CA 102/2008 at Nakuru

(Omollo, Bosire and O’Kubasu JJA)

In which the Election Petition was struck out for not stating what the results of the elections were.

7.16 From the evidence given, there was no results two days after the votes had been cast. In some instance ballot boxes arrived very late to the tallying station and evidence showed 5 to 6 ballot boxes had not been brought in, even on that second day. This explains why the petitioner said in his petition there were no results. If one examines the affidavit carefully, you would see that this was in reference to the date of 29<sup>th</sup> December 2007. There were no results then. The Returning Officer had left her station on the 28<sup>th</sup> December 2007 to return with the District Elections Co-ordinator. She still announced, there was **no results**.

7.57 This state of affairs prompted the ECK Chair to announce the postponement of the constituency elections. It is then, that the 1<sup>st</sup> respondent came to the Judicial Review Court to compel the 2<sup>nd</sup> and 3<sup>rd</sup> respondent here to disclose the results. The issue therefore of there being no results was due to this incident.

7.58 The petitioner did thereafter disclose in his petition that an announcement of the results was made and declared the 1<sup>st</sup> respondent as the winner of the Parliamentary Elections with a total of 22,614 votes.

7.59 These results were announced, according to the 2<sup>nd</sup> and 3<sup>rd</sup> respondent, in obedience to the court order in the Judicial Review Case 13/2008.

7.60 I would hold that the petitioners did comply with Rule 3(1) (a) of the Act, given the circumstances of this case.

7.61 My task is to now ask myself whether those votes that had been declared were valid or not?

7.62 When the original announcement was made on 28<sup>th</sup> December 2007, that the 1<sup>st</sup> respondent had 9,524 votes, this was interpreted to mean that the 1<sup>st</sup> respondent had won the election. It was the petitioner’s case that those were the results of 23 polling stations out of 157 polling stations.

7.63 The figure of 22,614 votes was arrived at from Form 16A obtained from the 1<sup>st</sup> respondent. The

Returning Officer through the Deputy and Assistant Returning Officer claim that they obtained forms from where they were posted at the stations and from the top of the ballot boxes. Despite this results were still missing.

7.64 I find that the results announced by the Returning Officer on the

11<sup>th</sup> August 2008 could not be credible. The method used at arriving at those figure so obtained almost two to three weeks later could not be relied on. This cannot be termed as a transparent, free and fair elections.

7.65 The ECK has made an announcement that there will be a postponement of the elections. The candidates did not therefore pursue any of their rights, that they may have had, during tallying. The delay to doing so had become in ordinate.

7.26 I hold that the elections were not transparent free and fair.

8. Decision

## **8. Decision**

8.1 I hereby find and declare in this election petition that the results declared on 11 August 2008 arrived at by the Returning Officer was compromised to such an extent that it was wanting and lacked integrity.

8.2 That the Parliamentary Elections for Kamukunji constituency was not transparent, free and fair (Section 17A) and it is hereby declared null and void.

8.3 The first respondent was not validly elected as the Member of Parliament for Kamukunji constituency.

8.4 Under Section 30(1) of the National Assembly and Presidential Elections Act Cap 7, Laws of Kenya this court hereby orders that a certificate to that effect above, shall issue to the speaker of the National Assembly.

9. Election Offence

## **9. Election Offence**

9.1 The petitioner prayed that

***“such election offences and corrupt practices on the part of the first respondent as disclosed and found before this Honourable court be reported to the speaker of the National Assembly”***

9.2 The evidence before this court as shown on the **video** clearly showed the 1<sup>st</sup> respondent use uncalled for and embarrassing language against a lady agent. This breached the Electoral Code of conduct (4<sup>th</sup> schedule of the Act and Section 34(2)) in which the 1<sup>st</sup> respondent committed to himself and his party to have a duty to

***6(a) “... publically and repeatedly condemn violence and intimidation and to avoid the use of language or any and kind of action which may lead to violence or intimidation whether to demonstrate party strength, gain any kind of advantage or for any other reasons.***

9.3 It is the Commissioner, who under Rule 8 of that schedule who would enforce the code. Failure to, the Electoral Commission are permitted under Rule 9 to institute proceedings in the High Court to enforce those rights.

9.4 The Election Offences Act Cap 66 is an Act of Parliament

***“to prevent election offence and corrupt and illegal practices at elections, and for matter incidental thereto and connected therewith”***

9.5 Its commencement date being 20<sup>th</sup> March 1958.

9.6 The Act envisages offences committed before and during elections and incidental there to. It is divided into four parts with;

**Part 1** dealing with preliminaries.

**Part 2** dealing with **offence by any person** relating to **fraud/forgery** /sale of nominations papers, ballot papers etc [Section 3]

Offences relating to the printing of documents and papers resembling register of voters, election cards, sale of elections and aiding and abetting etc. (Section 3B)

Offences by election officers [Section 4]

**Part 3** dealing with corrupt practices touching on

personating, using under influence

(Section 7 & 9)

Bribery (Section 10)

**Part 4** dealing with illegal practices for instance certain expenditure. Section 12.

9.7 What the law provides in **Part 2** (Section 4) that the offence is cognizable and carries a maximum of 5 years imprisonment. A **cognizable** offence means ***“an offence which a police officer may, in accordance with the 1<sup>st</sup> schedule or under any law for the time being in force arrest without a warrant.”***

(Section 2 Penal Code, Cap 63).

9.8 Under this part, before one is arraigned in court, a sanction by the Attorney General must be obtained.

In **Part 3**, Section 11 provided that;

**(a) An offence committed for personating treating, undue influence or bribery is a cognizable offence and carries imprisonment term not exceeding 5 years.**

**(b) An offence committed for prints, publish, distributing ... any advertisement, hand bill, placard or poster ...that doesn't have the address of the pointer or publish to imprisonment of up to 5 years imprisonment.**

In both (a) and (e) above the sanctions of the Attorney General is required.

This is not the case for 11(1) C making or publishes before or publishes before or during any elections for purpose of affecting the return of any candidate any false statement, character of the other candidate.

**Or in (d) pending the election or any false statement of withdrawal under (c) and (d).**

A person may be arrested without a warrant and taken to court without reference to the Attorney General.

9.9 In this election petition the circumstances are different in that the allegation that the respondent had interfered with Form 16A and delivered the same to the chair, who acted upon them to influence his victory for the election seat.

9.10 Apart from the prayer, this court finds no related offence under the Act.

9.11 I will therefore find that no election offence had been proved.

10. Costs

10. **Costs**

Rule 34

The National Assembly and Presidential Act.

10.1 Each of the party herein prays that costs be awarded to them.

10.2 **The Petitioner**, relied on the case law of:-

i) **The Republic**

v

**Nairobi Business Premises Rent Tribunal & Others**

**Exparte Karasha**

(1989) KLR 147

**Simpson and Scriven JJ**

That held costs as

**“A general rule follow the event as between the applicant and the party who improperly procured**

**the impugned order unless there are special circumstances that make it proper for an exception to be made.”**

ii) **Mariga V Musila**

(1984) KLR 251

That stated on the issue of costs. Under section 27 of the Civil Procedure Act, Costs of and incidental to all suits are in the **discretion** of the court or judge and the court or judge has full power to determine by whom and out of what properly and to what extent costs are to be paid and to give all necessary directions.

aa) **The Bullock Order**

is cost to be paid to a successful defendant and added to those to be re-covered from the appellant in a main appeal

**(Bullock**

**Versus**

**London General Omnibus Co.**

[1970]KB264]

bb) **The Sanderson Order**

where there are two defendants the court has to order the unsuccessful defendant to pay costs of a successful defendant.

**Sanderson**

**versus**

**Blyth Theatre Co**

(1903) 2KB533

cc) **Mayer v Harte & Others**

(1960) 2 All ER 840

Discretion of the court to award costs.

10.3 **The 1<sup>st</sup> Respondent**

i) Costs should follow the events.

ii) Allegations against the 1<sup>st</sup> respondent were frivolous

Costs should be paid by 2 & 3 respondent.

10.4 **The 2<sup>nd</sup> & 3<sup>rd</sup> respondent**

i) That no cost should be awarded against the 2<sup>nd</sup> & 3<sup>rd</sup> respondent on grounds that they acted in pursuant

of the court's order.

ii) The ECK's chairs' position in this matter was overruled in the Judicial Review case Misc 13/08 that he was to:-

***"...go back to Shauri Moyo YMCA and whatever you do, end with the announcement of the court"***

***"What would 2& 3 respondent have done in the face of such on order of a competent court? They did what a good citizen of this country could do. They obeyed and gathered at Shauri Moyo YMCA, that even [Mr.] Kortom got it right, and announced the results".***

The advocate relied on the case law of said **Said Hemed Said versus Ibrahim Salim Abdalla Mwaruwa (Election Petition 1183 Sachdeva, Aganyanya, Aluoch, JJ** (Petitioner paid the cost).

4. Under Rule 34 (a) of the Act, it provides for costs under the National Assembly and Presidential Elections and it is not necessary under the Civil Procedure Rules. This rules states:-

***" all costs of and incidental to the presentation of a petition and it's the proceedings consequent therein shall be defrayed by the parties to the petition in such matter and in such propositions as the Election Court may determine, regard being had to:-***

***a) The disallowance of any costs which may, in the opinion of the election court, have been caused by vexations conduct, unfounded allegations or unfounded objections on the petitioner or the respondent, and***

***b) The discouragement of any needless expense by throwing the burden of defraying it on the parties by whom it has been caused."***

**"Whether such parties are or are not on the whole successful."**

10.5 I noted that there were 32 applications (oral or otherwise) that had been raised before this court during the hearing of this petition. There were 5 to 6 applications, including a two judge bench on a Constitution Reference matter brought and filed by the 1<sup>st</sup> respondent and one oral application by the petitioner, so raised before Rawal J. There were 5 application brought and filed by the 1<sup>st</sup> respondent before Ochieng J.

10.6 Some of the application raised before the two other judges may have had little to do with the petition. No list of objections in recriminatory case was filed (Regulation 8).

10.7 I hereby award costs to the petitioner.

10.8 I find that the 2 & 3 respondent on taking the stand that they acted according to the court orders to announce the winner, should have relied on rule 33 (1) and countermanded that they had no intention to oppose the petition. This being in line with their affidavit before the Judicial Review bench in case Misc application. 13/08.

10.9 They stood by the 1<sup>st</sup> respondent and even declined to call two of their returning officer (2<sup>nd</sup> respondent and the assistant returning officer).

10.10 I find that there will be costs against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents jointly and severally, unless otherwise stated in **my 32 ruling** of whom of the respondents, would specifically pay the cost. Where it is in the cause, the three respondents are to pay the costs as stated.

10.11 Any expenses, under Rule 34(b) would be borne by the 1<sup>st</sup> respondent.

11. Final Orders

## **11 In Summary**

### **11. Final Order**

11.1 The Parliamentary Elections for Kamukunji Constituency was not transparent, free and fair.

11.2 The first respondent was not validly elected as the Member of Parliament for Kamukunji Constituency.

11.3 A certificate to that effect shall issue to the speaker of the National Assembly.

11.4 There was no proved election offence.

11.5 There will be costs to the petitioner to be paid jointly and severally by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent respectively.

11.6 Any expenses incurred under rules 34(b) of Act is to be borne by the 1<sup>st</sup> respondent.

Dated this 27<sup>th</sup> day of January 2011 at Nairobi.

**M. ANG'AWA**

**JUDGE**

### **Advocates**

M/s S.O. Owino instructed by S. Owino & Co. Advocates for the petitioner and assisted by A. M. Yusuf, M. Rachier (Partially)

M/s K.Mungai instructed by M/s Kinoti Kibe & Co. Advocates for the 1<sup>st</sup> Respondent assisted by I. Bitok and M. Chelegat (partially) J. Gaita (partially)

M/s Adere instructed by Adere & Co. Advocates for the 2<sup>nd</sup> & 3<sup>rd</sup> respondents