



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

ELECTION PETITION NO.2 OF 2008

IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT,
CHAPTER 7, LAWS OF KENYA

AND
IN THE MATTER OF THE ELECTION OFFENCES ACT, CHAPTER 66 OF THE LAWS OF
KENYA

AND IN THE MATTER OF THE ELECTION FOR IKOLOMANI CONSTITUENCY

BENARD SHINALI MASAHA PETITIONER

V E R S U S

DR. BONI KHALWALEFIRST RESPONDENT
ELECTORAL COMMISSION OF KENYA SECOND RESPONDENT
JANE WASILWA THIRD RESPONDENT

J U D G M E N T

Introduction

1. On 27th December 2007, Kenya held its most controversial General Elections yet and which remains the subject of debate and contest to-date. The results and repercussions therefrom are still etched in the painful memories that linger in the minds of all Kenyans. Ikolomani Constituency is one of the constituencies in which the results of the Parliamentary Elections conducted at the time, have been contested by Bernard Shinali Masaka, the Petitioner. In his Petition dated 24.1.2008, he seeks the following prayers;

- a) *“That it be ordered that there be a scrutiny of the votes recorded as having been cast in the Parliamentary election in Ikolomani Constituency.*
- b) *That it be ordered that there be a scrutiny of the rejected and spoilt ballot papers in the Parliamentary elections in the Ikolomani Constituency.*
- c) *That it be ordered that there be a recount of the ballot papers at the elections in the Parliamentary elections in all the Polling Stations in Ikolomani Constituency.*
- d) *That the said Parliamentary elections held on 27th December 2007 in Ikolomani Constituency be determined and declared null and void.*
- e) *That the said election of the 1st Respondent to the National Assembly be declared null and void.*

- f) *That it be determined that the 1st Respondent was not and has not been validly elected as the member of the National Assembly for Ikolomani Constituency.*
- g) *That there be a scrutiny of the counterfoils of the votes cast.*
- h) *That the Respondents be condemned to pay your Petitioner's costs of this petition and matters incidental hereto.*
- i) *That such other or further orders be made as the Honourable Court may deem just.*
- j) *That upon nullifying the above elections this Honourable Court be pleased to direct the Electoral Commission to engage Electoral Officers from another Constituency or as it deems fit.*
- k) *Any other relief that this Honourable Court may deem fit to grant."*

2. In the elections, the Petitioner, the 1st Respondent and others were all candidates, and it was the 1st Respondent who was gazetted as having been elected to represent Ikolomani in the National Assembly. He was certified to have garnered **8,386** votes while the Petitioner was number two and was certified to have garnered **8,121** votes and it is agreed that the difference in votes was therefore 265 votes, a very small margin.

3. The duty of this court is to analyze the evidence presented and determine whether the election was conducted in accordance with the law and satisfy itself that the allegations set out in the Petition and the evidence in support thereof are sufficient proof of the allegations made. The burden of proof, as I understand the law, lies squarely on the Petitioner, because, he who alleges, must prove.

Case for the Petitioner

4. The case for the Petitioner can be summarized as follows;

5. Although he swore Affidavits on 2.10.2009 and on 7.10.2009 he largely relied on the Affidavit, annexures thereof and the oral evidence of one, Graham Timothy Songwa (hereinafter referred to as "Songwa"), on the disputed question of the conduct of the election and the subsequent audit of the results. I will return to that evidence in detail, later, because that was the cornerstone of his case. The other issues raised in any event were:

i) Alleged violence, assault and threats to voters – on this point, **Nicholas Ogondo Mwenesi**, testified that on 27.12.2007, violence and assault on voters took place at Ituluvini and Luvambo Polling Stations and that he was able to confirm that fact because he was a civic candidate for the Idakho South Ward and his political rival, one David E sese Kwatsima, was the one who engineered the violence and it was the said E sese who assaulted one, Benedetta Mukoto and Dorah Iminza Kinangoi, would be voters in the election.

Further, **Maurice Hassan Imbeyi** stated that on 27.12.2007, he was assaulted by David E sese who was a civic ward candidate and that although he filed criminal charges against the said E sese, he later withdrew the same and he had no complaint in that regard against either the said E sese or the 1st Respondent.

ii) Allegations of witchcraft, oathing, devilish and satanic practices – it was the evidence on record that the 1st Respondent on 14.12.2007 hired traditional circumcisers at Makhokho market and the said persons administered oaths to would be voters with a view to coercing them to vote for the 1st Respondent. The evidence in that regard was tendered by **Henry Vulemi Mugaizi**, who also stated that on 19.12.2007, the 1st Respondent touched pregnant women with money pressed onto their stomachs with the intonation that they should vote for him or lose their unborn babies through a bad omen. The incident allegedly took place at Shisen Primary School during a political rally.

Turning back to the evidence regarding the general conduct of the elections at Ikolomani Constituency, it was the Petitioner's case that;

iii) The 2nd and 3rd Respondents committed election offences in that they, or their agents, and officers acting under them, made false entries regarding the election results and refused to allow the Petitioner's agents to sign the relevant election return forms. In his evidence, the Petitioner complained that at polling stations such as Shiduha and Matundu, his agents were never allowed the opportunity either to see, scrutinize or sign the Form 16 As and that the election results were being read from a foolscap paper which they never had access to.

iv) The 2nd and 3rd Respondent failed to ensure that the tallying centre at Makhokho Primary School was free of interfering influences. The Petitioner and his brother, **Maclean Shinali**, were allegedly present during tallying of votes and their evidence was that the 3rd Respondent allowed members of the public to enter the Tallying Hall and that the tallying exercise was thereafter rendered chaotic and unmanageable.

v) The Form 16As that were the basis of the tallying exercise were not genuine because at the polling stations, the Petitioner's agents were locked out, were stopped from scrutinizing the ballot papers and other election material before voting and during the counting exercise, and they were unable to verify the Form 16As, neither were they able to authenticate and/or express their objections to the voting exercise. Maclean Shinali added that during tallying of votes, although a recognized agent of the Petitioner, he was not given any writing material and he had to use the back of an Election poster to tally the results as they came in from the Polling stations.

vi) That the tallying and "totallying" of the votes cast was not accurate and the results contained in the Form 17A were false, fictitious, unlawful and fraudulent. The Petitioner, Maclean Shinali and Graham Timothy Lusava Songwa gave evidence that the 3rd Respondent mishandled the tallying exercise to the extent that the results she announced could not have been accurate. In his Affidavit sworn on 2.10.2009, Songwa stated that he was hired by the Petitioner to audit the election results and he produced a report dated 20.1.2009 in that regard. According to him, the audit was based on information obtained from the Petitioner, the election poster on which Maclean Shinali tallied the election results, some of the Petitioner's polling agents and Henry Vulemi Mugaizi aforesaid.

6. I have elsewhere above stated that the Petitioner largely relied on the audit report by Songwa to show that the elections under dispute were conducted in an unfair and unlawful manner and that the results thereof could not have been accurate or genuine. I deem it appropriate to reproduce paragraphs 18-25 of the Affidavit sworn by Songwa on 2.10.2009 as these paragraphs contain a concise summary of his findings. They read as follows;

"18. THAT I must point out that using the documents [above] I have compiled a 43 page report and 3 tables namely;

(a) Counting Agent Analysis as per the Returning Officer – using counting agent paper – the poster sheet that I have mentioned earlier.

(b) Counting Analysis Table 2 – Summary of form 17A page 2 analysis of the original of figure 1913 votes of Khalwale 1st provisional results which was a borrowing from Shitsama's tally.

(c) Information I have gathered from your [Petitioner's] counting agents. I was not able to get tally results for or anything about 9 candidates namely Atema, Khamati, Kubasu, Kwimba, Lijoodi, Lukunza, Mbapale, Okwanda and Shitukhu. Counting agent Mr. Vincent Shivachi was to record information tally of these 9 candidates but for some unexplained reason he never produced a record of the 9 candidates tally as requested. Counting agent Mr. Maclean Shinali was to record information tally on Khalwale, Shinali and Shitsama. I have obtained a copy of his record to assist in the analysis. This copy has been reproduced as counting agent analysis as per returning officer

announcement with 2 columns each of the three (sic). The 1st column of each per counting agent recording and column 2 is each of the three candidates' cumulative total.

19. THAT I do produce to the court true copy of the report which I mark GTLS – 4.

20. THAT I also produce to the Court the bundle of documents that I gathered for the task at hand. I mark the bundle GTLS – 5. In the bundle is a document index giving arrival sequence, centre name and centre number to add value to counting agent record.

21. THAT I would like to record the assistance I gathered from the Petitioner's agents and others as follows e.g. Mrs. Rael Mwinamo at Lirhembe polling centre 161/026 door A, who gave me form 16A and other materials given to her at the end of the polling exercise. Other agents were Dereck Mudi, Makhobi at Mbaka C/No.161/062. Ernest Ikutwa Busiega at Ibuka C/No.161/059, Mick Murunga at Busilwa C/No.161/042, Saul Ayiya at Shirandalo C/No.161/043, Mary Chitai Peri at Shitecha C/No.161/036, Agneta Munyeshi at Shijiko C/No. 161/032, Joshua Murunga at Shichinji C/No.161/011, Angelina Isalambo at Isulu door B, Antony Mumia at Shibunama C/No.161/008 and Julius Khatsika at Matundu C/No.161/003 for door A and B. They co-operated as best they could. Other agents e.g. Jackline Ligonu, Silas Mbuyi at Mumbetsa C/No.161/049, Leonida Amwoka at Shimanyiro door A, Henry Kakaya at Mwikhomo C/No.161/015, Mary Ukanga at Matundu door B, all gave their reports to Vincent Shivachi. Vincent Shivachi has not surrendered these reports to me for perusal. Other candidates Andrew Anyika at Shikondi C/No.161/051, Ainea Inyanza Mutsotso at Shiduha C/No. 161/014, Thomas Shihemi at Shamusinjiri C/No.161/015, Henry Lukunza at Eregi Mixed 161/041 all gave their reports to Henry Mugaisi. Henry Mugaisi has not surrendered these documents to me. Other documents from Madivini 161/028, 2 streams and Ishieywe C/No.161/040 were given to Councilor Mwenesi, who had not surrendered the documents to me by the time I was compiling the report.

22. THAT I make the following observations by way of highlights on the report I made and I have produced to the Court;

a. Running through arrival sequence (1) Ichina C/No.161/004 to (63) Matundu C/No.161/003, I have the following comments to highlight.

1. On page 2 of my report, Iremele C/No.161/003, Lijoodi had 94 votes as recorded by polling agent and Form 16A was not issued. The entry on form 17A is 93 votes.

2. On page 2 of my report, Erechero C/No.161/058, the agent has recorded 1 rejected vote which is not recorded on form 17A. The agent has recorded 103 total votes issued out whereas form 17A has 102, with one vote rejected. It is my belief that the 1 extra vote was used [in] Khalwale's tally. The rejected vote has not been shown on form 17A.

3. There has been an advance of 99 votes to Khalwale and 30 votes to Shinali. Counting agent analysis as per returning officer announcement, no centre name against these figures. The two figures are included in the candidates totals of the 1st provisional results and 2nd provisional results.

4. On page 3 of my report, Imulama C/No.161/017, Khalwale figure recorded by counting agent as announced was 71 votes, whereas 77 votes has been recorded on form 17A, up by 6 votes.

5. On page 6 of my report, Ibuka C/No.161/059 Khalwale's figure recorded by counting agent as announced was 53 votes, whereas 63 votes has been recorded on Form 17A, up by 10 votes given to Khalwale.

6. On page 6 of my report, Shitoli C/No.161/025, on form 16A, Lukunza's name is not appearing, meaning that he got nil votes. Total valid votes distributed are 448 against what is shown as valid votes of 453 with no rejection. In Form 17A, Lukunza has been given 5 votes from nowhere, but these were votes displaced I believe as a result of manipulation. Shinali's votes recorded by counting agent as 74

and on Form 17A recorded as 73.

7. On page 7 of my report, Shikombelo C/No. 161/047, the polling agent recorded 7 votes rejected. The polling agent was not issued with Form 16A. But returning Officer recorded 5 rejected votes on form 17A, 2 votes disappeared.

8. On page 9 of my report, Makhokho C/No.161/018 door A. there are two sets of form 16A with varying results that show their preparation was incorrect. One form 16A has total valid votes of 326 and the other form 16A has total valid votes of 328 whereas form 17A shows 325 votes. The two forms have been stamped and signed by the returning officer Nashon G. Wafula. Makhokho C/No.161/018 door B where rejected votes have been recorded, there is alteration as to the number. Therefore spoiled/rejected figure is not well defined. Makhokho C/No.161/018 door C form 16A has a total valid votes 264 and form 17A show total valid votes as 262.

9. On page 11 of my report Shivagala C/No. 161/050 the agent report has three votes rejected which are not recorded on form 17A. The total valid votes as recorded on form 16A are 237 and not 272 recorded. Agent report has 3 versions, all different information from form 16A.

10. On page 12 of my report, Shavihiga C/No.161/037, Shinali's votes were 156 as announced by the returning officer recorded by counting agent and Form 16A has 166 for Shinali. Form 16A shows total valid votes as 292 (as distributed to respective candidates) but above or 2 valid votes 295 i.e. giving a difference of 3 votes yet rejected votes are 4. The 4 rejected votes are shown in form 17A with valid votes 292 = 296 votes cast. The information on form 16A is not consistent with that on Form 17A.

11. On page 12 of my report, Mutaho C/No.161/012 door A according to polling agent report Khamati got zero, Kwimba got 7 votes, Lukunza zero, and Mbapale got zero. But on Form 17A Khamati got one vote, Kwimba got Zero, Lukunza got 7 votes, Mbapale got one vote and no Form 16A issued out. The Polling agent information is totally different from information on Form 17A by the returning officer.

12. On page 14 of my report, Shirumba C/No. 161/006, the rejected votes are 34 which is 4% of the total turnout which I feel is a high percentage and no comments of the presiding officer about it. Dr. Khalwale's tally was announced as 256 votes and on Form 17A has been recorded as 259 votes.

13. On page 16 of my report, Savane C/No.161/021 door B there is two sets of results declared on two Form 16A separately, 1st Form 16A giving Shitsama 24 votes and the other Form 16A giving Shitsama Nil. However Form 17A gives Shitsama 24 votes. The three forms (i.e. two Forms 16A and one Form 17A) are giving confusing results.

14. On page 16 of my report, Ibwali C/No. 161/046, total valid votes is 299 as per Form 16A and entry on Form 17A distributed but valid votes column is reading 298 which could be wrong. On Form 17A, 6 votes have been declared rejected but this record is not on Form 16A. The figure announced at tally centre for Khalwale and Shitsama were 53 and 38 respectively and recorded on Form 17A as 63 and 38 respectively. Therefore Khalwale received 10 extra votes.

15. On page 20 of my report, Shihalia C/No. 161/038 the figure announced at tally centre by returning officer and recorded by counting agent for Khalwale was 135 votes instead 175 votes was recorded on Form 17A. Therefore Khalwale received 40 extra votes.

16. On page 20 of my report, Musoli C/No.161/001 door A the returning officer announced 15 votes for Khalwale whereas 68 votes were recorded on Form 17A, a difference of 53 votes. There are two sets of Form 16A, one with 7 votes rejected and the other with 6 votes rejected.

18. On page 21 of my report, Musoli C/No.161/001 door B, the returning officer announced 49 votes for Khalwale whereas returning officer recorded 67 votes on Form 17A, a difference of 18 votes.

19. On page 22 of my report, Imbale C/No. 161/013, Lukunza had 12 votes recorded on form 17A but Form 16A, Lukunza's name is missing.
20. On page 22 of my report, Lirembe C/No.161/026 door A Khalwale had 23 votes as recorded on Form 16A, yet on Form 17A returning officer recorded 26 votes, a difference of 3 votes.
21. On page 24 of my report, Lusui C/No.161/052 Shitsama's 52 votes were not announced at tally hall but later entered on Form 17A. I have picked same figure and included it in Shitsama tally.
22. On page 24 of my report, Lusiola C/No. 161/057 Khalwale's votes as announced by returning officer and recorded by counting agent were 7 votes, but not 67 shown on Form 17A. There were 3 rejected votes not recorded on Form 17A. There were 3 rejected voted not recorded on Form 17A. Therefore Khalwale was given 60 extra votes.
23. On page 25 of my report, Ishieywe C/No. 161/040, there are two sets of conflicting figures on Form 16A.
24. On page 27 of my report, Shianjero C/No. 161/033, Khalwale's votes as announced by returning officer and recorded by counting agent were 157 votes, whereas 167 votes has been recorded on Form 17A – a discrepancy of 10 votes.
25. On page 29 of my report, Isulu C/No.161/007 door A total votes issued out to voters were 445 as per polling agent record. The figure of total valid votes 477 is genuine. Cross-casting of the votes as written on Form 17A brings valid votes to 476 which are inconsistent with polling agent report. The difference of 32 votes (477 – 445) was a manipulation, it seemed to me going by the pattern observed, to obviously favour Khalwale. I have thus adjusted Khalwale's figure to 180 to bring into balance.
26. On page 30 of my report, Isulu C/No. 161/007 door B the polling agent Angeline Isalamba has decided to keep her report and is not willing to release it. Therefore I am not able to compare and contrast the vote count at Isulu polling centre door B.
27. On page 30 of my report Lubambo C/No. 161/030 the polling agent recorded 3 votes rejected which have not been shown on Form 17A. The tally for Shinali was announced as 116 votes but entered on Form 17A as 115 votes. The 3 votes were used in manipulation.
28. Reference is made to Counting Agent Analysis Table as per returning officer announcement; there is a figure of 186 votes advanced to Khalwale just before Madivini C/No. 161/028. The figure is duplication for Khalwale's votes in door A.
29. On page 35 of my report Madivini C/No.161/028 door A Form 17A total cross cast is correctly 403 valid votes and not 440 valid votes an overcast of 37 votes which were used for manipulation. The polling agent record is not available.
30. On page 35 of my report, Madivini C/No.161/028 door B Form 17A total cross cast is correctly 365 valid votes and not 331 valid votes. The polling agent record is not available.
31. On page 38 of my report, Bushangala C/No. 161/002 door A there are two sets of Form 16A giving Shitukhu one vote. But Form 17A records Shitukhu to have 3 votes which is an irregularity. The recording on Form 17A under valid votes 590 which is not the cross cast total. Total turnout is 610 as per number of ballot issued out and as recorded by polling agent. There are 20 votes not accounted for.
32. On page 39 of my report, Bushiangala C/No.161/002 door B the cross cast total is 199 valid votes and not 196. The polling agent Mr. Morris Muhenje is not willing to release his record.
33. On page 40, is a summary of figures in Ikolomani tally table appended in this report. The

detailed figures are arrived at by use of counting agent record Form 16A and Form 17A and Polling Agent Report. The figures can be verified by reference to the Ikolomani tally table.

23. THAT I point to the Extra votes as detailed in page 41 are explained in my notes above – reports Highlights - items 2, 3, 5, 6, 14, 15, 16, 17, 18, 20, 22, 23, 25, 27, 28, 29 and 30. The total extra votes figure is 637 used in calculation at page 41 which has an effect on Khalwale results which is in three versions.

24. THAT I note that Form 17A of the Returning Officer was not dated or signed by all candidates or agents and the amounts recorded in words differ from figures. The Form 16As were not duly lawfully completed and missing signatures lack statutory explanation by returning officers.

25. THAT I believe that there is need for a careful review of the results by the court, I think that the petition is not frivolous and raises important issues.”

7. In addition, Songwa produced by way of attachments to his Affidavit, copies of Form 16As for the following Polling Stations;

- a) Bushiangala Stream A
- b) Shibuname
- c) Ituluvini
- d) Shiseno
- e) Shikumu
- f) Eregi Mixed
- g) Imuliru
- h) Ivole
- i) Kaluni
- j) Shiveye
- k) Mwikhomo Primary School
- l) Isulu
- m) Shimanyiro
- n) Shianjetso
- o) Ishieywe Primary School
- p) Kimingini
- q) Lusiola
- r) Lusui
- s) Lirhembe

- t) Imbale
- u) Ikhulili
- v) Musoli Girls Primary School
- w) Musoli Girls Primary School
- x) Shihalia primary School
- y) Shitechia
- z) Ibwali
- aa) Savane Primary School
- bb) Lwenya Primary School
- cc) Shirumba
- dd) Shirandalo
- ee) Shavihiga
- ff) shivagala
- gg) Makhokho Primary School
- hh) Iluhya
- ii) Shitoli
- jj) Mbaka
- kk) Irechero
- ll) Ichina

8. He also annexed a number of hand-written notes from the various station to make the point that polling agents were not given writing material and had to use any available piece of paper to do their additions during counting of votes. He also produced a Declaration of Results (Form 17A) signed and stamped by the 3rd Respondent indicating that the 1st Respondent had been elected as the Member of Parliament for Ikolomani Constituency with **“8,386”** votes but in words the figure was given as **“Eight Thousand Eight Hundred Eighty Six”** i.e. **8886** votes.

9. Further in his report, Songwa prepared a table partly reproduced below as follows at (page 69 of the report).

COUNTING AGENT ANALYSIS AS PER RETURNING OFFICER ANNOUNCEMENT

ARRIVAL SEQUENCY	CENTRE NAME	C/NO.
1.	ICHINA	161/004
2	IREMELE	161/056
3.	IRECHERO	161/058
4.	MBAKA	161/062

5.	IMULAMA	161/017
6.	MUKOYANI	161/045
7.	IBUKA (ECD)	161/059
8.	MASIYENZE	161/053
9.	SHIKONDI	161/051
10.	MUSASA	161/054
11.	SHITOLI	161/025
12.	ILUYA	161/039
13.	SHIKHOMBERO	161/047
14.	IVONDA A	161/019
	B	161/019
15.	SHIDUHA	161/014
16.	MAKHOKHO A, B, C	161/018
17.	BUSILWA	161/042
18.	SHIVAGALA	161/050
19.	SHAVIHIGA	161/037
20.	MUTAHO A, B	161/012
21.	BURENDWA	161/010
22.	SHIRANDALO	161/043
23.	SHIRUMBA	161/006
24.	LWENYA	161/024
25.	SAVANE A	161/021
	B	161/021
26.	IBWALI	161/046
27.	SHAMUSINJIRI	161/015
28.	SHISELE	161/038
29.	MALINYA A, B, C	161/005
30.	SHITECHIA	161/036
31.	SHIHALIA	161/044
32.	MUSOLI A	161/001
	B	161/001
33.	IKHULILI	161/034
34.	IMBALE	161/013
35.	LIRHEMBE A, B	161/026
36.	MUMBETSA	161/026
SECOND PROVISIONAL RESULTS		
37.	LUSUI	161/052
38.	LUSIOLA	161/057
39.	KIMINGINI	161/022
40.	SHIEYWE	161/040
41.	SHINJIKO A	161/032
	SHINJIKO B	161/032
42.	SHANJETSO	161/033
43.	SHICHINJI	161/011
44.	SHIBWE	161/060

45.	SHIMANYIRO	161/016
46.	ISULU A & B	161/007
47.	LUBAMBO	161/030
48.	MWIKHOMO	161/048
49.	SHIVEYE	161/023
50.	KALUMI	161/029
51.	SHIKOKHO	161/027
52.	LWANASWA	161/035
53.	IVOLE	161/061
54.	IMULIRU	161/020
	MATUNDU	161/003
	MADIVINI A & B	161/028
	ITULUBINI	161/063
	MALABA	161/031
	EREGI MIXED	161/041
	SHISENO	161/055
	SHIKUMU	161/009
	SHIBUNAME	161/008
	BUSHIANGALA	161/002

10. I should restate here that I only reproduced part of the form at page 69 and I should add that Songwa's point would seem to have been that there was a deliberate delay in bringing in votes from certain stations to the Tallying Centre with a view to manipulating the results to favour the 1st Respondent hence the use of the term, "*arrival sequence*". I will in due course say something about that issue.

11. The Petitioner has made one other point which I wish to raise at this stage; that during an inspection exercise that I ordered on 9.6.2010, a number of ballot boxes were found not to contain the requisite Form 16As. The stations were Malinya A, Shamusinjiri, Savane A, Madivini, Shihalia, Ireleme and Ibuka. Further, that Sixty-Five 16As were unsigned by either the candidates or their agents; Fifteen had no information of total registered votes, total votes cast, and total rejected votes; Twenty-One had less than the twelve candidates recorded on them; Fifty-Eight had no statutory comments of the respective presiding officers; Thirty of them did not have the 2nd Respondent's stamp and Seventy-Two did not have reasons why the agents did not sign the Form 16As.

The Petitioner has therefore urged this court to reject the results announced by the 3rd Respondent for reasons that the anomalies noted were too grave to have produced a credible outcome in the election.

1st Respondent's case

12. The 1st Respondent and his witnesses, in their Affidavits and in oral evidence, made the point that he won the election "*fairly and squarely*." He denied all the allegations of electoral misconduct on his part or at all. He particularly denied that he engaged circumcisers to intimidate voters and denied that circumcision songs are sacred and should only be sung in circumstances that instill fear. He treated the court to a video show where the popular Luhya circumcision song titled, "*Mulongo*", was being sung in the wedding of Television actor, Charles Bukeko a.k.a. "*Papa Shirandula*" and also in a bar and restaurant, somewhere in the Nairobi Metropolis.

13. He denied organizing, participating in or committing any acts of violence on any voter before or during the voting exercise and denied all the allegations made by Maurice Hassan Mbeyi and Nicholas Ogondo Mwenesi in that regard. He also denied the allegation that on 19.12.2007, he attended a rally at Shiseno Primary School and denied that on that or any other day, he gave money to pregnant women

while touching their stomachs. He however admitted that on that day he was in the Constituency and attended two political rallies at Iremele and Makhokho markets and later went to Shikoye market on a meet-the-people-tour.

14. Regarding the allegation that he used traditional circumcisers to intimidate voters with their drums and string instruments, he stated that on 14.12.2007 when the incident was alleged to have happened, he was attending his daughter's graduation ceremony at Kenyatta University and that he only returned to Ikolomani Constituency on 15.11.2007 in the evening and could not therefore have been at the place where the incident allegedly took place, if at all.

15. On the tallying exercise at Makhokho Primary School, it was the 1st Respondent's case that the exercise was conducted without controversy save that when the same had been concluded and on sensing defeat, the Petitioner was advised by one, Fred Lugalia, to storm out and so the former did so together with one, Seth Lugonzo and others of his supporters, and no objection was thus made to the final result by anyone.

16. Zinzi Shinangoi Khalwale, daughter of the 1st Respondent confirmed that on 14.12.2007 her father attended her graduation ceremony at Kenyatta University.

17. Joel Ingoi Mwilitsa corroborated the 1st Respondent's contention that he was not at Shiseno Primary School on 19.12.2007 and stated that he was with the Petitioner the whole of that day, and knew his movements and that at no time did the two and their entourage go to Shiseno market as alleged.

18. One Mathew Sobonkwa Esese, the 1st Respondent's agent at the Makhokho Tallying Centre stated that he was at the centre from 4 p.m. on 27.12.2007 until 2 p.m. on 28.12.2007 and was present when the Form 17A was being prepared. He testified to the fact that two Form 17As were prepared; one was found to have mistakes and so a second one was prepared and agents present signed both. It was his further evidence that the Petitioner and his supporters stormed out of the Tallying Centre after the first Form 17A was prepared and only because he realized that he had lost the election and not because of any irregularity in the tallying process.

19. The 1st Respondent sought the dismissal of the Petition because in his view, it was completely without merit.

2nd and 3rd Respondent's Case

20. The 3rd Respondent testified on behalf of herself and the 2nd Respondent. It was the totality of her evidence that the election was conducted lawfully and that the results that she announced reflected the correct position – that the 1st Respondent was the winning candidate. She produced copies of the Form 16As for all the Polling Stations in Ikolomani Constituency and admitted that they had a number of errors and mistakes in that they were not fully filled with the required details (I will later say what these were). She nevertheless stated that she used them in tallying the votes and later announced the final tally before filling and signing the "final" Form 17A although the one produced by Songwa was also filled and signed by her before she realized that it had some mistakes and errors which she sought to rectify in the "final" Form 17A.

21. The 2nd and 3rd Respondents take the view that the admitted errors and mistakes did not affect the result of the election and so the Petition ought to be dismissed.

The Law Governing Issues at Hand

22. I have read the submissions by Mr. Mwenesi for the Petitioner, Ms Aullo for the 1st Respondent and Mr. Mukele for the 2nd and 3rd Respondents. All aptly set out what the legal regime is as regards the issues in contest and I wish only to highlight the following matters of law;

23. Section 44 of the old Constitution provides as follows;

“S.44 (1) – The High court shall have jurisdiction to hear and determine any question whether –

(a) a person has been validly elected as a member of the National Assembly, or

(b) the seat in the National Assembly of a member thereof has become vacant.

(2) An application to the High Court for the determination of a question under subsection (1) (a) may be made by any person who was entitled to vote in the election to which the application relates, or by the Attorney General.

(3) An application to the High Court for the determination of a question under subsection (1) (b) may be made –

(a) where the Speaker has declared that the seat in the National Assembly of a member has by reason of a provision of this Constitution become vacant by that member, or

(b) in any other case, by a person who is registered a voter in elections of elected members of the Assembly or by the Attorney-General.

(c) Parliament may make a provision with respect to –

(a) the circumstances and manner in which, the time within which and the conditions upon which an application may be made to the High Court for the determination of a question under this section and; -

(b) the powers, practice and procedure of the High Court in relation to the application.”

24. Section 23 (1) and section 26 of the National Assemblies and Presidential Elections Act, Cap. 7 provides as follows;

“S.23 (1) – In the exercise by an election court of its jurisdiction -

(a) witnesses shall be summoned and sworn in the same manner as nearly as circumstances admit as in a trial by the High Court in the exercise of its original civil jurisdiction and shall be subject to the same penalties for the giving of false evidence;

(b) the election court may compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy, and a person refusing to obey the order shall be guilty of a contempt of court;

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

(d) the election court shall decide all matters that come before it without undue regard to technicalities.” (Emphasis added).

“ S. 26 (1) - On a scrutiny of votes at the trial of a petition, the following votes only shall be struck off-

(e) the vote of a person whose name was not on the register or list of electors assigned to the polling station at which the vote was recorded or who has not been authorized to vote at that station:

(f) the vote of a person whose vote was procured by bribery or undue influence:

- (g) *the vote of person who committed or procured the commission of personation at the election*
- (h) *the vote of a person proved to have voted in more than one constituency;*
- (i) *the vote of a person who , by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election;*
- (j) *votes for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification, or when the disqualification or the facts causing it were notorious.*

(2) The vote of a registered elector shall not, except in the case specified in paragraph (e) of subsection (1), be struck off at a scrutiny by reason only of the voter not having been or not being qualified to have his name entered on the register or list of electors.”

25. Section 28 of the Act is especially relevant to this Petition as it provides that;

“S. 28 – No election shall be declared to be void by reason 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 that written law, or that the non-compliance did not affect the result of the election.”

26. The National Assembly Elections (Election Petition) Rules, 1993 provide as follows in Rule 18 and Rule 35 A of the Presidential and Parliamentary Election Regulations Act provides as follows;

“Rule 18 – (1) Not less than forty eight hours before the time fixed by the election court for the trial of an election petition the petitioner shall deliver at the office of the Registrar an affidavit sworn by each witness whom the petitioner intends to call at the trial, setting out the substance of his evidence.

(2) Each affidavit shall be enclosed in a sealed envelope together with sufficient true copies of the judges, all other petitioners in the same petition and the respondents, and shall be opened by the election court when the witness who has sworn the affidavit is called to give evidence.

(3) The affidavit shall be read by or on behalf of the witness and shall form part of the record of the trial and a deponent may be cross-examined by the respondents and re-examined by the petitioner.

(4) Subject to sub-rule (5), a witness shall not be permitted to give evidence for the respondent unless an affidavit sworn by him, setting out the substance of his evidence, together with sufficient certified true copies for the use of the judges and the petitioner is handed to the election court when called to give evidence.

(5) A witness for the petitioner or the respondent who fails to deliver such affidavit under sub-rule (2) or (4) shall not be permitted to give evidence without the leave of the election court, and the election court shall not grant such leave unless sufficient reason is given for the failure.

(6) An affidavit recorded in a language other than English shall be accompanied by a translation into English with sufficient copies for the judges and other parties, certified by the person translating it as having been translated to the best of his knowledge and ability.

7. The provision of Order XVIII of the Civil Procedure Rules and the Oaths and Statutory Declarations Act shall apply to affidavits under this rule. ”

And

Rule 35 A – (1) In pursuance of the provisions of regulations 35 the presiding officer shall in the presence of the candidates or their agents as shall be present-

(a) open each ballot box and empty its contents on the counting table or any other facility provided for the purpose and with the assistance of polling clerks proceed to count the votes polled by each candidate; and

(b) record the total number of votes cast in favour of each candidate.

(2) Each ballot paper shall be counted as follows:-

(a) the presiding officer shall in respect of every ballot paper announce the candidate in whose favour the vote was cast.

(b) display to the candidates or their agents the ballot paper sufficiently for them to ascertain the vote and

(c) put the ballot paper at the place on the counting table or other facility provided for this purpose sufficiently for the candidate in whose favour it was cast.

(3) A candidate or his agent shall have a right to-

(a) dispute the inclusion in the count of a ballot, or

whereupon the presiding officer may decide to uphold or reject the complaint and act as provided under regulation 41.

(4) The presiding officer, the candidate or their agents shall then sign the declaration set out in Form 16A which shall state –

(a) the name of the polling station

(b) the total number of registered electors for the polling station

(c) the total number of valid votes cast

(d) the number of votes cast in favour of each candidate

(e) the number of votes that were rejected and

(f) the number of disputed votes

(5) The presiding officer shall-

(a) immediately announce the results of the voting at that polling station before communicating them to the returning officer.

(b) request each of the candidates and in the absence of a candidate, such of his agents then present to append his signature or write down reasons for the refusal to sign the declaration of the results of the count of the votes at that polling station.

(c) provide each candidate or agent with a copy of the declaration of the results and

(d) affix a copy of the declaration of the results at the public entrance to the polling station or at any other place convenient and accessible to the public at the polling station.

(3) Where any of the candidates or his agents refuses or fails to sign the declaration form, the candidate and his agent shall record the reasons for the refusal or failure to sign.

(4) *Where the candidate or his agent refuses or fails to record the reasons for refusal or failure to sign the declaration form the presiding officer shall record the fact of their refusal or failure to sign the form.*

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

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

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

27. The above issues of law are pertinent and I will address the relevant authorities and judicial decisions relevant to the Petition as I go on to determine the emerging issues as I hereby do below.

Opinion and Findings

28. It is now trite that election petitions are a special category of cases and reading the authorities submitted by parties, I am in agreement with Maraga J. in Joho vs Nyange & Another [2008] 3 KLR (EP) 500 and Rawal J. in Onalo vs Ludeki & Others [2008] 3 KLR (EP) 507 where the learned judges held the view that the burden of proving any allegation made in a Petition lies with the Petitioner. Further, I agree with the proposition grounded on the decision in Mbowe vs Eliufoo [1967] E.A. 240 that any allegations made in an election petition have to be proved to the “*satisfaction of the court*”. Like Rawal J. in Onalo, I am certain that the standard of proof, save in matters where electoral offences are alleged, cannot be generally beyond reasonable doubt, but because of the quasi – criminal nature of some election petitions, it is almost certainly on a higher degree than merely on a balance of probabilities, the latter being the standard in civil cases.

29. In the Petition before me, allegations that the 1st Respondent bribed voters were withdrawn at the beginning of the trial and so there is nothing to be said of the matter. However, there was the element of witchcraft as well as devilish and satanic practices which partly had money involved; that the 1st Respondent, before giving money to women, pressed the money onto their stomachs to intimidate them into voting for him lest an evil spell was cast upon them and they would be unable to give birth. I will only address the latter issue; The only evidence given on this rather bizarre subject was that tendered by Henry Vulemi Mugaizi. It was his evidence that the incident took place during a political rally at Shiseno Primary School on 19.12.2007.

30. I will combine my opinion on the above allegation with the allegation that on 14.12.2007, the 1st Respondent was seen with traditional circumcisers who were carrying a musical instrument called “*mutiti*” and that they were singing the Luhya song titled, “*Mulongo*”. The evidence given was that the intention of the incident was to instill fear on voters, similar to that instilled on uncircumcised boys prior to their circumcision and in the context of the election, the fear was intended to stop the voters from voting at all and if they did, to vote only for the 1st Respondent.

31. Applying the burden of proof and the standard thereof, I find these allegations completely incredible. It is not the actions per se complained of that should be the subject of investigation by this court but the actions and their effect that should be. Even if traditional circumcisers were present at some political function, there is nothing in our laws barring them from being there or dressing in any manner subject to public order and moral decency. Neither is there anything patently illegal about them playing “*mutiti*” or whatever other instrument they use in their trade nor singing “*Mulongo*” or any other song of their choice. What would be unlawful would be when their actions are designed and do have the effect of scaring voters away from their Constitutional right to vote or to affect that right by swaying them to vote without choice for a particular candidate.

32. Henry Mugaizi indeed voted on 27.12.2007 and he failed to name a single female person who was unable to vote because she was pregnant and was affected by the bad omen allegedly inflicted by the 1st Respondent's actions. He also failed to name a single person who voted for the 1st Respondent out of fear of the traditional circumcisers or who was unable to vote because he was intimidated by the said persons. Henry Mugaizi also stood alone in his evidence on the traditions and taboos of the Luhya people. Aside from the fact that he was not moved by the circumcisers and their actions and indeed voted, he never claimed to be an expert on the subject. I would have expected expert evidence to authenticate the effect of certain taboos but none was tendered and so the evidence ended up being weak, speculative and merely sensational.

33. Further, I agree with submissions by Ms Aullo, that the 1st Respondent gave a powerful defence in answer to Mugaizi's evidence. There is no shadow of doubt that on 14.12.2007, he was at Kenyatta University attending his daughter's graduation ceremony. Zinzi Khalwale produced not just pictures of the event but her degree certificate to clear the matter. I also believe the evidence of the 1st Respondent and his witness Joel Ingoi Mwilitsa that on 19.12.2007, he was at places within Ikolomani Constituency other than Shiseno Primary School. He produced his diary for the month of December 2007 and there was no evidence that he had scheduled a meeting at that place on that day. I believe that evidence as opposed to the casual, unauthenticated and unbelievable evidence of Henry Mugaizi in that regard.

34. Turning to the issue of electoral violence, evidence was adduced that Maurice Hassan Imbeyi was assaulted by one David E sese Khwatsima and others. The incident allegedly happened on 27.12.2007 at 1 p.m. outside a polling station and after the witness had voted. He insisted that the incident had nothing to do with the 1st Respondent and that his differences with E sese were personal to the two of them. The issue was apparently later settled amicably after Kakamega CM's Court Criminal Case no.19/2008 against E sese aforesaid was withdrawn by Imbeyi. The simple question to ask in any event is this; how did that event affect the results of elections at Ikolomani Constituency? Clearly, it did not. Imbeyi exercised his right to vote and any assault outside the polling station was a criminal offence in the normal manner to be addressed through the criminal justice system and not in the manner it has been introduced into this election petition.

35. Another witness who alleged that there was violence on the voting day was Nicholas Ogondo Mwenesi. Of interest was his evidence that he was unable to vote because of the violence that was allegedly unleashed on him by David E sese Khwatsima, his political rival. I will quickly dismiss allegations of violence against Mwenesi's supporters because none of them came forward to testify on their alleged harassment and in fact, in cross-examination, Mwenesi stated as follows;

“Benedetta Mukoto was assaulted by David E sese. He had his own interest in the election.

Paragraph 7 of my Affidavit – the supporters who informed me of the incident (assault) cannot be named for fear of their lives. The thugs were led by David E sese Khwatsima.”

36. There is little to be made of the above allegations. Granted, Mwenesi may not have been able to vote because of the alleged violence but where is the nexus between that fact and any of the specific allegations against the 1st Respondent? It is admitted that Mwenesi and E sese were political rivals and that E sese was fighting for the same civic ward position as Mwenesi. It is clear that any violence meted out by E sese was in furtherance of his own cause and not that of the 1st Respondent. The end of their rivalry was that Mwenesi triumphed and was elected and defeated E sese and even inspite of the fact that he (Mwenesi) never voted. That is all to say on Mwenesi's evidence and in any event, i find no fault on the part of the 1st Respondent.

37. I should now turn to the more fundamental issue in this Petition; the general conduct of the elections by the 2nd and 3rd Respondents. In his submissions, Mr. Mwenesi for the Petitioner focused wholly on this issue and for good reason. I say good reason because at the end of the day and inspite of all the other issues raised in evidence, the Petition will stand or fall on that singular question. I have elsewhere above reproduced the evidence itself and it focuses on two aspects of the election;

- i) the errors, anomalies, irregularities and mistakes contained in the Form 16As.
- ii) The errors and mistakes contained in the Form 17A.

38. There is no evidence to counter the Petitioner's contentions on both points and in fact the 3rd Respondent in her Replying Affidavit at paragraph 19 stated as follows;

"19. THAT in any election, mistakes do occur and the said mistakes may not be serious enough to change results of the elections. The mistakes made is this petition, if any, do not adversely affect the results."

39. Further in her written submissions at page 33, Ms. Aullo on behalf of the 1st Respondent stated as follows;

"It is conceded that not all the Forms 16A and 17A) were prepared in accordance with the regulations as is apparent on the face of the forms."

40. If that be the case, the question that now confronts me is this; are the errors, mistakes and irregularities so serious as to invalidate the election?

41. Firstly, Regulation 35 A of the Presidential and Parliamentary Elections Regulations, which I have reproduced above, has a clear procedure by which votes are counted and validated at a polling station. The end of the counting exercise is the declaration set out in Form 16A and the declaration shall state;

- a) the name of the polling station
- b) the total number of registered electors for the polling station.
- c) the total number of valid votes cast.
- d) the number of votes cast in favour of each candidate.
- e) the number of votes that were rejected; and
- f) the number of disputed votes.

42. The Petitioner has complained that in respect of the Ikolomani Parliamentary election, the above regulations were not followed to the letter. I have taken time to peruse all the 78 Forms 16As attached to the 3rd Respondent's Affidavit sworn on 27.10.2010 and the only one that meets the expectations of regulation 35A was Makhokho Primary School Stream A. No other polling station produced a properly filled Form 16A and each had either of the following anomalies and irregularities;

- i) No statutory comments by the Presiding officer.
- ii) No reasons why some agents never signed the declaration.
- iii) In Matundu, the results for Matundu Stream A and B were combined in one Form 16A.
- iv) No indication of how many valid votes were cast – e.g. Matundu (in the contested Form 16A).
- v) Alterations on valid votes cast without explanations e.g. Matundu and Malinya C
- vi) In Matundu, at the column for "*reasons for refusal to sign*", the following totally illogical information is recorded;

“Khalwale 6854	21	Shinali 6281	69
	6875		6350”

- vii) The name and signature of the Presiding officer is missing – e.g. Shamusinjiri.
- viii) No signature of any agent at all without explanation – e.g. Madivini ‘A’ and ‘B’.
- ix) No votes indicated for some candidates and their names missing from the Form 16A – e.g. Madivini A where candidates Mathew Okwanda’s name and votes are missing. [*I should note here that in Form 17A, Okwanda is recorded as having received 3 votes*].

43. The Petitioner’s case is that all the above irregularities were serious enough to invalidate the election if they are looked at in the context of the results finally announced upon the tallying exercise conducted by the 3rd Respondent.

44. I note that, in his written submissions at page 4, Mr. Mwenesi for the Petitioner stated as follows;

“The Inspection also revealed that in the following polling stations, the total votes in Form 16A did not tally with Form 17A. They are:-

(a) Bushiangala A; candidates Shituku had 0 total valid votes on Form 16A whereas on Form 17A he has 3 votes. Bushiangala B; at pg 7 of the inspection report candidate Shitukhu had 1 vote on Form 16A whereas on Form 17A he has 3 votes. There was no comment or counter signature by the returning officer for the variation.

(b) Ichina: candidate Shitukhu has 0 votes on Form 16A whereas on Form 17A he has 1 vote. There is no comment or counter signature made by the returning officer for this variation

(c) Imbale: candidate Lukunza has 3 votes on Form 16A whereas on Form 17A he has 12 votes. Also, candidate Shitukhu’s name and votes are missing on Form 16A whereas on Form 17A he has 3 votes.

(d) Imulama: candidate Atema’s votes of 77 were crossed and 67 entered on Form 17A. This alteration was not counter signed by the returning officer.

(e) Shitoli: Khamati’s votes were altered on Form 17A from 00 to 01 without countersigning by the Returning Officer.

(f) Lirhembe A: candidate Khalwale has 23 on Form 16A whereas on Form 17A he has 26 votes, Lirhembe B; at pg 39-40 of the inspection report candidate Khalwale’s votes were altered from 17 votes to 26 votes on Form 17A without countersigning.

(g) Shisere: candidate Liyayi has 3 votes on Form 16A whereas on Form 17A he has 0 votes.

(h) Irechero ECD: candidate Kwimba on Form 16A he has dash as the valid votes whereas on Form 17A he has 0 votes. Also, candidate Lukunza has a dash as valid votes whereas on Form 17A he has 0 votes.”

45. Aside from the above assertions, there was the evidence of the 3rd Respondent that;

- i) she was issued with a laptop to tally the results but the laptop was being used by her assistant during tallying and that there were “*mispostings*” of the figures in the laptop.

- ii) she prepared a number of Form 17As and that the one produced by Songwa was only one of them and it had errors which she rectified and then she prepared the fairest copy which she produced in evidence before this court as the final and authentic Form 17A.
- iii) she was unable to recall what “*mispostings*” or “*errors*” she had found during tallying.
- iv) in Madivini B whereas the valid votes cast were 333, she entered 331 in the Form 17A.
- v) in Madivini A, whereas the valid votes cast were 437, in Form 17A she entered 454 and therefore added 17 extra votes to the tally.
- vi) in Madivini A & B she recorded the wrong results for candidate Aggrey Shitsama.
- vii) Polling station no. 007A was recorded twice in the Form 17A and it was unclear why that was done.
- viii) although the 1st Respondent was recorded as having received **8,386** votes in Form 17A the votes in words indicated that he garnered 8886 votes and later at the 2nd Respondent’s Headquarters in Nairobi, she realized that in fact he had obtained **8537** votes, and not **8386** votes or 8886 votes. This was after using the Form 16As in her custody and the information stored in her laptop (the latter information was not availed to court).
- ix) that seven polling stations – Malinya A, Shamusinjiri, Madivini, Shihalia, Iremele and Ibuka did not have Form 16As in the sealed ballot boxes.
- x) that two Form 16As did not have the statutory remarks of the presiding officer.
- xi) Sixty Five Form 16As had no details of some candidates or agents.
- xii) although the Shamusinjiri Form 16A was unsigned by the Presiding officer, she nevertheless used it for tallying.
- xiii) that in terms of arrival sequence, Matundu Polling Station which was 10 km away from the Tallying Centre, had its results brought last and the two streams had joint results. (she was unable to tell why that was the case).
- xiv) there were alterations on the final Form 17A which were not counter-signed.
- xv) No agent for the Petitioner signed the final copy Form 17A because the Petitioner and his agents walked out during the “reconciliation” exercise.

46. What is my take of all these errors and irregularities? The law on the subject was well set out in John Fitch vs Tom Stephenson & 3 Others, QBD [2008] EWHC 501 where it was held as follows;

“The decided cases, including those which Lord Denning considered in MORGAN vs SIMPSON, established that the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches.

.....

This is because where possible, the courts seek to give effect to the will of the electorate.”

47. Musinga J. in Manson Nyamweya vs James Magara & 2 Others [2009] eKLR in following that

decision stated as follows;

“In determining that issue the court applied both the “quantitative test and qualitative test”, the nomenclature used by Musoke Kibuka, J. in WINNIE BABIHUGA vs MASIKO WINNIE KOMUHAMHI AND OTHERS HCT-00-CV-EP-0004-2001

The quantitative test was said to be most relevant where numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire election process is questioned and the court has to determine whether or not the election was free and fair.

While I agree that the two tests as aforesaid are important, it must be borne in mind that in auditing an electoral process to determine whether the results as declared in an election ought to be disturbed, the court is not dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. In a democratic election the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official.

Counsel for the respondents submitted that the first respondent won the election so convincingly that it was clear the will of the people of South Mugirango had been demonstrated. They submitted that it would be improper to interfere with the voters’ will. I agree that judicial authority is derived from the people and as much as possible courts should seek to give effect to the will of the electorate. However, in exercising their constitutional duties, courts must at all times act in accordance with the Constitution and other electoral laws and regulations made there under.”

48. Kimaru J. in William Kabogo Gitau vs George Thuo & 2 Others [2010] eKLR confronted with a situation similar to the present one had this to say;

“There are other complaints which were raised by the petitioner that are in the genre addressed by the court. They relate to Form 16As where specific results of specific candidates [were cancelled or altered]. The 3rd respondent explained away the cancellations and alterations to be on account of once again, human error which, according to him, was to be expected in the circumstances. Having evaluating the question Form 16As., it was clear to the court that whereas the regulations did not specify what ought to be done where there are cancellations and alterations, common sense dictates that where there is a cancellation and alteration in a statutory form, the same should be countersigned by the concerned official. In the case of electoral documents, it is important that the statutory forms which contain results that will invariably be required to be verified by other parties, including the members of the public, should be written without any alterations or cancellations. The cancellations and alterations in the Form 16As produced in this court raise question regarding the veracity and authenticity of the said results. The said Form 16As cannot in the circumstances be said to contain valid results of the polling stations in question.”

49. I have myself anxiously considered the issue at hand and in doing so I have also taken into account the provisions of *section 28* of the National Assembly and Presidential Elections Act, Cap 7 which provides as follows;

“S. 28 – No election shall be declared to be void by reason 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 that written law, or that the non-compliance did not affect the result of the election.”

50. Lord Denning in Morgan vs Simpson [1974] 3 All E.R. 722 at 728 had this to say on the same subject;

“(1) Under S.37(1) an election court was required to declare an election invalid

- (a) if irregularities in the conduct of the election had been such that it could not be said that the election had been so conducted as to be substantially in accordance with the law as to elections’, or**
- (b) if the irregularities had affected the result.**

Accordingly, where breaches of the election rules, although trivial, had affected the result, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to election. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the election law it was vitiated irrespective of whether or not the result of the election had been affected (see p 725 f to h, p 728 d to f, p 731 a b and f to h, p 733 d and p 734 a, post): Hackney Case, Gill v Reed and Holms (1874)2 O’M & H 77 applied; Birmingham Case, Woodward v Sarsons (1873) LR to CP 733 and Gunn v Sharpe [1973] 2 All ER 10 CP at 743-745, 751 disapproved.

(ii) Although the election had been conducted substantially in accordance with the law as to local elections, the omission to stamp the 44 ballot papers had affected the result of the election which would therefore be declared invalid (see p 728 f, p 731 d Decision of the Divisional Court of the Queen’s Bench Division [1974] 1 All ER 241 reversed.”

51. I am wholly in agreement with my more eminent brothers in the decisions quoted above and I take the view that the conduct of all Presiding officers, and the 3rd Respondent during the Ikolomani Parliamentary election was less than serious in the circumstances. The Form 16As were designed as the primary document in tallying so that once the Form 16A was wanting in content, the entire tallying exercise and the results thereafter announced were a complete sham. In the instant case, I have endeavoured to show that out of seventy-eight Form 16As placed before the court, only one met the statutory requirement and even if I were to close my judicial eye to some of the anomalies, how can I close my eye to the Shamusinjiri Primary School Polling Station where the Form 16A was unsigned by the Presiding officer and where his name was also missing? In that station, the 1st Respondent obtained 255 votes. If I nullify those results, his total tally would be **8,131** while that of the Petitioner would be **8,057**, a difference of **74** votes. How can I ignore Matundu Polling Station and all the shenanigans around it on the polling day? It had only **852** votes cast, yet it took a whole day to bring in the results for tallying and yet the station was only 10 kms away from the Tallying Centre. Further, when the results were brought, it was unclear how many votes were cast in each stream but the 1st Respondent got a total **420** votes while the Petitioner got a total of **17**. If I nullify those results, the 1st Respondent would have a total tally of **7,711** votes while the Petitioner would have **8,040** votes a difference of **329** votes in favour of the Petitioner. How can I ignore the fact that it was admitted by the 3rd Respondent that seven Polling Stations did not have Form 17As in the ballot boxes brought to court? Where are they and how can I accept the ones produced in court as authenticate and genuine? If I nullify the results of those stations, how can it be said that the people who voted in those stations participated in a free and fair election? How can I ignore the fact that during evidence, the total votes that the 1st Respondent obtained are clearly in doubt? In the first Form 17A, he obtained **8,386** but in words **8,886**. Later the 3rd Respondent privately gave him **8,537** votes. In his own calculation before court, he said that he obtained **8,617**. Graham Songwa in his audit incidentally also found that he obtained **8,537** votes. What votes did he actually get? It must be recalled that the results announced by the 3rd Respondent showed that the 1st Respondent won the election with a margin of 265 votes and that was too close a call to allow all manner of errors to impinge on the total tally. Had the gap between been very wide, then one could argue that the errors and anomalies may not have affected the result. The same cannot be said of the present case and particularly so where the errors affected every single Polling Station and results of every candidate as I have shown elsewhere above. How can I then ignore the fact that the nexus between all the Form 16As and the single Form 17A was completely lost and that the final tally was based on erroneous documentation?

“Tally” is defined in Osborn’s Concise Law Dictionary as;

“a stick of rectangular section across one side of which were cut notches denoting payments. The stick being split lengthwise so that on each half there was half of each notch, the debtor retained one half of the stick as evidence of the payment and the creditor kept the other half as a record.”

52. The simple definition is graphic and attractive to me in the context of this matter. I have shown elsewhere above that the 3rd Respondent inserted some votes in Form 17A which had no basis in any Form 16A. How can that be called a tally? Once the Form 16As were discredited, as they were in this case, there was no proper tally and the whole election was rendered a sham. I was impressed with the testimony of the 3rd Respondent who struck me as obviously well schooled and well versed with electoral issues. However, it surprised me when in answer to the issue of irregularities pointed out above, she dismissed them as of no consequence. How could they be of no consequence when she was unable to tell that tallying denotes the Form 16 A and Form 17 A each having similar notches and where one is not similar to the other, the deal has been broken? How could they be of no consequence when in seven stations, she was unable to tell what happened to the Form 16 As and that these results were crucial in an election that was so hotly contested? How could they be of no consequence when she admitted that her final Form 17 A was fraught with errors which had no basis if compared with Form 16 As which were the basis for its preparation? How could they be of no consequence when in Matundu, the last station to bring its results, someone was already adding up votes on the Form 16 A indicative of an attempt to monitor tallying and influence the final vote from Matundu? How could they be of no consequence when at the end of the day, she was unable to say exactly what votes the winning candidate obtained? Granted, Maraga J. in Joho vs Nyange & Another (2008) 3 KLR (EP) 500: stated as follows;

“In my view the errors made and the irregularities committed in this petition fall in two categories. The first one are the errors or mistakes, that I would call innocent even though negligent. The second category are those deliberate irregularities or forgeries that were committed.

In respect of the first category I would like to say this: Error is to human. Some errors in an election like this, conducted under a frenetic schedule, are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental they should always be excused and ignored. But where deliberate irregularities or forgeries are committed, different considerations come into play. In either case, however, serious consideration should be given as to what effect, if any, that those errors, whether innocent or deliberate, have on an election before the same is vitiated. As I have said if they are minor and do not affect the election or its results they should be ignore. This is what I understand section 28 of the National Assembly and Presidential Elections Act to be providing for when it declares that:

‘No election shall be declared 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 that written law, or that the non-compliance did not affect the result of the election.’

The law is therefore clear as to when an election can be nullified if it is not conducted substantially in accordance with the law as to elections. It will also be nullified, even though it is conducted substantially in accordance with the law as to elections, if there are errors or mistakes in conducting it which, however trivial, are found to have affected the results of an election.

But when is an election said not have been conducted substantially in accordance with the law as to elections which errors or irregularities can affect the results of an election?

To start with I do not think that anybody is in doubt as to the law as to the parliamentary elections which we are here concerned with. It is the National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya together with the Rules and Regulations made there-under.

It is not very non-compliance or every act or omission in breach of the election regulations or procedure that invalidates an election for being non-compliant with the law. As I have said minor breaches will be ignored. An election is said to be non-complaint with the law as to election when it is conducted in violation of the principles of an election by ballot. This is how Stephenson L.J expressed this point in the case of Morgan –vs- Simpson (1974) 3 All ER 722 at P 731.

“For an election to be conducted substantially in accordance with that law there must be a real election by ballot and no such substantial departure from the procedure laid down by parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot. Instances of such substantial departure would be allowing voters to vote for a person who is not in fact a candidate or refusing a qualified candidate on some illegal ground or disenfranchising a substantial proposition of qualified voters.”

And the result of an election is affected when the cumulative effect of the irregularities reverse it. For instance when a large proposition of the voters are by some blunder in the conduct of the election, as happened in *Harrison Garama Kombe vs Ali Omar & Others*, Civil Appeal No. 52 of 2006 (CA), do not turn up to vote, the result is said to be affected.”

53. I agree with the learned judge and I also agree that the chaos apparent during almost all elections may lead to innocent errors. However where there is no way of authenticating an election by use of statutory documents, the results become irrelevant, because the whole process is as crucial as the final results.

54. An election court, such as this one, is the body mandated by the Constitution and Statute (s.19 of the Act), to determine whether a person has been validly elected as a Member of the National Assembly. Where such a court is confronted with a situation where the process, from voting to tallying, cannot be validated, then it would be a dereliction of duty for that court to say that the process was fair and the will of the electorate should be left to stand. Where is the will of the electorate when there is a huge and unexplained gap in the electoral process? I submit that in such a case, the court must and ought to return all parties to the beginning; the ballot box.

55. In the end therefore, I hold the firm view, that the irregularities, admitted by all Respondents in this case, were so serious as to affect the results of the Parliamentary election in Ikolomani – see also *Mbove vs Eliufoo* (supra). In that regard I am of the same mind as Rawal J. in *Reuben Ndolo vs Dick Wathika & 2 Others E.P 11/2008 (Nbi.)* when she stated as follows;

“Where in the same circumstances as in this case the Form 17A had arithmetical errors, the Form 16As were not signed by the presiding Officers, their candidates and/or their agents, the court [must nullify] the election of the 1st Respondent. The “upshot of all the above is that [where evidence of] serious and admitted or undisputable anomalies and non compliance of important and mandatory provisions of the electoral law by the electoral officials are placed before the court [then] this court in all fairness has no option but to come to the conclusion that the Parliamentary election of Makadara Constituencies was not free, fair and transparent and that the 1st Respondent was not validly elected as the member of Parliament of the said of the said constituency.”

56. I am in the same position as Rawal J. in the above case and also Kimaru J. in *William Kabogo Gitau* (supra) and I must uphold the Petitioner’s complaints regarding the conduct of elections at Ikolomani Constituency and I need not repeat the myriad anomalies elsewhere pointed out above, which I find proved to my satisfaction.

Conclusion

57. I have endeavoured to show that all complaints raised in the Petition save one were completely without merit. The 1st Respondent was declared the Member of Parliament for Ikolomani Constituency through a flawed process for which, from evidence before me, he had no control over. On the other hand, the Petitioner from the first day protested that the 2nd and 3rd Respondents conducted the election in a less than professional manner. He lodged a complaint to the then Chairman of the 2nd Respondent who implicitly admitted the failings of his Commission and officers and lamely advised him to seek this court’s intervention and with good reason. He has been vindicated because **Article 81 (e)** of the Constitution provides as follows:

“Art. 81 (1) The electoral system shall comply with the following principles-

a)...

b)

c).....

d).....

(e) free and fair election, which are-

(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) Conducted by an independent body;

(iv) Transparent, and

(v) Administered in an impartial, neutral, efficient, accurate and accountable manner.

58. I have endeavoured to show that the 2007 election Ikolomani Constituency was not conducted in an efficient, accurate nor accountable manner. Mathematics aside, there was just no attempt to show that the entire process was designed to produce a credible result. In submissions, Ms. Aullo for the 1st Respondent made the gallant point that the 2007 General Election was generally badly conducted and while that may be so, it is no excuse for denying the people of Ikolomani their day at the ballot box. Granted, elections are an emotive, chaotic and expensive affair and I take the view that there is nothing unlawful, had I found it fit to do so, to declare a winner of the election and save the people of Ikolomani and the country at large, the expense of a by-election. Sadly, my thoughts aside, I am unable to do so in the circumstances of this case and I have shown that from where I sit, it is impossible to tell who actually won the election.

I know that the same statement may have been made elsewhere and in respect of different proceedings but I am certain that from the material placed before me, I am unable to tell who won the 2007 election in Ikolomani.

59. I will end by saying this; Ikolomani is famed for its bull-fighting sessions and pride in the culture of its occupants; the Idakho and Isukha people. Let this judgment be a message to those people that the Kenyan Courts will gallantly protect their constitutional right to elect leaders of their choice through a transparent and efficient process. Let this judgment also send a message to the Independent Electoral and Boundaries Commission that Article 249 of the Constitution enjoins it to protect the sovereignty of the people of Ikolomani as Kenyans and never to waver from ensuring their right to proper representation.

60. Let this judgment be a message to the Petitioner and the 1st Respondent that; *“like any owner of a bull knows, only at the bull-fight can the bravest bull be known; face each other again and let the best of you be the choice of the people of Ikolomani if that is their will.”*

61. Lastly, Seamus Heaney once wrote, “History says, don’t hope on this side of the grave; But then, once in a life time the longed – for tidal wave of justice can rise up, And hope and history rhyme.” Indeed let the hopes of the Kenyan people and the historical moment of implementing a new constitution rhyme for all eternity. But I digress. My work is done. The following shall be my final orders;

a) Since the 2007 election at Ikolomani Constituency was not carried out freely, fairly and in accordance with the law, I hereby declare the said election null and void and declare that the 1st Respondent was not validly elected as Member of Parliament and the Petition and the prayers in it is determined in those terms.

b) A certificate to the above effect shall issue forthwith and be served upon the Speaker of the National Assembly in terms of **section 30** of Cap.7.

c) The Independent Electoral and Boundaries Commission should now proceed and conduct a by-election as required by law.

d) For reasons given above, the 2nd Respondent shall bear the costs of this Petition.

e) Since Ms Aulo appeared with Mr. Mbaya and Mr. Khalwale, and noting the complexity and time taken in the matter, they shall be paid costs for two counsel only.

f) The advocates appearing deserve my gratitude for the decorum and courtesy extended to me and for their excellent research and diligence in the conduct of the Petition.

62. Orders accordingly.

Delivered, dated and signed at Kakamega this 18th day of February, 2011

ISAAC LENAOLA
J U D G E