



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 24 OF 2008

BERNARD CHEGE MBURU PETITIONER

VERSUS

CLEMENT KUNG’U WAIBARA.....1ST RESPONDENT

CHARLES MARARO NJOROGE2ND RESPONDENT

THE INTERIM INDEPENDENT ELECTORAL COMMISSION.....3RD RESPONDENT

JUDGMENT

On the 27th of December, 2007, the people of the Republic of Kenya took part in the elections for the positions of the country’s President, as well as for their members of Parliament, together with councilors for the wards constituting the Local Government.

Following the said elections, the 1st Respondent, **CLEMENT KUNGU WAIBARA**, was declared the validly elected Member of Parliament for the Gatundu North Constituency.

Being dissatisfied with the process leading up to the declaration of the results for Gatundu North Constituency, **PETER KAMAU NJERI**, filed the Election Petition herein, on the 24th of January 2008. Subsequently, Mr. Peter Kamau Njeri was substituted with one **BERNARD CHEGE MBURU**, as the Petitioner, with effect from the 26th of September 2008.

It is common ground that there were a total of 17 candidates for the Gatundu North constituency during the elections held on 27th December, 2007. The results declared by the 2nd and 3rd Respondents were as follows:-

<i>Name of Candidate</i>	<i>Political Party</i>	<i>Number of Votes</i>
<i>Gachanja Clement Benson</i>	<i>Mass party of Kenya</i>	<i>514</i>
<i>Gaitho Vincent Gichuru</i>	<i>Democratic party of Kenya</i>	<i>6,568</i>
<i>Gatarua Nahashon Ngungi</i>	<i>Party of Hope</i>	<i>804</i>
<i>Gatua Samuel Kagunye</i>	<i>United Democratic Party of Kenya</i>	<i>521</i>
<i>Gitau Anthony Kamuiru</i>	<i>Forum for the Restoration of Democracy-Asili</i>	<i>310</i>
<i>Karigi Gitau Mungai</i>	<i>Farmers party</i>	<i>105</i>
<i>Kigecha John Mariga</i>	<i>Progressive Party of Kenya</i>	<i>568</i>
<i>Kihui Joseph Githuka</i>	<i>New Revival Generation Party</i>	<i>65</i>
<i>Mbuthia Gerald Waweru</i>	<i>Safina party</i>	<i>651</i>
<i>Muiruri Patrick Kariuki</i>	<i>NARC – Kenya</i>	<i>2,885</i>

<i>Ng'ang'a Joseph Kabui</i>	<i>Republic Liberty Party</i>	<i>117</i>
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<i>Ng'ang'a Clement Kariuki</i>	<i>Sisi Kwa Sisi Party of Kenya</i>	237
<i>Njenga Francis Kigo</i>	<i>Kenya National Democratic Alliance</i>	2,471
<i>W'Njuguna Samuel Muchiri</i>	<i>Orange Democratic Movement</i>	915
<i>Waibara Clement Kungu</i>	<i>Party of Independent Candidates of Kenya</i>	20,573 (Winner)
<i>Wakimani Joseph Mukora</i>	<i>Kenya African National Union</i>	8,091
<i>Wanuoro Xavier Gatura</i>	<i>Agano Party</i>	385
	Total Votes Cast	45,970
	Total Valid Votes	45,537
	Registered Votes	57,569
	Rejected Votes	433
	Voter Turnout	79.85%

It is the Petitioner's case that the 1st Respondent was ineligible to be nominated or to be elected as a Member of Parliament. The reasons cited by the Petitioner for that assertion are that the 1st Respondent lacked sufficient proficiency in the English and Swahili languages to enable him take an active part in the proceedings of the National Assembly.

The Petitioner also faults the 2nd and 3rd Respondents for failing to ensure that the 1st Respondent could speak and read the Swahili and English languages well enough to take an active part in the proceedings of the National Assembly.

The Petitioner further asserted that the 1st Respondent had committed many election offences, during the campaigns, and also on the Election Day. As a consequence of the alleged election offences, the Petitioner asserts that the election was devoid of fairness and transparency.

The Petitioner cited 24 instances in which the 1st Respondent allegedly bribed potential voters, between the 7th of October 2007 and the 27th of December, 2007.

In an endeavour to prove his case, the Petitioner called 4 witnesses.

PW 1, MARTIN NDUNGU KAHURA, testified that he was a close friend and a former classmate of the 1st Respondent. Indeed, he was the best man at the wedding of the 1st Respondent. He had also acted as the campaign manager and a strategist for the 1st Respondent.

It was his evidence that he was asked by the 1st Respondent to impersonate him, and to take the language proficiency examination on his behalf. The said examinations were administered by the Language Examination Board set up by the 3rd Respondent. According to **PW 1**, he met with one **FREDERICK IRAYA (RW 5)** and the 1st Respondent at a Restaurant known as "Dancing Spoon", where they hatched the plan to have PW 1 impersonate the 1st Respondent.

The reason advanced by **PW 1**, for agreeing to help the 1st Respondent is that **PW 1** had better academic credentials, which would enable him participate successfully in the examinations. In order to demonstrate his said academic credentials, **PW 1** testified that he was an electrical engineer having graduated with a Diploma in Engineering from the Kenya Polytechnic, Nairobi.

PW 1 testified that he did sit for the proficiency examinations in both English and Kiswahili languages, and that he was thereafter issued with a certificate in the names of the 1st Respondent. It is that certificate which enabled the 1st Respondent to be nominated as a candidate for the elections in Gatundu North constituency.

In my understanding, **PW 1** is asserting that had he not obtained the certificate on behalf of the 1st Respondent, the latter would never have been nominated as a candidate in the elections in issue.

Although he stood in for the 1st Respondent during the examinations, **PW 1** testified that he was later pricked by his conscience, having appreciated the wrong that he did to the people of Gatundu North. As a result, he decided to make the confession to this court.

PW 2, PATRICK KARIUKI MUIRURI, testified that he was the immediate former Member of Parliament for Gatundu North Constituency. He was also a candidate in the 2007 General Elections.

It was his evidence that the highest academic qualification obtained by the 1st Respondent was a Kenya Certificate of Primary Education (K.C.P.E). **PW 2** made available to this court the KCPE Certificate issued to the 1st Respondent. In the said certificate, the 1st Respondent is shown to have failed in both Kiswahili and English. As a consequence, the Petitioner believes that the 1st Respondent was obliged to obtain a certificate from the Proficiency Examinations Board, if he were to be eligible for nomination as a candidate.

PW 2 also testified that the 1st Respondent participated actively in bribing voters, with a view to influencing them to vote for him.

In relation to the 2nd and 3rd Respondents, **PW 2** contended that they failed to comply with the requirements of section 42A (c) of the **Constitution of Kenya and Section 17A of the National Assembly and Presidential Elections Act**. In particular, **PW 1** asserted that Presiding Officers committed innumerable errors of commission and omission in the manner in which they handled Forms 16A. **PW 2** testified about the following errors;-

- (a) *Failure by presiding officers to sign Forms 16A;*
- (b) *Failure by presiding officers to stamp the Forms with the official ECK Stamp;*
- (c) *Failure to make mandatory entries as required by law;*
- (d) *Failure to indicate the names of all candidates who took part in the election;*
- (e) *Failure to indicate the names of the polling stations;*
- (f) *Failure to get the agents of candidates to sign the forms;*
- (g) *Failure to provide statutory comments where the agents did not sign the forms; and*
- (h) *Failure to sign against erasures or alterations made on the forms;*

According to **PW 2**, the errors and omissions on Forms 16A affected more than 25% of the polling stations. Consequently, the Petitioner asserted that the elections were not conducted in a manner that was transparent, free and fair.

PW 3, NEICEH WAITHIRA GICHIA testified that she witnessed the 1st Respondent engaging in acts of voter bribery. In particular she testified that the 1st Respondent gave out to her a One Thousand Kenya Shillings note, which she was to divide with four other persons. The said incident is alleged to have taken place near the Gituamba Chief's Camp on 17th November, 2007.

During cross-examination, **PW 3** admitted that she was a supporter of Kigo Njenga, who vied for the Gatundu North Seat on the party ticket of the Kenya National Democratic Alliance. Indeed, **PW 3** testified that she voted for the said Njenga Kigo. In effect, if the alleged bribery took place as alleged or at all, it did not have any impact at all on **PW 3**.

PW 4 STEPHEN NDEKEI NDUNGU, testified that he operated a shop at Makwa Shopping Centre in Gatundu North Constituency. On the 24th of December 2007, **PW 4** saw the 1st Respondent giving bribes to voters at the Makwa Shopping Centre. It was his evidence that the bribery took place at a distance which was about 50 metres away from his shop. One of the persons who was allegedly bribed by the 1st Respondent was **PW 4's** wife.

It was, however, **PW 4's** testimony that on the Election Day he voted freely without any hindrance.

The Petitioner closed his case after **PW 4** testified.

The 1st Respondent called a total of 6 witnesses. **RW 1, SAMSON MUTHAMA GAKUMO**, had first sworn an affidavit in his capacity as a witness for the Petitioner. By the time he was giving his evidence, **RW 1** had not sworn any other affidavit. Consequently, his only affidavit is that which supported the petition.

By his affidavit evidence **RW 1** indicated that on the voting day he found one, Mama John, giving 200 Shillings to each of the potential voters, whom she asked to vote for the 1st Respondent. He allegedly witnessed the said happenings at the Kangaita

Polling Station.

As this witness effectively supported the petition, this court finds it extremely surprising that the 1st Respondent called him as his own witness.

RW 2, DAVID GITAU KAMANDA, testified that he witnessed a transparent, free and fair process at the Mitero Polling Station where he voted.

RW 3, FREDERICK IRAYA, was a member of the Proficiency Examination Board No. 6. The other members of that board were Leah Rotich, Tom Alex Majani, Bibiana Chege, Dr. Geoffrey Wango, Josephine Kasera and Thomas Omuga.

He testified that on 1st November, 2007, the 1st Respondent appeared before the panel, and sat for the examinations, personally.

It was his testimony that each and every member of the panel scrutinized the identification documents of each candidate, including the first respondent. Therefore, he was very sure that **PW 1** did not impersonate the 1st Respondent as alleged or at all.

RW 4, SILVESTER GAKUNGA WAIBARA, is the younger brother to the 1st Respondent. He testified having visited no less than eight polling stations on Election Day. At none of the said polling stations did he witness any bribery or any violence.

He also testified that on 10th December, 2007, when the 1st Respondent was allegedly dishing out bribes at Kamwangi Market, the 1st Respondent was actually in Nakuru where he was celebrating the birthday of his son. Therefore, RW 4 emphasized that there was no truth in the assertions that the 1st Respondent bribed voters at Kamwangi Market.

RW 5, EDWARD NDICHU MBURU, voted at the Mitero Polling Station and said that the voting was peaceful. He also said that the campaigns were peaceful. It was his further testimony that there were no instances of either bribery or violence, both during the campaign period, as well as the voting day.

RW 6, CLEMENT KUNGU WAIBARA, testified that he did sit for the language proficiency test for both English and Kiswahili.

He denied ever having bribed any voter. He also denied having perpetrated any violence.

RW 6 testified that when he presented himself before the Language Board, he gave to them his identity card together with a letter from the ECK. Thereafter, he was required to write a composition in English and another in Kiswahili. He was also given texts to read in the 2 languages, and then he was asked questions about the said texts. After going through the tests, he was issued with a certificate. It is the said certificate which he presented to the ECK, as a precondition to being nominated as a candidate.

During cross-examination, **RW 6** was given a text in English and another in Kiswahili. He had difficulties in reading through the said texts. However, he emphasizes that he has no difficulty in speaking and reading Kiswahili and English well enough to participate in Parliamentary proceedings.

He also testified that **PW 1** did not resemble him at all. Therefore, **PW 1** could not, in **PW 6**'s understanding, have impersonated him.

He attributes **PW 1**'s evidence to personal differences which had arisen between the two of them, culminating in **PW 1** vowing never to forgive the 1st Respondent.

RW 7 HEZBON OCHIENG NYAGOWA was the academic registrar at the Kenya Polytechnic University College.

He testified that Martin Ndungu Kahura registered himself as a student at the Kenya Polytechnic in 1990. He enrolled in the department of Electrical and Electronic Engineering, where he was to pursue a Diploma Course.

According to **RW 7** Mr. Kahura failed the exams at the end of his first academic year at the Polytechnic. Therefore, he did not proceed to the second year. Consequently, Mr. Kahura never graduated from the Kenya Polytechnic in the year 1993 as alleged, or at all.

RW 8 CHARLES MARARO NJOROGE is the 2nd Respondent in the petition. He was the returning officer for the Gatundu North Constituency.

It was his evidence that the agents for the various candidates only signed Forms 16A when they were available. Secondly, the presiding officers did not need to insert any comments on the Forms 16A unless there was something unusual.

RW 8 took the court through most of the Forms 16A which had been produced before the court. He compared the Forms 16A produced by the 2nd and 3rd Respondents on the one hand, to those produced by **PW 2** on the other hand. He expressed the view that most of the documents attached to the affidavit of **PW 2** were fake.

RW 8 informed the court there were 95 polling stations in Gatundu North constituency. Each of the said polling stations issued Forms 16A. Those forms were filled in by the presiding officers at the respective polling stations. Thereafter, the Forms 16A were remitted by the presiding officers to the Returning Officer who was based at the tallying centre. Using the information contained in the Forms 16A the Returning Officer filled in Form 17A. In effect, Form 17A constitutes a summary of the information contained in all the Forms 16A. It therefore follows that the validity or otherwise of an election is determinable from the manner in which the Forms 16A are handled.

When **RW 8** was asked about the source of the Forms 16A annexed to the affidavit of **PW 2**, he said that the letter-heads must have emanated from the Electoral Commission of Kenya (ECK). However, the original Forms 16A, which were deemed by **RW 8** to be authentic, were to be found inside the ballot boxes which were in the custody of the court. Therefore, any Forms 16A which were produced by **PW 2** or any other person, and which were inconsistent with the originals, must be deemed to be fake.

It was the evidence of **RW 8** that the failure by an agent of any candidate to sign the Forms 16A would not render such form invalid.

RW 8 testified that the ECK letter-heads were readily available. Therefore in this view any one could have obtained the said letter-heads for Forms 16A and filled them in. However, **RW 8** admitted that it is the presiding officers, who ought to have had custody of the said letter-heads, and that it was wrong for the presiding officer to have given out blank ECK Forms.

As regards the omissions in Form 17A, **RW 8** emphasized that those did not constitute errors. At worst, they were omissions, which rendered the forms incomplete.

It was the explanation of **RW 8** that where there were any omissions, the Form 17A could be easily completed by reference to the Forms 16A. He emphasized that all the contents of the Form 17A were accurate.

RW 8 testified that he worked within the Gatundu North Constituency between 24th of October, 2007 and 28th of December, 2007. During that time, he and other members of Peace Committee monitored the campaigns throughout the Constituency, and the secretary to the said committee was none other than the Officer Commanding Police Station (OCS).

RW 8 testified that there was no evidence of any bribery or violence witnessed by the Committee or that was reported to the said committee by anybody.

Apart from the Peace Committee, there was the Government Committee on security which was chaired by the District Commissioner.

RW 8 attended the meetings chaired by the District Commissioner every week. However, at no such meetings was any report received from the Chiefs or anybody else about alleged bribery or violence within the Constituency. In conclusion, **RW 8** testified that the election in Gatundu North Constituency was conducted in a manner that was transparent, free and fair. He was therefore satisfied that the 1st Respondent was validly declared as the duly elected Member of Parliament for Gatundu North Constituency.

RW 9 PATRICK MURIITHI MIANO is the Principal Examination Secretary in charge of the archives at the Kenya National Examinations Council. He testified that **CLEMENT KUNGU WAIBARA**, did not sit for Certificate of Primary Education Examination at Gikindu Primary School in 1985. However, when being cross-examined by the Advocate for the 1st Respondent he admitted that there was a possibility that the results upon which he relied as the basis for his evidence, was in relation to the wrong school. The reason for that was that there are apparently two schools named Gikindu Primary School; with one being located in Muranga District whilst the other was located in the Gatundu North Constituency, Kiambu District.

RW 9 was consequently stood down, so as to enable him get an opportunity to verify the accuracy of the information which he had provided.

When **RW 9** was expected to resume his testimony, he failed to appear. In his place, the Kenya National Examination Council (KNEC), sent an assistant examination secretary.

RW 10 LINUS LIJINA SHIKAMI, is an Assistant Examination Secretary with KNEC. He is in-charge of confirmation and verification of examination results.

He produced the results from the two schools called Gikindu Primary School in Muranga and Kiambu Districts respectively. A perusal of the said results confirms that **CLEMENT KUNGU WAIBARA** did not sit for the KCPE at the school in Muranga. However, he sat for his KCPE at the Gikindu Primary School in Kiambu District.

RW 10 confirmed that the certificate produced by **PW 2**, in relation to the results of **CLEMENT KUNGU WAIBARA** was authentic.

It is necessary at this point that I make it clear that the witnesses from the Kenya National Examination Council and the Kenya Polytechnic University College testified after being summoned by the court. In other words, they did not testify for either the petitioner or any of the respondents. It will soon become clear why the court deemed it necessary to call for evidence from the said two institutions. Reverting to the issues raised in the petition for now, it is clear that the petitioner did not expressly make any assertions about the alleged invalidity of Forms 16A. That fact was readily conceded by **PW 2**, who also testified that it is he who provided the financial muscle to back the election petition.

After the petition was served upon the Respondent, the 2nd and 3rd Respondents served a request for particulars on the petitioner. In answer to the request for particulars, the petitioner responded in the manner following:-

When asked about the alleged violations of **Section 34 (c) and 42A (c) of the Constitution of Kenya** the petitioner said that the 2nd and 3rd Respondents had allowed the 1st Respondent to contest as a Member of Parliament whilst he was ineligible to do so. He further added that the 2nd and 3rd Respondents did not submit the 1st Respondent to a language test before allowing him to be nominated to contest in the elections.

The petitioner asserted that the 1st Respondent was ineligible *ab initio* because of his manifest deficiencies in reading and speaking in the English and Kiswahili languages.

The petitioner promised to provide to the Election Court: *“the full names, addresses and electors’ card numbers”*, of the persons who were allegedly bribed by the 1st respondent.

Notwithstanding the said promise made by the petitioner, the court was not provided with the names, addresses and electors’ card numbers of the persons who had been allegedly bribed by the 1st Respondent. Of course, **PW 2** gave a few names but without their requisite addresses or voters’ cards numbers. He only said that the names and the particulars of the persons who were bribed would be available. Of course, that was wholly insufficient as evidence to prove the allegations of bribery. They remained no more than allegations made by **PW 2**.

I so find because bribery is a serious allegation, which has criminal connotations. Whoever alleges it is obliged to meet the high threshold of proof.

On her part, **PW 3** testified that she was bribed by the 1st Respondent. That assertion was denied by the 1st Respondent. Therefore it boils down to the word of one witness against the other. Having observed the demeanour of the said two witnesses, this court is unable to say, without more, which of the two persons was to be believed and which one was not to be believed.

It is however significant to note that whereas the allegations of bribery were said to have been calculated to influence voters to cast their votes in favour of the 1st Respondent, **PW 3** was not influenced at all. She did not vote for the 1st Respondent. Therefore, the alleged bribery did not cause any undue influence on **PW 3**.

As regards **PW 1**, it is noteworthy that he purported to place himself on a high academic pedestal. He exalted his academic qualifications by informing the court that he had graduated with a Diploma from the Kenya Polytechnic, Nairobi. However, when he was required to produce evidence to support his alleged qualification, he failed to do so. Instead, he alleged that his documents had been lost whilst in the hands of his wife, who has been based in the United States of America for many years now.

Being aware that examining bodies which issue certificates to candidates who have sat for examinations, are able to verify the performance of any such witness, even in the event that the candidate had lost his original certificate, this court caused summons to issue to the Kenya Polytechnic University College. The intention for so doing was to enable the Kenya Polytechnic University College, which is the successor to the Kenya Polytechnic to authenticate the assertions made by **PW 1**.

As it is, the Kenya Polytechnic University College testified that **MARTIN NDUNGU KAHURA** only went through his first year of studies for the Diploma in Electrical and Electronics Engineering. They categorically denied having issued him with any Diploma.

In the event, **MARTIN NDUNGU KAHURA** strikes me as someone who was an unreliable witness.

On his part, **PW 2** conceded that he had been conned of Kenya Shillings, two million, one hundred thousand (Kshs.2.1 million). He lost the money to three persons who said that they worked for De la rue, Kenya. The said persons apparently indicated that they could print 30 million Kenya shillings for **PW 2**.

In view of that concession by **PW 2**, this court is reminded of the following words of the Court of Appeal in the case of **NDUNGU KIMANYI –Vs- THE REPUBLIC [1976-80] 1KLR 1442 at page 1444**.

“The complainant was not a virtuous virgin. A man of loose conscience, on a previous occasion also he had been involved in a swindle operation for making easy money when he lost Shs.40,000/-. In our opinion the evidence of the complainant does not come up to the minimum standard which we require before upholding a conviction in a criminal case. We lay down the minimum standard as follows; the witness upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence”.

To my mind, a person who had been a Member of Parliament for 10 years, but who is ready and willing to pay Kshs. 2.1million as a consideration for the printing of Kshs.30 million cannot be deemed as a man who engenders trustworthiness in him. I find that his conduct raises suspicion that he is a person of doubtful integrity and is therefore an unreliable witness whose evidence this court finds unsafe to accept.

As regards the 1st Respondent, he initially denied, very vigorously, any connection with the KCPE Certificate produced by **PW 2**. He said that the certificate did not belong to him. However, when faced with the prospects that the Kenya National Examinations Council would spill the beans, the 1st Respondent quickly admitted that the certificate was his. His conduct gives rise to doubts about his reliability as a witness.

In effect, I consider each and every one of the three main actors in this case to be persons all of doubtful integrity. For that reason, my sympathies go to the people of Gatundu North Constituency.

Ultimately however, the burden of proof rested upon the petitioner to prove their assertions set out in the petition. As a start, the petitioner did not testify at the hearing of this petition. That of itself, was suggestive of the petitioner’s own lack of faith in his case. However, the failure by the petitioner to give evidence did not, of itself, amount to a sufficient ground upon which to summarily dismiss the petition. I say so because there could have been a possibility that even without the evidence of the petitioner, his other witnesses who testified could have given sufficient evidence to prove the petition.

However, by the close of the case before me, no evidence had been adduced to prove the assertions of violence.

Meanwhile as regards the contention that the 1st Respondent did not sit for the Proficiency Examinations, the court finds that the evidence adduced vindicates the 1st Respondent. I say so not so much because of the evidence from the said 1st Respondent, but more so because of the evidence of **RW 3**. The petitioner has conceded, in his submissions that:

“The Petitioner humbly urges the Honourable Court to note the following with regard to this (Section 34 (c) constitutional provision:-

(a) The threshold of proficiency required of a candidate is ability to “speak” and “read” the two languages “well enough” to take “an active part” in the proceedings of the National Assembly. Accordingly, the threshold is not merely whether the 1st Respondent can speak or read the two languages.

(b) The operative time for purposes of the section is the date of nomination for election. Accordingly, it is immaterial whether the 1st Respondent can, as at the time of the trial or conclusion of the petition, demonstrate the requisite proficiency in the Swahili and English languages.”

In my view, that concession reflects the correct position in law. In other words, even if the 1st Respondent had difficulties in reading the texts that were presented to him when he was giving evidence, that, of itself, could not be a basis for concluding that he was unable to read and speak English and Kiswahili well enough to take an active part in the proceedings of the National Assembly.

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

This court’s assessment of the ability or otherwise of the 1st Respondent to read or speak English and Kiswahili cannot substitute the results given by the Examinations Board, which is clothed with authority to administer the proficiency examinations.

Of course, in the light of the Constitution of Kenya 2010, which demands openness and transparency in the manner in which leaders are to be chosen, the People of Kenya may well be entitled to demand information regarding the general content of the examinations administered by the Proficiency Examination Boards. Of course, I am not suggesting that the said examinations be conducted in the presence of the media, as has been the case during the interviews for the positions of the Chief Justice, the Deputy Chief Justice, and Judges of the Supreme Court and of the High Court of Kenya. But there may be need to consider the suitability of having forums which would satisfy the people of Kenya that any person issued with a proficiency certificate would satisfy the educational, moral, and ethical requirements espoused by **Article 99 (1) (b) of the Constitution of Kenya**.

By dint of the provisions of **Section 28 of the National Assembly and Presidential Elections Act**:-

“No election shall be declared void by reasons of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in that written law, or that the non-compliance did not affect the result of the election.”

That implies that if the election was conducted in a manner that was substantially in accordance with the law appertaining to elections, the said election is not vitiated by a breach of the rules or a mistake at the polls, provided that such breach or mistake did not affect the results of the election.

So, did the 2nd and 3rd respondents conduct the elections in a manner that was substantially in accordance with the law governing elections?

The Returning Officer readily conceded that it was wrong for the presiding officers to give out blank ECK letter-heads to any persons.

He also conceded that numerous Forms 16A were either not stamped by the presiding officers, or by the candidates' agents. Many other Forms 16A were not signed by the presiding officers.

Furthermore, the Form 17A was not signed by the Returning Officer. It was also incomplete in several respects.

And whereas the information on the Form 17A may have been accurate, the form was nonetheless incomplete.

RW 8 conceded that the petitioner's complaints regarding Forms 16A were legitimate.

However, the petition did not raise any complaints with regard to the provisions of Regulation 35A of the Presidential and Parliamentary Regulations.

Does that mean that the court should close its eyes to the evidence adduced?

Ordinarily, when a party leads evidence on something which was not in issue before the court, the other party would raise an objection to such evidence. The court would normally uphold such an objection because the evidence would have no relevance to the case.

In this case, the respondents did not raise any objections to the evidence led by the Petitioner, on the matters to do with Forms 16A. If anything, the respondents actually cross-examined the witnesses at length, in an endeavour to demonstrate that the Forms 16A and Form 17A were properly filled.

By taking that course of action, the respondents made the Forms 16A and Form 17A issues upon which the petition could be determined.

In the result, following the concessions made by the 2nd and 3rd respondents, I find as follows:-

- (i) ***The failure by the returning officer to sign the Form 17A was a significant omission on his part.***
- (ii) ***At the Gachege Nursery School polling station the presiding officer did not sign the Form 16A.***
- (iii) ***At the Gakoe Tea Nursery Polling station, the presiding officer did not indicate the particulars of the registered voters; the number of valid votes cast; the total number of rejected voters and the number of disputed votes.***

These are only 3 examples of the omissions and errors demonstrated to have occurred in 23 polling stations and in the Form 17A. They demonstrate the casual manner in which the returning officer and the electoral body appear to have conducted their duties.

In my considered view, it is most important that those charged with the responsibility of managing the electoral process must do everything within their power to comply with the rules and regulations governing elections. There should be no compromise, otherwise the integrity of the electoral process would be called to doubt, thus giving rise to the possible recurrence of the chaos witnessed in Kenya after the elections held in 2007. In other words we must hold the electoral commission and its officers fully accountable for their acts and omissions.

In **MANSON OYONGO NYAMWEYA Vs JAMES OMINGO MAGARA & 2 OTHERS, ELECTION PETITION NO.3 OF 2008**, **Musinga J.** held as follows:

“The failure or refusal of a candidate or agent to sign Form 16A or to record the reasons for not doing so, as required, cannot by itself invalidate the results announced by a Presiding Officer. But as far as other requirements under Regulation 35 are concerned, failure by a Presiding Officer to comply is a serious breach which requires appropriate explanation by the officer concerned. In fact, it is an election offence for a Presiding Officer, without reasonable cause, to fail and/or refuse to sign and stamp a Form 16A, including completing all the parts as required of him under the said regulation.”

The learned Judge noted that an incomplete Form 16A was of no value and could not therefore be used to authenticate any declared results.

In **WILLIAM KABOGO GITAU Vs GEORGE THUO & 2 OTHERS ELECTION PETITION NO.10 OF 2008**, **Kimaru J.** reiterated that;

“It is therefore evident that a Form 16A which is not signed by the presiding officer cannot constitute valid results which can be accepted for tallying by a returning officer. A Form 16A which is not authenticated by the stamp of the electoral body cannot be said to contain valid results which can be validated.”

It is now settled law that even though the irregularities would not have affected the actual results of the election in issue, the court cannot ignore irregularities which would affect the credibility of the results. I therefore find that the irregularities herein do have a significant effect on the credibility of the electoral process in the Gatundu North Constituency.

The electoral body failed to discharge its duties in such a manner as would imbue confidence in the process. I therefore find and hold that the elections were not demonstrably conducted in a transparent, free and fair manner.

Therefore, I do now declare that the election results announced by the 2nd & 3rd Respondents are null and void. The 1st Respondent was not validly elected as the Member of Parliament for the Gatundu North Constituency.

I direct that a certificate do issue forthwith, to be served upon the Speaker of the National Assembly pursuant to **section 30(1) of the National Assembly and Presidential Elections Act.**

The cost of the Petition shall be paid by the 2nd and 3rd Respondents, to the Petitioner and to the 1st Respondent.

Dated, Signed and Delivered at Nairobi this 26th day of August 2011

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FRED A. OCHIENG
JUDGE