REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Election Petition 3 of 2008

THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT (CAP 7 OF THE LAWS OF KENYA)

ELECTION PETITION FOR KIRINYAGA CENTRAL

THE PETITION OF DICKSON DANIEL KARABA

BETWEEN

DICKSON DANIEL KARABA ……..……..PETITIONER

VERSUS

JOHN NGATA KARIUKI ……..……..1ST RESPONDENT

JAMES KARIUKI GITAHI ……..……..……2ND RESPONDENT

INTERIM INDEPENDENT ELECTORAL COMMISSION OF KENYA

(Successor to Electoral Commission of Kenya) .....3RD RESPONDENT

JUDGEMENT

This petition concerns the Parliamentary election that was held in Kirinyaga Central Constituency on 27th December 2007. The petition is dated 10th January 2008 and is against the 1st, 2nd and 3rd respondents. The petitioner and the 1st respondent were amongst 16 other Parliamentary candidates in the said election. The 2nd respondent was the Returning Officer for the said Constituency having been duly appointed to that position by the 3rd respondent in exercise of its powers under the Constitution and Cap 7 laws of Kenya. The 3rd respondent is a Commission established under the Constitution with powers to conduct Presidential, Parliamentary and Civic elections within the law.

The election was conducted peacefully in all the polling stations within the said constituency. The results from each of the polling station were remitted to the Returning Officer for purposes of adding and tallying the results. The counting and the tallying of the votes was conducted at Kaitheri Youth Polytechnic known as the Tallying Centre. It is alleged that after taking into consideration all the results

from all the polling stations, the 1st respondent was declared the winner with **17,830** votes as against his closest rival (the petitioner) with **16,264** votes.

The announcement of the results and the declaration of the 1st respondent as the candidate elected to represent the said constituency was done around 7.00 a.m. on 28th December 2007 in the absence of the petitioner but in the presence of his agents.

According to the petitioner, he arrived at Kaitheri Youth Polytechnic Hall at about 7.15 a.m. and demanded for re-tallying of the votes which was done. The petitioner was not satisfied with the re-tallying and asked for a 2nd re-tallying but was refused by the 2nd respondent. In an effort to get a second re-tallying, the petitioner sought the intervention of the District Election Coordinator, Mr. Francis Kabata Githinji. The District Coordinator of Kirinyaga Central Constituency gave evidence on behalf of the petitioner and confirmed that the petitioner complained to him that the 2nd respondent had rejected his request for a second

re-tallying of the votes. It is the evidence of **Mr. Githinji** that he made a telephone call to the 2nd respondent and asked him to do a second re-tallying as requested by the petitioner. The 2nd respondent allegedly replied that he could not do second re-tallying as he was on his way to Nairobi.

The petitioner being dissatisfied with the tallying and the re-tallying of the votes presented this election petition on 11th January 2008 seeking;

(a) That all the votes cast in Kirinyaga Central Constituency be scrutinized, counted and tallied to ascertain who between the Petitioner and the 1st Respondent was the true winner of the election held on 27th December 2007.

(b) That subject to (a) hereinabove, it be determined that JOHN NGATA KARIUKI was not duly elected and the election was void;

(c) That a certificate of determination of this petition be issued as prescribed by Section 30 of the National Assembly and Presidential Election Act aforesaid.

(d) That costs of this petition be awarded to the Petitioner.

The basis of the petitioner's complaint is that the counting and re-tallying of votes was faulty and incorrect, in consequence whereof, an inaccurate number of votes were attributed to the 1st respondent, thereby making him a winner erroneously. He therefore says that had all the votes cast in the election been correctly counted and re-tallied, he would have won the election. He also contended that the 2nd respondent committed arithmetical errors and failed in his duties of taking into consideration all the results from each of the polling stations as recorded in Form 16As which were delivered to him. It is alleged that the 2nd respondent and his rallying clerks did not tally the votes for all candidates as reflected and recorded in Form 16As from each of the polling stations. It is also contended that the results announced after the alleged counting and re-tallying, did not reflect the will and wishes of the people in Kirinyaga Central Constituency. Consequently by reasons of mistaken counting, omission of results from certain polling stations, erroneous tallying and re-tallying of the results deprived,the petitioner the benefit of the true results as expressed by the voters, hence the collective choice of leadership by the electorate was undermined and denied.

According to the 1st respondent, the tallying was finalized at about 6.30 a.m. on 28th December 2007. The announcement of the winner was made at about 7.00 a.m. after taking into consideration the results from all the polling stations. The 1st respondent testified that he got a certificate of declaration of the results declaring him as the winner at about 9.30 a.m. through his agent one **Denis Njogu** who testified as the 1st respondent's second witness. The 1st respondent and his witness testified that there

was no complaint raised at the tallying centre with regard to tallying by any of the candidates or the agents before the winner was announced. They confirmed that the petitioner was not present at the tallying centre at the time the tallying was conducted, concluded and the winner declared. It is alleged that, one of the agents of the petitioner one **Isaac Mwangi** informed the petitioner that he was not declared the winner due to omissions and commissions committed by the 2nd respondent. The said **Isaac Mwangi** did not testify on the role he played at the tallying centre before the results was announced.

The petitioner alleged that he arrived at the tallying centre and found election over and the winner already announced. The petitioner demanded for a re-tallying of the votes and allegedly engaged the returning officer for about two hours until the returning officer acceded to his request. The 1st respondent contends that no evidence of the said re-tallying was produced before court. He also contended the said re-tallying was carried out without the authorization or direction of 3rd respondent. It was also carried out in the absence of all other candidates and their agents and obviously out of the petitioner's coercion and/or duress.

The 2nd respondent stated that he carried out the re-tallying, not under any obligation but to appease the petitioner. He alleged that the petitioner was dissatisfied with the outcome of the announced results and that is why he demanded for a re-tally of all the votes. The 2nd respondent also stated that the petitioner demanded for a 2nd re-tallying which he refused.

The first issue is whether at the end of this journey and if the petition succeeds, that is I should declare the petitioner as the duly elected Member of Parliament for Kirinyaga Central Constituency. **Mr. Paul Wamae** learned counsel for the petitioner submitted that if the petition succeeds, and a finding is made that the 1st respondent is not validly elected, then Ishould declare the petitioner as the winner. He contended that a false declaration of a loser as a winner is an unlawful declaration within the scope of Cap 7. It is act which is a nullity and of no legal effect. That may sound attractive but nevertheless it is not an issue borne out of pleadings filed by the petitioner. I therefore think that the submission by the petitioner's advocate is without merit and does not deserve the intervention. As rightly pointed out by the advocates for the respondents, the issue was not pleaded and in any case it would be unjust to impose somebody on the electorate without sufficient basis. The issue is therefore rejected at this early stage of this judgement.

I now go straight to the substratum of the petition and whether the petitioner has satisfied the threshold for nullifying the election, bearing in mind the yardstick and foundation as set out in Section 28 of Cap 7.

The grounds which the petitioner relies on, in his quest to set aside the election of the 1st respondent as Member of Parliament for Kirinyaga Central Constituency are that there was non-compliance with the provisions of Cap 7 and regulations thereunder. The law is that the court has to be satisfied that the election was not conducted in accordance with the principles laid down under the Constitution and Cap 7 Laws of Kenya. And that the failure affected the result of the election in a substantial manner. It is the case of the petitioner that the Returning Officer committed a fundamental error or mistake, in announcing the wrong candidate.

By virtue of section 106 and 107 of the Evidence Act, a party who asserts the existence of certain facts on which judgement is sought to be based and in the absence or failure to prove such fact, such party would fail as he has the burden of proof. In this case the petitioner asserts the existence of facts constituting as ground for setting aside the election of 1st respondent as Member of Parliament of Kirinyaga Central Constituency.

In my view the assertions by the petitioner against the respondents have to be proved to the satisfaction of this court and in the absence of such proof, the petitioner will fail. The point is that the petitioner is the party on whom the burden of proof, of such facts rests. Any ground specified in the petition has to be proved on a balance of probability. I think, the expression that a matter has to be proved to the satisfaction of the court is synonymous that it has to be proved on the basis of a balance of probabilities. It is now settled law that in election petitions, it is not enough for the petitioner to allege and

even prove that there was non-compliance with or contravention of electoral provisions or principles. It is a requirement, that the petitioner must go further and show that the results of the election was thereby affected and not merely affected but affected in a substantial manner.

In my understanding the entire election process should be conducted in an atmosphere free of anything intended to subvert the will of the electorate. It has been held that matters concerning validity of elections are matters of great public concern. These matters have far reaching implications and they call for and deserve the most diligent inquiry and investigations so that a party who emerges victorious in a rather hotly contested election is not denied the fruits of his victory on flimsy reasons. Such inquiry, investigations and determination must therefore involve cogent and credible evidence that applies directly to the facts in issue.

In determining whether non-compliance with or contravention of electoral laws affected results of an election in a substantial manner, the court has to apply either quantitative or qualitative tests or both depending on the circumstances and facts of each case. The quantitative test is relevant where the numbers or figures are in issue, while qualitative test is relevant where the quality or standard of an election on the whole is in issue. In determining whether an issue raised by a petitioner goes to the root of the election, it must be something substantial and calculated really to have affected the result of the election in a given manner.

This case concerns figures or number of votes obtained by the petitioner and the 1st respondent, so the quality and/or standard of the election process is not in issue. However, I must hasten to add that the process, quality, standard and transparency of an election can be gauged from the first step by the electoral body to the last step resulting in the conclusion of the election. The whole process has to be considered in a wholesome and conclusive manner. The process from the start to the end has to be fair, free, transparent and an expression of the will of the people so as to say a proper election process had been conducted and concluded in a particular constituency.

It is the position of the petitioner that the wrong candidate was declared the winner in contravention of the law. On the other hand it is the position of the 1st respondent that he was declared the true and legitimate winner of the election that was conducted on 27th December 2007. It is alleged that **Mr. Isaac Mwangi** an agent of the petitioner was present at the time the 1st respondent was declared as the winner. The petitioner immediately rushed to the tallying centre and demanded for a re-tallying of the votes. After much struggle a re-tallying was done which produced results to the effect;

John Ngata Kariuki - 17,219 votes

Dickson Daniel Karaba - 17,151 votes.

It is also alleged by the petitioner that, a second re-tallying was conducted which produced another different results as hereunder;

John Ngata Kariuki - 17,277 votes

Dickson Daniel Karaba - 17,234 votes

It was contended by the 1st respondent that no evidence was produced before court as to the said exercise of re-tallying of the votes twice in his absence. It was contended by the advocate for the 1st respondent that the cause of action of the petitioner is that the 2nd respondent in the first tallying and re-tallying did not include the results from one polling station namely **Kiamutuira** polling station and if that result was included, he would have been the winner with 198 votes more than the 1st respondent.

Regulation 40(1) of the Presidential and Parliamentary Elections Regulations of the provides that immediately after the results of the polling for all the stations in a constituency have been received, by the Returning Officer shall in the presence of candidates or their agents present;

(a) Tally the results from the polling stations for each candidate

(b) Examine the ballot papers, mark rejected, rejections objected to, and disputed and confirm or vary the decisions of the presiding officers with regard to the validity of these ballot papers.

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(c) …

(d) Publicly announce to persons present the total number of valid votes cast for each candidate in case of a Parliamentary election.

(e) Publicly declare to the persons present the candidate who has won the Parliamentary election for the constituency

The returning officer is required to publicly declare to the persons present the candidate who has won the Parliamentary election for the constituency and the number of votes obtained by such candidate. He is also required by law to inform and declare to all the candidates who participated in the Parliamentary elections as to the number of votes garnered. He is supposed to complete Form 17A indicating;

(1) The name of the Constituency

(2) Total number of registered voters

(3) Votes cast for each candidate in each polling station.

(4) Number of rejected votes for each candidate in each polling station.

(5) Aggregate number of votes cast in the Constituency.

(6) Aggregate number of rejected votes.

The Returning Officer is also required to sign and date the form and;

(a) Give to each candidate or candidates' agents present a copy of the form and

(b) Deliver to the Electoral Commission the original Form 16As with Form 17A and Form 18.

Regulation 41(6) provides that;

> **"Where a dispute arises over the counting and/or tallying of the votes, a candidate may within 24 hours petition the Electoral Commission which shall have the power to order and supervise a count and/or tally as is appropriate provided the decision of the Electoral Commission shall be made within 48 hours of such a petition."**

It is the position of the 1st respondent that the election for all purposes had been concluded the moment the results were announced by the 2nd respondent and from that moment onwards the Returning Officer had exhausted his official duties and mandate. It was contended by **Mr. Wachira Mari** learned counsel for the 1st respondent in accordance with Regulation 41(6), the petitioner recourse would have been to petition the Electoral body which alone had the right and power to direct a re-tally which the petitioner did not do. He contended that the petitioner decided to bully the Returning Officer to procure an unlawful re-tally and second re-tally. **Mr. Wachira Mari** submitted that the second re-tally was an illegitimate and unlawful exercise that the court cannot take cognizance of and any cause of action arising from the outcome of an illegitimate and unfounded cause of action should be dismissed.

According to **Mr. Wachira Mari** it is of no consequence whether the second tally produced a

different result from the results declared after the initial tally and against which the winner of Parliamentary election was announced. He submitted that the validity of the 1st respondent's election should not be measured as against the outcome of the said invalid exercise. According to Regulation 40 and 41 the Returning Officer is supposed to declare the outcome of the election upon tallying of all the Form 16As and not the Form 17A which he submits to the electoral body as Form 17A is completed after the results have been announced.

The 2nd respondent stated that at the time he announced the results, the Form 17A was not completed. As a result **Mr. Wachira Mari** advocate submitted that any error that would arise in making entries to Form 17A while lifting the results from Form 16As should not vitiate the validity of the counting, tallying and declaration of the winner of the election. In the opinion of **Mr. Wachira Mari**, the outcome of the election was not dependent on the entries on form 17As which was not in existence at the time the election results were announced. He cited the case of Uganda Supreme Court of **Joy Kabatsi Kafula vs Anifa Kawuoya Election Petition No.25 of 2005** where it was held;

> **"An election is a process encompassing several activities from nomination of candidates through to the final declaration of the duly elected candidate. If any one of the activities is flawed through failure to comply with the law it affects the quality of the electoral process."**

According to **Mr. Wachira Mari** learned counsel for the 1st respondent the above proposition would mean that the election ends with the declaration of the winner and subsequent activities do not constitute the electoral process *strict sensu* and if any subsequent act is flawed, therefore cannot affect the validity of the said process. **Mr. Wachira Mari** submitted that the petitioner's claim is unproven hence the petition ought to be dismissed with costs.

Another issue which is central to the determination of the issues raised by the parties concerns the election materials that were not produced before court by the 2nd and 3rd respondents. It is in evidence that all the election materials required to be produced before court by the returning officer under rule 19 of the National Assembly Elections (Election Petition) Rules, were all destroyed in a fire that gutted the offices in Kerugoya. Accordingly there were no votes to be scrutinized.

Section 26 of Cap 7 provides for the procedure to be followed in the scrutiny of votes to determine whether the counting of votes was appropriately carried out. **Mr. Wachira Mari** submitted that without the destroyed materials, this court cannot resolve whether the counting was carried out in accordance with the law. He also contended that the original Form 16As and 17A that were submitted to the electoral Commission was also unavailable given further credence that any scrutiny and/or re-tallying would be on shaky grounds. He cited the case of **Ngethe vs Njeru & another Petition No.2 of 2008** where **Visram J** (as he was then) in a matter where the election materials and records for Kiambaa Constituency had been lost held;

> **"the petitioner has established that the petition could not be heard and determined in a fair and just manner and that it would not be possible for him to properly prosecute his petition in the absence of the vital documents which by law are required to be placed before the court within 48 hours before the hearing of the petition."**

On the strength of the above passage **Mr. Wachira Mari** submitted that it was not possible to determine whether the counting of the votes was properly carried out without the benefit of the original materials that were destroyed and lost by acts outside the control of the parties. **Mr. Wachira Mari** attacked certain materials that were produced in court by the 2nd and 3rd respondents which were Photostat copies obtained from African Union office of African Eminent Personalities. The said material did not emanate from the 2nd or 3rd respondent.

It is alleged that some of the said Form 16As were either not signed by the presiding officers, didn't bear the names of the presiding officer or an ECK stamp. Consequently their authenticity was called into question as a representative of the official election materials under rule 19. Mr. Wachira Mari

submitted that Form 17A had multiple entries that were not intelligible, cancellation that could not be explained were found and countersigned for and alteration for which no one was accountable. He also stated that the Presiding Officers who prepared the Form 16As were not called to shed light on the contents of the said documents to render them a true reflection of the counting and tallying of votes at the polling stations and centres for the said election. There were no ballot papers available for counting to verify the accuracy of the entries on Form 16As. The 1st respondent did not have any election materials retained from the electoral process and the petitioner did not produce any of his own to be compared with Form 16As and 17Abrought to court, by the 3rd respondent.

It was also contended that the 3rd respondent did not vouch for the said authenticity of the said documents and that there was no witness called from African Union who could vouch for the authenticity of the said document that they were in proper and safe custody. No evidence was given on the movement of the documents from the time the 2nd respondent delivered them to the Electoral Commission to the other offices that had handled including the Kriegler Commission and up to the point that copies were found in the offices of African Union. No evidence was given on the reproduction process, if any, taken to protect the said documents from distortion, alterations which were either deliberate or accidental or through manipulation. As a result **Mr. Wachira Mari** submitted that the materials procured and produced by the 3rd respondent were totally unreliable in assisting the court to get an accurate and correct picture of the true votes cast for each candidate in Kirinyaga Central Constituency. He submitted that the said materials should not be used to assess and determine the validity of the 1st respondent's election. **Mr. Wachira Mari** alleged that this court has no basis of making a fair assessment of what transpired in Kirinyaga Central Constituency parliamentary election using the materials that were tendered before court in replacement of the materials under Rule 19. He contended that the use of the said materials would expose the 1st respondent to potential prejudice which is likely to outweigh any evidential value that may be attributed to the document. In support of his assertions he cited the case of **Republic vs Stoyananavic Millan [2006] eKLR,** where production of a tape recording in court was objected to on the ground that the same was not original and genuine and the court held;

> **"…There is a missing link in the chain of possession of the tape to that extent…without evidence of safe custody reception of that tape in evidence would be prejudicial to the accused person."**

The court in the said case cited the words of **Kilner Brown J in Republic vs Hulse and Republic vs Whitney [1971] All E.R. 678 at page 680** letter E – G viz;

> **"Once original has been impugned and sufficient details as to certain peculiarities in the preferred evidence have been examined in court, and once the situation is reached that it is likely that the preferred evidence is not the original is not the primary and best evidence that seems to be to create a situation in which whether a reasonable doubt or whether in a prima facie basis, the judge is left with no alternative but to reject the evidence."**

To get a background and to put into perspective the submissions and the position taken by the 1st respondent, it is important to relate the events leading to the use of the documents that were produced by the 3rd respondent in satisfaction of its duty under rule 19. On 12th January 2008 the petitioner served the 1st respondent in person at Sarova Hotels head office in Nairobi. The 1st respondent denied that he was served at all and within the described period. He then filed an application to strike out the petition for lack of service which was heard and determined by **Kasango J** at Nyeri. The learned Judge dismissed the petition for lack of service.

After the delivery of the ruling, **Mr. Arusei** learned counsel for 2nd and 3rd respondents made an application to have the ballot boxes and/or accompanying materials be returned to the safe custody of the District Election Coordinator Kirinyaga Central. The said application was supported by the advocate of the 1st respondent. On the other hand the petitioner's advocate opposed the application on the grounds that all election materials are by law required to be preserved under jurisdiction of the Registrar of the High Court. He urged the court to preserve the election materials pending the hearing and determination

of an intended appeal. However, the trial court released the election materials to 2nd and 3rd respondents for safe custody pending further orders from the court or pending the outcome of the appeal undertaken by the petitioner. The petitioner successfully appealed against the ruling to strike out in consequence whereof this petition was ordered to be heard by this court.

On 14th June 2010, when the petition was to commence for hearing, this court ordered the 2nd and 3rd respondent to deliver all the election materials under rule 19 of election Petition rules within the requisite period. No election materials was delivered and the counsel for the 2nd and 3rd respondents informed court that the election materials were not available. He referred to an affidavit sworn by **Teresia Wanjiru** which stated inter alia that there was a fire at the offices of the 3rd respondent in Kerugoya town on 19th March 2009 in which all the election materials for Kirinyaga Central Constituency were burnt and destroyed. It was alleged that the matter was still under police investigation hence the election materials under rule 19 could not be physically and properly produced before court.

It was at this juncture that **Mr. Arusei** learned counsel for the 2nd and 3rd respondents informed court that Form 16As and 17A which were delivered to the offices of the 3rd respondent were also missing. This court then ordered the 2nd and 3rd respondents to produce Form 16As, 17 and 17A.

On 21st June 2010 **Mr. Arusei** advocate informed court that his client was not able to trace the forms despite making strenuous efforts including employing 10 casuals to assist in the search at their warehouses in Industrial Area. It was then that this court ordered the Chairman and manager Legal services of 3rd respondent to appear and give a proper explanation as to why the said forms were not available. On 22nd June 2010 the Chairman and the Legal manager appeared and promised to deliver the forms within the shortest time possible. In particular the Chairman informed court that he would take due and diligent steps in procuring the said documents. As a result the 3rd respondent brought before court Photostat copies of Form 16As and 17A in a sealed envelope which had been obtained from African Union. Mr. Arusei advocate assured court and advocates for the parties that the contents of the envelope had remained intact from the date of receipt to the date it was tendered to court. The forms were then photocopied and given to the advocates for the parties for perusal and further action.

After the petitioner had given evidence, an application by the counsel for the petitioner that the Photostat copies of Form 16As and 17A be used as secondary evidence of the original and as the best evidence available in lieu of the documents under Rule 19. The application was opposed by the respondents on the grounds that the accuracy and authenticity of the documents cannot be vouched for. This court ruled that the said forms be examined and the results therein be re-tallied before the Deputy Registrar **Hon. Mr. Bidali** in the presence of the parties and their advocates.

The exercise was to include copying of results in Form 16As onto a similar form 17A which was prepared by the Deputy Registrar with consent and assistance of the parties. It is un-contested that the votes cast for both petitioner and the 1st respondent were to be tallied and were tallied to determine what each candidate got. The exercise commenced on 22nd July

2010 and ended on 30th July 2010. At the conclusion of the examination of the forms, recording of the results from the Form 16As onto the form prepared by the Deputy Registrar, and form 17A were respectively added for the petitioner and 1st respondent.

The results of the exercise is as follows:

The petitioner - 17,270 votes

1st respondent - 17,175 votes

After the tallying and adding, the information/figures reflected in Form yielded the following results;

Petitioner - 17,270 votes

1st respondent - 17,266 votes

In the cause of the aforesaid exercise, any issue or question that arose which the Deputy Registrar could not resolve with the consent of all the advocates was referred to this court for direction. On each such reference, this court gave directions in the presence of all the advocates who had opportunity to be heard and gave the relevant direction and orders.

The main contention raised by the advocates for the respondents is that the documents were photocopies and were therefore unreliable to determine the issues at stake in this petition. The question is whether or not the state of being Photostat copies renders the form 16, 16As, 17 and 17A inadmissible as evidence of the contents of the original or in any manner lessen the weight to be attached.

Mr. Paul Wamae learned counsel for the petitioner submitted that the Photostat copies are not only admissible as evidence of the content of the originals, but full weight should be attached to that evidence. Under Rule 19, the 2nd and 3rd respondents are obliged to deliver all the electoral materials specified therein within 48 hours of the hearing of the petition. No doubt the 2nd and 3rd respondent failed to deliver the electoral materials to court on the grounds that the same were wholly destroyed by fire. It is also the responsibility of the 2nd and 3rd respondents to produce form 16As and 17As which were by law required delivered to the 3rd respondent under regulation 41(1) (c). The 2nd respondent testified that he delivered the original Form 16As and 17A to ECK and that on 16th August 2008 or thereabout he saw the original forms with the election manager at ECK offices.

It is the position of the petitioner that the respondents by conduct are estopped from questioning the authenticity and contents of Form 16As and 17A or the weight to be attached to the contents thereof. As an officer or agent of the principal, the 2nd respondent delivered the said forms to court through his advocate and he cannot now turn to question the validity and authenticity of the said documents. It is contended that the 3rd respondent who produced Photostat copies should be deemed, to have known whether or not they were true copies of the originals. In essence a party cannot be allowed to take two divergent and conflicting positions.

In my understanding proof is a foundation of evidence and an issue can only be proved by cogent, credible and consistent evidence. The nature of evidence, the value of evidence, the authenticity of evidence, the veracity of evidence and the weight of evidence are matters that are for determination of this court. Pleadings contain the averments/assertions of the parties. The averments of the parties are to be proved or disproved by evidence or admission. Under section 3 Cap 80 evidence is defined as;

> **"The means by which an alleged matter of fact, the truth of which is sub mitted to investigation is proved or disproved and without prejudice to the foregoing generality includes statements by accused persons, admissions and observation by the court in its judicial capacity."**

Under the same section a fact includes;

"(a) anything, state of things or relation of things, capable of being perceived by the senses and

(c) Any mental condition of which any person is conscious.

Again a fact in issue means;

> **"any fact from which, either by itself or in connexion with other facts, the existence, non-existence, nature or extent of any right, liability, disability, asserted or denied in any suit or proceedings, necessarily follows.**

(2) A fact is proved when after considering a matter before it the court either believes it to exist or

considers its existence so probable that a prudent man ought in the circumstances of the particular case, to act upon the supposition that exists.

(3) A fact is disproved when after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought in the circumstances of the particular case, to act upon the supposition that it does not exist.

(4) A fact is not proved when it is neither proved or disproved.

The question is whether the documents produced by the 3rd respondent in lieu of its obligation to produce the election materials enumerated under rule 19 and its failure to produce the said documents on the grounds that they were destroyed can reduce the weight, authenticity and veracity of the photocopies tendered in part satisfaction of its statutory duty to court and to the parties in this petition. As stated averments are matters the truth of which is submitted for investigations and determination until their truth is established otherwise they remain unproved. It is the cardinal duty of the petitioner to show that he has proved that the documents produced in part satisfaction of the 3rd respondent's obligation under rule 19 are true and clear reflection of the originals.

Section 64 of Cap 80 says that the contents of documents may be proved either by primary or secondary evidence. Section 66 defines secondary evidence to include;

(a) Certified copies

(b) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy and copies compared with such copies.

(c) Copies made from or compared with originals.

(d) …..

(e) Oral accounts of the contents of a document given by some person who has himself seen it.

Again section 68(1) of Cap 80 secondary evidence may be given of the existence, condition or contents of a document in

(a) When the original is shown or appears to be in possession ….

(b) When the original has been destroyed or lost or when the person offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time.

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It was submitted by **Mr. Wachira Mari** that the copies of Forms 16As and 17A as scrutinized are inadmissible and therefore the outcome of the scrutiny, re-tallying and re-counting as ordered and done by the parties has no basis. **Mr. Wachira Mari** also submitted that election petitions are not ordinary suits that they should not be taken lightly and should not be determined on generalized allegations.

No doubt the parties have raised the issue of admissibility of the Photostat form 16As and 17A produced by the 3rd respondent. I have rendered my ruling on why I thought the said documents could be used by the parties in order to test the veracity of the issues raised by the petitioner. The law is very clear that the contents of a document may be proved by secondary evidence. In the instant case there was no doubt that the copies produced were genuine copies of the original documents generated by the officials who conducted Kirinyaga Central Constituency election. Such recognition is borne out of the fact that the originals were destroyed and that the documents were procured by the 3rd respondent from a 3rd source whom it believed had or was in possession of materials concerning Kirinyaga Central Constituency. I

think therefore there can be no doubt photocopies of documents not readily available fall within the meaning of secondary evidence. The documents were therefore secondary documentary evidence of the nature provided for by the sections of the Evidence Act, I have referred to. The purpose of such evidence is to eliminate and ensure that the secondary evidence produced in evidence are genuine copies of the originals which cannot be produced or are not available for acceptable reasons. In **Rukidi vs Iguru & another EALR [1995-1998] page 318 Supreme Court of Uganda** held;

> **"Whether evidence by the maker of a copy of a document or of the circumstances in which such a copy was made should be adduced must depend on the circumstances of each case. However, there must be absolute certainty that the copy produced was a genuine production of the original document."**

At the start of the hearing of the petition, this court asked the advocates appearing whether they were in possession of Form 16As and 17A to assist the court to countercheck with any document that may be produced by the 3rd respondent. The advocate for the 1st respondent was categorical that they were not in possession of any material concerning Kirinyaga Central Constituency. However, when the issue of whether or not 93 votes were cast in favour of the 1st respondent at polling station No.035, they were able to produce Photostat copies of both streams annexed to the affidavit sworn on 2nd August 2010 and served on all the parties. It suffices to say that the said copies annexed to the affidavit of the 1st respondent did not have the name and the signature of the presiding officer. The evidence of the 2nd respondent was that there were at least 1836 agents for all the 18 candidates in the 102 streams of the 50 polling stations in Kirinyaga Central Constituency. I am in agreement with advocate for the petitioner that it is understandable and quite probable for such a large number of streams that some form 16As could escape authentication by name or by signature of the 50 presiding officers.

As rightly pointed out by **Mr. Wamae** advocate similar omissions of signatures in form 16As were found in the case of **William Maina Kamanda - Election Petition No.5 of 2008** but the results in all the forms signed or unsigned were taken into account. It is also clear as in this case that the forms that were relied upon in that case were also photocopies. Similarly that is what transpired in the **Kabogo** case. While the procedures advocated by the learned counsel for the 1st respondent may be a requirement for prudence, it cannot in my view be a mandatory rule in every case. Whether the evidence by the maker of a copy of document or of the circumstances in which such a copy is made should be adduced, must in my opinion depend on the circumstances of each case. One fundamental condition is that there must be absolute certainty that the copies produced are genuine reproduction or reflection of the original documents and not a forgery.

In my view the evidence of the petitioner, 1st respondent and 2nd respondent leaves no doubt that the documents produced are genuine reflection or reproduction of the originals. There was not a slightest suggestion that the copies may have been forged at African Union. On the contrary the 2nd respondent who was familiar with the documents and the entries did not raise a finger on the authenticity and accuracy on the contents therein.

The 2nd respondent was best placed to question the details and the contents of the documents in his evidence before court since there is evidence that he dealt on the contents on three different occasions. He is the one who uplifted all the details from all the forms 16As from the 50 polling station into form 17As before he announced the 1st respondent as the winner of the election. After announcing the 1st respondent as a winner, he filled form 17A with the results obtained by the 18 candidates who participated in the Kirinyaga Central Constituency election. The 2nd respondent is also on record as having admitted that he undertook and carried out two subsequent recounting, re-tallying and additions of the votes to determine who won the election. In essence he was familiar with the photocopies having seen the originals on three different occasions. His evidence is therefore crucial and gave credence that the photocopies were a true reflection of the originals.

On the other hand, the furthest that the evidence of the respondents went to throwing any doubts on the authenticity of the evidence was that they were not sure or they could not tell whether the documents were treated properly from the source and before they were copied from the originals. This

was far from disputing that the documents were made or generated by the officials of 3rd respondent. It is also clear that the respondents did not say that the documents were a forgery and therefore could not be relied upon. In the circumstances, I think the evidence of the petitioner and the 2nd respondent sufficiently proved that the originals were destroyed, lost and could not be traced after diligent and reasonable search. in considering whether the original of a document is lost, I agree with the principles stated on **Sarkar on Evidence 11th Edition page 1623** where the writer stated that;

> **"Where the original has been destroyed or lost and a party has made a diligent search for it and exhausted all the sources and means available for its production, secondary evidence is admissible. The existence and execution of the document must of course be proved first. In cases under this clause any kind of secondary evidence is admissible. A destruction signifies that the thing no longer exists, while a loss signifies merely that it cannot be discovered."**

In this case the destruction of the election materials through fire which occurred at the offices of the 3rd respondent is not questionable. It is also not disputed that the original form 16As and 17A cannot be traced after exercise of diligent and reasonable efforts. I agree that there cannot be any universal or fixed rule to test the sufficiency of a search especially on the loss or non-availability of form 16As and 17A. The law is that the court has to give sufficient time to a party who after diligent effort finds it difficult to produce originals. From the time the election materials were destroyed which is on 19th March 2009 to the time the petition was concluded before this court, there was sufficient time for the 2nd and 3rd respondents to procure the originals. That was not possible. In my humble view therefore destruction and loss of the originals has been satisfactorily proved by the petitioner. In such circumstances, those who have seen and know the contents can prove or disprove the contents of photocopies provided the court believes them.

The question that arises is what is the duty of the court in the circumstances where a party in possession of a document fraudulently destroys it or suppress it to the detriment of the opposite party. As stated the 2nd and 3rd respondents had a statutory duty to ensure the electoral materials were in safe and secure custody pending the dispute concerning the election that was conducted in Kirinyaga Central Constituency. They were under absolute duty to ensure that the election materials were not destroyed, stolen or lost in mysterious circumstances. The source of the fire that destroyed the electoral materials is a mystery to this court. In such circumstances, the 2nd and 3rd respondents cannot be allowed to object to the production and use of secondary evidence they brought in part fulfillment of their statutory obligation.

In my mind where documents have been destroyed with intent to produce a wrong or injury to the opposite party or for fraudulent purposes or to create an excuse for its non- production, the court has a legal responsibility to accept the production of secondary evidence. I think, I have said enough to satisfy the requirement of the law that the documents ought to be accepted as secondary evidence. I am therefore unable to agree with the learned counsels for the respondents that the photocopies cannot be accepted and cannot be used in the absence of the originals. I think the forceful, attractive and vigorous submission by the learned counsel for the 1st respondent is without merit. I also think the arguments by the advocates for the 2nd and 3rd respondents is a ludicrous stretch and abdication of responsibility by persons who have statutory and legal responsibility to ensure independence and impartiality in the electoral process. Another issue which arose during the hearing of the matter is the introduction, use and admission of the **Independent Review Commission** known as **Kriegler Report** by the petition as evidence to support his case. It is the position of the 1st respondent that the Kriegler Commission's proceedings and reporting did not meet the threshold for proceedings before a Judicial or quasi judicial forum. The 1st respondent produced an exhibit Kenya Gazette notice issue of 14th March 2008 which showed the Commission was established by the President under the Commission of Inquiry Act. The terms of reference, inter alia, included to investigate vote counting and tallying for the entire election with special attention to Presidential election. The 1st respondent sought standing before the Commission started its hearings. The request was founded on the fact that it had been reported in the newspapers that the Commission had analyzed the parliamentary results of Kirinyaga Central Constituency and reached the verdict that the 1st respondent had lost the contest to the petitioner by 2 votes yet he was the one declared the winner. It is not that premise that the 1st respondent's standing accrued as the Commission questioned the duly elected

Member of Parliament for Kirinyaga Central Constituency.

It is alleged the Commission denied the 1st respondent a standing stating that he was not going to dwell on the said constituency as it was outside its mandate. However, it transpired that the 2nd respondent testified and gave adverse evidence against the 1st respondent. It is also alleged that proceedings were taken and findings were made against the 1st respondent's interests which were included in the Commission's final report.

Mr. Wachira Mari learned counsel for the 1st respondent submitted that the Commission acted in a manner *ultra vires* in its mandate in dwelling into parliamentary elections of Kirinyaga Central Constituency and in breach of the 1st respondent's rights of natural justice. It is contended that the 1st respondent did not participate in the process of counting or tallying of the votes and indeed does not know what materials or methods the Commission used. It was further submitted that the Commission's proceedings and verdict a nullity. He cited **Kisumu Civil Appeal No.179 of 1995 Provincial Insurance Co. East African Ltd. Vs Mordekai Mwanga Nadwa** where it was held;

> **"Whether an order is or is not a nullity depends on the circumstance in which it was made. In the main one must ensure if there was jurisdiction to make the order and whether the principles of natural justice were followed."**

It is the position of the 1st respondent that the most important consideration is not the correctness of the verdict reached but the procedure followed. And that no witness was called by the petitioner who could be cross-examined on the contents of the Commission's final report to test its veracity.

The position of the 1st respondent was supported by the advocate for the 2nd and 3rd respondents. **Mr. Arusei** learned counsel for the 2nd and 3rd respondents submitted that the issue of relying or introducing the Kriegler Commission report is not captured anywhere in the pleadings by the petitioner, therefore it cannot be introduced. In any event if the petitioner so strongly desired to rely on **Kriegler** report or the manner in which the forms 16As and 17A were filled, the petitioner could have properly filed a supplementary petition in terms of the provisions of section 20(3) of Cap 7 Laws of Kenya.

Mr. Arusei spent a lot of time and energy on the principles that a party is bound by his pleadings and his case can either fail or succeed within the perimeters of his pleadings. He also submitted that a point that is not pleaded cannot be canvassed at the hearing and cannot be a basis for a determination. He further submitted that a court can only grant reliefs based on the pleadings of the parties. And that a court should not go outside the issues pleaded by the parties in so far as any determination is concerned. I entirely agree with **Mr. Arusei** that a party is bound by his pleadings, a court cannot grant prayers or reliefs which are not pleaded and proved by the parties. I also agree that if a party wishes to bring an issue for determination which is not captured in his pleadings, he has to undertake amendments to his case. However, I disagree with the learned counsel for the respondents that a party is bound to plead evidence. That is the point I captured in the ruling I delivered when the issue of the production, use, reliance and admission of the Kriegler report was raised in the middle of the hearing of this petition. 24 Dickson Daniel Karaba v John Ngata Kariuki & 2 others [2010] eKLPerhaps it is important to note at this juncture that a party needs not to plead in his case that he will rely on a particular piece of evidence in proving its case. I think it is well known that public generated reports or any evidence can be used by a party without indicating in his cause of action or without seeking an amendment to his pleadings. With respect, I think the objection that before the petitioner could introduce, rely and produce the Kriegler report or any other report as a basis of proving his case, had to be incorporated into his petition by way of amendments are utterly misplaced and without any legal basis.

It suffices to say that you do not need to plead evidence and that you do not need to amend your pleadings if you wish to introduce a particular piece of evidence in satisfaction of your case. It is not the case of the petitioner that he is only relying on the proceedings and the final report of the Kriegler Commission. That is one piece of evidence in so far as the case of the petitioner is concerned. And it is for this court to decide the weight and the relevance of the evidence contained in the Kriegler report. In doing so this court would exercise some measure of caution in that the 1st respondent did not participate

in the said proceedings and has expressed that the principles of natural justice were breached by the said Commission.

This court is aware of its duty to consider and determine the evidence concerning the Kriegler Commission with caution and circumspection. That does not mean that this court would not attach any weight or relevance to the evidence contained in the Kriegler Commission. The caution I am bound to exercise is whether the report has any evidential or probative value in so far as it is not prejudicial to the interests and rights of the 1st respondent. Equally, this court is bound to accept any evidence rendered before the Kriegler Commission and which passes the test of legality and principle of prejudiciality. In essence this court will not nullify the election of the 1st respondent on the basis of the Kriegler report alone but on the basis of whether the petitioner has established to the required standard of proof that there were irregularities and malpractices in announcing the 1st respondent as the winner of election.

Now, it is clear in my mind that the petitioner relied on three issues in proving his case against the respondents. The first is the oral evidence given on behalf of the petitioner and the respondents. It is the case of the petitioner that the returning officer had no mandate in law to announce the loser of an election a winner. It was submitted on behalf of the petitioner that what the Act contemplated, as well as Parliament is that the one who gets the highest number of votes would be declared the winner. An announcement over loser of election as winner is ultra vires the provisions of the law and is therefore a nullity. The process of declaring the results of the election is not completed until the winner is declared in accordance with the law. It is for that reason that the petitioner contended that the 2nd respondent had not discharged its mandate and the election process is not complete.

Mr. Paul Wamae learned counsel for the petitioner submitted that the petitioner is not questioning the manner in which the election was conducted, they are not questioning the declaration of the results in the polling stations and they are accepting the results as shown in form 16As should be taken as correct. However, they are questioning the announcement and declaration of the 1st respondent as having garnered 17,830 votes as the winner of the election.

The central issue for determination is whether the 1st respondent was duly and correctly announced as the legal winner of the election conducted on 27th December 2007 in Kirinyaga Central Constituency. It is important to note that there are no allegations that the 1st respondent has committed any illegality, malpractices and omissions in the outcome of the results announced by the 2nd respondent. There are also no allegations of impropriety or contravention of electoral laws against the 1st respondent or his agents either before or during the announcement of the final results or that they were engaged in illegal practices that was likely to affect the result of the election in a substantial manner. The main and only complaint is against the 2nd respondent that he did not take into consideration all the results from all the polling stations in announcing the winner. It is the law that the issue raised by the petitioner must be something substantial and which was calculated to determine the outcome or results of the election. The allegations contained in the petition can be proved by oral or documentary evidence. It can also be proved if there are admissions of the facts or the issues through oral or documentary evidence by parties in this petition. An election ought not to be held void on the basis of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates.

The court is concerned with substance and that the results of the election was and could not have been affected by those transgressions in a substantial manner. On the other hand an election process encompasses of several activities from the nomination to the declaration of the final and duly elected candidate. In my understanding the whole process from the nomination of candidates to the final declaration of the candidate as the winner must be within the law and must as far as possible represent the wishes and the voice of the electorate. It cannot be said that one part was fair while the other part was conducted in a flawed manner. The basic tenet of democracy is that the will of the people must be respected and incorporated in all the branches and the process of the election. One cannot be heard to say that he derived a benefit from a process that did not meet all the requirements of the law. The requirement of the law is that the person with the highest votes be declared the winner.

According to the affidavit filed by the 2nd respondent and which he relied as a basis of his evidence

before court in paragraph 13, he discounted the allegations by the petitioner that he conducted a re-tallying and re-count of the votes. Paragraph 13 reads;

"I have read and understood the petitioner's petition herein and I wish to state that even after the re-tally the person of John Ngata Kariuki emerged the winner. That therefore I am not aware of the figures being put out by the petitioner in the petition filed herein as;

John Ngata Kariuki 17,277 votes

Dickson Daniel Karaba 17,234

My understanding of the above paragraph is that the 2nd respondent conducted a re-tally but nevertheless the 1st respondent appeared or emerged as the winner. On the other hand the 2nd respondent in a meekly manner says that he is not aware of the figures being put out by the petitioner. That is rather interesting and I intend to resolve the contradiction in a later part of this judgement. It is pertinent to note that in paragraph 14 the 2nd respondent states as follows;

> **"That at the time I completed the tallying of the Parliamentary election results at 6.30 a.m. and declared the winner on the 28th December 2007 at about 7.00 a.m. or thereabouts, I had captured all the results from all the polling stations including Kiamutuira polling station Number 006."**

In my understanding when announcing the results of the election, the returning officer has absolute discretion and powers to announce the winner after he was satisfied that he had completed tallying of all election results from all the polling stations. Indeed that is what is captured in paragraph 14 of the 2nd respondent's affidavit that at the time of declaring the winner. The law is that when the winner is declared, he has to be issued with a certificate of declaration of results. The returning officer is also required to fill form 16 and other forms which are forwarded to the Electoral body so that the winner is gazetted as the duly elected Member of Parliament. It is also the duty of the 2nd respondent to capture the final results in form 17A showing what each of the Parliamentary candidates got or obtained. The evidence by the 2nd respondent is that he completed form 17A signed and dated the same and that no party asked for a copy of Form 17A.

In the form 16 filled in respect of Kirinyaga Central Constituency, the returning officer states;

"I do hereby certify that the total number of votes cast for each candidate in the above election was;

Dickson Daniel Karaba - 17,151

Kariuki John Ngata - 17,219

He then appended his signature and dated it 28th December 2007. In another form filled by the returning officer on 29th December 2009, containing the percentage votes and votes score by each of the candidates, the same results as the one above is captured. That is also the same information that is contained in Form 17A that was produced by the 3rd respondent before this court. The question is whether the 1st respondent was actually the true and legitimate winner of Kirinyaga Central Constituency election conducted in December 2007.

The 2nd respondent gave evidence on behalf of himself and 3rd respondent. In his evidence he said that he announced the winner at about 7.00 a.m. with **17,830** votes. He also said that the petitioner came back at 10.00 a.m. and when he did a re-tally, the winner is captured to have garnered 17,219 votes. From the testimony of the 2nd respondent, the votes of the winner were reduced by **611** votes after the petitioner requested for a re-tally. In his wisdom the 2nd respondent captured the second results in forms 16, 17A and all other polling day documents submitted to the Electoral Commission. It is also clear that the 2nd respondent enhanced the votes garnered by the petitioner by **887** votes at the time the re-tallying was done and as far as per the information or evidence captured in form 16, 17A and other documents

submitted to the Electoral Commission.

It is also the evidence of the 2nd respondent that he did another re-tally in August 2008 before he testified in Kriegler Commission. He said he was given the originals which were in custody of the election manager and he discovered discrepancies in the results announced and subsequent results captured in the documents submitted to the Electoral Commission. **Mr. Gitahi** said that he made a mistake before the **Kriegler Commission**, **ECK** and **before this court** in announcing the winner. He confirmed that there were discrepancies in the results announced, results submitted to ECK and the subsequent re-tallying he carried out before he appeared before the Kriegler Commission. He also admitted that the one with the majority votes was the petitioner with **17,270** votes before the Kriegler Commission.

In his evidence, the 2nd respondent confirmed that it was the posting of the results from 16As to 17A which was erroneous. He nevertheless stated that the posting was done by him or under his supervision. It is pertinent to note that in a question that was put to the 2nd respondent before the Kriegler commission as to ***"What is the net effect now of what you have now discovered in terms of Parliamentary constituency of Kirinyaga Central?"***

And he replied;

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> **"It shows the one who was the second has superseded the one whom I announced. I announced the wrong candidate to be the winner. ….I find there was miscalculation. I faxed form 16A which was erroneous."**

The 2nd respondent also confirmed that he did not tell ECK that the information previously relayed was erroneous and that he had discovered an error in the Parliamentary results announced. The evidence of the 2nd respondent was corroborated by evidence given by the 1st respondent under cross-examination. The 1st respondent stated under cross-examination;

> **"In the final results as captured in form 17A, it shows the petitioner got 17,151 and it shows I got 17,219 votes. …..I was announced as having gotten 17,830 votes and for the petitioner 16,264 votes. I see the figures are different."**

It is also clear that the 2nd respondent wrote a letter dated 26th August 2008 to the Kriegler Commission voluntarily and without any coercion. In the said letter he contended that he made an error in announcing the wrong candidate as the winner and he was willing to appear before the Kriegler Commission to state the true position.

Before the Kriegler Commission, the 2nd respondent gave evidence under oath and confirmed that he announced the wrong person as the winner. The findings of the Kriegler Commission is that a wrong Parliamentary winner was declared and that according to ECK and the Returning Officer the winner was the petitioner.

Another issue that confirms the evidence of the petitioner, the 2nd respondent and the Kriegler report is the exercise that was carried out by the Deputy Registrar on the instructions of this court that the Photostat copies of form 16As and 17A be examined and the results therein be re-tallied in the presence of all the advocates and their clients. The exercise was to include copying the results in form 16As in similar Form 17A which was prepared by the Deputy Registrar with the assistance and consent of the advocates.

The exercise started on 22nd July 2010 and was conducted on a day to day basis in the presence of the parties till completion on 30th July 2010. At the conclusion of the examination of the forms, recording of the results from Form 16As into the form prepared and form 17As were added for the petitioner and 1st respondent respectively. The calculation and addition derived from form 16As in the streams of all the

polling stations, showed that the petitioner garnered **17,270** votes whereas the 1st respondent was credited with **17,175** votes.

In the same exercise, the additions for all the votes cast in favour of the petitioner and for the 1st respondent as shown in form 17A was undertaken and where in doubt was counterchecked with form 16As resulting in the following figures;

Petitioner - 17,270

1st respondent - 17,266

It is therefore clear that at the end of the exercise there were glaring discrepancies in the results announced in favour of the parties and what was discovered from re-tallying and scrutinizing form 16As and 17A. It is also significant to note that in both cases the result of the petitioner was constant i.e. **17,270** whereas the results of the 1st respondent differed from 17,175 to **17,266**. The difference can be partly explained by 93 votes omitted on one stream of polling station number 035 which were not shown in form 16A. However the 93 votes were recorded in form 17A and which if taken into consideration would give the 1st respondent 17,268 votes. In both instances the petitioner emerged as the winner notwithstanding the size of the numbers in both situations.

In the light of the above facts the question that arises is whether a reasonable tribunal would come to the conclusion that the results announced and declared on 28th December 2007 in favour of the 1st respondent was a reflection of the will of the people of Kirinyaga Central Constituency. In deciding and determining whether the will of the electorate was respected and taken into consideration, it is essential to take into consideration all the issues in a wholesome manner. An election would be held to be void if it was conducted so badly that it was not sufficiently in accordance with the law. If the election was conducted such that, it was substantially in accordance with the law, it would not be vitiated by breach of rules or mistake at the polls or the process, provided it did not affect the outcome of the election. In my view a matter is deemed to affect the outcome of an election if it changes the direction and will of the people in a particular way or manner.

It is also important to determine whether the Returning Officer complied with the requirement of Rule 40 of the Presidential and Parliamentary elections. It is contended by the respondents that upon completion of the election process the Returning Officer delivered to the Electoral Commission the original form 16As together with Form 17A and at that stage any question regarding the results announced was final. And that the Returning officer had become *functus officio* and that he cannot be held liable for elementary omissions and errors. It is alleged that the petitioner was required to petition the Electoral Commission within 24 hours for orders and supervision of a recount and re-tally which he did not do. It is contended by the 1st respondent that after the tallying of the entire votes cast in Kirinyaga Central Constituency Parliamentary elections, the 2nd respondent announced the winner and issued a certificate of declaration of results. Consequently, the Returning Officer had concluded the process and exhausted his official duties and mandate.

The question that arises is whether the Returning Officer complied with Regulation 40(1) by tallying the results from all the polling stations and announcing the correct candidate who won the election in accordance with the law. In my view election process includes nomination, conducting the election, the day of the voting, taking and counting of votes, creating an environment where people can chose and decide their representative in accordance with the law and universally accepted standards. Here it is alleged that the Returning Officer did not take into consideration the results from all the polling stations in announcing the winner of the election.

It is clear in my mind that a Returning Officer has no discretion or powers to vary or override the results captured in Form 16As from each of the polling station in a given constituency. He has also no powers to change or substitute the result of the candidate as reflected in Form 16As from the polling stations. The primary role of the Returning Officer is as captured in Rule 40 which is;

(a) To tally the results from the polling stations and announce to the persons present the total number of valid

votes cast for each candidate in case of a Parliamentary election.

It is clear that the Returning Officer announced the 1st respondent as having garnered **17,830** and issued a certificate of declaration of results which enabled the 1st respondent to be gazette as Member of Parliament for Kirinyaga Central Constituency. No doubt the Returning Officer changed the results allegedly obtained by the petitioner and the 1st respondent a few hours after he declared the 1st respondent as the winner. It is also clear that the results sent to the Electoral Commission as a basis to gazette the name of the 1st respondent and as a basis to be sworn before the Speaker is substantially different. The 1st respondent says he had no role in the differences or substitution of figures as announced and as submitted to the Electoral Commission by the 2nd respondent.

One may say that nobody may expect counting in an election to be completely accurate, indeed I suppose if one goes on re-counting one will get in each case slightly different results. But really when one is dealing with matters as raised by the petitioner, that quite clearly something has gone wrong, it is important for the Returning Officer to ensure that the results announced is not subsequently changed with or without any intervention. I confess that it alarms me this sort of thing can happen on this scale and still more, I am, alarmed when I am told that there is no correct means of letting the public know what the correct figures are as obtained by the candidates.

In my judgement, the system and process employed by the Returning Officer did not guarantee the rights of the candidate were taken into consideration and respected. By announcing the 1st respondent as the winner and subsequently changing the results in three different occasions, the Returning Officer did not respect the popular will of the people of Kirinyaga Central. The Returning Officer had a legal obligation enforceable by the candidates and that burden has been clearly abdicated by announcing the 1st respondent as the winner when evidence available was to the contrary. Election is defined in **Black Law Dictionary, 8th Edition** as;

> **"The exercise of a choice. The act of choosing from several candidates entitled. An obligation imposed on a party to**
>
> **choose between alternative rights or claims. The process of electing a person to occupy an office."**

It is essential that persons entrusted to conduct and carry a democratic election ensure strict compliance with the law. As stated earlier a person cannot be allowed to derive a benefit from a flawed process. In my view a process is flawed when a matter which ought to be taken into consideration is not taken into consideration or when the person takes into consideration issues which are not necessary for determination of matters in issue or he introduces extraneous matters.

In my understanding if a duty is imposed upon a party, citizens expect strict performance by ensuring the laws of the land are observed and respected. No immunity can be granted to a person who clearly transgresses on the rights and the liberties of citizens. In essence responsibility attracts liability. To announce a person who did not obtain the highest votes as the winner of the election is to deprive or disenfranchise citizens of their rights to choose a person of their choice. I think that is exactly what happened in this case. The Returning Officer committed fundamental and substantial error in announcing the 1st respondent as the winner when the evidence on record did not support that position.

In my opinion, there was no adherence and proper observance of the rules and regulations pertaining to election process. This is vital for the citizens of this country to have faith in the functions entrusted and carried out by the electoral body. It is of paramount importance to ensure that persons entrusted with legal duty that they strictly respect the will of the citizens in a given constituency. That is

equally important for the maintenance and preservation of the democratic ideals which we cherish.

In my view it was strictly mandatory for the Returning Officer to take into consideration the results from all the polling stations as captured in form 16As before he announced the final results to the candidates. He had a mandate to ensure that the correct candidate with the highest votes was announced as the winner. That was the legitimate expectation of all the candidates who participated in the Parliamentary elections of Kirinyaga Central Constituency. The electorate expected nothing less. Equally the law does not envisage where a parliamentary loser is announced as the candidate who won the election.To do so would be a substantial departure from the normal and reasonable expectation of the electorate.

In my understanding the Returning officer had cardinal duty to take into consideration the results from all the 50 polling stations within Kirinyaga Central Constituency. He could not depart from the figures capture in the form 16As that were submitted to him from each of the polling stations. He had no escape close to avoid performance of duty as enshrined in Cap 7 Laws of Kenya. The role of the Returning Officer under Regulation 41 is to primarily tally the results from the polling stations as captured and indicated in form 16As and announced the winner of the election.

In this case the Returning Officer announced the 1st respondent as the winner with **17,830** votes but subsequently changed the figures on three different occasions. He was required to announce accurate results which was a reflection of the electorate. If he is guilty of gross failure, he might be said in the absence of reasonable cause to be guilty of dereliction of duty. The 2nd respondent gave contradictory and disjointed evidence which was manifested by way of oral and documented evidence. Apparently what influenced him was the undoubted desire for confusion and contradiction. He thought there was need to protect the 1st respondent when the evidence on record clearly betrayed him. I think his desire to protect a lost cause outweighed the possible need for the administration of justice by owning up the mistakes which resulted in the challenge mounted by the petitioner. Perhaps to be fair to the 2nd respondent, he owned up the mistake in a clear and unequivocal manner without being cautious of its ramification.

It was an error to announce the 1st respondent when there was clear evidence that he did not garner the highest number of votes. It was an error which does not conform to objective assessment or reality of the prevailing circumstances. It was a false and fictitious decision. In my view an erroneous decision which results in substantial injustice or prejudice to the opposite party calls for the intervention of the court. The error committed by the 2nd respondent was not harmless but it was inappropriate and detrimental. It is not an error which often occurs. It was unquestionably erroneous to announce a loser as the true winner depriving the electorate of their right to be presented to a person of their choice. The decision had a negative impact on the electoral process to such a degree that the rights of the petitioner and electorate were compromised. It was a plain and undisputable error which amounts to a complete disregard of Cap 7 or the credible evidence on record. In my view a plain error is often said to be so obvious and substantial that failure to correct it would infringe a party's right to due process and damage the integrity of the electoral process. I think the announcement of the 1st respondent as the winner clearly compromises the rights of the electorate and the petitioner. It also damaged the integrity of the election process that was conducted under the supervision of the 2nd respondent. The announcement that the 1st respondent garnered 17,830 votes was not made in good faith and with honest believe in view of the glaring mistakes or errors committed by the 2nd respondent.

In my judgement while I sympathize with the 1st respondent's concerns at the miscounting, tallying and declaration of results, the matter must be approached unemotionally and with judicious mind. It may be true that the 1st respondent had no role to play in the miscounting, tallying and announcement of the fictitious results, but nevertheless a person cannot be allowed to derive a benefit from an illegal process. It is clear that the confusion was solely created by the 2nd respondent but that confusion bestowed a benefit or a right to the 1st respondent which did not belong to him. I think the announcement and declaration of the 1st respondent as the Member of Parliament for Kirinyaga Central Constituency was made without any basis and in contravention of the law. The challenge by the loser against the winner calling for analysis, intervention and determination of the election results has been accepted by this court. This judgement divests the 1st respondent of the rights which were illegally bestowed on him

by the 2nd respondent. I make a finding that the 1st respondent was holding the estate in contravention of the law. The shareholders did not decree him to be given a dividend. He was an entity that did not deserve to be in Parliament on behalf of the electorate in Kirinyaga Central Constituency. The profits, earnings, emoluments enjoyed by the 1st respondent was at the behest of the 2nd respondent and in contravention of the will of the people in Kirinyaga Central Constituency. The contract falsely given to him by the 2nd respondent was an emancipation of the voice and expression of the people of Kirinyaga Central Constituency. It was an imaginary benefit since he did not emerge as the preferred candidate to represent them in Parliament. The 1st respondent was given a flag and emblem in contravention of the will of the people. The flag and the emblem must be returned back to the people of Kirinyaga Central Constituency for them to decide who to carry their aspirations and identity. In short there was tangible manifestation that the 1st respondent was not duly elected as a Member of Parliament for Kirinyaga Central Constituency. He was not properly employed. He benefited from a wrong announcement, which amounts to unjust enrichment from an illegal and unlawful process. It must be set aside.

I therefore make a finding that the parliamentary election of Kirinyaga Central Constituency was not conducted fairly and properly to its conclusion. The Returning Officer committed a fundamental error by announcing the 1st respondent as the winner when the evidence clearly and overwhelmingly showed that that was not the case. In essence he shortchanged the expression and the will of the people of Kirinyaga Central Constituency. It was shown to my satisfaction that what happened at Kaitheri Youth Polytechnic on the morning of 28th December 2007 was not a reflection of the results and the will of the people from the 50 polling stations in the said constituency. **Mr. Wachira Mari** learned counsel for the 1st respondent submitted that once the result is declared, the election is at an end, so that its validity cannot be questioned. I think the finality of an election result cannot validate an election which was a nullity because it was not conducted in accordance with the rules. A candidate cannot be deemed to have been elected legally unless the process was transparent, fair and free from the start to the end. The overwhelming evidence tendered before this court is that the 1st respondent was not the candidate who garnered the highest votes. It would be therefore be pedantic to allow a situation where a Returning Officer announces the wrong candidate to be a Member of Parliament for a particular constituency.

Before I conclude this judgement, I think it deserves for me to comment on what transpired on 27th December 2007 otherwise known as the flawed or sham elections conducted by the defunct Electoral Commission of Kenya. What happened in 2007 was that there was a possibility that the structure at the top layer of the electoral body revolted against the aspirations of the Kenyan electorate. The voters were all deprived of their choice in mysterious circumstances. Persons who had no support or overwhelming support bound themselves directly to the important player (Electoral Commission of Kenya). The two signed an oath of loyalty in order to subvert the will of the people. This was particularly effective to deprive, deface, demean and distort the popular will of the Kenyan people. The ECK in a bid to fulfill its oath of loyalty sanctioned particular candidates to be imposed on the people of Kenya. No man or woman amongst the defunct electoral officials who took the oath of loyalty broke his or her oath. They all succeeded in sanctioning and deceiving the electorate out of their votes. Kenyans were denied, Kenyans were deceived and were taken for granted by the dishonest and despicable electoral officials personified and manifested by the Commissioners. I think what happened in this case must have been part of fulfillment of the oath to ensure certain individuals were elected contrary to the will of the people.

On my part I will with humility repeat the words of **Sir Isaac Newton** and say that *"We stand on the shoulders of giants"*, giants of the Kenyan Judiciary that have afforded all powerful and sundry justice. The Kenyan Judiciary has answered and given appropriate solution to the most difficult cases that arose out of the sham elections conducted by ECK in 2007. Nevertheless, others may have been aggrieved and did not file their cases before High Court on the mistaken belief that they would not achieve justice. My answer is that we cannot force people to bring their grievances before court. If you do we are able and equal to the task. I think we have shown that we are up to the task and that we can answer the most difficult questions no matter who is involved. That is what our oath of office demands. That is fidelity to the law.

For the advocates who appeared in this petition, I commend their decorum, punctuality, serenity, scholarship and profound industry. They conducted themselves as brave soldiers and proper officers of

this court. No matter who is the winner, they all put their best foot forward. They deserve a credit for their industry and remarkable courtesy. Notwithstanding the outcome, I owe them a debt. ‘Thank you very much’.

Consequently, the petition succeeds and I make an order that the 1st respondent was not validly elected as a Member of Parliament for Kirinyaga Central Constituency. I declare his election to be null and void. A certificate to that effect shall issue forthwith and shall be served upon the Speaker of National Assembly in accordance with Section 30(1) of the National Assembly and Presidential Elections Act Cap 7. The costs of the petitioner and the 1st respondent shall be borne by the party who was responsible for the flawed results, being the 2nd and 3rd respondents.

Dated, signed and delivered at Nairobi this **22nd** day of **October 2010**.

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M. WARSAME

JUDGE