



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Election Petition 1 of 2008

AYUB JUMA MWAKESIPETITIONER

VERSUS

MWAKWERE CHIRAU ALI1ST RESPONDENT

ALI MAALIM HASSAN2ND RESPONDENT

THE ELECTORAL COMMISSION OF KENYA.....3RD RESPONDENT

J U D G M E N T

The Petitioner was a registered voter at Matuga Constituency (hereinafter referred to as “**the Constituency**”) in the Parliamentary Election, held on 27th December, 2007 (hereinafter referred to as “**the Election**”) and was at all material times one of the polling agents for the ODM candidate Mr. Hassan Mohamed Mwanyoha.

The First Respondent was also a candidate in the election and was declared as the successful candidate and Member of Parliament elect for the Constituency. The Second Respondent was the Returning Officer for the constituency during the elections. He was joined in these proceedings by reason of his conduct and the conduct of some of his subordinates during the election process and being Election Officer appointed under the Regulations by the Third Respondents.

The Third Respondent was the Electoral Commission of Kenya hereinafter referred to as “**the**” a public body established under Section 41 of the Constitution of Kenya prior to the enactment of the Constitution of Kenya (Amendment) Act, 2008. It was mandated to carry out and supervise elections in the country in a free, fair and transparent manner including the Matuga Parliamentary Election.

Prior to the enactment of the said Act, Section 42A of the Constitution stated as follows:-

“The Electoral Commission shall be responsible for:

- (a) The registration of voters and the maintenance and revision of the register of voters;**
- (b) Directing and supervising the Presidential, National Assembly and Local Government elections.**
- (c) Promoting free and fair elections**
- (d) Promoting voter education throughout Kenya; and**
- (e) Such other functions as may be prescribed by law.”**

On 29th December, 2008, the Constitution of Kenya (Amendment) Act, 2008 came into operation. Section 2 thereof amended the Constitution by repealing the then existing Section 41 and thereby abolishing the ECK and replacing it with the Interim Independent Electoral Commission, hereinafter referred to as **“the I.I.E.C.”** which became the successor to the ECK. Section 41(2) of the Constitution states that:-

“The Interim Independent Electoral Commission shall be the Successor to the Electoral Commission of Kenya established by the Section 41 (now repealed) and subject to the Constitution, all rights, duties, obligations, assets and liabilities, of the Electoral Commission of Kenya existing immediately before the commencement of this Section shall be automatically and fully transferred to the Interim Independent Electoral Commission and any reference to the Electoral Commission of Kenya shall, for all purposes be deemed to be a reference to the Interim Independent Electoral Commission established under this section.”

The results of the election as declared by the Second Respondent and the Third Respondent, the ECK were as follows:-

Name of Candidate

Political Party

No. of Votes

1.	Mwakwere Chirau Ali	SHIRIKISHO/PNU	8638
2.	Hassan Mohamed Mwanyoha	ODM	8328
3.	Kassim Sawa	ODM-K	5109
4.	Shee Mbwana Mwasukuti	FPK	3264
5.	Digore Kitambi	KENDA	1098
6.	Mutula Isaac	-	1049
7.	Mwaguni Said	RPK	441
8.	Toya Suleiman	-	403
9.	Zainab Chidzuga	KADU ASILI	380
10.	Steven Kavoko	-	164
11.	Athman Hoka	NEW DEMOCRATS	67
12.	Nicholas Zani	-	87
13.	Issa Boy	-	164
	TOTAL		<u>29192</u>

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The Petitioner being aggrieved with the elections and

results filed this Petition on 23.01.2008 on the following grounds set out in the Petition dated 23rd January 2008.

Grounds of Petition:-

1. That the 2nd Respondent certified that the 1st Respondent had the greatest number of votes in the election and the 1st Respondent was subsequently declared and gazetted by the 3rd Respondent as a Member of Parliament for Matuga in the Kenya Gazette of 30th December 2007.
2. The Petitioner states that the said Parliamentary election for the said constituency was not conducted in accordance with the provisions of the Act and the regulations and other provisions of law including the Election Offences Act (Cap. 66) and not in accordance with the principles of natural justice and that as such the result of the said elections was seriously affected to the detriment of your Petitioners choice of candidate and seriously disenfranchised by the various irregularities and offences.
3. That in some polling stations and at the rallying centre the counting and tallying exercise was generally irregular as the votes announced by the Presiding Officers at some polling stations were different from the final votes announced by the returning officer. This obviously indicated that the votes were either tampered with or manipulated to the benefit of the 1st Respondent.
4. That in the case of some polling stations the 2nd Respondent announced and recorded inflated results for the 1st Respondent in Form 17A without any reference to the results provided by the Presiding Officers in the Form 16A's or other lawful basis for doing so.
5. That the 2nd Respondent in gross neglect of his duties and/or through deliberate schemes inflated the total results of the said constituency at the tallying centre to grant an advantage to the 1st Respondent and to the detriment of the Petitioner's choice in the parliamentary race as well as other candidates.
6. That in most of the Polling Stations the required particulars to be recorded in the Form 16A's were not recorded nor were the agents asked to sign or reasons given for their failure to sign the said Forms as

required by law thus compromising the fair verification and tally of the ballots cast.

7. That ODM agents had further been denied the right to inspect the seals placed on the boxes and place their seals on the boxes in most polling stations.

8. That the 2nd Respondent and other officers of the 3rd Respondent in various stations failed to comply with mandatory provisions of law with regard to record keeping and in particular the handling of electoral materials thus compromising the entire process to the detriment of the Petitioners choice in the parliamentary race as well as other candidates and to the unfair advantage of the 1st Respondent.

9. That the 1st Respondent delayed in the tallying process by several hours.

10. That during the tallying exercise the 2nd Respondent was

openly biased in favour of the 1st Respondent and was extremely rude insulting and intimidating against the ODM candidate and his agents while appearing co-operative and polite to the 1st Respondent.

11. That the Returning Officer 2nd Respondent was handpicked

by undue influence to favour the 1st Respondent to the

detriment of all other candidates.

12. That the 2nd Respondent displayed open bias through his

conduct at the tallying centre by talking privately to the 1st

Respondent side from all other parties present and would

engage in telephone conversations through the 1st

Respondent's mobile phones with unknown people who

appeared to issue instructions to him.

13. That the 2nd Respondent after regular consultations with

the 1st Respondent unduly delayed the entire tallying

exercise which lasted more than 24 hours with numerous

instances of interruptions whenever the 1st respondent

was trailing in the count

14. That before the last 2 boxes the 1st respondent was trailing

the ODM candidate by more than 500 votes even despite

the inflated votes given to the 1st Respondent in his tally.

15. That the 2nd Respondent for no apparent reason at that

stage refused to include the last boxes for 2 stations from

Kombani Primary School which again showed that Hassan

Mohammed Mwanyoha of ODM had 452 and 100 votes

respectively and the 1st Respondent had 78 and 22 votes

respectively, thus giving the ODM candidate an extended

lead over the 1st Respondent.

16. That after protest from all candidates present (with the

exception of the 1st respondent) on the exclusion of

Kombani results, the 2nd Respondent unprocedurally

opened the boxes and proceeded to conduct a recount

exercise of that station. The results were found to be the

same as per the Presiding Officers results and the boxes

were then sealed.

17. that notwithstanding the results of Kombani and the clear

lead given to ODM the 2nd Respondent after several hours

Of waiting called in riot police and read out the results in

favour of the 1st Respondent.

The 2nd Respondent failed to read the results of all the

candidates or account for the ballots cast as required by

law but restricted himself to only reading the 1st

Respondent's alleged results.

18. That without giving any person an opportunity to protest or verify the results the riot police on the instructions of the 1st and 2nd Respondents begun to physically assault the candidates' agents and members of the public present without lawful cause or justification leading to a state of panic and fear.

19. That after the tallying and even one day after, the ODM

candidate was continually denied any copy to the Form 17A

allegedly completed on the violent and unusual trying

night.

20. That the results of Forms 16A's with the ECK and the tally in

17A have numerous discrepancies in the result and do not

coincide with the results actually declared as per the Form 16A's given to the ODM agents at the various polling

stations.

21. That at various polling stations the 1st Respondent's agents

were giving money to voters for the purposes of corruptly

influencing voters to vote for him and guilty of vote

buying.

22. That the 1st Respondent and/or his agents were guilty of

transportation of voters to the polling stations.

23. That by the various irregularities committed by the

Respondents the results were materially altered to the

detriment of the ODM candidate and in favour of the 1st

Respondent.

On the basis of the foregoing the Petitioner sought the following prayers:-

(a) *A scrutiny and recount of all the ballot papers counterfoils registers*

and tally sheets for all the votes cast on the Election day in Matuga

Constituency.

(b) That the Election of the 1st Respondent to the National Assembly as

the Member of Parliament for Matuga be declared as null and void'

(c) The Respondent bear the costs of this petition and matters

incidental thereto.

(d) Such further orders as this Honourable court may deem fit and just

to grant.

Before the final hearing of the Petition there arose several

interlocutory applications most of them filed by the Respondents.

One of the applications was by the 1st Petitioner in which he

sought to strike out the Petition for lack of service of the same on him. This court through a decision by his Lordship, Hon. Justice Sergon dismissed the said application. The 1st Respondent appealed against the said decision. At the same time the 2nd Respondent also filed a similar application on the ground that he had not been served with the Petition. Justice Sergon upon hearing dismissed the said application. Both of the two Respondents appealed to the Court of Appeal in Civil Appeal No. 80 of 2008 and Civil Appeal No. 136 of 2008. The two were heard together by the Court of Appeal and/or consolidated. The court of Appeal (J.A. Hon. Bosire, J.A. Hon. Githinji and J.A. Hon. Onyango Otieno) delivered its judgment and made the following orders:-

1. **CIVIL APPEAL NO. 80 OF 2008 – MWAKWERE CHIRAU ALI –VS- AYUB JUMA MWAKESI** and two others is hereby dismissed with costs to be paid by Mwakwere Chirau Ali.

2. **CIVIL APPEAL NO. 136 OF 2008 – ALI MAALIM HASSAN –VS- AYUB JUMA MWAKESI** and two others is hereby allowed. His notice of motion dated 19th May, 2008 is allowed and the Petition by Ayub Juma Mwakesi against him, Ali Maalim Hassan, is struck out with costs to the same Ali Maalim Hassan to be paid by Ayub Juma Mwakesi.

In allowing Civil Appeal No. 136 of 2008 the Court of Appeal

held that no diligence was exercised to serve the Returning Officer, the 2nd Respondent in the Petition and consequently the Petition against him was struck out. Thus the returning officer ceased to be a party to the Petition.

By a motion dated 2nd December 2008 to this court, the 1st

Respondent sought two orders: a stay of further proceedings pending the hearing and determination of the application and striking out of the Petition on the grounds that the appeal by the 2nd Respondent, the Returning Officer having been allowed and consequently ceasing to be a party to the petition; the inevitable consequence is that a petition cannot be sustained in view of the fact that an important and absolutely necessary party to the Petition having been removed from it, and that allowing the Petitioner herein to proceed any further with the balance of the Petition (as the Petition was then substantially partly heard) would be prejudicial to the 1st Respondent in that it would be tantamount to asking the court to adjudicate upon the petition against the 1st Respondent on the basis of unproved wrongs or mistake allegedly committed by a party not before it.

The 3rd Respondent, the Electoral Commission of Kenya also, in its motion on the same day was as with that of the 1st Respondent however sought an order that the Petition against it be struck out on the ground that the Returning Officer having been removed from the Petition any further proceedings against it in the absence of the Returning Officer who is alleged to have perpetrated the omissions and the irregularities the subject matter of the petition would be prejudicial to it and would be contrary to natural justice.

The Hon. Justice Sergon refused to admit the aforesaid two applications for hearing on the ground that he had already listed the matter for hearing. The judge in his ruling held:-

“By the time the petition against the 2nd Respondent was struck out, this court had already formed the opinion that the petition should proceed for hearing pursuant to the provisions of section 22 of the National Assembly and Presidential Elections Act, Chapter 7 Laws of Kenya. I agree with the submissions of Mr. Buti that this court has a wide discretion to admit for hearing certain applications in the course of a trial in exercise of its inherent residuary power in order to maintain its character as a court of justice. The overriding feature of the inherent residuary power is a part of procedural law, both in civil and criminal matters it however does not form part of the substantive law”

And Also that:

“This court has now been told to adjourn the substantive hearing of the petition and proceed to instead, admit the aforesaid motions to hearing.”

The learned Judge concluded:-

“The law under S. 22 of the National Assembly and Presidential Elections Act is quite categorical that this court can either summarily reject the petition or in the alternative list it for hearing. That is the substantive law which of course overrides the procedural law set out under rule 22 of the National Assembly Election [Election Petition] Rules 1993. When this court chose to fix the petition for hearing, the law presumed that the court must have perused each and every complaint facing each respondent. In my view, when an election court chooses to list an election petition for hearing it cannot entertain an interlocutory application to have it rejected save for those other applications specified in the rules.”

“For the above reasons I decline to admit the aforesaid motions dated 2/12/2008 for hearing. I hereby order them struck out with costs abiding the outcome of the petition. Let the petition proceed for hearing as scheduled.”

Being aggrieved, the two Respondents lodged respective appeals against the said rulings of the High Court Civil Appeal No. 272 of 2008 and Civil Appeal No. 275 of 2008 respectively. The Court of Appeal (J.A. Hon. P.K. Tunoi, J.A. Hon. P.N. Waki and J.A.

Hon. D.K. S. Aganyanya) dismissed the two appeals upon consolidation and hearing on the ground that

the Honourable Judge in the High Court had exercised his discretion judicially and he cannot be faulted. The Honourable Justices of Appeal held:-

“The applications before the learned Judge were brought after the 2nd appellant had closed his case and the entire petition hearing was about to be concluded it having been substantially heard. The next date for further hearing had been fixed long before this court struck out the name of the returning officer from the petition. Though the character and the substance of the petition had drastically changed after the appeal, this fact could have been raised during the petition rather than filing fresh motions. The obvious consequences of the course taken by the appellants was to unnecessarily prolong the proceedings. The motions were, in our view wantonly brought without a shadow of an excuse. As the appellants could still have their day in court, they could not complain that they had been driven from the judgment seat without the court having considered their right to be heard.

Section 22 of the Act and rule 22 of the National Assembly [Elections Petition] Rules 1993 give power to the election court to admit to hearing certain applications in the course of a trial in exercise of its inherent residuary power in the interest of justice. The Rules further mandate the court to regulate its proceedings, to adjourn or to

continue to hear the petition. Further under section 22 of the Act the court can either reject the petition or in the alternative list it for hearing. In the particular circumstances of this case, the learned judge had exercised his discretion judicially and he cannot be faulted.

No doubt it is obvious from the circumstances enumerated in detail by the learned Judge in his ruling that there is evidence of an attempt to buy time and to see that the election petition is rendered meaningless by effluxion of time.

We think that to allow this appeal would in fact be rewarding the appellants’ attempt to prevent conclusion of the petition and we would instead be negating the principle that election petitions should be disposed of expeditiously.

For the foregoing reasons, these two consolidated appeals are hereby ordered dismissed with costs to the 1st Respondent Ayub Juma Mwakesi only.”

The 1st Respondent in his written submissions in this Petition has taken up the same point of law and has invited this court as the Election Court to now determine this question on its merits after the full hearing.

In view of its nature and as the answer could affect the manner or mode that this judgment goes, I think that this question is to the effect of the removal of the Returning Officer as a party is one which ought to be determined at the outset as a preliminary issue in this judgment. From their written submissions filed by the Petitioner and the 1st Respondent, I think Counsels are in agreement with this procedure or approach.

The 1st Respondent who took up the issue in his written submissions states as follows:-

1. We would like to point out from the outset of these submissions that, just as the heading glaringly declares, these are skeletal arguments in outline that we shall endeavour to expound in detail during the oral submissions in court, on the appointed day for the same.
2. Matters arising in this Petition have previously been the subject of litigation in the Court of Appeal in Civil Appeal Number 80 and 136 of 2008 and Judgments in respect of those matters delivered.
3. Of relevance from those two Appeals and which is quite central in this Petition and in particular our submissions, is Civil Appeal Number 1360 of 2008. In that appeal, the Appeal Court found that the Returning Officer (in this Petition sued as the 2nd Respondent) was not served in accordance with the law. The order made which is already extracted was that “The Petition” against the Returning Officer, who was sued as the 2nd Respondent, was “struck out”. Costs in the matter were also awarded to him.
4. As a corollary to the foregoing, it is our submission as follows:-
 - (a) This court has to give effect to the direction given by the court of Appeal as per the Civil Appeal Number 136 of 2008.
 - (b) By reason of the matters stated in paragraph 4 (a) above, any allegations made in the Petition directed against the 2nd Respondent were accordingly struck out.
 - (c) Further, any evidence which had been tendered in this petition touching on the conduct or omissions on the part of the said 2nd Respondent must have necessarily suffered a similar fate.
5. Consequent upon the matters stated in the foregoing paragraphs, it is our submission that all allegations both in the Petition and the evidence adduced by the Petitioner in this Petition will not be for consideration in the final analysis of this matter.

In support of the above submission, we base our reliance on

the following provisions of law and authorities:

- (i) ***Sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya.***
- (ii) ***The Constitution of Kenya Section 44, thereof.***
- (iii) ***The National Assembly and Presidential Elections Act (Cap 7) Laws of Kenya and the High Court of Election Petition Rules made thereunder.***
- (iv) ***Mudavadi –vs- Kibisu (1970) E.A. 582.***
- (v) ***Mbowe –vs- Eliutoo (1967)***
- (vi) ***Stoney –v- Eastbourne R.D. Council (1927) 1 Ch. 367.***
- (vii) ***Nelson –v- Attorney General (1999) E.A. 240.***
- (viii) ***Phillip Durand’s Evidence for Magistrate’s Part 1.***

In its written submissions the Petitioner recognizes the

question of the removal of the Returning Officer as party by the decision of the Court of appeal as a preliminary issue to be dealt with in this judgment. In his written submissions, the Petition poses the following questions:-

“1.

2. Since the Returning Officer was removed from these proceedings by the Court of Appeal mid-stream as it was found that he had not been served in accordance with the law, what is the effect on this petition and the prayers touching on him?

Response

(a)

(b) In response to the 2nd issue; the Returning Officer's Removal is immaterial to these proceedings. MUDAVADI –V- KIBISU is distinguishable and inapplicable in the present case. It has been overtaken by events and numerous changes in the law. The ratio of the decision relied on different circumstances as was the case then”

The Petitioner also submitted that: -

“4. The responsibilities of [redacted] at the material time and its position –vis a vis the Returning Officer are one of Master and Servant.

The [redacted] is vicariously liable for the act of its returning officers and all officers subordinate to court. It is the [redacted] which is mandated to carry out elections and carries out its mandate with the assistance of officers appointed by it including the Returning Officer (Section 3 of the Act). It is the [redacted] which is mandated to carry out elections and carries out its mandate with the assistance of officers appointed by it including the Returning Officer (Section 3 of the Act.)

By dint of S.17A of the Act the provision in the subsidiary legislation rule 2 has been overridden. A petitioner's job is not to determine culpability in election irregularities for the purpose

of declaring whether a person has been validly elected to the National Assembly or not. Culpability is only relevant where a report as to election offence is to be made (refer Muchemi J ruling in Wetangula case).

Not only did the Returning Officer's exclusion have no effect on this Petition but the complaints against the Returning Officer can be visited upon the as his master and for whom they were ultimately responsible for."

The Third Respondent, the Electoral Commission of Kenya, before it was disbanded was represented by the firm of M/s Charles Kioko, Munyithya Advocates. After the Constitution of Kenya (Amendment) Act, 2000 came into operation on 29th December 2008, Section 41 of the Constitution was repealed and a new one enacted. ECK was disbanded and the I.I.E.C. came into being, replacing it. The said firm of Advocates remained on record as acting for new Electoral Commission. There was no application to court to formally substitute the 3rd Respondent. This gave rise to a legal question which this court may deal with depending on the way this court deals with the present preliminary question. For purposes of the question Mr. Justus Munyithya did not file written submissions. He stated that he would only make oral submissions.

Mr. Buti for the 1st Respondent and Mr. Balala for the Petitioner made elaborate oral submissions in addition to their respective written submissions. Mr. Buti submitted inter alia that:-

The responsibility to hold elections is cast on the Returning Officer.

The Petition was against 3 persons; Mwakwere Chirau Ali, Ali Maalim Hassan, (The Returning Officer) and the ECK. That the Petition against the Returning Officer had been struck out.

Any grounds against the 1st Respondent and ECK should not be disturbed as they were unaffected.

The duty to conduct election in a constituency lay with the Returning Officer under the Regulations.

The Returning Officer is not an agent of ECK

The question of vicarious liability does not arise.

The Election Petition is a special jurisdiction.

Once the name of the Presiding Officer is mentioned then one is touncing on the Returning Officer.

Paragraphs, 11, 12, 12, 14, 15, 16, 18, 19, 20, 21,22,23,24,25,26,27 and 28 all touch and make allegations against the Retuning Officer. That these have been struck out by the Court of Appeal.

That the Court cannot touch on any question that referred to the Returning Officer and his subordinates.

It is only paragraph 17, 29 and 30 against the 1st Petition which must remain for trial.

While the petition may proceed to the said extent, the Petitioner is not permitted to raise or pursue any matter that could be construed as a complaint against the conduct of the Returning Officer.

With regard to the Evidence already tendered, the court of Appeal having struck out the Petition against the 2nd Respondent, any evidence previously led and touching on him must be struck out. They cannot stand in isolation. They should be expunged or not be relied upon.

The burden of proof, legal and evidentiary lay on the Petitioner.

ECK cannot enter the shoes of the Returning Officer as each have their specific mandates and jurisdiction.

Returning Officer cannot be tried in ab sentia.

Mr. Balala as the Petitioner on this question made oral

submissions to buffer the written submissions. He inter alia submitted that:

The question before the court is whether the successful candidate the 1st Petitioner was validly elected or not.

In an election dispute, the people values and aspirations is to have the question of validity of elections determined expeditiously and without undue regard to technicalities. Case should be heard on its merits.

It is for the court to decide on the evidence as a whole whether there was a substantial compliance with the law as to the election or whether the act or omission affected the result.

To exclude any evidence relating to a party no longer in the proceedings is against the Constitution and the law.

The election court is a quasi-inquisitional body.

Are the prayers in the Petition extinguished by the discharge of the 2nd Respondent for the Petition?

The law since MUDAVADI –V- KIBISU (1970) EA 585 has substantially changed.

The law intends that every person whose conduct is complained of must be included in the petition.

Conduct of elections vested in the ECK at the time.

ECK had the ultimate control.

Returning Officer is subordinate to the ECK

ECK could hire and fire him.

ECK cannot escape liability for the conduct of the election officials and even persons involved like the police.

ECK was disbanded for the conduct of the 2007 elections and not the Returning Officer who is a mere agent of the ECK

There exists a relationship of master and servant between ECK and a Returning Officer.

The absence of the Returning Officer as a party is not fatal to the Petition.

Returning Officer only is entitled to defend himself or be a party where there are allegations of Criminal culpability.

Election Petition is not about the Returning Officer.

Evidence of an election offence can be adduced even against a person not being a party in a suit. That it can be adduced whether or not he is a witness.

This court must first determine and decide on this first

preliminary issue or question before moving to the second one. There is no doubt that the way forward in this Petition will depend on the way and determination by the Court of this question.

It is pertinent for this court at this stage to re-visit what the Court of Appeal said when it struck out the Petition as against the Second Respondent, the Returning Officer (hereinafter referred to as the (“**R.O.**”).

The 1st Respondent on 25.2.2008 had applied to the High Court for the striking out of the Petition against him for lack of service of the Petition on him within the prescribed period by the Petitioner. The Hon. Justice Serگون disallowed the application and the 1st Petitioner, Mwakwere Chirau Ali he then filed an appeal No. 80 of 2008 to the Court of Appeal challenging the said decision.

Shortly after, on 19.05.08 the **R.O** Ali Maalim Hassan also filed an application in the High Court to strike out the Petition against him for lack of service of the petition on him within the prescribed period by the Petitioner. The Hon. Justice Serگون also dismissed the said application holding that he had been properly and timeously served with the petition. The **R.O.** being aggrieved filed Appeal No. 136 of 2008 to the Court of Appeal.

The two appeals were consolidated and heard together. The Appeals were heard by Justices of Appeal Hon. Justice Bosire, Hon. Justice Githinji and Hon. Justice Onyango Otieno.

There was a unanimous decision by the three Justices of Appeal that the Respondent, the **R.O.** had not been served with the petition within the prescribed and the appeal was allowed. With respect to the 1st Respondent, Mwakwere Chirau Ali, there was a dissenting decision by the Hon. Justice of Appeal Hon. Justice Bosire with the majority holding that the 1st Respondent, had duly been served within the prescribed time when his advocates reacted to the publication of the petition in the newspapers and wrote to the Petitioner’s advocate asking to be served.

The Court of Appeal concluded as follows:

“.....

It is agreed that the appeal by Ali Maalim Hassan be allowed.

It follows that Civil Appeal No. 136 2008 is allowed with costs with the result that his motion dated 19th May 2008 is allowed and the petition by Ayub Juma Mwakesi against him must therefore be and is hereby struck out with costs.

However as regards the appeal by Mwakwere Chirau Ali, to wit, Civil appeal No. 80 of 2008, both Githinji and Onyango Otieno JJA are in agreement that the said appeal be dismissed. That being the position it is ordered that the appeal be and is hereby dismissed with costs of the appeal to Ayub Juma Mwakesi, the 1st Respondent in that appeal.”

(Emphasis mine).

What was the effect of the said judgment? From the record it appears that Counsel and their clients could not agree on the meaning and effect of the decision. They went back to the Court of Appeal to settle the terms of the order. The result was that the Petition as against the 1st and 3rd Respondents was to proceed to hearing while that against the **R.O.** had been struck out.

On 2nd December 2008 before the continued hearing of the petition the 1st and 3rd Respondents filed separate notices of motions each seeking to strike out the petition. The Hon. Justice Serگون refused to admit the hearing of the two motions and struck them out. He ruled inter alia:-

“The Court of Appeal however struck out the Petition against the 2nd Respondent thus leaving the 1st and 3rd Respondents to fight the petition. The law, in my humble understanding did not prescribe what should happen if one party is left off the hook like the case of the 2nd Respondent. By the time that this court had already formed the opinion that the petition should proceed for hearing pursuant to the provisions of Section 22 of the National Assembly and Presidential Elections Act ,Chapter 7, Laws of Kenya. The Court has power to either adjourn or continue the with the petition. The law under Section 22 of the National Assembly and Presidential Elections Act is quite categorical that this court can either summarily reject the Petition or in the alternative list it for hearing. When this court chose to fix the petition for hearing the law presumed

that the court must have perused each and every complaint facing each Respondent. In my view when an election court chooses to list an election petition for hearing it cannot entertain interlocutory application to have it rejected save for those other applications specified in the rules. Each respondent is presumed to know the case facing it. It has been stated that the striking out of the Petition as against the 2nd Respondent has left the other Respondents vulnerable. In my view those are issues which can be competently dealt with during the trial and at the stage of final submissions.

For the above reasons, I decline to admit the aforesaid motions dated 2/12/08 for hearing. I hereby order them struck out with costs abiding the outcome of the Petition. Let the petition proceed for hearing as scheduled.”(Emphasis mine)

The two Respondents lodged appeals against the said decision in the Court of Appeal. The appeals were consolidated and heard by Justices of Appeal, the Hon. Tunoi, the Hon. Waki and the Honourable Aganyanya. They delivered their decisions on 16.10.2009 when they dismissed the two appeals. I had already set out the ruling of the court herein before at length. In summary they held inter alia that:-

Though the character and substance of the Petition had drastically changed after, the appeal, this fact could have been raised during the petitions rather than filing fresh motions.

The obvious consequences of the course taken by the appellant was to unnecessarily prolong the proceedings.

The motion were in our view wantonly brought without a shadow of an excuse.

As the appellants could still have their day in court, they could not complain that they had been driven from the judgment seat without the court having considered their right to be heard.

In the particular circumstances of this case, the learned judge had exercised his discretion judicially and he cannot be faulted.

In the light of the decisions by the Hon. Justice Serгон

and the three Justices of Appeal, these meant that the question as to the striking out of the petition as against Ali Maalim Hassan, the Returning Officer was left to be decided by this court at the end of the trial and upon final submissions. I have already set out the submissions by the respective counsel for the Petitioner and the 1st Respondent. Mr. Justus Muniyithya at the stage of oral submissions associated himself with all submissions by the 1st Respondent. He however added inter alia that:

When the Court of Appeal removed the **R.O.** as a party in the Petition, all allegations and evidence against him were taken away.

It is not the duty of the ECK to fill in the gaps for the Petitioner.

It was the duty of the ECK to gazette the winner.

To commence on a basic issue is that there was only one Petition as against the 1st, 2nd and 3rd Respondents. There are no three petitions for each Respondent. So what is the construction of the extracted order of the Court of Appeal that:-

“...and the Petition by Ayub Juma Mwakesi against him, Ali Maalim Hassan is struck out with costs to

the same Ali Maalim to be paid by Ayub Juma Mwakesi.”

?

It is my interpretation and construction that the ordinary and natural meaning of the order is that what it really says ‘ “the Petition against him has been struck out.

This means that he has been struck out as a Respondent in the Petition. He is not a party in the Petition and from the date of being removed as a party he is not obliged to defend the petition or participate in the proceedings as a party. He was no longer a Respondent.

Before the National Assembly elections (Election Petition) Rules 1961 were repealed or replaced after the repeal of S.2A of the Constitution of Kenya in 1992 and return of multiparty democracy in Kenya after the one party dictatorships and after the reforms of Electoral laws were pushed by the inter-parties Parliamentary Group – IPPG, the definition of Respondent in Rule 2 was:-

“2 In these Rules, unless the context otherwise requiresrespondent in relation to an election petition means the persons whose election or nomination is complained of, and, if the petition complains of the conduct of a returning officer, includes that officer.”

In the Court of Appeal case of **MUDAVADI –V- KIBISU AND ANOTHER 1970 E.A.** which was cited and relied on by all the three groups of counsel for the remaining parties – an election petition filed by the appellant challenged the conduct of the returning officer and also the conduct of the presiding officers at polling stations. The returning officer’s name was not included in the heading of the petition nor was he served with the Petition within the time allowed by the Election Petition rules 1961, rule 15. The High Court ruled that the returning officer had not been made a respondent, and had not been served in time, and that complaints against presiding officer, or deputy presiding officers are complaints against the returning officer.

The Appellant appealed and the Court of Appeal held inter alia that:-

A returning officer against whom complaints are made automatically becomes a respondent.

Complaints against presiding officers appointed by the returning officer are complaints against the

returning officer.

The three Justices of Appeal (Duffus P, Law and Mustafa JJA) stated:-

“.....

We are therefore of the view that the judges of the election court were correct in finding that the returning officer had not been served as he should have been in accordance with r.15. the effect of this is that the returning officer was not properly brought before the election court as a party to these proceedings and we are of the view that the election court were correct in holding that while the petition must proceed, the parties would not be permitted to raise or pursue any matter that could be construed as a complaint against the conduct of the returning officer ...”

And also that:-

“.....

In so far as this is concerned the purpose of this election petition is to determine whether Mr. Kibisu has been validly elected as the member of Vihiga constituency.

There is no question here as to the default or personal liability of the returning officer or of other election officers in so far as the election court is charged under S.31 to report to the Speaker whether any election offences have been proved. The substantive questions here in so far as the returning officer is concerned is whether his conduct of the election has been properly and legally carried out and this must refer not only to his own conduct but to the conduct of those election officials assisting him to carry out the election. It is our view therefore that the correct interpretation of the words “the conduct of a returning officer” in the definition of the respondent in r.2 of the Election Petition Rules 1961 must include both his own acts and the acts of the presiding officer or deputy presiding officer who are in fact really assisting the returning officer in the conduct of the election in each constituency...”

As stated earlier above these Rules were replaced in 1993 by the National Assembly Elections (Election Petition) Rules, 1993. Rule 2 was changed to read as follows:-

“respondent, in relation to an election petition means the person whose election is complained of, or if the petition complains of the conduct of the returning officer or any person under him, that officer and includes any other person whose conduct is complained of in relation to the election.”

My interpretation is that Parliament decided to widen or extend the persons who are respondents in an election petition. This could easily be understood or make one to believe that it was as a result of the decision of MUDAVADI –V- KIBISU and was intended to remove any doubts as to who a respondent in an election petition could be without the need for judicial interpretation as happened in the MUDAVADI –V- KIBISU election petition.

It is my view that as a result, where there are specific allegations against or in relation to the conduct of any other person, then such a person, where practically possible, ought to be named, enjoined and served as a respondent. It is understandable that in view of the number of constituencies, number of officers under any returning officer including others like agents, police officers and even voters etc then it may still not be practicable to name them or enjoin them thereby making the ratio decidendi in the MUDAVADI –V- KIBISU still applicable in so far as officials answerable to the returning officers are concerned.

Upon consideration, I am of the view that the new extended definition of who may be a “respondent” in an election petition does not change the situation very much. It only brings about certainty and widens the persons who may be deemed to be respondents. The Rule now makes it clear that complaints against any person under the Returning officer would be complaints against the Returning officer. There would be no need to enjoin a presiding officer, his deputy, police officers at the police station etc as Respondents. It is enough to name the Returning Officer as the Respondent for him to answer to the complaints against himself and/or those under him. This means that the Returning Officer would be held responsible for the conduct of the officer under him provided these complaints are not of one of willful misconduct or of a criminal nature that would require the speaker to be notified. These could be conduct in respect of each omissions, irregularities which may not be willful but if true could have affected the results of the election.

I do hold therefore the *ratio decidendi* in MUDAVADI –V- KIBISU would still apply that if a Returning Officer is not served with the Petition as a Respondent within the prescribed period and/or his name is struck out as a party before the commencement of the trial or at any early stage of the trial then the parties would not be permitted to raise or pursue any evidence or matter that could be construed as a complaint against the conduct of the returning officer and those under his direction. I have deliberately emphasized and underlined the words “before the commencement of the trial. Or at an early stage of the trial.” I have done so because the court should ask itself as to whether there could be an exceptional situation or circumstances where the Returning Officer is excluded or removed as a party at a very late stage and when the trial is almost concluded yet he had filed his defence and had throughout actively participated in the proceedings through his counsel.

I have been urged by Counsel for the 1st Respondent and the 3rd Respondent that since the Court of Appeal struck out the Petition against the **R.O.** then all the evidence on record and previously led in support of those paragraphs against him or touching on him must be expunged from the record. That they cannot now stand on their own in isolation and they should go out with the **R.O.** In the alternative, they have asked the court not to rely on or refer to such evidence. That no evidence could have been led

against him in the first place.

Mr. Buti in a careful and detailed analysis went through the Petition, the Petitioner's affidavit, affidavit of Hassan Mohamed Mwanyoha (P.W.2), Affidavit of Fatuma Hamisi Masito (P.W.3), Affidavit of Amana Saidi Jirani (P.W.4), and Affidavit of Juma Hamisi Mwakishindo (P.W.5) and pointed out the allegations purported evidence against the **R.O.** He submitted that having been removed from the Petition, then all those must be struck out and expunged from the record.

Should the Court do this? Is the court obliged to disregard the allegations against the **R.O.** in the Petition, the affidavits of the Petitioner and his witnesses, and the evidence given on oath against and touching on the **R.O.** and those under him? Should the court apply the *ratio decidendi* in the MUDAVADI –V- KIBISU case in the circumstances of this case or should there be an exception?

Justice Serгон in his ruling of 4th December 2008 had these to say regarding the stage the proceedings and the petition had reached when the court of Appeal struck out the Petition against the **R.O.**:-

“.....

It is not in dispute that the petition has been substantially heard. In fact, a total of 5 witnesses testified in support of the Petitioner's petition whereas 6 witnesses have so far testified in opposition on behalf of the 1st Respondent. The last time the Petition came up for hearing on 7/11/2008, Mr. Mabeya, Learned advocate for the 1st Respondent, indicated that he was only remaining with the evidence for the 1st Respondent. The 2nd Respondent and the 3rd Respondent had not testified....”

This means that by the time the Petition against the **R.O.** was struck out, the Petition had substantially been heard and almost coming to a close.

The Court of Appeal in its ruling of 16th October 2009 when it rejected the 1st and 3rd Respondents' appeals against refusal to admit their new applications to strike out the petition, observed:-

“The application before the Learned Judge were brought after the 2nd Appellant had closed his case and entire petition was about to be concluded at having been substantially heard.”

The Court of Appeal went ahead to castigate the 1st and 3rd Respondents for “an attempt to buy time and to see that the election petition is rendered meaningless by effluxion of time.”

After I took over the conduct of the hearing of the Petition, I indeed found that the Petitioner had closed his case with 5 witnesses having testified (including himself). The 1st Respondent had opened his defence and called 6 witnesses. He was the only one remaining to testify. I took his evidence. The 2nd Respondent had been struck out as a party. The 3rd Respondent called one witness. After 1 year and 8 months since the Petition was filed, I concluded the taking of evidence within three months (24.8.08 – 24.11.09). This shows how far the petition had gone before the Hon. Justice Serگون.

I have carefully perused the proceedings and record. The **R.O.** – ALI MAALIM HASSAN entered appearance and appointed Counsel to appear for him i.e. Mr. Justus Muniyithya and Ms. Anne Ngugi who also acted for the 3rd Respondent, the . Through his advocates he participated in the hearing of the petition from inception to the time the Petition against him was struck out on 21st November 2008. The **R.O.** was involved in the case and deemed to have been in court when the petitioner and his 4 witnesses testified. In fact, the record shows that his advocates thoroughly cross-examined each witness for the Petitioner on his/her affidavit and testimony.

The **R.O.** also thoroughly cross-examined the 6 witnesses of the 1st Respondent up to 5th November 2008. His Petition was struck out on 21.11.08 before the 1st Respondent took the witness-box.

The Petitioner patiently and painstakingly prosecuted his petition despite all the hurdles and even obstructions placed along his path to seek justice. As a result he procured and placed on record vital evidence based on his petition which he had filed against all the 3 Respondents. He took almost a year to almost conclude the entire case. He testified in support of his affidavit. He was put through cross-examination by counsel for the 1st, 2nd and 3rd Respondents. His witnesses faced the same lawful ordeal.

The **R.O.** filed his application to strike out on 19th May 2008 and the Ruling dismissing the same delivered on 30th June, 2008. He lodged an appeal which was finally concluded and determined on 21.11.08 in his favour.

The Petitioner of course was not obliged to wait for final determination of the appeal. The **R.O.** did not obtain any stay of proceedings and the Petitioner quite rightly as expected of him by law prosecuted his petition.

When the evidence of the Petitioner and his witnesses was taken, the **R.O.** was a party and there was

no bar for Petitioner to pursue the allegations and complaints against his conduct and that of those under him during the election. Now that they are on record and the Petition against him having been struck, what is the legal situation/effect in the circumstances?

In my humble view, the Petitioner has acquired some proprietary and vested rights in respect of the records of the court i.e. the proceedings. The evidence has legitimately come on record before there could be any legal bar. All the parties are aware of the evidence. All the voters in Matuga who may be in support of the petition are aware of the contents. I think that the Petitioner, his witnesses and possibly his supporters have acquired some legitimate expectations in respect of the evidence already lawfully and legally on record. It would be a grave miscarriage of justice for the Petitioner's rights acquired in respect of the evidence to be taken away after working so hard with outlay of legal and other expenses to ensure that his petition reached where it did.

I think that this court would be allowing a monstrous travesty of injustice if it expunged the evidence legitimately laid before the court and more so through submissions by not even the **R.O.** himself but the 1st Petitioner. The **R.O.** decided by his own choice despite having participated in the hearing to a late stage to exit and jump ship. He was entitled to do so in law in view of the Court of Appeal decision.

The Court of Appeal did not strike out all the Petitions. It only struck out the Petition against the **R.O.** Does this translate to an order of striking out the record of the Election court? I do not think so. I hold that the **MUDAVADI –V- KIBISU** ratio decidendi cannot operate retrospectively as it is water under the bridge. The evidence is on record and while it may not be used as against the **R.O.**, now not being a party, but the Election Court's eyes cannot be shut to the record. The Election Court has power and discretion to look at all the evidence **broadly** when investigating whether the 1st Respondent, Mwakwere Chirau Ali was validly elected. This was clearly stated in the case of **MUDAVADI –V- KIBISU & ANOTHER (1970) E.A. 585 at P.590** when the court said:-

“It is necessary to consider the purpose of an election petition and the reasons why the election petition Acts and Rules provided for such a petition. An election petition has really only two purposes and that is either to

(1) Determine whether a person has been validly elected either as the President or as a member of the National assembly or

(2) Whether a seat in the National Assembly has become vacant.

In so far as this case is concerned the purpose of this election-petition is to determine whether Mr. Kibisu has been validly elected as the member of Vihiga Constituency.”

This petition is not about the **R.O.** Ali Maalim Hassan who is no longer a party and there is no

petition against him now. This court cannot now make any orders against him. Had he obtained a stay of proceedings in this petition pending the appeal, no evidence touching on him would have gone on record. He did not do so. There is evidence already on record making allegations against him. He cross-examined the witnesses. This is on record and he will have the benefit of the impact of the same on the probative value of the testimonies. However, I cannot see how this as an election court can erase its record and expunge the evidence in the circumstances. As indicated earlier there was no formal application to expunge such evidence before the close of the hearing. It is the **R.O.** who has created the situation by allowing the proceedings to proceed almost to conclusion without a stay of the same.

The Court of Appeal after striking out the petition against the **R.O.** left the Petitions against the 1st and 2nd Defendant's intact. These petitions could and have proceeded to hearing. It is true that the parties would not have been permitted to raise or pursue any matter that could be construed as a complaint against the conduct of the **R.O.** and those under him had the striking out taken place before the hearing commenced. However, as stated the Petition against **R.O.** was struck almost at the end of the trial. Evidence has already been taken and when tend to be complaints about him and those under him. The Petitioner has acquired legal rights over the record and the evidence. I think that it is in the interest of Justice and fairness in this election petition for the court to look at the totality of the evidence including the evidence against the 1st Respondent and the 3rd Respondents.

This court as an election court is now under a duty to broadly look at and consider all the evidence. The court ought not make any value judgments against the **R.O.** or investigate culpability or otherwise.

The court can look at the evidence and ask itself whether the election was free and fair.

Under the repealed Section 42 A of the Constitution of Kenya which set out the functions of ECK, it was charged with the duty to inter alia:

Directing and supervising the Presidential, National Assembly and local government elections

Promoting free and fair elections.

While the **R.O.** was mandated to carry out the election, he

did that under the general direction and supervision of the ECK. I am of the view that the office of a Returning Officer is an Organ within the ECK. While the **R.O.** discharge his duties independently he does

so in consultation, co-ordination and under the direction of the ECK. This court is therefore capable of looking at the allegations against the **R.O.** not in respect of any willful misconduct that could attract personal liabilities or retribution but which could amount to possible irregularities or improprieties that could give an insight and into the way the election process took place in Matuga and whether as a result the ECK carried out its function/duties competently, fairly and freely and to what extent the allegations against ECK itself are true or credible.

I would like to refer to the old English Case of **HARMON –V- PARK & ANOTEHR 1880 6, Q.B.D 323** which was cited by the Court of Appeal in **MUDAVADI –V- KIBISU** case but indicated that the application of the principles there should depend on the interpretation of own law. I would add that it can also be interpreted in accordance with the special circumstances of each case.

In the said English case Lord Selborne L.C. observed:

“In this case we all agree that this petition does not complain of the conduct of a returning officer within the meaning of S.13 of the Corrupt Practices (Municipal election) Act, 1872, even assuming that the mayor was here a returning officer. The words “complain of the conduct” must as I read them, be taken to mean that there must be an imputation of misconduct. As at present advised, I am inclined to doubt whether any act on the part of a returning officer, which did not fall within the list of offences enumerated in S.11 of the Ballot Act, could be treated as misconduct, so as to render him liable to be made a respondent in a municipal election petition, but it is unnecessary here to determine that point, for one thing I am perfectly clear – that an erroneous decision upon the validity of a nomination paper given bona fide by a mayor, whether he be a returning officer or not, is not misconduct and that complaint of such decision as erroneous is not a complaint of his conduct.”

Applying an analogy of this approach, I would think that it is quite possible that even without a Returning Officer being a respondent and party in an election petition having been so removed, the court can look at any evidence placed before it to find out whether there could have been errors, irregularities, omissions etc. that could possibly have affected the result of the elections and to what extent. In such a case the court would not be hearing any case against the **R.O.** but strictly looking at the electoral process and whether there was compliance with the law and to what extent it affected the role of the 3rd Respondent, which is still a party.

The Court of Appeal in any case did not strike out the Petition against the 1st and 3rd Respondents. The Election Court must therefore hear and determine the said petition. For purposes of transparency, I must place it on record that in the case of **MOSE V NYAMBEGA** the Election Court over which I presided struck out the entire petition after the petition against the **R.O.** therein was struck out for non-service. This was done consequently and no arguments had been made as to the effect of striking out the **R.O.**'s petition. This meant that the Court of Appeal must have been of the view that the Petitions against the 1st Respondent and the 3rd Respondent survives the **R.O.**'s being struck out.

I respect the decision of our highest Court in the land and the law is that I am bound by the said decision irrespective of any past reservations or decisions which could have been made. It is the duty of this court to investigate the elections held at Matuga Constituency as against the 1st and 3rd Respondents.

If this court were to proceed as proposed by the 1st Respondent's and 3rd Respondent's Counsel that I strike out all paragraphs in the petition that referred to or touched on the 2nd Respondent then it is certain that nothing would remain of the petitions. Almost 95 % of the allegations or statements are connected with or refer to the **R.O.** and those under him.

With respect, I cannot believe that it was the intention of the Court of Appeal to leave the Petition against the 1st and 3rd Respondents only to have it mutilated wholesale by the election court and leaving it bear. It is my interpretation that the court of Appeal in its discretion must have been of some opinion that there was a basis for an inquiry in the election at Matuga Constituency even without the participation of the **R.O.** as a party or respondent.

Having said the above, there is another reason why this court is entitled to have a look and consider the evidence touching on the **R.O.** This is as a result or on the basis of evidence or material that he himself presented to the court during the hearing or intended hearing of an interlocutory application.

I have carefully perused the record and do find that there is a substantive Replying affidavit filed by the **R.O.** in answer or response to the claims and/or allegations made in the petition by the Petitioner or the affidavits of the Petitioner and his witnesses. This must be in order since the **R.O.**'s turn to testify and present his affidavit in court had not and never arose. Before this stage could be reached, at his instance the Petition against him was struck out and he ceased being a respondent. However, he left an affidavit sworn by himself on record. It was sworn by him on 6th March 2008 in answer to an Notice of Motion dated 25th February 2008 supported by an affidavit by the Petitioner Ayub Juma Mwakesi. The application sought orders for:

“recount scrutiny and reconciliation of all ballot papers, counterfoils, and register of all votes cast in the election in Matuga Constituency.”

In the said affidavit the **R.O.** deponed inter alia that due to

the fact that there were disputed votes, he opened the ballot box for Kombani polling station stream A where he found there were more counted votes than the counterfoils. That the unused ballot paper books and the partly used ballot paper books were also missing in respect of the Kombani polling station and the presiding officer could not account for them. He added that after making his comments on the Forms 16A for the polling station in exercise of his power under the election law he cancelled the Presidential, Parliamentary, and Civic elections in that polling stations as he believed that they were fraudulent results.

The **R.O.** placed this Affidavit on record at his own behest and volition when he was still a respondent and a party. The affidavit is on record. It raises on the face of it some significant and crucial facts and issues. The facts deponed are coming from him on oath. They are admitted facts which the court has come across on record. Can the court ignore them? I do not think so. These are statements from him made voluntarily and they are on record. They are not the evidence or statements of the Petitioner and his witnesses. There is no request or application that these should be expunged.

In view of the nature of the contents this election court is entitled to inquire and determine whether the **R.O.** exercised his powers under the election law and whether he had such powers. The court cannot investigate about his intentions or conduct i.e. whether it was willful conduct or not.

All the court is required to inquire into is on the law was in the case of **HARMON –V- PARK** which I referred to earlier. Did the **R.O.** have such powers under the election law - to cancel the Presidential, Parliamentary and Civic elections at Kombani polling station as he did? Was it legal? The court can determine this without judging the **R.O.**'s intention or mind, his conduct or whether there was misconduct or not.

As stated before this inquiry is not pegged or founded on personalities, misconduct, culpability retribution or punishment. It is an inquiry into the due process of the elections at Matuga. It can be done clinically and cleanly and without going for any jugular and without condemnation of parties who cannot defend themselves having elected to exit from the proceedings. The **R.O.** shall not be condemned unheard in such process. It would be a pure interpretation of the law.

At this juncture I will proceed to the second preliminary point of law raised by the 1st Respondent and the 3rd Respondent in respect of the question relating to the ECK vis- a-vis the Interim Independent Electoral Commission (hereinafter referred to as the “**ILEC**”) and only come back to the evidence if the petition survives this point of law.

The 1st Respondent submitted that:

(1) In view of the Amendment to the constitution of Kenya which introduced Sections 41 and 41A repealing that which created the Electoral Commission of Kenya (ECK), the continued retention of ECK in the present petition is an unnecessary appendage. It is not a party recognizable in law that can continue to be retained for the sustenance of the present petition.

(2) In the alternative and without prejudice to the submission

in the preceding paragraph, even if it were to be a proper party to the petition (i.e. ECK), in the absence of any amendment to the Petition to accommodate the new party, ECK as a non-existent cannot be deemed to be correctly representative of its successor.

(3) (i) whether or not ECK or any other body succeeding it e.g. ILEC is a proper and necessary party in this petition has not been demonstrated by the Petitioner.

(ii) Even if the answer to (i) above is in the affirmative, the

Petitioner has not demonstrated that in view of the

provisions of Section 41A of the Constitution as amended,

the successor to ECK, although not herein enjoined was

mandated to deal with any Petition and in particular the

present petition.

The 1st Respondent concluded his submissions by declaring that from the matters stated above, the continued prosecution of the 1st Respondent by the Petitioner in the given circumstances of this case has denied the said 1st Respondent his Constitutional right to a fair trial/or hearing as enshrined in the Constitution. He relied on the provisions of Section 77 (9) of the Constitution.

The 3rd Respondent through its counsel Mr. Justus Munyithya associated itself with the submissions of the 1st Respondent. He added that:

That the 3rd Respondent was and is still the ECK.

By the constitution Amendment Act No. 1 of 2008, the body referred to as ILEC was established.

Legislative judgment by Parliament decided that ECK did not conduct elections in a free and fair manner.

That it was discredited and found that it could not carry out or conduct elections.

The purpose for the constitutional amendments were to institute Electoral reforms and to restore confidence in the elections.

The Petition became incompetent as soon as the ECK was removed as the Supervisor of Elections and replaced by ILEC.

That the appointment of the Counsel for ECK was signed by then ECK chairman and it was the duty of the Petitioner to formerly substitute the 3rd Respondent.

That there was no proper person in the petition to respond to the allegations against the ECK.

In his submissions through his counsel Mr. Balala, the Petitioner argued that:-

The change in the law to substitute the ILEC in place of the ECK has no effect on the petition.

The amendment as contained in the Constitution Section 44A is clear on the face that all matters are automatically and immediately transferred to the new body and all references to ECK are also references to ILEC.

Section 23 (1) of Chapter 2 the Interpretation and

General Provisions Act has the clear effect that substitution does not affect pending proceedings.

Constitutional provisions should be given a wide interpretation.

The court should look at the intention of parliament.

If ILEC did not take over all the functions and duties of the ECK, there would be a vacuum that could lead a Constitutional breakdown and crisis. This will lead to chaos as even no elections could be undertaken or possible whatsoever.

The interpretation by the 1st and 3rd Respondents were radical and drastic.

He criticized Mr. Munyithya as counsel for 3rd Respondent in supporting the said interpretation as he would be shooting himself in the leg.

The aforesaid preliminary point of law is not entirely new as it was considered and determined in the following cases by the Election Courts in Kisii and Bungoma:-

ELECTION PETITION NO. 3 OF 2008 AT KISII – MANSON OYONGO NYAMWEYA –V- JAMES OMINGO MAGARA AND TWO OTHERS.

ELECTION PETITION NO. 1 OF 2008 – BUNGOMA - JOHN WALUK –V- MOSES WETANGULA & OTHERS.

On 29th December 2008m the Constitution of Kenya (Amendment) Act 2008 came into operation. By this Act of Parliament, Section 41 of the Constitution as A existed was repealed and replaced with a new Section 41 whose subsections 1 and 2 provide as follows:-

“41 (1) there shall be an Interim Independent Electoral Commission which shall consist of a chairman and not more than eight other Commissioners.

(2) The Interim Independent Electoral commission shall be the Successor to the Electoral commission of Kenya established by Section 41 (now repealed) and subject to this constitution, all rights duties, obligations, assets and liabilities of the Electoral commission of Kenya existing immediately before the commencement of this section shall be automatically and fully transferred

to the Interim Independent Electoral Commission and any reference to the Electoral Commission of Kenya shall, for all purposes, be deemed to be a reference to the Interim Independent Electoral commission established under the Section.”

It is significant to take into account the express functions

that were given to the ILEC and contrast them with the ECK. The repealed Section 42 A of the Constitution stated as follows:-

“42A. the Electoral Commission of Kenya shall be responsible for –

- (a) Registration of voters and the maintenance and revision of the register of voters.**
- (b) Directing and supervising the Presidential, National assembly and Local Government elections.**
- (c) promoting voter education throughout Kenya and such other function as may be prescribed by law.**

The new sections 41A brought in through the amendment by Parliament sets out the functions of the ILEC as follows:-

- (a) reform of the electoral process and the management of elections in order to institutionalize free and fair elections;**
- (b) Establishment of an efficient and effective secretariat;**
- (c) Promotion of free and fair elections;**
- (d) Fresh registration of voters and the creation of a new voter register;**
- (e) Efficient conduct and supervision of elections and referenda;**

- (f) **Development of modern system for the collection, collation, transmission and tallying of electoral data;**
- (g) **Facilitation of the observation, monitoring and evaluation of elections and referenda;**
- (h) **Promotion of voter education and culture of democracy;**
- (i) **Settlement of minor electoral disputes during an election as may be provided by law; and**
- (j) **performance of such other functions as may be prescribed by law.”**

As seen above in the new Section 41, all the duties that existed immediately before 29th December 2008 was automatically and fully transferred to the ILEC and any reference to the ECK “shall, for all purposes” be deemed to be a reference to the ILEC. This in effect includes all the duties and references to the ECK in the National Assembly and Parliamentary Elections Act Cap. 7 and the Rules and Regulations made thereunder. The Hon. Justice Musinga observed, inter alia that:

“

It would therefore appear that Parliament did not take away any duty that was hitherto performed by the ECK, it instead expanded or widened the mandate of the I.I.E.C. Parliament did not merely want I.I.E.C. to replace ECK. If that was the only intention it would not have been necessary to repeal Section 42 A and bring in Section 41A. As far as I can recall, the ECK has always been one of the respondents in every election petition. In this particular one, it was the third respondent.

.....”

When Parliament was enacting the Constitution of Kenya (Amendment) Act, there were several election petitions that were pending in various Courts, including this one. Parliament must have been aware of that fact. Did Parliament intend to enact a law that would bar the I.I.E.C. from participating in the pending election petitions as a respondent in place of ECK? ...”

In answer to the said question and after a critical analysis of the law, the Honourable Judge held:-

“subscribing to the above school of thought I hold that Parliament gave the I.I.EC. mandate to take over as a respondent, election petitions in place of ECK.....

For the aforesaid reasons, I am not inclined to accept that there exists a **Caucus Omissus** in the Constitution of (Kenya) Act.”

In reaching the said decision the Judge applied the liberal approach to Constitutional interpretation as adopted in **CRISPUS KARANJA NJOGU –V- ATTORNEY GENERAL** Criminal Application No. 39 of 2000 (unreported).

I wholly agree with the Learned Honourable Judge. There is no need to re-invent the wheel when it has been already invented, workable and irreplaceable. I adopt the said decision and do apply it herein answering the second preliminary question of law posed.

In the second case of **JOHN KOYI WALUKE –V- MOSES MASIKA WTANGULA, ELECTORAL COMMISSION OF KENYA & 3 OTHERS (2009)** e KLR, the Honourable Lady Justice Florence Muchemi held that:-

“The Constitutional Amendment which created the IIEC was based on the Kriegler Report which called for replacement of ECK. The ECK had by that time lost public confidence due to the manner in which it conducted the 2007 General Elections as the Kriegler Report put it.

The intention of Parliament when it passed the amendment was to replace the ECK with a new body. The duties of the new body were to manage elections which was the mandate of the disbanded ECK, Manage elections, includes handling or defending election petitions. The two duties are related and cannot be separated.

It could not have been the intention of Parliament to have the IIEC succeed ECK in all matters pending as at 29th December 2008 and leave a vacuum as far as election petitions are concerned. In my view, election petitions are included in the rights, duties and obligations of the disbanded body and, therefore, became the business of the IIEC when it was created. Parliament had no intention of creating another body after IIEC which would be mandated to take over elections petitions pending in courts. In my view Section 41A does not created vacuum on duties relating to pending election petitions. Section 41 read together with Section 41 A is clear that IIEC has fully succeeded the ECK in respect of the rights, duties, obligations, assets and liabilities for the two year period

that it will be in office. Section 41 used the words “automatically” and “fully transferred.” There is no doubt that Parliament was aware at the time of enacting the constitutional amendment that there were election petitions pending in court. The Legislature had no intention to block the IIEC from defending the said petitions.”

Again I do find that the said decision lays down the correct interpretation of the law. I hereby do adopt the said decision wholly in respect of the second preliminary point of law raised. It should be noted that in both of the two decisions, what was before the courts included applications to substitute the ECK with IIEC as respondents. They were formal applications for substitution and joinder. There is a difference in the present petition. No party has applied to substitute ECK whose name is still on the record, with IIEC, the new body. In fact the 1st Respondent and counsel for the “3rd Respondent” have taken issue with this and have raised it as a limb of the initial 2nd preliminary point of law. They argue that even if IIEC fully succeeded the ECK in respect of rights, duties, obligations assets, and liabilities including the right to take over pending petitions from ECK, the Petitioner has not formally moved the court to enjoin IIEC as a respondent and party in this petition.

My understanding of Mr. Balala’s response for the Petitioner is that there is no need for this as the joinder is automatic by virtue of Section 41 A of the Constitution (Amendment) Act.

In fact as for as this court is concerned, I had believed and still believe that it would have been the IIEC which would take the initial and immediate step of applying for substitution as a matter of formality to rectify the pleadings. The court would have expected then to apply for the substitution if the take-over was not automatic under section 41A.

This is the reason why this court in its directions when I came on record at the outset posed some questions or issues to be considered before the matter proceeded. In my directions of 24.8.09 is stated as follows:-

“This matter was placed before me for directions as to the way forward. In the intervening period from the last adjournment, the 3rd Respondent was disbanded by an Act of Parliament and a new Electoral body established namely the Interim Independent Electoral Commission of Kenya (IIEC). In my view of the foregoing it is clear that this will have substantial impact and ramifications on the petition. The Petitioner will have to go back to the drawing board and decide on what course of action he will have to take. As things stand now, the questions that arise include the following:-

(1)

(2)

(3) Should the new Interim Independent Electoral Commission of Kenya (IIEC) be joined as a Respondent in place of the 3rd Respondent or added as such or the 3rd Respondent still remains a party in law in the suit.

(4) Should the Petitioner make a formal application to deal with the rear situation? Including amendments of the petition.

All these question and many others are serious questions facing the Petitioner. The Petitioner and his counsel need time to consider the action to take.”

The court adjourned the matter to allow the parties to consider the aforesaid issues.

What was the response of counsel at the next hearing?

Mr. Balala for the Petitioner said that the new body automatically takes over from ECK. There was no need for amendment of the petition and the petition can proceed for hearing.

Mr. Mabeya stated that if IIEC is not joined he would either apply to enjoin it or to strike out the petition.

Mr. Munyithya for the “3rd Respondent” said that an application would be made to enjoin IIEC.

None of the advocates for the parties took any action and the hearing of the petition continued to conclusion.

I can understand Mr. Balala’s position as it is legal opinion that IIEC by virtue of the provisions of S.41 A would automatically take over the place of ECK and are in effect be a party in the petition. What I find surprising and even puzzling is the position taken by Mr. Justus Munyithya who had come on record for the ECK before it was disbanded. After the disbandment of ECK one would have reasonably expected that IIEC applies to be made a party by substitution as happened in the WETANGULA CASE and MAGARA CASE. In this case IIEC does nothing of the sort instead its advocate comes to court to support the 1st Respondent and submits that the Petition is defective and it became incompetent as soon as ECK was removed as supervisor of elections. He stated that his appointment was by the ECK Chairman and it was the duty of the Petitioner to substitute the ECK as 3rd Respondent with IIEC. That there was no proper person to respond to the allegations against ECK.

I found the aforesaid position to be quite strange and absurd. If the ECK had been disbanded and was moribund and Mr. Munyithya had not been retained by IIEC then on whose behalf was he and Ms. Ngugi in court. Who were they representing?

After the disbandment of ECK Mr. Munyithya remained on record and always stated in the “Coram” that he appeared with Ms. Ngugi for the “3rd Respondent”. Who was the 3rd Respondent then if not IIEC as ECK no longer existed in law? Mr. Munyithya participated in the proceedings and cross-examined the Petitioners and his witnesses in opposition to the petition. The fruits of his thorough and incisive cross-examination are on record. For whose benefit were they? Why were the Petitioner’s witnesses being baggered and their credibility challenged in court by a party who is undisclosed and unsuited?

I think with all respect that Mr. Justus Munyithya as an officer of the court was less than candid and even acted in a questionable manner. It bothers the court if truly the instructions to take the position he did emanated from IIEC.

It should be noted that Mr. Munyithya did call a witness for and on behalf of the 3rd Respondent Mr. Paul Papa Onuko Akuonya, the former Deputy Elections Manager with the ECK who testified on behalf of the supposed 3rd Respondent. If ECK had been disbanded could it participate in the petition and proceedings? Of course it could not. If IIEC had not applied to be enjoined in the petition, then who was Mr. Munyithya and Ms. Ngugi representing, who had retained them and paying their legal fees. Who had called the witness and for whom was he testifying?

This court takes exception with the conduct of Mr. Munyithya and the IIEC. This is a serious matter touching on the Constitutional rights of the electorate in Matuga Constituency. It concerns with the right to vote – universal suffrage. It is a solemn matter not to be taken lightly. I do not comprehend the inconsistency and contradictions of Mr. Munyithya and the IIEC.

Upon consideration, I do hold that Mr. Munyithya and Ms. Ngugi continued to remain on record after the disbandment of the ECK their initial client. They continued to represent the so-called 3rd Respondent throughout in the manner I have explained. At all material times this court verily believed and was made to believe that Mr. Munyithya and Ms. Ngugi were acting for IIEC as the new 3rd Respondent. They held themselves out in such capacity. The IIEC which must have been aware of proceedings as it did not intervene or object to what was happening in court and their representation by the said counsel. The Petitioner did not object to this representation and neither did the 1st Respondent. In fact Mr. Mabeya and Munyithya Counsel for the 1st Respondent and the 3rd Respondent always took the same position.

I do hold that despite the absence of a formal order for substitution of ECK by IIEC in the petition and joinder thereof, the IIEC and its advocates held themselves out as having the capacity to automatically take over the ECK’s case and position under the provisions of Section 41A of the Amendment Act. This court, the Petitioner, the 1st Respondent and all involved in good faith and trust believed this to be the position. All relied on the said representations by conduct and statements and the IIEC, Mr. Munyithya and Ms. Ngugi are now estopped from denying that IIEC was not the 3rd

Respondent . I do hold that by conduct in this Constitutional matter IIEC took over the place of ECK and became substituted as the 3rd Respondent. There can be no two ways about it.

I therefore reject and dismiss the second preliminary point of law raised in its entirety.

For the avoidance of doubt and to prevent an abuse of the election court process and gross miscarriage of justice, and in the event I am wrong in my interpretation, I do hereby invoke the powers of the court under Section 60 of the Constitution, Sections 1A and B and 3A of the Civil Procedure Rules and also Order 1, Rule 10 and do hereby order that the IIEC is deemed to have been enjoined in the petition in substitution of ECK with effect from 29.12.2008 and participated in these proceedings as the 3rd Respondent. In the alternative, I do hereby substitute the IIEC as the 3rd Respondent in place of the ECK for the purpose of a fair and just determination of this petition.

As I conclude this issue, I do refer to the WETANGULA and MAGARA cases. In the WETANGULA case it is the IIEC which applied to be substituted in place of ECK as Respondent. In the MAGARA case while the IIEC did not apply to be substituted as a Respondent in place of ECK, it did not object when the Petitioner made such an application. I do find that the said positions taken in the other cases are diametrically opposed to the position taken in this position “The IIEC are by law required to be impartial and they ought not be perceived to be taking a particular position in support of a particular candidate” – see KIBAKI –V- MOI (No. 3) (2008) 2 KLR (EP), 351.

In the said case, the Court of Appeal frowned upon the practice of inconsistent positions taken by parties in different cases. The Judges of Appeal stated:-

“The 2nd and 3rd Respondents must remain impartial in matters of elections. The law binds them to be impartial. But when they are sued and allegations of impropriety or wrong-doing is made against them, then unless they admit improper conduct or wrong-doing on their part, they must somehow challenge those allegations. If they are sued, then they become parties to the suit in which they are sued, and as parties surely they must be partisan in the defence of their interest. They are, in the position of parties, entitled to make whatever submissions they like to make and leave the decision on their submissions to the presiding judge or judges. That is how the adversarial system of justice operates. We would, however, state that once a party has in a previous case, taken a particular stand on an issue of law, then good practice would demand that if the position previously taken is being changed, the party ought to disclose that a contrary view and the reason or reasons for the change that there had been a change and the reason or reasons for the change stated.”

In view of the foregoing, I do find that the IIEC in the circumstances could legitimately be accused of misleading the court. The entire situation amounted to an abuse of the court process. If IIEC did not want to take over the place of ECK and participate in this petition, they should have kept away until they were enjoined through the actions of any other party.

I now come to the EVIDENCE on record in this petition. I have already stated my opinion regarding the effect of the striking out of the Petition on the allegations against and conduct of the **R.O.** and those under him. I have already explained the court's position on the effect of the late striking out of the petition or failure to stay the proceedings such that most of the witnesses had testified and their evidence admitted on record.

There are no such peculiarities or inhibition with regard to the evidence if any against the 1st Respondent and the 3rd Respondent.

I have also cautioned myself that strictly the petition as against the **R.O.** has been struck out. In the court's qualifications is to the effect and extent of the evidence already on record and on which rights have accrued to the Petitioner, the court must proceed and deal with such evidence with care and caution such that the striking out of the petition against the **R.O.** is not rendered nugatory resulting in effect to disregard of the Court of Appeal's decision. This court cannot do so and I will not allow that to happen in view of the binding effect of the said court's decision.

This court must disregard any evidence that would tend to accuse the **R.O.** of any willful misconduct and which would require him to defend himself in a fair and just manner.

I am guided by Section 28 of the National Assembly and Presidential Elections Act, Cap 7 which reads:-

“28 No election shall be declared to be void by reason of a non-compliance with any written law relating to the 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 attend the result of the elections”

I agree with Mr. Balala that in applying this provision there is no requirement that one proves criminal culpability or as I would put it willful misconduct, negligence etc. If one can show that an irregularity took place or non-compliance then it is for the court to decide whether the same affected the result and if so in what manner.

I have carefully perused the petition herein. It has 31 paragraphs. Paragraphs 1 – 5 are formal and descriptive and do not raise any allegations.

Paragraphs 6 – 9 contain narrations of the candidates, their parties, the results of the elections and how they were announced.

Paragraph 10 of the petition is a general claim by the Petitioner that elections at Matuga were not conducted in accordance with the provisions of law including the Election Offence Act (Cap 66) and not in accordance with the principle of natural justice and that as such the results of the said elections was seriously affected to the detriment of the Petitioner and that this resulted in serious disenfranchisement due to various irregularities and offences.

Paragraph 11 alleged that some polling stations and at the tallying centre the counting and tallying exercise was generally irregular as the votes announced by the Presiding Officers at some polling station were different from the final votes announced by the returning officer. That this obviously indicated that the votes were either tampered with or manipulated to the benefit of the 1st respondent.

I agree entirely with Mr. Buti that strictly any paragraph that contains allegations against the **R.O.** and which accuse him of any misconduct, negligence etc must not be inquired into or touched by this election court. To do so would be reviving the Petition – against him which cannot be done.

As a result, I agree with Mr. Buti that paragraphs 12 cannot be dealt with by this court. In paragraph 13, the allegations are as against the presiding officer. This is an officer under the **R.O.** and as a result this must be left out.

I do hold that paragraphs 14, 15 16,18,19,20,21,22,26 and 27 must be disregarded and not considered or looked into by the court as they refer and touch on the Returning Officer.

I do not agree with Mr. Buti that I should not look at and inquire into paragraphs 23, 24, 25 and 28 of the Petition. I agree that by considering and investigating the allegations therein I would be touching on the **R.O.**, the 2nd Respondent.

I have already given the reasons why this court is entitled to consider and evaluate some of the evidence already on record and which were recorded and admitted when the **R.O.** was a party. This evidence are those that relate to Kombani |Polling Station at Kombani Primary School.

The **R.O.**, the 2nd Respondent himself placed evidence before this court relating to what happened at Kombani Polling station though his affidavit sworn on 6th March 2008 in opposition to the application by the Petitioner. I am not quite sure about the fate of the application but it appears that it was not prosecuted to the end but the evidence remains on record.

The affidavit itself being evidence tendered voluntarily and at the **R.O.**'s volition raised matters which this court finds it hard to ignore. The **R.O.** himself before he was removed from the Petition

provided answers to the allegations made in paragraph 23, 24, 25 and 28 of the petition I deem it as a result that he duly answered and defended himself against the said allegations in the said affidavit.

Again, through his cross-examination of the Petitioner and his witnesses he had the opportunity to challenge their credibility and the veracity of the evidence. He has tested the said evidence and answered the allegations in his affidavit. He could have had the opportunity to testify in the witness-box and give more explanations but he elected to exit from the petition and proceedings.

I do hold once again that it would be a travesty of justice for the court not to inquire into the serious issues raised in his affidavit and the allegations about the Kombani Polling Station. Another protection for the **R.O.** in case of any challenge to his statement is that the 1st Respondent and his witnesses have already testified on what happened at Kombani polling station.

PETITIONER'S EVIDENCE

P.W.1 Ayub Juma Mwakesi in his affidavit deponed:-

- (1) That he opened the box for one of the stations, raised an envelope from inside the box and declared that that envelope was the problem without explaining himself. After further exchanges of words with those present he proceeded to recount the valid votes inside the box. The results of his recount were as per the Form 16A result, showing Mwanyoha with a clear lead over Mwakwere.
- (2) That the box was then resealed and he asked the deputy **R.O.**, one Mrs. Peninah to read the results for Kombani A and B, which she did, together with results for civic and presidential votes. After which the people in the hall cheered and awaited the declaration from the 2nd respondent, as everyone knew the 1st respondent had lost the election.
- (3) That the 2nd respondent delayed the declaration of the results for further few hours. At around 7 or 7.30 after Mwakere whispered something in his ear and handed him the phone to talk to some unknown person, he asked the police in charge to form a cordon round the table, which they did. He then got up and said:

“I am a gazette returning officer, I am a Muslim and I am a Somali and I will announce the person whom I think is the winner and the person who thinks he has won this election and has not been declared can go to court or anywhere else he wants: the winner is Ali Chirau Mwakwere!”

- (4) That this announcement shocked the entire hall who began to protest as not one knew the basis of the results.
- (5) That despite demands for the final tally form from the ODM lead agent and candidate the 2nd respondent and the 1st Respondent ordered the police to remove everyone out of the hall and we were all beaten and chased away.
- (6) That on analyzing the forms 16A's obtained from Mr. Hassan Mwanoyoha's lead agent, one Mr. Amana, which results., I verily believe to be true as were the results announced at the respective polling stations, by the presiding officers, I realized that there is a great discrepancy in that the results declared had been doctored hence the urgent need for verification
- (7) That it will be seen from the analysis that, the 1st respondent obtained a total of 8730 votes while Mr. Mwanoyoha of ODM had a total of 8886 votes. Accordingly, it is quite clear that the 1st respondent was wrongly declared as the winner and MP for Matuga as Mr. Mwanoyoha had actually won the election.
- (8) that I was shocked to further read from an affidavit sworn by the 2nd respondent and filed in this case earlier that he had cancelled the results for Kombani for his stated reasons, which I do not believe to be true.

P.W. 2 – Juma Hamisi Mwakishando in his affidavit deponed:

- (1) That I am a registered voter and was an agent of ODM Kenya at Kombani Stream B during the 2007 General election held on 27th December 2008. Steam A was in the classroom next door. I am familiar with the facts of this case and duly competent to swear this affidavit.
- (2) That I was the polling agent ODM Kenya whose candidate for the parliamentary seat was one Mr. Kassim Sawa also referred to as "Tandaza".

- (3) That the results of Kombani A and B showed that Mwanyoha had beaten Mwakwere by 522 votes to 100 votes, which results were recorded on the Forms 16A's and pinned on the door to the station.
- (4) That none of the agents present especially for Mwakwere, Mwanyoha or myself for "Tandaza" objected to the results or the manner of the election at that station.
- (5) That after sealing of the boxes we carried them to the school bus of Waa Girls for transportation to the tally centre. Other agents for the other candidates also accompanied the Kombani boxes to the Tally hall at Matuga DDI.
- (6) That we arranged the boxes outside the hall, but within the compound, on the queue with other boxes waiting to be called in, in the safe custody of the ECK officials present namely Mr. Sudi and the deputy presiding officer.
- (7) That I then waited to hear the final results outside the tally hall.
- (8) That later we heard commotion inside the hall and when we rushed in to see what was going on I found Mwakwere saying that he was not sure Kombani was ok. I was surprised as his agent had not protested at the polling station and everyone there appeared to have been content with the results. We returned to wait outside the hall.
- (9) That later on there was more commotion and after hearing gun shots presumably by police firing in the air, the crowd scattered and I also went home.

P.W.3 - Fatuma Hamisi Masito deponed that:-

- (1) That I am an adult female and currently a nominated ODM Councillor in Kwale Council and a business lady. At the material time of the General Elections of 2007, I was a voter and an ODM agent at Kombani polling station which had 2 streams (A and B). I was in stream B at Kombani, familiar with the facts of this case, hence clothed with the necessary competence and authority to swear this affidavit.

(2) That I arrived at the Kombani station at poll opening at 6.00 a.m. and was present throughout the voting exercise.

(3) that there were no incidents and voting went on peacefully except for delays through the slowness of ECK officials. Otherwise the voting was free and fair.

(4) That at 6.00 a.m. the polling station closed and we all proposed to rest for 30 minutes before starting to count, but as the ECK officials were generally slow we did not begin counting until around 10.00 p.m. after we had also rested and taken some meals. At no time were the boxes left unattended whenever a person left the room.

(5) That the counting of both streams A and B were done in one room, one after the other, in the presence and the agreement of all agents.

(6) That the total results for the top two candidates were as follows:-

<u>Stream</u>	<u>Mwanyoha</u>	<u>Mwakwere</u>
A	452	78
B	100	22

(7) That after the counting and closure of the boxes the Presiding Officer gave us copies of Forms 16A were some forms had been signed and others had not, and there were so much paper work and confusion. My copy was not signed. We loaded the boxes in the school bus of Waa Girls early in the morning of 28th December 2007 for transportation to Matuga DDI where tallying was being done. I accompanied the boxes to the centre.

(8) That at Matuga DDI, the boxes were kept in a queue of ballot boxes outside the hall awaiting to be called in. I handed my copy of Form 16A for Parliamentary results to our lead agent, Mr. Amana as per earlier instructions he had given to all ODM agents to do so and remained inside till the results were announced later that evening.

(9) That when Kombani station was called out around 9 a.m., the 2nd respondent asked the Presiding Officer Mr. Sudi, why they had arrived so late and for unknown reasons directed that Kombani boxes should be kept aside until later.

(10) That at around 3.00 p.m. the Kombani boxes were recalled as they were the last 2 boxes at that stage. After argument the 2nd respondent ordered the Presiding Officer to be arrested and he was removed from the room by police.

P.W. 4 - Hamisi Mohamed Mwanyoha deponed:-

(1) That I was the ODM candidate at Matuga Constituency for the General election of 2007, I am familiar with the facts of this case, hence clothed with the necessary competence and authority to swear this affidavit.

(2) That by 3.00p.m. of the 28th December 2008 close to 20 hours after the close of polls, the 2nd respondent asked for the last 2 stations boxes i.e. for Kombani A and Kombani B, which he had kept aside earlier, to be brought up. These were delivered by the Presiding Officer one Mr. Sudi who had been present in the hall and waiting with the boxes for his turn.

(3) That upon handing the boxes and Form 16A's for those station to the 2nd respondent, he began shouting at Mr. Sudi and engaged him in a heated exchange. He then declared that he would not accept the results of those station.

(4) That as we watched the drama unfold the said Mr. Sudi went out of the room and got a package with unused ballot books upon which the 2nd respondent called the police and ordered them to arrest and take the said presiding officer away, in what looked like a well orchestrated strategy to create a crisis in as far as Kombani was concerned.

(5) That after some confusion I insisted that clarification be given on the fate of Kombani or reasons for failure to include them in the tally, the 2nd respondent summoned all the candidates, including myself, to the table.

(6) That he opened the box for one of the stations, raised an envelope from inside the box and declared that that envelope was the problem without explaining himself. I mentioned that I could not see the relevance of the envelope he was holding up because the Parliamentary votes were unaffected and the people who voted at Kombani could not be punished because of an internal problem between the returning officer and his presiding officer. As far as we were concerned that was an internal ECK matter.

(7) That at that point he said he would recount the valid votes inside the box. The results of his recount were as per the Form 16A result, showing I had won in that polling station. He looked very dejected.

(8) That the 2nd respondent delayed the declaration of the results for further few hours, without explaining his reasons. At around 7 or 7.30 after Mwakwere whispered something in his ear and handed him the phone to talk to some unknown person, he asked the police in charge to form a cordon around the table, which they did, he then made a short declaration that he would do what he wanted and anyone who didn't like it could go to court or anywhere.

(9) That he then merely announced that the 1st respondent was the winner.

(10) That I was shocked by this announcement as I didn't know the basis of the announcement made as all our tallies including that read by the returning officer and his deputy throughout the two days still showed I had won the elections.

(11) That despite our demands for the final tally form 17A the 2nd respondent and the 1st respondent ordered the police to remove everyone out of the hall and we were all beaten and chased away.

(12) That I was shocked to later read from an affidavit sworn by the 2nd respondent and filed in this case earlier that he had cancelled the results for Kombani for his stated reasons, which I do not believe to be true as those results had never been cancelled at the tally hall and had on fact been read out by the deputy returning officer at the tally hall. The cancellation and reasons given appear to be an afterthought in view of the petition filed and I believe that in any event the cancellation was unlawful.

P.W. 5, - Amani Saidi Jirani deponed in his affidavit:-

(1) That I am a registered voter at Matuga Constituency for the General Election of 2007 and was at the material time the lead agent at the tallying hall for the ODM candidate Mr. Hassan Mohamed Mwanyoha

(2) That by 3 p.m. of the 28th December 2008 close to 20 hours after the close of polls, the 2nd respondent asked for the last two(2) stations boxes i.e. for Kombani a and Kombani B, which he had kept aside earlier, to be brought up. These were delivered by the Presiding Officer one Mr. Sudi who had been present in the hall and waiting with the boxes for his turn.

(3) that upon handing the boxes and Form 16A's for those stations to the 2nd respondent, he began shouting at Mr. sudi and engaged him in a heated exchange. He then declared that he would not accept the

results of those stations and when Mr. Sudi tried to talk to him, the 2nd respondent called the police and ordered them to arrest and take the said presiding officer away.

(4) That after the ODM candidate protested on this conduct and instead that clarification be given on the fate of Kombani or reasons for failure to include them in the tally, the 2nd respondent summoned all the candidates to the table.

(5) That he opened the box for one of the stations, raised an envelope from inside the box and declared that that envelope was the problem without explaining himself. After further exchanges of words with those present he proceeded to recount the valid votes inside the box. The results of his recount were as per the Form 16A result, showing Mwanyoha with a clear lead over Mwakwere.

(6) That the box was then resealed and he asked the deputy RO, one Mrs. Peninah to read the results for Kombani A and B, which she did, together with results for civic and presidential votes, Upon finishing, the people in the hall cheered and awaited the declaration from the 2nd respondent, as everyone knew the 1st respondent had lost the election and Mr. Mwanyoha was the winner.

(7) That the 2nd respondent delayed the declaration of the results for further few hours. At around 7 or 7.30 after Mwakwere whispered something in his ear and handed him the phone to talk to some unknown person, he asked the police in charge to form a cordon round the table, which they did. He then got up and said:

“I am a gazetted returning officer, I am a Muslim and I am a Somali and I will announce the person whom I think is the winner and the person who thinks he has won this election and has not been declared can go to court or anywhere else he wants: the winner is Ali Chirau Mwakwere!”

(8) That I was shocked by this announcement as we didn't know the basis of the announcement made as all our tallies including that read by the returning officer and his deputy throughout the two days still showed Mr. Mwanyoha of ODM had won the elections.

(9) That despite our demands for the final tally Form 17A the 2nd respondent and the 1st respondent ordered the police to remove everyone out of the hall and we were all beaten and chased away.

(10) that I was shocked to later read from an affidavit sworn by the 2nd respondent and filed in this case earlier that he had cancelled the results of Kombani for his stated reasons, which I do not believe to be true as those results had never been cancelled at the tally hall and had on fact been read out by the deputy returning officer at the tally hall. The cancellation and reasons given appear to be an afterthought in view of the petition filed.

(11) That since then, I together with the Petitioner, analyzed the forms 16A's obtained from our agents at the tally centre at the conclusion of voting which I believe to be the most accurate account of the outcome of the election as announced at the respective polling stations, by the presiding officers. The analysis shows a clear victory for the ODM Candidate, Mr. Mwanzyoha.

(12) that it will be seen from the analysis that, the 1st respondent obtained a total of 8730 votes while Mr. Mwanzyoha of IDM had a total of 8886 votes. Accordingly it is quite clear that the 1st respondent was wrongly declared as the winner and MP for Matuga as Mr. Mwanzyoha had actually won the election.

(13) That if Kombani A and B were taken into account for the top two candidates i.e the 1st respondent and Mr. Mwanzyoha, using the ECK official announcement and ignoring any other irregularities, the results as shown below still ensures Mr. Mwanzyoha's victory by a margin of 142 votes.

(14) That the election process in Matuga constituency had a lot of irregularities and loopholes in the handling of records and tallying exercise especially at the last stages which left a lot to be desired.

RESPONDENT'S EVIDENCE:

D.W. 1 - Hassan Kishindo Mwawasaa

D.W. 1 Hassan Kishindo Mwawasaa in his affidavit did not

refer to the Kombani Polling Station and he was not cross-examined on this issue.

D.W.2 - Edward Mwanzi Kavuko

D.W.2 Edward Mwanzi Kavuko did not witness the incident relating to Kombani polling station as he said that he had rushed outside to save his motor vehicle as it seemed tension was growing outside.

D.W.3 - Sofiani Mohamed Changani

D.W.3 was Sofiani Mohamed Changani. She did not specifically testify on whether any results were cancelled.

D.W. 4 - Dr. Suleman Mwamlole Warrakah

D.W. 4 was Dr. Suleman Mwamlole Warrakah and he deponed in his affidavit in :

(1) That the candidates agreed with the Returning Officer to

reseal the ballot box, U then heard the Returning Officer say

that he had cancelled the results.

(2) That all the candidates put seals on the ballot box except for Mr. Mwanyoha who asked one of his agents to put a seal on his behalf.

(3) That the results of Kombani were never read.

(4) That after the announcement of the results that Mwakwere had won, the Mwanyoha group rushed to the Returning Officer and started to manhandle him whereupon chaos broke out.

(5) That the Police Officer in charge thereupon ordered the police officers in the hall to save the Returning Officer who by now had announced the Hon. Mwakwere as the winner.

D.W.5 - Godzo Ali Mwinyikai

D.W.5 was Godzo Ali Mwinyikai did not mention anything in his affidavit about Kombani.

D.W.6 - Bakari Suleiman Mwakazi

D.W.6 was Bakari Suleiman Mwakazi and he did not say anything relevant regarding Kombani ballot boxes.

D.W.7 – Mwakwere Chirau Ali

D.W, 7 was the 1st Respondent himself. He did not refer or talk about Kombani Polling Station. However in cross-examination by the Petitioner’s counsel he said that everything was done in accordance with the ECK Rules. He denied that there were any excluded polling stations like Kombani “A or Kombani “B” or ballot boxes. He denied that the Kombani results were cancelled. He said that he did not hear of any incidents at Kombani. Upon being asked more questions, he admitted that the **R.O.** declared the Kombani results as fraudulent. He declined to comment on Form 16A in respect of Kombani. He said it was the **R.O.**’s duty to comment on those issues.

It is now pertinent to see what the **R.O.** Ali Maalim Hassan said in his affidavit sworn on 6th March 2008.

- (1) That I am a male adult of sound mind.
- (2) That I am the 2nd Respondent herein and duly authorized and competent to swear this affidavit.
- (3) That I have read and understood the Notice of Motion dated 25th February 2008 and the Affidavit of Ayub Juma Mwakesi.

(4) That in opposition to the application I have been advised by advocate on record that the application is baseless and vexatious.

(5) That in response to the affidavit of Ayub Juma Mwakesi I wish to state as follows:-

(a) That the affidavit is based on falsehood and especially on allegation of hostility.

(b) That in respect of Kombani Primary School polling station, there was undue delay by the presiding officer in bringing the results.

(c) That due to the fact that there were 5 disputed votes, I in the presence of some parliamentary candidates and agents opened the ballot box for Kombani polling station stream A where I found that there were more counted votes than the counterfoils.

(d) That the unused ballot paper books and the partly used ballot paper books were also missing in respect of the Kombani polling station and the presiding officer could not account for them.

(e) That after making my comments on the form 16A for the polling station in exercise of my powers under the election law I cancelled the presidential, Parliamentary and civic elections in that polling stations as I believed they were fraudulent results.

(6) That I am informed by my advocate on record that the issues raised in the affidavit are issues for trial which must be determined to lay basis for recount if necessary.

(7) That I did not receive any complaint written or oral from the Applicant during the election.

(8) That I swear the affidavit in opposition to the application for recount, scrutiny and reconciliation.

(9) That what is state herein is true to the best of my knowledge information and belief.”

I now will deal with the allegations against the 1st Respondent and the 3rd Respondent. I agree with

Mr. Buti that paragraph 17 and 29 refer to the 1st Respondent and must be tried. Also that paragraph 31 is against the 3rd Respondent and was not struck out. The three paragraphs read:-

“17. That the 1st respondent delayed in the tallying process by several hours.

29. That at various polling stations the 1st Respondent’s agents were giving money to voters for the purposes of corruptly influencing voters to vote for him and guilty of vote buying.

30. That the 1st Respondent and/or his agents were guilty of transportation of voters to the polling stations.”

The 3rd Respondent called one Paul Papa Onuiko Akuonga, R.W. 1 as its witness. He had sworn a Replying Affidavit on 8.12.2008 before the disbandment of ECK. He was now a witness for IIEC. He deponed that:-

“.....

11. That the Returning officers were to conduct elections as mandated by the law and convey the results and a report as to the outcome of the election process at the end of the election period.

12. That the Electoral Commission of Kenya headquarters received the results for Matuga Constituency and a certificate of results dated 28th December 2008 from the returning Officer Mr. Ali Maalim Hassan on 29th December 2009.

13. That on verifying that the result complied with the legal provision the said results were sent for dated entry and the print out was given to the returning officer Mr. Ali Maalim Hassan to sign and the same was received at the KICC.

14. That elections for Matuga Constituency was conducted in a free and fair manner and no one

has lodged a complaint to the Electoral Commission of Kenya as to the conduct or otherwise of the said Election within the time required by the law.”

I have considered the evidence of the Petitioner, and his witnesses, the evidence of the **R.O.** before he ceased being a party, the evidence of the 2nd Respondent and his witnesses. I have also considered the evidence of the 3rd Respondent. In the course of the preparation of the judgment I have perused all evidence by way of affidavits, oral and all the annexures. I have considered the pleadings, proceedings and all material on record.

However, before analyzing the evidence, I wish to briefly discuss the question of the burden of proof and the standards required thereof.

The burden of proof lies upon the person who desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts. These are the words in section 107 of the Evidence Act, cap 80. In the Tanzania Court of Appeal case NELSON –V- ATTORNEY GENERAL & ANOTHER 1997 2 E.A. CAT the said court stated the general principles of law in respect of the burden of proof in election cases. The judges said:

“The burden is heavy on him who assails on election which has been concluded. He must prove beyond any reasonable doubt. But as Lord Oaksey observed in Preston-Jones (1951) I All E.R. 124 at 133 “.... What is a reasonable doubt is always difficult to decide and varies in practice according to the nature of the case.” The standard of proof depends on the seriousness of the allegation made.

In Kenya the standard of proof was dealt with by Justice Musinga in the MAGARA CASE. He said:

“MOHAMED JHAZI –VS- SHARIFF NASSIR A. TAIB – Election Petition No. 9 of 1983, it was held that the burden of proof throughout rests on the Petitioner and the quality of evidence that is advanced is to be considered with thoroughness and gravity which is commensurate with the dire consequences that can follow by virtue of the provisions of the ‘section 6 of

the National Assembly and Presidential Elections Act and Section 35 of the Constitution. The standard of proof is slightly higher than the one adopted in civil cases, balance of probabilities, but not as high as in Criminal cases which is beyond any reasonable doubt. The evidence herein and is particularly the Petitioners allegations must be subjected to the degree of proof as stated herein-above,”

I accept the standard of proof applicable in Kenya to be that stated by Justice Musinga in the Magara case.

I have considered the allegations and evidence of what happened at Kombani Polling stations. P.W.1 was the Petitioner and one of the polling agents for one of the candidates Hassan Mohamed Mwanyoha. He testified on oath on the basis of his affidavit. His evidence was clear and consistent. I find that the **R.O.** without giving any reasons then and his affidavit on record had kept aside the ballot boxes for Kombani A and Kombani B. They had been delivered by the Presiding Officer Mr. Sudi who waited for his turn. Mr. Sudi handed over his boxes and Forms 16A for the stations to the **R.O.**

The **R.O.** declared he would not accept them. The **R.O.** is said to have ordered the arrest of his own Presiding Officer Mr. Sudi and for him to be taken away. The ODM candidate protested. The **R.O.** opened the box for one of the stations raised an envelope from inside the box and declared that there was a problem. He proceeded to recount the valid votes in the box. The results of his recount were as for the Form 16A result, showing Manyoha with a clear lead over Mwakwere.

I do find that the box was resealed and the **R.O.** asked his deputy **R.O.** one Penina to read the results for Kombani A and B which she did, together with the results for civic and Presidential votes. Upon finishing the declaration from the 2nd Respondent was awaited. The 2nd Respondent delayed the declaration of the results for further few hours it was alleged. The **R.O.** then declared the winner to be Ali Chirau Mwalwere as these were the last boxes

On analyzing the Forms 16A's obtained from Mr. Amani, the lead agent for their candidate he realized that there was a great discrepancy in the results and there was need for verification.

From his analysis, P.W.1 found that the 1st Respondent had obtained a total of 8730 votes while Mr. Mwanyoha of ODM had a total of 8886 votes. According to him, it was clear that the 1st Respondent was wrongly declared as the winner and MP for Matuga as Mr. Mwanyoha had actually won the election. P.W.1 said that he was shocked to further read from an affidavit sworn by the 2nd Respondent and filed in this case earlier that he had cancelled the results for Kombani for the given reasons. He produced a copy of the affidavit as an exhibit.

I also had sight of the original copy annexed to the **R.O.**'s application.

The evidence of P.W.1 was corroborated by P.W.2, P.W.3, P.W.4 and P.W.5. All of them witnessed the events at the tallying centre.

I find their evidence to be truthful, honest and consistent. The evidence of the 1st Respondent and his witnesses were evasive and non-committal. In cross-examination the 1st respondent initially even denied that the Kombani results had been cancelled at the Kombani Polling Station by the **R.O.** He feigned ignorance until he was pushed by the Petitioner's advocates during cross-examination,

However, if there was any doubt about the cancellation of the elections then this immediately is removed once one reads the deposition of the **R.O.** in his affidavit sworn on 3rd March 2008.

The 3rd Respondent's witness R.W.1 did not refer to any issue at Kombani Polling Station in his affidavit. In his responses during cross-examination he said that while he was sure that Form 17A had been submitted to the ECK by the **R.O.** yet he could not remember the results of Kombani "A" and "B". He said that he did not bring along the Forms 17A since he no longer worked for the ECK. He admitted that he had seen forms 16A. He said that not all forms had been signed. He could not remember which one had not been signed. The candidates and agents must explain why they did not sign. He said that the **R.O.** was required to write and give the reasons. R.W.1 said that he is the one who had trained the **R.O.** Ali Maalim Mohamed. He said that the signing or lack of it on Form 16A does not invalidate the votes.

RW 1 said that he did not recall the cancellation of any results for the two (2) polling stations. The **R.O.** did not speak to him on phone. That there was no cancellation information through fax that when **R.O.** flew to Nairobi he did not tell ECK of any cancellation of any votes.

RW however said that the **R.O.** had power to cancel results at the station for instance if there is a fight that leads to destruction. Upon being asked to check if there was any discrepancies or differences he confirmed that there was a discrepancy of 500 votes.

He admitted that the absence of 500 votes can change the votes and results. He agreed that there was no reason, for cancellations.

R.W.1 added that:-

- The **R.O.** had no power to recount the votes at the polling station.
- Only disputed votes to be scrutinized at the polling station.
- at close of polling the presiding officer are expected by the law to seal the ballot papers cast and seal them.
- a presiding officer has to seal the disputed votes in a separate bundle and marked disputed votes.
- rejected votes similarly dealt with

- Not **R.O.**'s duty to recount votes.

- He was not to re-open the envelopes of the counted votes.

- he agreed that it was not regular for the **R.O.** to do so.

- He stated that when he swore his affidavit he had expected that the **R.O.** as a party would deal with the exhibits and evidence in relation to Forms 16A and 17.

- He said that he was surprised that the **R.O.** cancelled the results.

- he said that he first saw it in the **R.O.**'s affidavit.

- He could not tell the court who wrote the word cancellation.

- He did not know where the entry had been made.

- There were no presidential results and no civic results.

- He said that such cancellation was serious and causes anxiety,

- There was no complaint and to ECK with 48 hours.

- Had complaint been made ECK would have set up a committee.

I have carefully considered the evidence of R.W.1 and I found

his evidence despite an initial rigidity to be credible, honest and clear. This court accepts his evidence as

to the procedure and regulations to one who is knowledgeable and an expert in the field.

I do hold that the 3rd Respondent through R.w. has conceded to the Petitioner's assertions and claims regarding the results at Kombani Polling Stations.

We have now have to peruse Forms 16a at Kombani Stream A and B. The copies of the Forms were produced inter alia by the **R.O.** himself the custodian of the election documents. In Stream A the results were as follows:

<u>Name of Candidate</u>	<u>No. of Valid Votes cast</u>
Zani Nicholas Stephen	1
Boy Issa Juma	2
Chidzuga Zainab Kalekye	1
Mutula Isaac Moosila	1
Mwaguni Said Mutta	3
Toyya Suleiman Mwakuphunza	6
Mwasuti Shee Mbwana	6
Hoka Athman	3
Digore Mwalimu Kithambi	16
Mwakwere Chirau Ali	78

Sawa Kassim Ali 58

Mwanyoha Hassan Mohamed 452

Total **627**

At this station Mwanyoha Hassan Mohamed had 452 votes when Mwakwere Chirau Ali had 78 a difference of 374 votes.

At Kombani Stream B the results were as follows:-

Name of Candidate No. of Valid votes cast

Mutula Isaac Masila 1

Toyya Suleiman Mwakuphunza 1

Sawa Kassim Ali 12

Mwakwere Chirau Ali 22

Mwanyoha Hassan Mohamed 100

Total **136**

At this station Mwanyoha Hassan Mohamed had 100 votes while Mwakwere Chirau Ali had 22 votes a difference of 72.

A simple arithmetic shows that at Kombani “A” and “B” Mwanyoha Hassan Mhohamed before the cancellation of the results had lead Mwakwere Chirau Ali with 452 votes.

I accept the evidence of R.W.1 upon cross-examination. The **R.O.** did not have the legal power to open the envelopes of the counted votes. The **R.O.** could not carry out a recount of the votes. He saw that the **R.O.** did not have power to cancel the votes in the manner he did.

On Form 16 A at Kombani Stream B, the **R.O.** entered the following entry/statement:-

“57 A/ 47 B

Cancelled

(1) More ballot papers then counterfoils in ballot box.

(2) Unused ballot papers were found missing in the ballot box.

(3) The centre was missing for many hours and yet it is only less than five kilometers to the tallying centre.

(4) Agents did not sign the results.”

The court in this election does not have any reasonable explanation for this purported cancellation and its legal justification. The R.W. 1 on oath states in effect that the **R.O.** had no power to cancel the results. I have seen no legal basis in the evidence of the Respondents and even in Respondents’ Counsels submissions.

I do hold therefore that the cancellation of the results at Kombani “A” and “B” was unlawful and illegal.

The **R.O.** did not have the power, mandate or jurisdiction to do what he did. It is only the Presiding Officer who could order and carry out a recount at the polling station under regulation 37.

An **R.O.** or any other officer cannot cancel votes. It is the Presiding Officer who can secure disputed votes, spoilt votes, and undisputed votes.

I do hold that there was non-compliance with the written law and the election was not carried out with the principles laid down in that written law. Did the non-compliance affect the result of the election?

While applying provisions of English statutes, the court of appeal in **MORGAN & OTHERS –V- SIMPSON & ANOTHER (1974) 3 All E.R. 722** the court of Appeal laid down certain principles in relation to election petitions. They held:

“An election court was required to declare an election invalid

(a) If the irregularities in the conduct of the election had been such that it could not be said that the election had been so conducted as to be substantially in accordance with the law as to election,”

(b) If the irregularities had affected the result.

Accordingly where breaches of the election rules although trivial had affected the result, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the election law it was vitiated – irrespective of whether or not the result of election had been affected.”

In the said case although an election had been conducted substantially in accordance with the law as to local elections, the omission to stamp 44 ballot papers had affected the result of the election which would therefore be declared invalid.

I am persuaded by the said principles in interpreting Section 28 of the National Assembly and Presidential Elections. In the case of **MBOWE –V- ELIUFOO (1967) E.A. 240**, the Election Court in Tanzania interpreted the meaning of “affected the result” The court said:-

“affected result means not only the result in the sense that a certain candidate won and another one candidate lost. The result may be said to be affected if, after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined.”

In the present case, a mere arithmetical calculation of Form 16A at Kombani “A” and”B”

demonstrates that at the said polling station, Mwanyoha led with 452 votes. If this is tallied against the final results pronounced by the Returning Officer the results would look like this.

Mwakwere Chirau Ali

Declared votes - 8638

Cancelled votes at Kombani - 100

Total - 8738

Hassan Mohamed Mwanyoha

Declared Votes - 8328

Cancelled votes at Kombani - 552

Total - 8,880

The difference is 142 votes.

After adjustment of the irregularities, Hassan Mohammed Mwanyoha would have won with 142 votes.

As a result, I hold that the contest was much close than it appeared with the incumbent disadvantaged.

In the case of **NELSON –V- ATTORNEY GENERAL AND ANOTHER** (1999) E.A. 2 E.A. 160 it was observed by the court of appeal in Tanzania that:-

“We want to say in the clearest terms that it is of first important that elections shall not only be fairly and properly held but should also be seen to be so conducted John Adams, a renowned jurist who between 1797 and 1801 was President of U.S.A. is said to have once remarked: “Remember, remember democracy never lasts long. It soon wastes, exhausts and murders itself. There never was a democracy that did not commit suicide”

.....”

Our young democracy in Kenya committed suicide during the elections of 2007 after its aftermath. Unseen – violence, murder permanent injuries destructions of property and other criminal activities bringing the country to its knees. It was by the Grace of God that we did not annihilate ourselves leading to collapse of the Republic of Kenya.

This case is now proof that ECK deserved to be disbanded, as it was the mother of the chaos and may-hem that followed the elections of 2007.

It had been the hope of the court that the IIEC would call the **R.O.** as a witness even if he was no longer a party to assist the election court as an impartial respondent which owes a duty to all Kenyans and the electorate. I do not think that the Petitioner was obliged to call or summon him. As it was he had gone underground and could not even be traced by R.W.1 on his mobile.

With regard to paragraphs 17 , 29 and 30 as against the 1st Respondent i.e. interference with polling transportation of voters and bribery, I do not find that the Petitioner did not prove him beyond a reasonable standard for this court to find him culpable. I would not apply 'a balance of probabilities as in Civil cases. I therefore dismiss the claims against him.

In view of the foregoing I do find that the election at Matuga constituency was not carried out freely, fairly and in a transparent manner. Consequently I do declare it null and void. The first Respondent, Mwakwere Chirau Ali was not validly elected as the member of Parliament for Matuga constituency.

A certificate to that effect shall issue forthwith and be served on the speaker of the National Assembly in terms of Section 30

(1) of the National Assembly and Presidential Elections Act.

The IIEC, the Third Respondent should therefore proceed to conduct a by-election as required under the

law.

I do order that the Third Respondent bears the Petitioner's costs as well as those of the First Respondent.

Mr. Balala and Mr. Abed appeared for the Petitioner. The 1st Respondent was represented by Mr. Buti and Mr. Mabeya. In view of the complexity, intricacy of issues, research, preparation of evidence and marshalling of witnesses, besides the presentation of their clients cases, I do hereby certify costs for two counsel in respect of the Petitioner and the 1st Respondent.

I must commend all counsel for their industry articulate presentations, diligence and co-operation. I thank them for the assistance they gave to this court as officers of the court and without which the election court would have been the poorer.

DATED, SIGNED and DELIVERED at Mombasa on this 5th day of January 2010.

MOHAMMED K. IBRAHIM

J U D G E