



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Election Petition 11 of 2008**

**REUBEN NYANGINJA NDOLO .....PETITIONER**  
**AND**

**DICKSON WATHIKA MWANGI .....1<sup>ST</sup> RESPONDENT**  
**JERUSHA CHEPSAP .....2<sup>ND</sup> RESPONDENT**  
**THE ELECTORAL COMMISSION OF KENYA .....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

**BACKGROUND, EVIDENCE AND OBSERVATIONS**

The Petitioner Reuben Nyanginja Ndolo filed the Petition under the provisions of the National Assembly and Presidential Elections Act (Cap 7) and the Regulations made thereunder (hereafter referred to as 'The Act' and 'The Regulations' respectively).

The Petitioner was one of the candidates for the Parliamentary Election for Makadara constituency and the 1<sup>st</sup> Respondent Dickson Wathika Mwangi was declared a successful candidate for the said Parliamentary constituency and hence this petition.

The Petitioner has based his petition on two grounds – namely the Results of the election and the Electoral offences, irregularities and malpractices by the Respondents.

In the first heading as aforesaid, he has alleged that during the tallying process, his arrest was orchestrated and thus he was barred to witness the entire tallying process, that the results of only two top candidates were announced by the Returning Officer namely, the 1<sup>st</sup> Respondent and himself. It was further alleged that neither him nor any of his agents were given copies of relevant declaration forms showing the results of all the candidates. Several allegations are made under the second heading: (see paragraphs 11 – 30 of the Petition). I shall summarise the same as under:-

- (1) The 1<sup>st</sup> Respondent by himself and/or through his agents printed, published, posted or distributed the election materials like handbills, placards, posters etc without disclosing on the face thereof the name and address of its printers or publishers.
- (2) The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents themselves and through the officers and agents committed an election offence by breaching their duties and code of conduct as they;
  - (a) failed to serve impartially and independently and perform their duties in good faith and,
  - (b) succumbed to the influence of the 1<sup>st</sup> Respondent's political party in declaring the results which they believed to be false or did not believe to be correct.
- (3) The 3<sup>rd</sup> Respondent by itself or through its Chairman and commission committed an election offence

by

(a) declaring results which they knew or had reasonable belief to be false or they did not believe it be correct,  
(b) succumbing to the influence of 1<sup>st</sup> Respondent and/or his political party in declaring result which they knew or had reasonable belief to be false or they did not believe it to be correct.

(4) When the Petitioner raised grievance as regards arrival of ballot boxes at the tallying centre without seals, 2<sup>nd</sup> Respondent ordered the security personnel to arrest him.

(5) The Petitioner's agents were denied opportunity to accompany the ballot boxes from Star of Hope Polling station to the tallying center.

(6) Form No. 16A from Viwandani Polling station was taken to tallying centre at around 3.00 pm on 28<sup>th</sup> December, 2007 despite the delivery of ballot boxes.

(7) Some ballot boxes were without Form 16A and were not sealed.

(8) The Returning Officer refused to allow a complain of alteration of result of Form 16A from Plain View Polling centre.

(9) Some ballot boxes from Star of Hope Polling Station arrived at tallying centre carried by strange people.

(10) The total votes cast for Parliamentary Candidates were around 66,000 and those for the Presidential election as announced at the tallying centre by the 2<sup>nd</sup> Respondent was 77,828 and those published by 3<sup>rd</sup> Respondent were 77 916.

(11) The Parliamentary election for Makadara Constituency was flawed as the result from the said constituency in respect of the Presidential votes declared and returned by the 2<sup>nd</sup> Respondent is dramatically different in terms of the total numbers of votes cast and voters' turn out.

(12) The statutory documents and forms, which the Presiding Officers and Returning Officer are supposed to keep, were altered and numbers of votes changed.

(13) Some of the Forms 16A had their original figures crossed and higher figures inserted at the tallying centre.

(14) In view of the pleaded express violation of the Regulations, the declaration of the 1<sup>st</sup> Respondent as a successful candidate was heavily tainted with illegality and does not reflect the overall will of the elector and thus the said declaration be declared null and void.

Thereafter, the particulars were requested for by all the Respondents and supplied by the Petitioner and the Respondents conceded to commence the Hearing. 175 ballot boxes for Makadara Constituency were also deposited with the Registrar of the High Court. Those ballot boxes were ordered by Hon. Wendoh J. to be opened to scrutinize the compliance of Rule 19 of the National Assembly and Presidential Election Rules (hereinafter referred to as 'The Election Rules') the record thereof is on court file.

I shall refer briefly on the particulars requested and supplied.

The applications of the request of particulars were filed by 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on 15<sup>th</sup> February 2008. It sought particulars on paragraphs 7, 8, 11, 12, 13, 15, 16, 17, 18, 19, 23, 24, 25, 26 and 30 of the Petition.

The response to this application was made vide replying affidavit of the Petitioner with annexed particulars and reasons for not supplying particulars.

***I shall note specify the particulars of paragraph 13 and the evidence of Milka Oyare and Levy Ogeto. I shall also note that the particulars of paragraph 14 of the Petition as regards declaration of the results have not been asked by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. As regards the difference in the votes cast for Presidential and Parliamentary Election the particulars for paragraphs 23, 24, 25 and 26 are also given by stating Forms 16A and specific alteration on Form 16A of the Plains View polling centre.***

Serial numbers of the ballot boxes as well as one from Star of Hope Polling Station is also given, which was without seal and was open. The same particulars were also given in response to the requests made by the 1<sup>st</sup> Respondent. Similarly, the particulars for two requests made by the 1<sup>st</sup> Respondent were given vide response dated 10<sup>th</sup> March, 2007 and further response filed on 14<sup>th</sup> April, 2008, wherein it was stated that the grievances for allegations averred in paragraph 15 of the Petition was raised orally and those made in paragraph 19, 26, 28 and 30 shall be proved by taking relevant summons. It is evident that no summons were taken out. But the evidence was adduced by all concerned.

During the hearing of the petition, several objections as to the competence of the affidavits sworn by Petitioner's witnesses were raised, heard and determined. The affidavit of one Joshua Kitivu Mulia sworn on 8<sup>th</sup> May, 2008 was struck out. Similarly an affidavit sworn on by one Ambe Mbarak Ali was not admitted in evidence having been filed out of time as per Rule 18 of the Election Petition Rules. The court also struck out paragraphs 4, 6, 7, part of 9, 11, 12, 13, (1) (i) from the affidavit of one Joseph Wandolo.

All these rulings were delivered by Hon. Wendoh J. who was gazetted by Hon. The Chief Justice to hear and determine this petition. However, on 22<sup>nd</sup> July, 2009, she recused herself and thereafter, this court was gazetted to hear this matter.

The first witness to give evidence was then Joseph Okwasi Wandolo. He was a registered voter at Makuru Primary School in Makadara constituency in ward 8 and was an agent of the Petitioner at the said polling centre. His evidence as to how the voting process was conducted cannot be considered, as the same fact is not pleaded but I do note that the witnesses from the 1<sup>st</sup> Respondent also averred and denied that fact. He deponed further that on arrival at tallying centre where he accompanied the ballot boxes from his polling station, he saw some ballot boxes left behind which were unnumbered. He arrived at the tallying centre around 9.00 pm and found those boxes there. He complained to ECK official wearing its badge. He has also alleged that the officials took one hour break at the polling station after the polling was completed and he complained also of that fact.

I started the hearing on 29<sup>th</sup> September, 2009 by hearing the Preliminary Objection on the competence of the Petition. Thereafter, several applications like that of stay of proceedings, of prayers that I recuse myself from hearing the petition and striking out affidavits or some paragraphs thereof were made, heard and determined. Vide ruling dated 24<sup>th</sup> November, 2009, I struck out paragraph 17 (i) to (v), vii and viii of the affidavit of 1<sup>st</sup> witness before this court namely Milka Oyaro. She stated that she knew the Petitioner since 2001 and that she was a representative or his agent in 2002 general election and that she has undergone training of electoral process and last training was organized by Orange Democratic Movement, (hereinafter referred to as 'ODM'). Thereafter before the election, they also were given briefings by the officials of ECK on 26<sup>th</sup> December, 2007. She showed the letter of appointment as an election agent dated 17<sup>th</sup> December, 2007 under the letter-head of Rt. Hon. Raila Odinga and stressed that all the agents of ODM had similar letters. She was appointed as an agent of polling/voting/counting and she confirmed she had no other letter of appointment except P Ex. 1 which allows her to represent the candidates for all the elections – namely Presidential, Parliamentary and civic elections.

She testified that at the night of 26<sup>th</sup> December, 2007, at Railway Training Institute, the ECK officials distributed all the electoral documents. She was stationed at St. Martin Luther Polling Station of Makadara Constituency and she noted down the number of ballot materials when the electoral official was reading them. The said polling station had nine polling centre and each were given three ballot boxes, one for each of three elections. She also wrote down serial numbers of ballot papers and had mentioned some of them in her affidavit. She lost her other documents at the tallying centre, when the security men started beating persons. Those documents and boxes were received by Presiding Officers of the polling stations from the Returning Officers.

She was substantively cross examined on her handwritten record annexed to the affidavit. I just note that on the 2<sup>nd</sup> page of her annexure, she has written number of Parliamentary ballot-papers given out in the form of a booklet which is

500 in numbers – without indicating 001 which was the number for Makadara constituency. The first page is a copy of Form 16A for Presidential Election without any details filled in except the names of 9 (Nine) candidates and the votes garnered by them.

She then stated that at St. Martin Luther polling station, the votes were counted and Forms 16A were filled in and pinned on the doors. The figures were put together to be taken to tallying centre. The agent also had Form 16As. Much reliance was placed by the 1<sup>st</sup> Respondent on this fact in opposition to the allegations made by the Petitioner. In any event, she talked about her polling station.

She clarified that in the tallying centre many boxes arrived when they were open. In her further cross examination, reiterating averments in paragraphs 5 and 8 of her affidavit she deponed that one ballot box no. 85557 from Star of Hope was open and kept at one corner and there was no seal on other side and the said box was kept with other disputed boxes. According to her the disputed boxes were noticed being brought without security and were not removed from a bus assigned by ECK and more specifically they were not accompanied by the Presiding Officer and agents and that they were kept without any one claiming them.

She described the Tallying Hall which had a podium or Dais and a door – the tables of Returning Officer were kept at the dais and next to the right door from where most of the boxes were brought in but some were brought from the back door of dais. The Petitioner entered from the right door and when the complaint of the disputed boxes was raised to him, he went to Returning Officer to ask about these disputed boxes. The 1<sup>st</sup> Respondent was also present with his supporters. When the Petitioner approached the Returning Officer, she saw police men arriving and saw them arresting the Petitioner. She emphatically denied that he overturned any table of the Returning Officer or that he was violent. The security officers came from left door, passed through the room where ballot boxes were kept and chased people including agents to the candidates. **Some of them did not have a chance to tally Form 16A given to them with the Form 16A sealed on the ballot boxes after the fracas ensued.** She also ran out of the Tallying Hall. When she came back after about 30 minutes, she saw the Hall in chaos and papers strewn all over the floor. The confusion, according to her, continued upto 1.00 am of 28<sup>th</sup> December, 2007. **After that the Returning Officer asked her three assistants to re-tally the results of only four candidates with highest number of votes.** Then she testified and I quote:-

***“In retallying process, the Returning Officer relies on Form 16A presented by the Presiding Officers. As per what I saw, those ballot papers were not given to the Returning Officer. When the boxes were given, Forms 16A also has to be there and if the boxes are not given and only Forms 16A handed over, there would be something fishy about”***

She denied that there was no request for retallying. She stated that the results for all candidates for presidential election were announced but for Parliamentary Election the results for only two candidates were announced. No results were announced for civil election but certificates were given to the winner candidate. Coming back to the retallying after she returned to the Hall, she saw many persons standing on the table near dais or looking and watching over the table. She gave names of some agents of 1<sup>st</sup> Respondent who were among those allowed to do so as well as walk freely on the dais. On the other hand, herself and few of Petitioner’s agents were not allowed even to talk. No questions were asked on this issue by the Respondents.

She stressed that out of three assistants of Returning Officers, namely, Andrew Nyaiki, Nancy Gachanja and Ambe Mbarak, the last person was chased out of the Hall when 1<sup>st</sup> Respondent raised his discomfort over his involvement. She denied that Ambe Mbaraka uttered the words to the effect that the seat for Parliamentary candidate was to be taken by ODM. The fact of absence of Ambe Mbaraka from the tallying center is not questioned or denied by any of the Respondents.

The Returning Officer did not have copy of the result of the Parliamentary election and Form 17A was also not given and/or complied with. This fact in any event is accepted by the 2<sup>nd</sup> Respondent.

The Returning Officer took the result signed by her as well as Form 17A to KICC where the results were declared.

I may note here that even the 1<sup>st</sup> Respondent in his evidence testified that he was not given Form 17A, and was given only the certificate of a winning candidate.

Coming to the numbers of ballot papers issued by the Returning Officer, she stated that she was not aware that figure 001 was the code number for Makadara Constituency and observed that that is the only difference in the two sets given

in paragraph 12 of her affidavit. However, in re- examination, she stated:

***“paragraph 12 – second entry serial No. 083301-0083800. This numbers do not exist in second set. The fourth entry – 086301-0084300. They do not exist in the second set 5<sup>th</sup> entry – 084301 – 0084800. It does not appear in second set. The second set - .....from bottom 00184051-001084300. I do not see them in the first set Last one-001083051-001083300 second set – 6<sup>th</sup> from bottom 001086051-001086300 no corresponding number in first set. In the first set, there are 14 entries. In the 2<sup>nd</sup> set, there are 16 entries. They do not correspond.***

I have made observations thereon in the later part of the judgement.

Lastly, she testified that they were not allowed to compare Form 16A which were on the boxes and tallied results were not pinned anywhere at the tallying centre. When she came back, she saw the tallying process in chaos – people were shouting – papers strewn over and she was not allowed to see what the Returning Officer was doing. Thus she would not know how many Forms 16A were retallied and that she was not allowed to see or verify any of those forms.

The third witness from the Petitioner was **Levi Ogeto Nyamete**, who swore an affidavit on 8<sup>th</sup> May, 2007. He was a civic candidate for Viwandani ward within Makadara constituency on the ticket from ODM. On 27<sup>th</sup> December, 2007, an agent named Edward Mati from Star of Hope polling station informed him that counting clerk had taken a break while counting of Parliamentary election was underway.

He also averred and confirmed during his cross examination that some of his agents, whom he named were bribed to abandon their responsibility of ODM and his candidates. He stated that he was not given a chance to complain to Returning Officer but agreed he did not complain to the police who were at the polling station. At the tallying centre when the commotion ensued, he was also arrested but not charged. His agents were not given Forms 16A and thus he did not see any of them.

He was also questioned on his affidavit and specially the last page whereon the number of the paragraphs is handwritten but he refuted the suggestions that he only signed the last page and was not aware of the contents of his affidavit.

He then described the incident which led to his arrest and that of the Petitioner. According to him, he and the Petitioner went to Returning Officer to complain about open boxes and while they were talking, the 1<sup>st</sup> Respondent came towards them and His roughed up the Petitioner and a ‘skirmish’ started. People started running, the security officers got hold of the Petitioner and he himself was picked up later. They were taken to Industrial Police Station. He confirmed that he saw 1<sup>st</sup> Respondent grab the petitioner on his neck. He denied that they were picked and taken away because they were abusive and violent and reiterated that he did not see the Petitioner lifting the table of Returning Officer. He and one Mr. Kizito were put in the police vehicle and were taken to Industrial Police Station.

He also added that he did not know the ballot box left at Star of Hope Polling Station was of which stream of election and whether it was brought because he was arrested. He reiterated that he became suspicious of some wrong doing from the treatment he received from the police at the Star of Hope Polling station. He denied that he is giving the evidence because of his frustration of losing the election and reiterated that he was denied opportunity to complain either to Presiding Officer or Returning Officer and his affidavit before the court is another process of complaint.

He has basically summed up, his averrements in paragraph 18 of his affidavit, namely:-

***That by my own observations and by the messages I received from some of my agents, some of the notable irregularities included:***

- (a) The opening and resealing of ballot boxes at Railway Training Centre.***
- (b) The leaving of one ballot box at Star of Hope Polling Station, and later picking it.***

- (c) *The lack of Form 16As for most of my agents*
- (d) *The counting clerks taking a one hour break during the counting*
- (e) *The failure to announce results for Civil candidates at the Tallying Centre*

**Eriq Stanley Saburi Omino** swore his affidavit on 8<sup>th</sup> May, 2008 and in short averred that:

He was engaged by Electoral Commission of Kenya (referred to as 'ECK') on 15<sup>th</sup> August, 2007 as a Data Entry Clerk during the 2007 general elections. His duties at ECK headquarters included updating ECK's voting database, effecting changes in the voters register and printing the same.

At plenary Hall of KICC, his duties included receiving results from the Returning Officers – duly certified by Team Leader and respective Returning Officers. On Parliamentary results tabs, Makadara was the first constituency having designated ECK number 001.

On 28<sup>th</sup> December, 2007 at about 5.30 pm, he clicked the results tab and found that results for Makadara constituency had been entered and the petitioner was marked as 'winner' having garnered 12,035 votes.

On 29<sup>th</sup> December, 2009 he arrived at KICC at about 7.00 am and around 9.00 am, his colleague Mr. David Musyoki told him that results of Makadara constituency had been altered and he was asked to confirm by checking. He was surprised to see a completely blank page for Makadara constituency result, however, the correct and factual physical entries in the physical file showed that the Petitioner had won. He made copies of Presidential and Parliamentary result slips which were annexed to his affidavit. On 30<sup>th</sup> December, 2007 he could not trace the said physical file. As there was no physical record, the result of the constituency was not declared at KICC amongst other 48 constituencies.

According to him, either Database Administrator or the IT manager could alter entries or authorize the effecting of any changes recorded on the computer. They were named as Mr. Elias Mugo and Mr. Ayub Imbua respectively. Those two were permanently on night shift and specifically on night of 28<sup>th</sup> and 29<sup>th</sup> December, 2007 and 30<sup>th</sup> December, 2007.

In cross examination he stated that the data entry clerks were divided in 10 teams to cater for 210 constituencies assigned to him but he explained that Makadara being given the number 001 it was the first to appear on computer before one keys into a specific constituency and would not know who amongst the clerks dealt with Makadara Constituency. It was only after he was told by a colleague that Makadara results were altered, he went to look for the physical file. The results are only certified at KICC after being brought in by the Returning Officer and that the results which he printed and annexed were provisional results and that the document does not have the name of the 1<sup>st</sup> Respondent, who was declared the winner from Makadara constituency. After printing the Provisional result, he gave the same to Prof Anyang' Nyongo, the General Secretary of ODM and did not raise any issue with his superior officers. In his second annexure – results of 174 constituencies for Parliamentary election are mentioned. He denied that what he did was unprocedural when he gave a copy to Prof. Anyang' Nyongo. He said he could not produce the results which were tampered with as the results of Makadara was obliterated from the computer.

He denied that he had specific interest in Makadara Results. He just happened to see the same and as emotions were raising throughout the country, he thought it fit to print the result for Makadara constituency. He also stated that the handwritten results are keyed in the computer and thereafter the same are kept by the Team Leader.

He also agreed that the results are tallied by Returning Officer at the tallying centre and that the winner is given certificate and that he would not know how many votes were in the constituency or how many votes were cast. He refuted the suggestion that it is possible to have two different results in two computers and reiterated that he knew of tampering only after his colleague informed him and then he opened his computer only to find a blank page.

He reiterated that he put two sheets in the physical file and the next day only one page of presidential election was in that file and the computer was blank.

He believed that after the printed copies are filed and accumulated in the physical file, the same is given to the chairman of ECK to pronounce the results.

The last witness from the Petitioner's case was himself. As was for his other witnesses, some paragraphs namely, 21, 24, 25, 29, 31 and 53 from his affidavit were struck out vide my ruling of 18<sup>th</sup> December, 2009. The application on his behalf to play the audio recording of the media broadcast and to admit the same in evidence was withdrawn by Mr. Ongoya during his evidence.

According to the Petitioner, after he was informed about the arrest of the 1<sup>st</sup> Respondent with fake ballot papers, he became more vigilant. On 28<sup>th</sup> December, 2007, he went to the RTI at about 2.00 pm and was informed that there were three ballot boxes peculiarly kept aside, not serialized or accompanied by any required papers and that one Mr. Joshua Kitivi Muria, a fellow Parliamentary candidate, and his agent also had raised the concern thereon resulting in commotion and security officers trying to restrain them. Mr. Kitivi pointed to him the three ballot boxes. Thereupon himself with Mr. Kitivi tried to seek an explanation and while he was seeking explanation from the Returning Officer, an agent of the 1<sup>st</sup> Respondent purporting to be an ECK official came holding some papers and ECK's rubber stamp. But before he could do so, one Mr. Otieno who was an authentic ECK officials arrived and explained that valid Form 16A had been rained on.

The person, who purported to be the ECK officials as aforesaid although was reported to the police by Mr. Kitivi, was not arrested and was let off. When he reported the three ballot boxes and the absence of Forms 16A, the Returning Officer told him that her officers had noted the anomaly and were working to sort out the issue before counting. When they were dealing with the issue the 1<sup>st</sup> Respondent with his agents came in shouting out his names, chanting and abusing him and tried to eject him from the Hall.

Despite this action by the 1<sup>st</sup> Respondent, the Returning Officer failed to apply her mandate by dealing with such intimidation who were also denying ingress and egress to the other agents to and from the RTI. His agents were not given an opportunity to check that all ballot boxes were delivered as required by law. The Returning Officer instead of dealing with his grievances, asked the security officers to arrest him, his agent Mr. Kizito Oyugi and one civil candidate Mr. Levy Ogeto Nyamute. He was taken to Industrial Area Remand Prison and was released on 29<sup>th</sup> December 2007 at about 4.00 am, without any charge being preferred against him, after the results were announced.

He was thereafter informed by his agents that the Returning Officer had announced three (which he asked orally to read two) top candidates and 1<sup>st</sup> Respondent garnered 22,878 and himself 21,948. He could not get the votes garnered by other candidates as he or his agents were not given copies of declaration forms (Form 17A) showing the results.

He was also informed that one Nancy Gichanja the ARO tallied the results of Parliamentary candidates who had openly shown her support for the 1<sup>st</sup> Respondent. He also testified that she was the niece of the vice-chairman of ECK Mr. Kihara Mutu who was known to be close to the 1<sup>st</sup> Respondent. These allegations are denied by Nancy Gachanja in her evidence.

He also claimed that 1<sup>st</sup> Respondent by himself and/or through his agents committed election offences and/or corrupt practices of printing, publishing and distribution of handbills, placards and posters of 1<sup>st</sup> Respondent without disclosing on the face thereof the name and address of its printers or publisher. A copy one of such poster was annexed to his affidavit.

He alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed to serve impartially, independently and perform their duties in good faith and acted under influence of the 1<sup>st</sup> Respondent and his party.

He also alleged that the 3<sup>rd</sup> Respondent committed an election offence – by declaring results which they knew or had reasonable cause to believe to be false or by succumbing to the influence of the political party of the 1<sup>st</sup> Respondent by declaring the results which then knew were false.

He reiterated what he was informed about intimidation during the tallying by the agents of the 1<sup>st</sup> Respondent who were shouting that votes of 1<sup>st</sup> Respondent had to be higher than the Petitioner, that at Star of Hope polling stations his agents were denied opportunity to accompany the ballot boxes, that the Presiding Officer from Viwandani polling station took Form 16A to her home and returned the same at around 3.00 pm on 28<sup>th</sup> December, 2007, that a ballot box serial number PA 85557 from Star of Hope polling station arrived without Form 16A and was not sealed and was actually open, that when his agent sought the explanation, the Returning Officer informed that someone might have sat on it while transporting the same, that ballot boxes from the said polling station were carried by hands and not by bus by persons wearing PNU's badges and not in the transport provided by ECK and without police escort, that ballot box Nos. L 85863, PA 85557, L855392, PA 85604, P8572 and PA 855588 were set aside as disputed ballot boxes but before

explaining the fate thereof, the votes shown therein were included in the results, that the complaints of his agents were refused to be allowed, that a Form 16A from Plains view polling station had been altered, that ballot papers from Martin Luther polling station were different that those distributed at the RTI.

The numbers were then given in paragraph 44 of his affidavit:

**Set One:** 082801 – 0083300

083301 – 0083800

083801 – 0084300

086301 – 0086800

084301 – 0084800

085801 – 0086300

086801 – 0087050

084801 – 0085300

081801 – 0082300

081301 – 0081800

081301 – 0082800

080301 – 0080800

080801 – 0081300

**Parliamentary Ballot Papers that were read by the Presiding Officer as available for use at Martin Luther Primary Polling Centre on the morning of 27<sup>th</sup> December, 2007.**

The ballot papers were in booklets whose serial numbers were in the following ranges:

**Set Two** 001085301 – 0010085800

001080801 – 0010081300

001082301 – 001082800

001080301 – 0010080800

001081801 – 0010082300

00184801 – 0010085300

001081301 – 0010081800

00108301 – 0010083800

001083601 – 0010086800

0010185801 – 0010086050

001086051 – 001086300

001086801 – 0010087050

001083801 – 0010184050

001084051 – 001084300

001082801 – 001083050

001083051 – 001083300

From these figures, many anomalies are noted. Only numbers 1, 2, 4, 5, 6, 8, 9, and 10 on set one are reflected on the set no. 2, if the figures are taken at face value as shown thereon. I also do not see confirmation of the suggestions by the Respondents that they were split in 500 ballot papers, except some.

It was also averred that total votes cast in three classes of elections were different and that it is not logical and that fact is self suggestive of the manipulation of the electoral process.

He enumerated the irregularities as per paragraph 57 and 58 of his affidavit and alleged that due to the averments made in the affidavit, the tallying process was infested by illegalities, irregularities and conspiracies that establish beyond reasonable doubt that the election results declared were null and void and beyond redemption. In cross examination, he reiterated that Hon. Odinga appointed all the agents from all the candidates for Orange Democratic Movement (ODM), and that he based his petition on pleadings, particulars and affidavit. He voted very early for the election from St John polling station at Kaloleni and then started visiting other polling centres like Viwandani, Mbotela, Maringo, Jericho, South B, Marigani, Kayamha, Mukuru etc but he was followed by security personnel. As a candidate, he was not supposed to enter the polling station and thus could not witness how the polling proceeded.

After the voting closed, he went to RTI where the boxes after counting of votes were supposed to arrive. He denied that he knew the fate of his result and accepted his defeat to the 1<sup>st</sup> Respondent.

He reiterated that when he was shown the three boxes and sought clarifications, group of young people from 1<sup>st</sup>

Respondent's side gathered and he saw GSU officials coming in and he was arrested on 28<sup>th</sup> December, 2007 around 2.30 pm. The results were announced in his absence. He could not comment on how each polling station personnel undertook his/her duty but insisted that Form 16A's had to be pasted on the ballot box and reiterated the contents of his affidavit averring that one agent of 1<sup>st</sup> Respondent purported to be an ECK official left the Hall when he realized that Mr. Otieno, an ECK official, also came in at the same time. He reiterated the scene upto his arrest. The police officer who informed about the order from above was one Mr. Majale and was sacked within a week on his divulging the information to his lawyers. He agreed that apart from what he has stated in his affidavit, he did not have any other instances of intimidation from the 1<sup>st</sup> Respondent. He also named supporters of 1<sup>st</sup> Respondents, to name a few, Mwai Kashika, Mutuga, Simoli etc and that as per his information, those amongst others were shouting and intimidating.

He stressed that his agents and those of 1<sup>st</sup> Respondent were seated separately and agreed that what happened as averred by him after his arrest was as per his information.

He also agreed that the result shown by his side (Eriq Saburi) was a progressive result but insisted that as per the Chairman of ECK, the results of Makadara was one of those not posted on website and that after what happened at RTI to him, he believed that the results were influenced by the party of the 1<sup>st</sup> Respondent. He also agreed that, as per his own knowledge, before his arrest the Returning Officer did not open any ballot box and tallying was from Forms 16A.

He in short reiterated the information he received and what transpired after he was in RTI and before his arrest.

He stated that upto his arrest, he was leading in count of votes and one of the ECK officials Mr. Haji disappeared from RTI because in his belief the results were "cooked". After Mr. Haji left RTI Hall, the results of four leading candidates were retallied according to his information.

He was referred to Kriegler's report which showed disputes in 47 constituencies and Makadara was not one of them but stated that Makadara results were not declared upto 30<sup>th</sup> December, 2007. He agreed that the total votes varied in Presidential and Parliamentary but stated that both should tally.

Before his arrest, RTI Hall had many of his agents but thereafter, only Milka Oyari remained, the others having been chased away.

He reiterated that he had not appointed any agent under his name. The court observed that despite the questions of the appointment of ODM agents been asked to almost all the witnesses of the Petitioner, the fact has emerged that none of the ODM agents were barred from polling stations by ECK officials, and 2<sup>nd</sup> Respondent categorically accepted them as such.

In re-examination, he referred to paragraphs 11 and 13 of the petition to show the disclosure of sources of information.

As regards the pamphlet of 1<sup>st</sup> Respondent shown by him in the affidavit and the ones shown from the counsel of the 1<sup>st</sup> Respondent, he commented that the latter is freshly printed.

In short, according to him results were false as:-

- (1) Results of all the candidates were not announced except of the two
- (2) Results of all candidates not given
- (3) Announced names of two candidates
- (4) His agents did not sign any documents
- (5) Even before the court the results for all are not presented
- (6) He has not seen any Form 17A filled in for Makadara constituency.

That was the evidence in brief from the Petitioner's side.

## **Evidence from the 1<sup>st</sup> Respondent:**

The 1<sup>st</sup> Respondent called 4 witnesses including himself.

The first witness was **Charles Chege Mbuthia** who runs *inter alia* a business of printing in the name and Style of Daily Views Publishers. In response to the evidence of the Petitioner, he specified that the 1<sup>st</sup> Respondent engaged him to print all his electoral campaign materials including posters and placards and all the materials he printed included on the face thereof the postal address of the printer and publisher of those materials. He annexed one of the posters which confirms his averments.

In response to questions by Mr. Lubullellah, he agreed that where he was standing (in the witness box) he could not see the bottom printing in black against dark blue background and that white printing could have come out better against that blue background. He stated that to his knowledge, he had exclusive mandate to print all the campaign materials of the 1<sup>st</sup> Respondent, however, he was free to employ another printer.

In response to question from Mr. Ongoya, he agreed that all the copies of his annexures were not used in the campaign.

Lastly, in the re-examination, he stated that the annexures are the remainder after sorting out the posters so as to give out the clear copies.

The second witness was **Alice Wanjiru Njoroge** who was appointed as polling and counting agent by the 1<sup>st</sup> Respondent for 2007 general elections. She was based at Star of Hope Primary School polling centre. On 26<sup>th</sup>, 27<sup>th</sup> December, 2007, she along with all other agents of the Parliamentary candidates, was present when election materials including 33 ballot boxes were collected from Railway Training Institute (RTI) and were taken at the Star of Hope polling station. Out of the said boxes, 11 boxes were for the Parliamentary election. She was at polling station no. 7.

The voting process continued from around 7.00 am upto about 6.30 pm and thereafter the counting of votes went on until 10.30 pm.

After counting, the Presiding Officers prepared Forms 16As for Presidential and Parliamentary results and invited agents of the candidates present to sign the same polling stations cannot be accepted. After that, results of all the candidates were announced. The electoral materials were returned into ballot boxes and 3 (three) ballot boxes were sealed and Form 16As were displayed on the exterior door of classroom and there was no complaints during voting, counting of votes and announcement of the results. She also saw the results in Form 16As displayed in all other eleven (11) polling stations at the said centre I note that her assumption that the process was as she testified in all others polling stations cannot be accepted as she was not present in other stations.

At about 7.00 am, the bus from Kenya Bus Service came to her station **carrying ballot boxes from Sinai polling centre and St. Elizabeth Primary School polling centre**. They were asked to load ballot boxes from Star of Hope Centre – which was done seriatim from polling station No. 1 to 11. ECK officials and agent of candidates also boarded the bus, the plain cloth police officers were the last to board the Bus. She did not notice any agent being left out.

They arrived at RTI at about 2.00 am and procedure of handing over ballot boxes to Returning Officer was carried out on the basis of first come first served but when the turn of any polling centre came, the boxes were handed over serially or sequentially.

**They queued** in at RTI starting from 1 to 11 polling stations from Star of Hope polling station centre. **They started handing over as from 11 am** on 28<sup>th</sup> December, 2007. Only one polling station was allowed access for handing over the ballot boxes at RTI centre. The Returning Officer on receipt of Forms 16A publicly announced the results of each candidate.

When her turn came, they were allowed access to the tallying centre. While the process was on, the Petitioner who appeared furious, menacingly approached the Returning Officer's table and attempted to overturn the table and tried to kick ballot boxes of polling station (7) seven and at that time, the 1<sup>st</sup> Respondent approached to restrain him but the Petitioner tried to punch the 1<sup>st</sup> Respondent.

The police officers present at the centre took the Petitioner outside the Hall and the fracas of handing over the Ballot boxes was interrupted for about seven to ten minutes.

Thereafter, 3 boxes from **her polling station were handed over to the** Returning Officer who publicly announced the results of all candidates in three elections. Thereafter, she was present at the Tallying Hall till the remaining results were announced. She stated that all the boxes from her polling station were delivered and no ballot box was kept aside as a disputed box. She stated that as per her recollection, there was no rainfall during the night of 27<sup>th</sup>/28<sup>th</sup> December, 2007, and thus it is improbable that any Form 16A could have been rained on and/or damaged. She also did not see any ballot boxes being delivered which was without serial numbers. She stated further that Returning Officers publicly announced the results of all Parliamentary candidates and that she was present at that time and the 1<sup>st</sup> Respondent was publicly declared as a winner.

She did not hear any complaint and tallying was carried out and results were announced. In cross-examination from the Petitioner's counsel, she agreed that she had no business in other 10 polling stations and that she would not know who and how Form 16A's were completed in those stations. The Bus which arrived after collecting boxes from two other polling centers was 46 seater and stated that agents from Star of Hope Polling station were 33 and that all the agents did accompany the ballot boxes to tallying station. They arrived at 2.00 am on 28<sup>th</sup> December, 2007, adding that the bus carried election officials and ballot boxes.

She did not see how many agents or how the agents from Star of Hope polling stations took seats at RTI and that she did not know those agents, however, she reiterated that all the agents were in the bus. But agreed that she would not know who was the agent of the Petitioner at the Star of Hope.

She stated that she took her **seat after handing over the ballot box for her polling station but then said that the Petitioner overturned the table before she took the seat.** She added that fracas started when the Presiding Officer of polling station No. 7 and agents were at the table of Returning Officer. That is the time the fracas ensued by the Petitioner kicking a box and attempting to overturn the table of Returning Officer. The Petitioner tried to punch the 1<sup>st</sup> Respondent when he came near to talk. The policemen who were outside came in and got hold of the Petitioner who was taken out. It took about 7 minutes before he was taken out and process began.

Then she stated, contradicting her earlier evidence, that at that time they were next to the table of the Returning Officer and that she was not seated. She stated that she was inside the Hall and there was noise and many people were inside but were not seated and did not say what other people were doing. Although she stated that the Returning Officer publicly announced results of all the candidates, she could not say what was the no. of candidates, whose results were declared or who was the last to be declared.

In re-examination, she stated that her appointment letter by the 1<sup>st</sup> Respondent was presented to the ECK officials when she entered the polling stations and that in the bus going back to RTI there were 33 agents and some were standing including her. She clarified that **when she stated earlier that she handed over the ballot box, she meant that after she got the ballot boxes in the Hall, the Presiding Officer took the same and handed over.** I may pause here to state that there is no clarification of the fact of her averments in paragraph 14 of her affidavit that the bus came to Star of Hope centre carrying ballot boxes from Sinai centre and St. Elizabeth Primary School polling centres. **Then how about the ECK officials and the agents of candidates for those centres? They ought to be also in the said Bus. This fact do suggest that there was not enough space in that bus.** Be that as it may, the third witness was *Njeri Gachanja* who was appointed by ECK as an Assistant Returning Officer in Makadara constituency.

She swore an affidavit on 25<sup>th</sup> January, 2010 and relied on its contents as her evidence. She was specifically referred to paragraph 15 of her affidavit which stated that upon receipt of Form 16A's and Form 8 the Returning Officer announced the results of each candidates and after those announcements, the boxes were sorted out into presidential, Parliamentary and civic elections and kept on dais behind the Returning Officer and manned by uniform police officer.

I would at this stage refer to the evidence of DW2 when she averred that the police officers who were outside got in and took the Petitioner away after the fracas.

She identified the annexures enclosed in her affidavit which were her appointment letter, the provisional statistics for registered voters per polling stations by constituencies, registered voters for Makadara constituency as per polling centre, Kenya Gazette of 31<sup>st</sup> May, 2007. With list of Polling stations wherein no tent was published as a polling station and the last entry was of results (Makadara) wherein it is showed that the Petitioner garnered 21,948 votes and the 1<sup>st</sup> Respondent garnered 22,878 votes.

In her affidavit, she narrated the process of commencement of voting from 26<sup>th</sup>/27<sup>th</sup> December, 2007 when she

distributed electoral materials for 26 polling areas in Makadara constituency in presence of agents of the candidates. She believes that after the distribution, the materials were sent to their respective destination. She denied that any tent was designated as a polling station. On the voting day, she visited various polling stations and returned to RTI at 1.30 pm to await for the ballot boxes from the polling centre's. The first batch arrived at 8.00 pm and the process was continued on the first come first served basis, but each polling centres were giving out the ballot boxes sequentially and access in the Hall was granted to one polling station at a time. While handing over the ballot boxes, the Presiding Officers of the polling station was handing over to Returning Officer Form 16A for Parliamentary election and Returning Officer was publicly announcing the results. She was not involved in the tallying of results and thus she was not aware of any request for re-tallying but she stated that she was present at the Tallying Hall and no agent was allowed to have an access to the tallying tables where Returning Officer was receiving ballot boxes, I pause here and note that this evidence is contrary to what Alice has stated and she further stated that she was not aware of any ballot box being placed aside by Returning Officer as a disputed one in respect of Parliamentary election in Makadara constituency.

One would wonder despite not being involved in tallying process, how she could notice all these details and aver the same under oath after lapse of time.

Similar is the fact on her further averments that she did not witness any ballot box without serial number specially when she was not involved in the tallying process and was only in charge of all the officials on duty. After the tallying, and she specifically stated that there was no request for re-tallying, the Returning Officer announced the results for all the candidates. After that the 1<sup>st</sup> Respondent was declared as the winner and they all proceeded to KICC and delivered the results to ECK.

In response to questions raised from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, she stated that the records were kept properly and she did not receive any complaints from the polling stations she visited on the polling day but did not name those stations. She would not know which stations her counterparts Mr. Ambe visited as she was not in communication with Returning Officer or any Assistant Returning Officer. She was given the duty of collecting data (did not specify which) and to supervise all the clerks on the ground to check that they worked as per directives. She agreed she took an oath not to divulge any confidential election matter before permission taken by ECK and that she had not obtained any permission before swearing the affidavit. She said that she had a copy of the election results along with the Returning Officer which fact is not in line with evidence of Returning Officer as well as her own evidence hereinafter.

In response to the questions from the Petitioner, she agreed that the register of polling stations (page VII of her affidavit) in the fourth column, which is to fill in the name of the polling station, the location of polling stations are not shown in respect of Our Lady of Mercy Sec. School, Sinai Centre, St. Elizabeth, Makuni Kaiyaha, Buru Buru Labour office. She deponed that the result of the elections, annexed at page VIII, of her affidavit was received from Returning Officer immediately after the results were announced at the tallying centre but had to concede that the bottom of the same document *shows "page 1 of 65 – printed 22.05.2008"* and after being confronted with the same, she had to admit that she received the same on 22.05.2008 immediately after it was printed. However she still insisted that she received the document from the Returning Officer!!! The Returning Officer has emphatically denied having given any results to Nancy.

She responded that she was not aware that an agent named A K Wanjiku of the 1<sup>st</sup> Respondent was allowed access to the Returning Officer's table.

***She stated she never witnessed any fracas and tallying process went on without any interruption from the beginning to the end. With this evidence, this witness contradicts the evidence from almost all the witnesses from all the parties.***

Lastly, **the 1<sup>st</sup> Respondent** based on his affidavit sworn on 11<sup>th</sup> February, 2008 gave evidence. He denied that he was ever arrested on the suspicion of being in possession of the false ballot papers as alleged by the Petitioner.

On 27<sup>th</sup> December, 2007, he went to RTI at 8.00 pm and observed the return of ballot boxes been conducted in organized manner.

He went back to RTI again on 28<sup>th</sup> December, 2007 at 9.00 am and found the Petitioner who accepted his defeat to him. But then stated that sometimes in the afternoon, the Petitioner came inside the Hall and went to Returning Officer's table in menacing manner and attempted to overturn the table. He immediately approached to restrain him but the Petitioner tried to punch him. The police intervened and took the Petitioner out but this fracas interrupted the process

for a short time only and the tallying process was **completed by about 3 am on the night of 28<sup>th</sup>/29<sup>th</sup> December, 2007** and Returning Officer announced publicly the results of all the candidates and he was issued with the certificate. He also confirmed during cross-examination that **the results were announced on the night of 29/30 December 2007.**

**In paragraph 36 of his affidavit, he stated that in the Kriegler Commission report at pages 121 to 131, it was shown that the exaggerated disparity between presidential and Parliamentary votes did not arise out of incompetency but innocent arithmetical calculations and thus without ascertaining the arithmetical accuracy of total number of presidential and Parliamentary votes cast in Makadara constituency any apparent disparity cannot be used in determining the petition before it.**

He stated that by the time Returning Officer declared the results, ECK had received results from all constituencies.

As regards questions on scrutiny of his election materials, (pamphlets etc), he simply stated that he left the logistics thereof to his campaign manager apart from approving the samples.

At RTI, apart from the scuffle, the delivery of ballot boxes was carried out an organized way. His agents did have the copies of Forms 16A from polling centres and that he was also not given Form 17A and that he was simply given the certificate declaring him as the winner

**He agreed that there has been alterations in the result of Star of Hope against his name.**

According to him, the voting process of Makadara constituency was a good example of regularly held election. **He further responded that he was given Form 17A at KICC and that when he requested for it at RTI, he was told they did not have one.**

He was shown many pages of Form 17A (page 6 – 29) – namely pages 27, 28 and 29 and agreed that none of them is signed by any candidate or candidate's agent and there have been alteration in figures of valid votes cast specially in respect of Star of Hope, High Way Secondary School, Sinai School etc. He was then taken to the process of arithmetical calculation/arithmetical errors. It was pointed out and agreed by him that in voting process, the summary of valid votes cast, rejected and disputed votes is important, and that Form 16As should cater for that, and that in tallying centre, relying on the validity of Forms 16A, Form 17A is prepared and details of Form 16As should tally those in Form 17A. He also agreed that he was not aware that no voting took place at any polling station in Makadara constituency or any polling station did not deliver results to the tallying centre. He was then shown polling station no. 11 of Star of Hope centre wherein no result was shown on page 7 of his annexure. Similarly it was so for polling station 10 of Government Vehicle Inspection Unit polling centre.

Many omission in Form 17A were shown wherein valid votes cast and rejected as well as valid votes were not filled i.e. Joseph Apulo Primary School, Government Vehicle Inspection Unit, Labour Office, Highway Secondary School, St. Michael Primary School, Harambee Secondary School, Bidii primary school.

He went through the arithmetical totalling of his votes which showed he gained more votes than announced. He agreed that there have been arithmetic errors in the recounting of all most all candidates.

The last witness was **Jerusa Chepsap** who was the Returning Officer of Makadara Constituency and is the 2<sup>nd</sup> Respondent. According to her affidavit, the election process commenced and was completed as per law. She was taken through two sets of the serial numbers of the ballot boxes to suggest that there was no difference in the two sets and that the number varied because two sets were split in two parts.

She testified that after the ballot boxes started arriving, the Forms 16A were given to her to publicly announce the results and a clerk was reading the figure and three other clerks were filling in Form 17As and she kept several copies thereof. It is to be noted that she did not give Form 17A even to the 1<sup>st</sup> Respondent. She reiterated that partial results were not sent to ECK. At KICC the Returning Officer had to certify the results and then hand over to ECK to be sent to computer section of ECK. She completed tallying process around **2.00 to 3.00 am on 29<sup>th</sup> December, 2007.** The results given by Nancy bears the same results though the result produced by her was printed on 3<sup>rd</sup> January, 2008.

As regards the fracas, she stated that while she was doing her work, she saw the Petitioner coming to her but before he could reach her, she saw 1<sup>st</sup> Respondent approaching the Petitioner and before long she saw both of them arguing and shouting at each other. She was receiving boxes, when she tried to inquire, the Petitioner held her table and flask fell. The noise scared every one and she first thought of securing the election materials which she did, including Forms 16As and Form 17As (sic). The police came and the Petitioner was taken away. When calm returned, she continued with her work. I should note that at that time the Form 17A cannot be in the picture. She continued working without break like her colleagues from 26<sup>th</sup> December, 2007 to 3.00 am of 28<sup>th</sup>/29<sup>th</sup> December, 2007.

The arithmetical error according to her did not benefit anyone but could only distort the voter turnout. She explained the difference in serial No of one box, namely 68150 of for Nairobi South Primary School by stating that it was switched over to replace a box which was not closing properly. **She did not give the number of the ballot box which was switched over.** She has not averred that fact in her affidavit or has not shown by any other document. Similarly, she has not averred the fact that one ward did not carry out the election and denied all the allegations made against her in the Petition and stated that **she was not aware that the Petitioner was arrested but agreed she did not see him after the fracas.** This she stated after averring that she saw the police taking away the petitioner when both 1<sup>st</sup> Respondent and the petitioner were shouting. The replaced box, as per her evidence, lends support to the case of the Petitioner.

**She agreed that although the Petitioner was complaining of Plainview (having 7 polling stations) and Sinai centre (having 3 polling stations), she has not produced all Form 16As of the two.**

She was shown and conceded that in all the forms attached to her affidavit the number of ballot boxes are not indicated and the Form 16A on page 13 of the annexure is not signed by the Presiding Officer. She also agreed that for Sinai centres results of 11 candidates are not before the court. She first stated she used Form 16As to declare the result and then stated that she used Form 17A. The total shown on page 13 of her annexure came to 422 votes and had to agree that this figure is neither 506 or 508 (which figures were shown to her by 1<sup>st</sup> Respondent counsel). Moreover, the result was shown only for 14 candidates and she could not be able to know who benefited from the difference in those votes.

She also agreed that she made four copies of Form 17A and that she did not give the same to any candidate because it was not requested for.

She also agreed that the total number of registered votes for Sinai is 2218 which is higher than the total votes. Once again, for Sinai Centre she confirmed that one Joseph Olulang was a Deputy Presiding Officer and there is no known Presiding Officer for that centre and Deputy Presiding Officer presided over the counting of votes and filled in Form 16A. Then she changed her version and stated that the said person was the Presiding Officer but did not bring any document to support.

She was shown the forms on pages 14, 15 and 18 of her annexure where no agent or candidates have signed and figures were changed without countersignature. The Form 16A on page 22 and 23 were not signed by any Presiding Officer.

As regards Nancy, she stated that she could not recall whether she was in charge of personnel and that she had nothing to do with result which is contradicting the evidence of Nancy. She also agreed that she produced only 15 Form 16As out of 175 polling stations.

**She confirmed that ballot box no. 85858 is not amongst those issued by her to Plains View or to Nairobi South Primary School. And that it is not amongst all the boxes distributed, by her. Similar is the fact with Box No. 85431.** The list of ballot boxes which is on pages 74 – 80 was prepared by her for her lawyers but then changed her version and stated that the list was prepared before the election though she agreed that it did not bear any date or signature of any person receiving those ballot boxes. Then she stated that she copied the same from original which is with ECK. Thus the court is totally in dark how the said list was prepared and produced before the court.

According to her the record for ballot papers including spoiled and unused ballot papers, marked copies of register, counter foils for used ballot papers would show the number of ballot papers issued to each polling station and

that they were brought before the court along with the ballot papers.

**She could not tell how many voters were in polling station number 11 of Star of Hope or Polling station No. 10 of Government Vehicle Inspection Unit whose results are not included in Form 17A. Despite that she still stated that she received results from all polling stations together with their results which were announced publicly and that she did not announce that all candidates got '0' votes in those two stations but then she conceded and testified:**

***“I agree that if I receive the election results from those two stations, it shall change the result of all the candidates”.***

She then stated that ***“it will not surprise me if the results of none of the candidates are right”.*** She also conceded that she became aware of absence of results from two polling stations as aforesaid when she was forwarding results to ECK at KICC but she could not change Form 17A and added that if it was found earlier she would not have declared the result.

She agreed that she has not availed all Forms 16A but added that they are in their respective ballot boxes. Though she did not explain why the relevant Form 16As are not produced though specifically pleaded like Plains View and Sinai centre and why only 15 Form 16As are produced.

**After detailing the process of election for all three streams she agreed that it would be impossible for about 10,000 voters only to vote for presidential election and pass over or not to vote for the Parliamentary election in a constituency.**

She categorically denied that she gave the result of election to Nancy in the format she had annexed in her affidavit (page VIII of Nancy's affidavit).

In her re-examination, she stated (though inaccurately) that when the ballot boxes were opened, all Form 16As were in the box. This is not the fact as per the record of the court. Her explanation of an agent refusing to sign of the reverse of Form 16A is counterproductive. Even if there is a refusal by the agent to sign, the reason for such refusal ought to be filled in by Presiding Officer if not by the agent. Her explanation on the inclusion of Box No. 85858 is also lame one and not consummarate with the record of the court. Moreover, her assertion that all the documents as per Rule 19 were given to the court also vary from the records of the proceedings.

**Then she changed her version of timing of tallying and results by stating she announced the result at 9.30 pm on 28<sup>th</sup> December, 2007.**

**I would also note that the certificate of result is of 28<sup>th</sup> December, 2007 and that of the Presidential election is dated 29<sup>th</sup> December, 2007. Page (51 and 82 of the Annexure of the 2<sup>nd</sup> Respondent). It is on record however and to be noted that the Presidential election were announced prior to the Parliamentary Election Results.**

I would reiterate that 2<sup>nd</sup> Respondent conceded that the results of two polling stations namely polling station 11 of Star of Hope Primary School and Polling station no. 10 Government Vehicle Inspection Unit are not included in the Form 17A and despite the questions asked about the number of voters for those polling stations, there were no answers from her.

There are several polling stations where the details of votes cast, rejected votes and valid votes are not filled in (pages 31, 32, 36 etc). In polling stations No. 2 of Sinai centre, the total number of votes cast exceeds to figure 98 (Total is 407 against total of 506 shown on page 33 of the annexure) of her affidavit. From the evidence from the Respondents as outlined hereinbefore. Several serious irregularities are noted. Moreover, the evidence of Nancy in all relevant aspects is contradicted by the 2<sup>nd</sup> Respondent.

## **SUBMISSIONS AND FINDINGS.**

At the outset, I shall reject the contention raised by Mr. Lubulellah, the learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup>

Respondents, that Milka Oyare was a stranger and a busy body simply because of the fact her name appears on page 59 of the annexure to the affidavit of 2<sup>nd</sup> Respondent as one of the agents for ODM for Martin Luther King Primary School as averred and accepted in paragraph 14 of her affidavit which avers *inter alia* that the Petitioner was allowed such agents for the Petitioner's party who were duly recognized by the Presiding Officers and herself. At this juncture, I shall also observe, contrary to what was stated by Mr. Kilukumi from Bar, that Alice Wanjiru Njoroge the agent for the 1<sup>st</sup> Respondent for Star of Hope polling station also did not annex any copy of her appointment letter as such agent in her affidavit and stated that no such letter was also produced. Thus the averment made attacking one side's witness is not accepted and also appreciated. I have also sufficiently covered her evidence as regards the allegation of the Petitioner to the effect that his agents did not accompany the ballot boxes to the tallying centre and need not reiterate it.

I do tend to agree, at this stage, that the Petitioner's averments of the offence of false statement as regards his personal character is not sufficiently proved as per the standard of proof of the election offence as observed in my own judgment in Election Petition No. 1 of 2003 (***Onalo Vs. Ludeki and Others, 2008 3KLR***) 614. The burden of proof of election offences like bribery etc as per the Election Offences Act (Cap 66) in the election petition are higher because they are in the nature of quasi – criminal nature and if the offence is not proved to the satisfaction of the court and if the court is not satisfied and when it is in doubt and where a Reasonable doubt exists, the same cannot be held to be proved against the Respondent.

Suffice it shall be to state that in the said case the court was determining serious allegations of bribery and undue influence on voters by the elected candidate.

Before this court, the only allegation as regards Election Offence is as per Sec. 11 of the Election Offences Act, which is the publication of Election materials like advertisement, placards, posters or handbills as is averred in paragraph 11 of the petition, and I do find that the petitioner has failed to prove that offence and reject the claim thereon.

Going back to the submission, it may be pertinent to deal with, at this stage, the contentions raised as regards the schedule of irregularities made apparent during opening of various ballot boxes before Hon. Wendoh J. attached to the submissions filed by the Petitioner.

Mr. Lubulellah asked the court to expunge the same from the submissions only because it is not a part of the submissions. He could not give satisfactory response when the court stated that it would be taken as a summary of exercise of opening of the boxes which was in fact undertaken as per the emphasis given on the importance of such exercise before the commencement of hearing of the Petition by Mr. Kilukumi. In any event, Hon. Wendoh J. in her last paragraph of her Ruling delivered on 25<sup>th</sup> November, 2008 observed:-

**“This court has already opened ballot boxes and the contents noted. I believe the parties have taken note of what may have transpired at the polls following what they saw in the ballot boxes. That forms part of the hearing.”** (emphasis mine).

Moreover, no issue was raised as to the correctness of observations made in the summarized form of the proceedings and record taken during the opening of the boxes by the court. The schedule is also mentioned in the submissions. Thus I shall refer to the said Schedule as a part of submissions whose correctness is not disputed. The schedule mentions that out of the boxes specified in those respective parts of the schedule, only three boxes out of 175 ballot boxes complied with Rule 19 of the Election Rules, some had their lids half open with contents easily accessible, some had lids improperly sealed on one side, some had seals broken or had seals without numbers, some did not contain Form 16A at all, some had Form 16A exposed inside and pinned on top of the box, some did not contain all or some ECK Form 1B – 5, some had their origin unspecified and unidentified from the outside, some had exposed ballot papers, some contained documents not put in yellow ECK bags but in brown envelopes, some contained presidential election materials, some contained Civic Election materials, some had less than 2 ECK or Agent seals some had torn ECK bags and brown envelopes, some had open envelopes without contents or unsealed yellow ECK bag marked and also unmarked with content, some had exposed marked Register or open envelope containing marked register, some had exposed counter foils or open marked counter foil, some had open envelopes marked rejected ballots, some had open envelopes marked spoilt ballots, some had open envelope marked invalid and valid votes, some had open brown envelopes and wrapped exposed unused ballot booklets and ballot papers, some had materials marked with individuals names or note books, sheets of papers, metallic blades or envelopes, some had materials of different stations than the one shown on boxes, the ballot box Serial No.PA 681520 whose first two names did not fit into the series of all the rest of ballot boxes, some had label of Presidential Election outside and had a hole at the side capable of accessing its contents.

I have stated the explanation of the inclusion of ballot box 68150 by the 2<sup>nd</sup> Respondent, and I do hold that it is not satisfactory in any manner one looks at it. I have also reiterated that she also stated before the court that all Forms 16A

are in the boxes but the proceedings of the court during opening of those boxes paints totally different picture. At least 91 ballot boxes as per Part (vi) of the Schedule did not contain Form 16As at all. (See sub-paragraph VI of the schedules.)

Looking to the above evidence as per the court's record, the submission that Rule 19 of the Election Rules were complied with and that the Petitioner ought to have asked for scrutiny to prove the same is in my humble opinion, not worthy of acceptance. Moreover, as per the 2<sup>nd</sup> Respondent's evidence, she had not opened any ballot boxes during tallying, then how she can depone that all the forms and documents are in ballot boxes and moreover, how she can aver that tallying was properly done as per Form 16As which are not in the ballot boxes? Her evidence in this aspect totally lacks credibility. Moreover, she has not bothered to scrutinize the validity of rejected votes even as shown in her own Form 17A.

When four boxes were opened at the request of the Petitioner, it was confirmed that Ballot Box No. PA 88673 included materials of only civil election and the 2<sup>nd</sup> Respondent agreed that if that had occurred, she would be surprised and further that Ballot Box No. 8892 had 2 Form 16A's which were not signed and its contents are not sealed. This fact is also shown apart from that Form 16A, which have been annexed to the annexure of her affidavit.

As regards the evidence which could not be denied or questioned, the certificate of result given to the 1<sup>st</sup> Respondent prepared by the 2<sup>nd</sup> Respondent stands out in forefront. Perusing the certificate produced by her on page 51, it is evidently signed by her on 28<sup>th</sup> December, 2007. Nancy Gachanja, who is an electoral official from ECK and who gave evidence in support of the 1<sup>st</sup> Respondent, stated that the election results were declared on the night of 29<sup>th</sup>/30<sup>th</sup> December, 2007 and on top of it, 2<sup>nd</sup> Respondent herself agreed that the tallying process of the Makadara constituency were completed by around 3.00 am on the night of 28<sup>th</sup>/29<sup>th</sup> December, 2007. The same is the evidence of the 1<sup>st</sup> Respondent who confirmed that the results were declared on night of 29/30 December, 2007

**With this evidence, it is apparent that the certificate of results issued by the 2<sup>nd</sup> Respondent declaring the 1<sup>st</sup> Respondent as a winner was in fact issued before the tallying process and form 17A were completed.** That fact cannot be traversed by any manner and by proffering any manner of ingenious submissions. Though I must note that both the counsel of the Respondents have kept silence on this fact. It is also on record of the case, as emerges from the evidence proffered by the Respondents, that some of Form 16As which are availed to the court are not signed by the Presiding Officers, are not signed by all the candidates or their agents and the reasons for failure of such signatures are not filled in Form 16As. Figures from Plain View polling centre was altered without counter signature and not dated. Similar anomalies were present in Form 17A availed by the 2<sup>nd</sup> Respondent and also from that availed by the 1<sup>st</sup> Respondent which are written in different hands. Apart from the above evidence, most of which came from the Respondents' evidence, the Petitioner's counsel Mr. Omollo submitted that the averments of the arrest of the Petitioner from the tallying centre has been amply corroborated by the evidence of Milka Oyare, Levi Ogeto, Alice Wanjiru and 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Except for Nancy, all the witnesses have deponed on the fracas at the tallying centre. I have adequately detailed the same in earlier part of this judgment and considering the same objectively, one cannot escape to note the fact that there was a scuffle between the Petitioner and the 1<sup>st</sup> Respondent and that only the Petitioner was taken away from the tallying centre. 2<sup>nd</sup> Respondent's testimony to the effect that she did not order the security officials to take him away and that she was not even aware of his arrest is nothing but a guided effort to mislead the court and cannot be accepted as truthful. She in any event agreed that she did not see the Petitioner thereafter. The evidence thus supports the Petitioner's contention that he approached the 2<sup>nd</sup> Respondent to complain about the three disputed ballot boxes, and was not heard on that issue and was instead arrested and thus was hampered to witness the tallying process. I would further observe that the 1<sup>st</sup> Respondent has conceded that he did approach the Petitioner when he saw him approaching the 2<sup>nd</sup> Respondent but did not give any reason of his intervention when no one else did so. The arrest of the Petitioner under the circumstances shows the failure to serve impartially by the 2<sup>nd</sup> Respondent.

Similarly, it was also submitted that the averments that petitioner's agents were not allowed to accompany the ballot boxes from star of Hope polling station are also sufficiently proved. I have made my observations on this evidence earlier herein and agree with the Petitioner.

The averments of arrival of those ballot boxes, absence of Form 16As are proved per the evidence and it was so submitted. Authorities were cited by Mr. Omollo to support his contention that the election is faulted with serious irregularities and non-compliance of law and must be declared a nullity.

eya vs. James Omingo Magara.

*“...The refusal or failure of a candidate or agent to sign Form 16A or to record the reasons for not doing as required cannot by itself invalidate the results as announced by a Presiding Officer. But as far as the other requirements under Regulation 35 are concerned, failure by a Presiding Officer to comply is a serious breach which requires appropriate explanation by the officer concerned. In fact, it is an election offence for Presiding Officer, without a reasonable cause, to fail and/or refuse to sign and stamp a Form 16A including completing all the parts as required of him under the said regulation. These include the statistical part just above the names of the candidates, reason for refusal and/or failure of a candidate and/or his agent to sign the form and any necessary statutory comments. Such an Officer is liable to imprisonment for a term not exceeding five years, see section 4(g) of the Election Offences Act. Where a Presiding Officer presents to a Returning Officer a Form 16A which is neither signed by that Presiding Officer and/or any of the candidate’s agent, that declaration is of no value and cannot be used or authenticate any declared results.”*

*“It is apparent that the Returning Officer abdicated his responsibility by failing to personally complete Form 17A after declaration of the winner and in the manner stated hereinabove. He said that it is not possible for a Returning Officer to complete Form 17A by himself without delegating the responsibility to other people. He said it is very tedious to do so. However, the above quoted regulation is couched in peremptory terms and does not permit a Returning Officer to do otherwise. But in the event that he chooses to delegate that responsibility to anyone else (which seems to be against the law) the Returning Officer has to ensure that the form is filled correctly and in accordance with the declared results as they appear in forms 16A. In the event of any mistake in completion of form 17A, he cannot shift the blame to anyone else.*

*In this case, the second respondent allowed tally clerks to complete form 17A immediately upon receipt of forms 16A even before he announced the final results. The tally clerks made very many mistakes. That notwithstanding, the Returning Officer said that he scrutinized the form and was satisfied that it was correct before he signed the same. That was far from the truth. Apart from the recorded results in the form, the Returning Officer failed to indicate very basic but important information like the voter turnout percentage. He did not also date the form. He failed to record the names of the candidates and/or counting agents present at the time of filing and signing the same. He did not even declare the results of the petitioner in the form. The second respondent simply failed in this important task of completion of form 17A.” (emphasis mine)*

According to Mr. Omollo, the said observations are, in all relevant aspects, echoing the facts of the present Petition.

Relying on the following passage from the said case, it was urged that the declaration of 1<sup>st</sup> Respondent as a successful candidate was heavily tainted with illegalities and does not reflect the will of the people and he relied on the following passage in the aforesaid case:-

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

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

Thus in short, it is submitted that there were serious irregularities and illegalities in the process of polling and tallying and following facts were reiterated.

)Alice Wanjiru admitted that she was allowed to carry the ballot boxes from Star of Hope to tallying centre who was a stranger.

(2)Ballot boxes released to Martin Luther Primary School were different than those received. (I have also noted earlier the evidence of the 2<sup>nd</sup> Respondent in respect of different box replaced without any record.)

(3)Difference of about 10,000 votes cast between Presidential and Parliamentary Election.

(4)The documents produced by Eriq was similar to that produced by 2<sup>nd</sup> Respondent in respect of Presidential Election Results.

(5)Admission of serious calculation errors by the 1<sup>st</sup> Respondent and his request for scrutiny of ballot boxes at the end of the hearing of the Petition.

(6)2<sup>nd</sup> Respondent admitted that had she discovered the missing results of two polling stations, she would not have declared the result and that the omission would have affected the results of all the candidates.

(7)Irredeemable irregularities in the process of tallying and thus serious breaches of Regulation 40 of The Election Regulation.

Thus, according to the Petitioner the facts before the court prove the allegations in the petition and that those pleaded and proved violation of the Regulations go to show that there was no free, fair and transparent Parliamentary Election and this election be nullified as prayed in the Petition.

Mr. Lublellah and Mr. Kilukami the learned Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the 1<sup>st</sup> Respondent respectively submitted vehemently against the Petition and raised interesting points in law that the petition is for dismissal with costs. They both also filed written submissions.

I shall first deal with the common issues raised by both counsel, which could be termed as points of law.

Mr. Lublellah submitted that and I quote:-

***“No new ground alluded to or becoming self evident from the process of cross-examination gives the petitioner a legitimate ground for the nullification of the election.”***

It was stressed by both Counsel that the party cannot be allowed to depart from the pleadings and particulars and then lead evidence outside the pleadings. If he did so such evidence would not be relevant. Both Counsel also relied on the Ruling of the Court of Appeal in C.A. No. 255 of 2009 which was in respect of the appeal filed by the petitioner against the ruling made Hon. Wendoh J. who struck out some paragraphs from the affidavit of a witness called by the petitioner. In the said ruling the Court of Appeal cited some passages from **Halsbury's Laws of England on pleadings, orders on pleadings and relevant evidence namely:-**

***“Admissible evidence is that which is (1) relevant and (2) not excluded by any rule of Law or Practice... The court has, however, a general discretionary power to control and this include the power to exclude evidence even if it is admissible”***

***“It follows that the pleadings enable the parties to decide in advance of the trial what evidence will be needed. From the pleadings the appropriate method of trial can be determined.”***

After considering the above passages amongst others the Court of Appeal agreed with the Ruling of Hon. Wendoh

J. and observed that the evidence cannot be relevant or admissible unless such evidence is based on the issues as per the Petition and particulars supplied.

I would have no hesitation to accept the observations made to the effect that the purpose of particulars is to **“prevent surprise and limit inquiry at the trial to matters set out in particulars”** and that a party is bound by his pleadings and issues raised from the pleadings and particulars which become the pleadings in the petitions.

From the fair and simple reading of those passages, I deduct that what the party is prevented to do is not to lead evidence from his witnesses on the matters which are not pleaded in his case. This is so because the other party has to be aware and prepared for the evidence to be led.

Mr. Lubulellah stressed that the Arithmetic error was not pleaded and that tallying is not the same thing as calculation. I must confess I fail to understand that argument. He further submitted vehemently that the Returning Officer is working under stressful circumstances of an election process and is expected to rely on the assistance from her officers and that **“to err is human”** and moreover the arithmetic error is not a ground for nullification of the petition as per Sec.28 of the Act (Cap.7). Mr. Kilukumi also on the issue of evidence of arithmetical errors and others, relied on the findings in the case of **JOHN O. NYAMSE & ANOTHER 2008 eKLR** (election partitions at 500 at 512).

It was found by the court in the said case that:-

**“The innocent error made even though negligent is human and in election matters these kind of errors are human activity and if they are not fundamental they should be dismissed and ignored, because they are minor and do not effect the election or its results”.**

Mr. Lublellah also went on to submit that the 2<sup>nd</sup> Respondent was not cross examined on whether her Presiding Officers had kept a record of reasons for the refusal by some candidates and agents to sign Forms 16A and that there might be some records in the Ballot Boxes in the custody of the court. It is interesting to note this submissions on the face of the fact that Form 16A itself provide for a column to record the reasons for refusal to sign the same!!!

I need not reiterate all the reasoning’s given in the submissions filed on behalf of 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as regards evidence on record and it shall be sufficient to place on record that I have perused the same, considered the same and commented upon them in this Judgment, while considering the evidence led before the court.

Mr. Kilukumi, the learned counsel for the 1<sup>st</sup> Respondent submitted very detailed and challenging submissions. He started with contending that the Petitioner cannot be allowed to introduce new grounds in the course of adducing evidence in support of his petition and the court was asked to disregard the issue regarding validity of the Parliamentary Form 16As. I was also reminded of my ruling made in **Onalo’s case (supra)**. I have observed this issue earlier in the Judgment and Sec. 11 of the Election Offences Act was referred to in the particulars supplied on 10<sup>th</sup> March, 2010 as per request of particulars in respect of paragraph 11 of the Petition. As regards the evidence adduced on the averments made in the said paragraph, I do entirely agree and have observed earlier that the Petitioner has failed to prove that the 1<sup>st</sup> Respondent was guilty of the said offence and I do find so.

I also make similar finding in respect of allegation of publication of posters and placards made in paragraph 12 of the Petition.

As regards the allegations made in paragraphs 13 and 14 of the Petition, it was submitted that although the name of one Faith Wachira Mawe, the Presiding Officer of former Viwandani Polling Station, and particular of her action was given, no evidence against her is given and that no credible evidence was adduced by the Petitioner or his witness that the 2<sup>nd</sup> Respondent acted impartially and was under the influence of the 1<sup>st</sup> Respondent and his party as per the allegations and particulars supplied.

As regards paragraph 14 of the Petition, it was submitted that it was not his case that his votes were not correctly tallied or that there were arithmetical errors and it was further stressed that the petition and particulars have no reference to statutory Form 17A.

I may pause here and note that it was the case of the Petitioner that the copy of results as declared were not given to him. It is also on record and admitted by both 1<sup>st</sup> and 2<sup>nd</sup> Respondents that copies of Form 17A were not even given to the 1<sup>st</sup> Respondent and that she did not give the copy to any of them. It was for the first time that Form 17As were produced by 1<sup>st</sup> and 2<sup>nd</sup> Respondents. It will be thus inconceivable that the Petitioner could have given any particulars as regards Form 17A. **Considering the element of surprise, neither the 1<sup>st</sup> Respondent or 2<sup>nd</sup> Respondent can be heard to complain that they were surprised by the evidence led on Form 17A (even if it was in cross-examination) as they were all the time aware of its details and have readily shown them to the court in support of their cases** that the process of tallying process and declaration of the election results were conducted fairly and justly. The evidence received during the cross-examination of those witnesses, if allowed to be irrelevant and inadmissible, that would be, in my honest view, a sad day for the principles of justice and Rule of Law. This court as shown in the passages cited in **C.A No. 255 of 2008 (supra)** hereinbefore has unlimited and wide discretion to admit or refuse to admit even admissible evidence. No principle of law, and I am not aware of any, by which the court can be prevented to look into the evidence led by opposite party which would support the pleaded case of the other party.

I shall also note that, although it is the Returning Officer who declares the result and issues the certificate of result, the same becomes authentic when it is declared and published by the Electoral Commission in gazette as per the law

The narrow view expressed otherwise by the learned counsel of 2<sup>nd</sup> and 3<sup>rd</sup> Respondents thus is not merited.

Mr. Kilukumi relying on his detailed submissions, which this court has perused, relied on the arithmetic errors in **Kriegler’s Report**. It is evident that the said report was for the Presidential election and the differentiation between the

two elections in Makadara constituency has not been shown or relied upon. The 2<sup>nd</sup> Respondent admitted and her evidence is not challenged by the 1<sup>st</sup> Respondent, that the difference of votes cast in the constituency in the figure of 10,000 votes is not usual and would lead to the conclusion that all was not well. Yes, it is true that the voter cannot be forced to vote for all the streams of election, but as per Regulation 30 (2) of the Election Regulations, the ballot papers for each stream of elections should be issued and should be in the ballot box by the voter.

As regards the submissions on the non-signature of the candidate and/or agent on Form 16A, Mr. Kilukumi relied on the provisions of Regulation 35A (5) and (6) and it is true that those regulations stipulate that non-signature cannot affect the election. However, nothing was commented on the absence of signature and seal of the Electoral Commissioner by the Presiding Officer on the Form 16A. The omission to do so is of a serious nature which could cast doubt on the validity of the result declared as observed in the *case of Nyamweya* (supra).

However, I also observe that Regulation 40 of the Election Regulation does not have provisions similar to Regulation 35 (A) (5) and (6). Regulation 40 (1) (g) and (i) provide that the Returning Officer shall sign and date the form and give to any candidate or his agent present a copy of Form 17A. Before the court there is evidence that Form 17A was not dated by the 2<sup>nd</sup> Respondent.

Reliance was placed on Sec. 28 of the Act which stipulates:-

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

It was emphasized that after recalculations of figures in Form 17A, the 1<sup>st</sup> Respondent was still shown to be the winner and thus the errors and omissions shown on record should not result in election been declared void. It was once again reiterated that the Petitioner did not plead that election in question was not conducted in accordance with the principles laid down in the governing electoral legislation and that the Petitioner has failed to demonstrate through evidence any violation of electoral regulations which were pleaded and particularized.

It was further stressed that the Petitioner cannot take support from the generalized allegation and the case of *Joho vs. Nyonge & Another (2008) 3KLR (EP) 500* was relied upon.

It was also submitted that the Petition should be proved by cogent, credible and consistent evidence.

Lastly, I should place on record that it was submitted that the Petitioner failed to call persons named in the particulars to support his case and testimony before the court.

From the above specified pleadings, evidence and submissions, I can confess that the case has posed unique points and issues of law and facts before the court

I can start from agreeing that the 3<sup>rd</sup> Respondent was replaced by Interim Independent Electoral Commission (IIEC) as its successor on 29<sup>th</sup> December 2008 and the amended Sec. 41 (2) of the Constitution came into effect and consequently IIEC took over the place of ECK and became substituted as the 3<sup>rd</sup> Respondent.

Kenya is a democratic multiparty state and thus Parliamentary election is and ought to be pivotal to its people and its governance and that a free and fair election is accepted as the basis of a valid election. The constitution has given this court jurisdiction to hear the election petition and the court is expected by all the laws, to determine that the process of election has been free, fair and transparent and that the court must give effect to the tenets of the Constitution, Rule of Law, Electoral Laws and Regulations made thereunder and if the court finds that the electoral process was very badly flawed and that the process so undertaken could affect the results of the election as declared, the court should not hesitate to declare the election as null and void.

It is true that before this court, after the arithmetical counting, the 1<sup>st</sup> Respondent has been shown to remain in lead of the Petitioner. However, it was contended by Mr. Omollo that this factor was considered in the case of *Wabuge vs. Limo & Another (2008), KLR (EP)* where the court held that an election would be held to be void if it was conducted so badly that it was not sufficiently in accordance with the laws relevant to an election and the court held that:-

***“This court however, cannot shut its eyes to such illegal acts which although the number of ballot papers if involved is small being 285 cannot affect the result of this election, nonetheless it clearly revealed that the election, despite the assurance of the 1<sup>st</sup> Respondent to the contrary was not conducted in accordance with the law as claimed.”***

Accordingly, what is to be considered as the paramount issue is whether the Parliamentary election in respect of Makadara constituency was conducted in fair, free and transparent manner as per relevant law and whether the election of the 1<sup>st</sup> Respondent was valid as a successful member of the parliament.

These issues shall be determined as per the allegations made in the Petition, the particulars requested and supplied and evidence as a whole before the court.

The moot question is whether the evidence in respect of the election in question can only be considered which is produced by the Petitioner and whether the court should shut its eyes on the evidence and admissions from the Respondent on the compliance or otherwise of the relevant electoral laws and which directly affect the results of the election as per the electoral laws? I pose the question, should the court be told to shut its eyes if such evidence was against the case of the Petitioner?

The court is urged by the Respondents' counsel that those evidence has to be strictly tied with the allegations by the Petitioner made in the Petition. If not, the irregularities, however serious and though produced before the court which are committed by the electoral officials, should not be considered. I was also reminded of the standard of proof as

determined in *Onalo's case* and I have made my observations thereon hereinbefore.

I shall at this juncture quote the full paragraph 409 of Halsbury's Laws of England Vol. 17 (1) Fourth Edition (page 211) which is relied partly in the Ruling of Court of Appeal made in C.A. 255/08.

***"In general. The prime requirement of anything sought to be admitted in evidence is that it is of sufficient relevance. What is relevant (namely what goes to the proof or disproof of a matter in issue) will be decided by logic and human experience, and facts may be proved directly or circumstantially. But while no matter should be proved which is not relevant, some things which are relevant by the normal tests of logic may not be proved because of exclusionary rules of evidence. Such matters are inadmissible. Admissible evidence is thus that which is 91) relevant and (2) not excluded by any rule of law or practice. It may be that an item of evidence is admissible on one ground and inadmissible on others; if so, it will be admitted. Evidence may also be admissible for one purpose and not for another.***

***The court has, however, a general discretionary power to control evidence and this includes the power to exclude evidence even if it is admissible.***

With the above, I am fortified in my observations and findings herein.

I do reiterate that the evidence has been produced by the Respondents which brings out the breaches and violation of the electoral laws and regulations. Moreover, absence of Form 16As and other irregularities became apparent when the ballot boxes were opened to check compliance of Rule 19 of the Election Rules.

These facts are fairly within the purview of the allegations made in the Petition specifically in paragraphs 13, 14, 18, 20, 21, 25, 26, 27 & 30. The paragraph 27 sums up the case of the Petitioner.

I shall thus, with due respect to the submissions made, reject the aforesaid submissions simply because to do so shall be against all the principles of fairness and justice.

In *Republic vs. Returning Officer Kamukunji Constituency & The Electoral Commission of Kenya Misc. C. A. No. 13 of 2008*. The court stated and I adopt the same:-

***"The now freely used phrase namely 'free and fair elections' has a clear meaning in terms of democratic audit. Thus, the elections provide an important ingredient of popular election of parliament. For this to be achieved the underlying notes concerning the conduct of the election must provide a level playing ground or better still high standard of fairness as between parties, candidates and voters."*** (emphasis mine).

The court, apart from doing justice between the parties, must also consider the aspect of public interest in the electoral process which is to give the voters **a duly elected member** representing them in the parliament.

The Election Petition is a special jurisdiction donated to this court. The electoral officials appointed by the Electoral Commission is expected to adhere to the provisions of electoral laws substantively. No one can deny that Forms 16A and forms 17A are the most important documents in the electoral process and they should be shown to have been duly filled in and completed. This has not been shown to have been duly undertaken in this petition. Nay they are shown to have been badly flouted. Yes, I can understand the factor of human error but the errors should not be consistent and serious. A Returning Officer, even if has taken assistance from his/her deputies, cannot abdicate her duty and legal obligation to scrutinize the validity of Form 17A which is the document to be used to declare the winning candidate.

Form 16As should also confirm to Regulation 35A at each polling station as they are to be scrutinized and relied upon by the Returning Officer to fill in Form 17A. Regulation 35 of the Election Regulation provides for the procedure to be followed by the Presiding Officer at the polling station culminating to the sealing of ballot boxes. These are very serious and onerous obligations stipulated by the electoral laws and cannot be lightly shrugged off under the guise of human errors. If allowed to be overlooked, that will result in slow death of democracy, which our country against all the odds, is trying to preserve and the courts should come forth to be the guardian of such preservation.

The ballot boxes which were opened before the court, and as per the record of the court, had many flaws and I would accept the summary provided by the Petitioner as the true version thereof except when it makes the request to the court to scrutinize some of the boxes at this stage and check the Presidential Election materials and Civic Election materials because it is delayed. The court's record is clear and I shall not succumb to that offer.

At this juncture, I shall also like to quote with approval the following passage in the case of *Nyamweya (Supra)* on page 75, namely.

***"Where a Presiding Officer presents to a Returning Officer a Form 16A which is neither signed by that Presiding Officer and/or any of the candidates agent, that declaration is of no value and cannot be used in or authenticate any declared result."***

To say the least, in the annexures to the affidavit of 2<sup>nd</sup> Respondent (pages 13 to 27), except on pages 26 and

27, none of the Form 16As is as per Rule 35. Some of them are not even signed by the Presiding Officer and do not show the name of the polling station. Some of them do not have signature of the candidates or agents.. Obviously as per the evidence of the 2<sup>nd</sup> Respondent, she took into account all the Form 16As in recording and tallying Form 17A.

Coming to Form 17A, it is clear that there were arithmetical errors in the results of all the candidates, it is not dated, results of the two polling stations are not included. Moreover, figures in respect of final tally of the results of the of Petitioner and 1<sup>st</sup> Respondent were altered without authenticating the same or by counter signing. The figures of votes (cast, rejected and valid ones) not entered in respect of some polling stations, signature of candidates or agent were not shown. The Form 17A presented **by the 1<sup>st</sup> Respondent** was neither signed nor dated. To crown all these irregularities, is the certificate of result. From the clear evidence before the court, I do agree with the submissions made by the Petitioner that the **2<sup>nd</sup> Respondent issued the certificate of result on 28<sup>th</sup> December 2007 before the completion of the tallying process.** This fact is not challenged or commented upon.

It is thus apparent that the 2<sup>nd</sup> Respondent simply abdicated, ignored and failed in the important obligation of completion of Form 17A.

## **CONCLUSION**

Finally, I must determine the issue, to wit, are these irregularities and breaches of the electoral process sufficient to find that the electoral process was not free, fair and transparent?

I have, in the earlier part of this judgment, adequately observed the scene at the tallying centre, before the Petitioner was removed from the tallying Hall. I have similarly observed and commented on the evidence of all the witnesses of the Petitioner and the 1<sup>st</sup> Respondent including their own individual evidence. It is not in dispute that the Petitioner did try to approach the 2<sup>nd</sup> Respondent during the tallying process under the circumstances suggesting that he had some grievances. The 2<sup>nd</sup> Respondent also accepted that fact and I reiterate that she stated to the effect that the Petitioner and 1<sup>st</sup> Respondent were seen and heard by her to be having differences and were shouting then the flask fell and people in the Hall scattered resulting in a halt of tallying process. Yet she, as a Returning Officer, did not try to inquire the cause of the aforesaid scuffle or skirmish either from the Petitioner or from the 1<sup>st</sup> Respondent or as she stated that she did not see the Petitioner, thereafter also from his agent even at the time of declaring the results. She failed to inquire about the presence or otherwise of the Petitioner, specially under these circumstances as well as looking at the fact that he was the runner up. I would note the stand of the 1<sup>st</sup> Respondent that the Petitioner was arrested or removed because he was violent. If so, there is no record to that effect in the note book of the 2<sup>nd</sup> Respondent. 2<sup>nd</sup> Respondent does not state that the Petitioner was violent. All these facts which are not disputed and/or undisputable, can lead to the conclusion that the 2<sup>nd</sup> Respondent also did not perform her duties fairly and impartially when a candidate was removed from the tallying centre at a very critical stage of the election process and I do hold so. With this finding, I do tend to agree with the Petitioner allegation, that she did not undertake her duties fairly and impartially.

In my considered view, it is very clear that the process of the election, starting from the ferrying of ballot boxes from Star of Hope to the whole process of receiving and tallying the ballot boxes in the tallying centre and declaration of the 1<sup>st</sup> Respondent as a successful candidate do not demonstrate that there was a fair and free election. I shall like to adopt by reiterating the passage from the case of Nyamweya which is already cited hereinbefore. I am further aware that the Petitioner did not ask for scrutiny of votes as prayed by the him, but the court ordered the opening of the ballot boxes to confirm the compliance of Rule 19 of the Election Rules as well as scrutinized four sample boxes as requested by the Petitioner. In the first exercise, all the boxes were opened and its contents as well as the condition of the boxes were noted very carefully by the court. The 2<sup>nd</sup> Respondent although ordered to comply with the Rule 19 has failed to do so. Moreover, in her affidavit, she opted or chose to produce only certain documents.

I can only state that even from the exercise of opening the ballot boxes as aforesaid, the fact emerged that boxes contained materials unconnected to the election herein. Only part of Form 16As are before the court, which begs the question "how then the Form 17A which is before the court was filled in?"

In the premises aforesaid, the court does have the evidence before it, to find that there were serious anomalies in the process of election results, which are fundamental and are in the nature which would affect the results of the election, and this fact is even admitted by the 2<sup>nd</sup> Respondent. What does support the court's view is the fact that these anomalies which are fairly pleaded in the Petition are shown from the evidence adduced by the Respondents and thus cannot be contradicted or questioned by them. They do speak for themselves!!! I thus summarise and find that the allegations, as summarized by the court in the earlier parts in terms of allegations 2, 3, 7, 10, 13 and 14 are proved.

The upshot of all the above is that serious and admitted or undisputable anomalies and non-compliance of

important and mandatory provisions of the electoral law from the electoral officials are placed before the court and this court in all fairness has no option but to come to the conclusion that the parliamentary election of the Makadara Constituency was not fair, free and transparent and that the 1<sup>st</sup> Respondent was not validly elected as the member of parliament of the said constituency.

The court, however, does not find 1<sup>st</sup> Respondent or other Respondents guilty of any election offence under the Election Offences Act (Capt 22). Accordingly, a certificate to that effect be issued forthwith to the Speaker of the National Assembly in terms of Sec. 30 (1) of the National Assembly and Presidential Elections Act (Cap 7).

The third Respondent thus shall proceed to conduct the by-election as required under the law. Looking to the facts of this petition, I order that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents bear the costs of the Petitioner as well as of the first Respondent.

All the parties were represented by more than one counsel but the lead counsel bore the maximum responsibility and in all fairness, I certify the cost for one counsel for the Petitioner and 1<sup>st</sup> Respondent.

**Dated, Signed and delivered** at Nairobi this **30<sup>th</sup>** day of **April, 2010**.

**K. H. RAWAL**  
**JUDGE**  
**30.04.2010**