



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

Election Petition 10 of 2008

WILLIAM KABOGO GITAU.....PETITIONER

VERSUS

GEORGE THUO.....1ST RESPONDENT

INTERIM INDEPENDENT ELECTORAL COMMISSION.....

2ND RESPONDENT

WATSON MAHINDA.....3RD RESPONDENT

JUDGMENT

The petitioner contested the Juja Constituency parliamentary seat in the general elections which were held in 2007. The petitioner was among the 13 candidates who contested the seat as representatives of various political parties. Among the contestants was the 1st respondent who was declared to have duly been elected as a Member of Parliament for Juja Constituency. In the results of the election published by the predecessor of the 2nd respondent i.e. Electoral Commission of Kenya (ECK), the following were the votes scored by each of the 13 candidates:

	<u>CANDIDATE'S NAME</u>	<u>POLITICAL PARTY</u>	<u>VOTES</u>
		<u>SCORED</u>	
(i)	Enos David Nzioka	Orange Democratic Movement, Kenya	2,653
(ii)	Gathua Eunice Gathigia	New Revival Generation Party	832
(iii)	Gitau William Kabogo	Sisi Kwa Sisi Party of Kenya	32,987
(iv)	Githaiga Dick Maina	Democratic Party of Kenya	2,621
(v)	Kamamia Beatrice Wairimu	Workers Congress Party of Kenya	268
(vi)	Kiama Peter Wangai	Kenya Citizens Congress	
	272		
(vii)	Kibugu Agnes Wangui	Agano Party	
	973		
(viii)	Kihara Freddie Kirima	Forum for the Restoration of Democracy for the People	472
(ix)	Kirika Mary Wanjiru Mwaniki	Party of Independent Candidates of Kenya	661
(x)	Moreka David Nyamache	Orange Democratic Movement	7,410

(xi)	Ndabi Stephen Nduchu	Kenya National Democratic Alliance	
	2,924		
(xii)	Ng'ang'a Alice Wambui	Safina Party	
	9,252		
(xiii)	Thuo George	Party of National Unity	<u>52,321</u>
		Total valid votes cast	<u>113,646</u>

According to the certificate issued by Watson Mahinda, the Returning Officer of Juja Constituency (*the 3rd respondent*), the total registered voters in the constituency were 163,657, of whom 114,808 voted. Out of all those who voted, 1,162 votes were rejected. In the said certificate, it was indicated that the percentage of the voter turnout was 70.15%. In a special gazette notice published by ECK on 30th December 2007, George Thuo (*the 1st respondent*) was declared to have won the election and hence was declared the duly elected member of parliament of Juja constituency.

The petitioner was aggrieved by the declaration of the 1st respondent as the duly elected Member of Parliament of Juja Constituency. Pursuant to the provisions of **Section 44** of the **Constitution** and the **National Assembly and Presidential Elections Act** (*hereinafter referred to as the Elections Act*), the petitioner on 21st January 2008 filed this petition challenging the said declaration of the 1st respondent as the duly elected Member of Parliament of Juja Constituency. The petitioner raised several complaints which may be summarized as thus; he was aggrieved that the said election was not conducted in accordance with the provisions of the **Elections Act** or the **Regulations** made thereunder or in accordance with the principles laid down thereunder or in accordance with the principles of common law and the principles of natural justice that it seriously affected the said election to the detriment of the petitioner. The petitioner complained that the tallying and the totaling of the results was inaccurate and neither was it correct. The petitioner averred that the ballot boxes for the voted cast in the said elections were opened and ballot papers counted, totaled and tallied in the absence of the petitioner and his agents and further that the declaration of the results of each polling station as contained in the Forms 16A remitted to ECK were not verified and witnessed by the petitioner and or his agents nor were any reasons given for the 3rd respondent's failure to procure the petitioner's or his agents verification and endorsement on the declared results. The petitioner was of the view that the declared results were therefore false, fictitious and unlawful.

The petitioner further complained that the results of the elections as announced at the end of the tallying and totaling of the counts contained in Form 17A and other election documents were false, fictitious, unlawful and therefore fraudulent. The petitioner was aggrieved that the declared results in the parliamentary vote was at variance with the presidential and the civic vote. In his view, the discrepancies thereto lent credence to his assertion that the declared results in the parliamentary vote was fraudulent and unlawful. The petitioner was aggrieved that the results contained in the various election documents published by the 3rd respondent did not correspond and therefore put in doubt the entire results that were ultimately declared by the ECK and the 3rd respondent. In particular, the petitioner complained that the declared results indicated an unrealistic and an exceptionally high voter turnout that was not consonant with voter turnout in other cosmopolitan constituencies; that the declared results included 12,000 ineligible voters disqualified on account of double or multiple registrations; and that the 2nd and 3rd respondents, had by themselves or through their agents, committed an election offence of marking in the election records returns and other documents, entries regarding the results of the said elections which they knew or had reasonable cause to believe to be false and therefore incorrect.

As against the 1st respondent, the petitioner made specific complaints which included the allegations that the 1st respondent had by himself or through his agents committed an election offence by printing, publishing and distributing

posters, handbills, placards and advertisements which on their face did not specify the name and addresses of the printers or publishers. The petitioner complained that the 1st respondent committed an election offence by aiding, abetting, counseling or procuring the commission of an election offence by printing, publishing and distributing posters which did not bear on their faces the names and addresses of the printers and the publishers. The petitioner was aggrieved that the 1st respondent had influenced ECK and the 3rd respondent in their conduct of the elections and who thereby rigged the elections in the 1st respondent's favour.

As against the predecessor of the 2nd respondent and 3rd respondent, the petitioner complained that they had committed election offences and electoral malpractices by breaching their official duties and the duly enacted **Electoral Code of Conduct** by *inter alia*, omitting to prepare an accurate, complete and signed elections returns including declarations and the certificate of the results of the parliamentary election; marking ballot papers in favour of, assisting and instructing voters to vote for the 1st respondent; permitting unauthorized persons to fill and complete election returns including declarations and the certificate of parliamentary election results; putting into ballot boxes materials other than ballot papers authorized by law to be put in the ballot boxes; counting ballot papers cast for the 1st respondents which they knew or had reasonable cause to believe were not validly cast for the 1st respondent; rejecting or refusing to count ballot papers which they knew or had reasonable cause to believe were validly cast for the petitioner; falsifying vote tallies in favour of the 1st respondent and failing to declare and certify the true and correct results in the parliamentary election; denying the petitioner and his agents the right to be present during the tallying of votes; denying the petitioner and his agents the right to verify and witness the declarations and certificates of the parliamentary election results; announcing and declaring results that were unlawful, fraudulent, fictitious and false; denying the petitioner and his agents the right to a recount of the votes cast; inexplicably and without any reasonable or justifiable cause delaying the release of the results in respect of the presidential and the parliamentary elections and thus casting doubt to the credibility and authenticity of the results thereby declared; permitting and accepting for appointment as officers, persons who were directly or indirectly opposed to the petitioner; permitting and accepting for appointment as officers persons who were disqualified from appointment on account of their association with the 1st respondent; permitting members of the same family (*husband and wife*) to act as officers in the said elections; permitting persons related to the said officers of the 2nd respondent (*son and daughter*) to act as agents of the 1st respondent in the said elections.

The petitioner was further aggrieved that ECK and the 3rd respondent had acted in breach of their official duties and the law in failing to serve impartially and independently in the performance of their duties; and had performed their duties under the influence of the Provincial Administration, the 1st respondent's political party and the 1st respondent. In the circumstances, the petitioner pleaded that for the aforesaid reasons; the parliamentary election of Juja constituency was rigged and unfair and therefore should be nullified. The petitioner averred that, since there was no proper tallying, counting and totaling of votes cast, the court should order the scrutiny, recount and re-tallying of the votes cast. The petitioner was of the view that by reason of non-compliance with written law relating to elections, the said parliamentary election for Juja constituency was not conducted substantially in accordance with the law and the principles laid down by the law. The petitioner stated that the foregoing breaches, violations, non-compliance with the law as set out by the petitioner affected the outcome of the said elections and therefore the announcement of the 1st respondent as the duly elected member of parliament of Juja constituency should be declared null and void and his election therefore be nullified. The petitioner prayed that the court issues appropriate orders or other consequential orders that will result in the nullification of the election of the 1st respondent as the member of parliament of Juja constituency. The petitioner prayed that he be awarded costs incidental to the prosecution of the petition.

When the petition was filed, the Chief Justice of the Republic of Kenya nominated Nyamu J (*as he was then*) to

hear and determine the petition. Before the learned judge could hear the case, he was elevated to the Court of Appeal. The Chief Justice nominated this court to hear this petition. This court was gazetted to hear this petition on 20th November 2009 vide Gazette Notice No.12358 of the same date. When the petition was first mentioned before this court on 7th December 2009, the court issued several directions regarding the conduct and the hearing of the petition. It directed the parties to the petition to file witnesses' statements in the manner prescribed under **Rule 18(2)** of the **National Assembly Elections (Election Petition) Rules** (*hereinafter referred to as the Election Petition Rules*). It substituted the Interim Independent Electoral Commission as the 2nd respondent in the petition in place of the defunct Electoral Commission of Kenya. The court directed the 2nd respondent to deliver to the court the ballot boxes and all the election documents referred to under **Rule 19** of the **Election Petition Rules**. The court further ordered the 2nd respondent to supply to the petitioner and the 1st respondent copies of all the Forms 16A, 17 and 17A in respect of the parliamentary election held on 27th December 2007 for the Juja Constituency. The 2nd respondent was required to comply with the orders of this court by the 10th January 2010. There were two applications which had been filed by the 1st respondent which sought the striking out of the petition on grounds that the 1st respondent had not been properly served, and secondly, on grounds that the petitioner had failed to supply the required particulars envisaged under **Rule 5** of the **Election Petition Rules** to the 1st respondent. The court fixed these two applications for hearing on 26th January 2010. The court further directed that the hearing of the petition would be conducted on a day to day basis with effect from 8th February 2010.

The 2nd respondent did not comply with this court's directions within the period specified by the order. It was only after this court issued further orders that the 2nd respondent delivered to the court the 231 ballot boxes in respect of the Juja constituency parliamentary election. As was evident from the list prepared by the Deputy Registrar of this court, upon receipt of the said ballot boxes, 66 out of the 231 ballot boxes appeared to have been tampered with. Out of the 66 ballot boxes, more than 50 ballot boxes had their seals broken. Some of the ballot boxes were open, the seals and the rivets having been removed. When the Returning Officer (*3rd respondent*) testified during the hearing of the case, he confirmed that indeed the 66 ballot boxes had been interfered with. He stated that all the ballot boxes were intact at the time he handed over their possession to the custody of the District Election Coordinator of the defunct ECK. The fact that a significant number of the ballot boxes had been interfered with meant that this court could not in the circumstances direct for the scrutiny and recount of the ballots as craved by the petitioner. This was in light of the fact that the integrity of the said ballot boxes had been put in question. This court will return to this aspect of the integrity of the ballot boxes later in this judgment. The 2nd and 3rd respondents did not comply with this court's orders regarding the availing of election documents as provided under **Rule 19** of the **Election Petition Rules**. In particular, the 2nd and 3rd respondents failed to avail the results as contained in the original Forms 16A and 17A. The 2nd respondent gave an explanation to the effect that the original results of the parliamentary election of Juja Constituency were either lost or misplaced in the period between the time the defunct ECK was disbanded and the setting up of the 2nd respondent to take over the functions of ECK. The hearing of this petition therefore proceeded in the absence of the original Form 16As and 17A of the parliamentary elections of Juja constituency. This court had to make do with the photocopies of the Forms 16As, 17 and 17A that were produced in evidence, respectively, by the petitioner and the 2nd and 3rd respondents. This court shall revert to this aspect of the petition later in this judgment.

After disposing off the interlocutory applications that had been filed by the 1st respondent, this court heard oral evidence adduced by the witnesses called by the petitioner, the 1st respondent and the 2nd and 3rd respondents. In total, the court heard 18 witnesses. The court heard the case for a total period of twenty three (23) days spanning a period of

two months. After the close of the petitioner's and the respondents' respective cases, counsel for the parties filed written closing submissions. The said counsel were given an opportunity by the court to highlight the said closing submissions. After reading the pleadings filed by the parties herein in support of their respective opposing positions, and after evaluating the oral evidence adduced by the witnesses who testified in this petition, and also after considering the submissions made by counsel for the respective parties to this petition, there are several issues which came to the fore for determination by this court. The issues are:

- (i) What is this court's jurisdiction in regard to the hearing and determination of an election petition?
- (ii) What is the standard of proof that should be applied by the court in regard to determining the matters in issue in an election petition?
- (iii) What evidence did the petitioner offer in support of his claim for the nullification of the election of the 1st respondent as the Member of Parliament of Juja Constituency?
- (iv) Does the evidence adduced by the petitioner support his claim that there were electoral malpractices and other irregularities in the conduct of the parliamentary election in respect of Juja constituency to such an extent that the said irregularities and the malpractices complained of should lead to the nullification of the election of the 1st respondent as a Member of Parliament of Juja constituency?
- (v) What orders should issue in regard to the petition?
- (vi) Which party shall be entitled to be paid costs?

As regard issue (i), **Section 44** of the **Constitution** provides as follows:

- “(1)The High Court shall have jurisdiction to hear and determine any question whether –*
- (a)A person has been validly elected as a member of the National Assembly; or*
 - (b)The seat in the National Assembly of a member thereof has become vacant.*
- (2) An application to the High Court for the determination of a question under Subsection (1) (a) may be made by any person who was entitled to vote in the election to which the application relates, or by the Attorney-General.*
- (3) An application to the High Court for the determination of a question under Subsection (1) (b) may be made –*
- (a) where the Speaker has declared that the seat in the National Assembly of a member has by reason of a provision of this Constitution become vacant, by that member, or*
 - (b) in any other case, by a person who is registered as a voter in elections of elected members of the Assembly, or by the Attorney-General.*
- (4) Parliament may make provision with respect to-*
- (a) the circumstances and manner in which, the time within which and the conditions upon which an application may be made to the High Court for the determination of a question under this section; and*
 - (b) the powers, practice and procedure of the High Court in relation to the application.”*

The High Court has jurisdiction to determine the question whether a person has been validly elected as a Member of the National Assembly. In determining the validity of an election, the court will take into consideration the provisions of the Constitution, the **National Assembly and the Presidential Elections Act**, the **Election Rules** and **Regulations** made thereunder, and the general principles recognized by the law as constituting the proper conduct of a valid election.

Section 19 of the **Act** provides that:

- “(1) An application to the High Court under the Constitution to hear and determine a question whether-*
- (a)A person has been validly elected as President; or*
 - (b)A person has been validly elected as a member of the National Assembly; or*
 - (c) The seat in the National Assembly of a member thereof shall be made by way of petition.*
- (2) A petition to determine the question whether a person has been validly nominated for election as President, or was validly elected as President, or, being a person elected President, was validly elected as a member of the National Assembly, shall be heard by a court consisting of three judges.*
- (3) A petition other than a petition under Subsection (2) shall be heard by an election court consisting of one judge.*
- (4) A petition under this Act shall be heard and determined on a priority basis.”*

In determining election petitions, the High Court is required to put in mind that election petitions are not ordinary suits

where a party is enforcing a right that accrues to him as a person. The court has to take cognizance of the fact that an election is a signification of the exercise of the democratic rights of the people to have a person of their choice represent them in the National Assembly. The court has taken account of the fact that Kenya is a democratic state which espouses democratic ideals that recognize that it is only the people who have the right to determine their political leadership, and exercise such determination in free and fair elections which can be so judged in accordance with the provisions of the Constitution, Legislation and International Conventions and Treaties which Kenya as a sovereign State is party to. The test as to what constitutes free and fair elections will of necessity be the internationally acceptable standard of what constitutes such free and fair elections. The court will consider whether the complaints made by the petitioner are such that, apart from establishing the particular electoral malpractice, or irregularity, impacted on the rights of the voters of Juja constituency to have a person of their choice represent them in the National Assembly. As was held by Maraga J in **Joho vs. Nyange & Anor (No. 4) (2008) 3KLR (Election Petitions) 500** at page 507:

*“Election petitions are no ordinary suits. Though they are disputes **in rem** fought between certain parties, election petitions are nonetheless disputes of great public importance – **Kibaki –vs- Moi, Civil Appeal No. 172 of 1999**. This is because when elections are successfully challenged by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents’ social and economic activities. It is for these reasons that I concur with the election court’s decision on **Wanguhu Ng’anga & Another – vs – George Owiti & Another, Election Petition No. 41 of 1993** that election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are therefore not the kind of evidence required to prove election petitions. As I have said, they should be proved by cogent, credible and consistent evidence.”*

This court in **John Kiarie Waweru –vs- Beth Wambui Mugo & 2 others [2008]eKLR** cited with approval the above decision of Maraga J and further stated the following at page 5 in regard to the petition filed in respect of the election of the Member of Parliament of Dagoretti Constituency:

“This court is aware of its duty to consider and determine the evidence adduced by the parties to this election petition after putting in mind the fact that the election that is sought to be nullified is in respect of an exercise of the right by the voters of Dagoretti constituency to elect a representative of their choice. This court will not therefore interfere with the democratic choice of the voters of Dagoretti constituency unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and therefore subject to nullification. It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did occur: he must establish that the said electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the elections held on 27th December 2007.”

The Electoral Commission of Kenya (ECK), the predecessor of the 2nd respondent, was required under **Section 42A (c)** of the **Constitution** (which was repealed by **Act No.10 of 2008** and substituted by **Section 41A (a) & (c)** of the **Constitution**) to promote free and fair elections. ECK was required to put in place rules and regulations that would enable it achieve its mandate of conducting free and fair elections.

What constitutes free and fair elections? The right of a people to freely elect their representative in a credible electoral process is recognized as a human right. **Article 21** of the **Universal Declaration of Human Rights** which was adopted and proclaimed by the General Assembly of the United Nations in **Resolution 217A(III)** on 10th December 1948 provides as follows:

*“Everyone has the right to take part in the government of his country, directly or through freely chosen representative
Everyone has the right to equal access to public service in his country
The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent voting procedures.”*

Article 25 of the **International Convention on Civil and Political Rights (1966)** which Kenya ratified and expressed her accession on 1st May 1972 states as follows:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions;

- (a) *To take part in the conduct of public affairs, directly or through freely chosen representatives,*
- (b) *To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors,*
- (c) *To have access on general terms of equality, to public service in his country.”*

In its **Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers** which was commemorated on 27th October 2005 at the United Nations in New York and which was endorsed by among others, the African Union, the Commonwealth Secretariat and the Inter-Parliamentary Union, (organizations to which Kenya is a member) the United Nations Electoral Assistance Division had this to say at page 1:

“Genuine democratic elections are a requisite condition for democratic governance, because they are the vehicle through which the people of a country freely express their will, on the basis established by law, as to who shall have the legitimacy to govern in their name and in their interests. Achieving genuine democratic elections is a part of establishing broader processes and institutions of democratic governance. Therefore, while all election processes should reflect universal principles for genuine democratic elections, no election can be separated from the political, cultural and historical context in which it takes place.”

In his treatise, **“Free and Fair Elections”**, written under the auspices of **Inter-Parliamentary Union (2006)** a leading legal scholar Guy S. Goodwill-Gill, a Professor at Oxford University set out what is internationally considered as the acceptable indices of free and fair elections. The *“markers”* for effective implementation of the indices of free and fair elections are as follows: Electoral law and system; Constituency delimitation; Election management; The right to vote; voter registration; Civic education and voter information; Candidates, political parties and political organization, including funding; Electoral campaign, including protection and respect for fundamental rights, political meetings, media access and coverage; balloting, monitoring and results and finally complaints and dispute resolution. Under the heading *“Balloting, Monitoring and Results”* the learned author quoting in part Garber L. in his article *“The Role of International Observers”* in a treatise by Garber & Bjornlund, *“New Democratic Frontier”* at pages 220 and 221, stated as follows at page 155:

“The duties of such monitors, as described in the report, show the practical ways in which representative presence can build public confidence by ensuring that the polling station arrangements is correct and that the ballot box is empty and sealed before voting; checking against the impersonation of voters; checking that no one is denied the right to vote without cause; ensuring that the vote is truly secret; watching for unexpected problems; participating in decisions that require a departure from the rules, for example, on the need for additional boxes; preventing campaigning and intimidation around polling stations and in queues; ensuring that the polling station is correctly closed and that no one is prevented from voting; observing the count and agreeing on or challenging difficult decisions, for example, with respect to void or damaged ballots; and receiving a signed copy of the count, as a check on any tampering with ballots or with the result between the polling station and the district centre.”

Courts have given interpretation of what it considers to be its role in determining issues raised in regard to the conduct of an election in an election petition. In the Ugandan Supreme court case of **Joy Kabatsi Kafura vs. Anifa Kawooya & Anor [Election Petition No. 25 of 2005]** (unreported) Mulenga JSC held at page 38 of the judgment as follows:

“An election is a process encompassing several activities from nomination of candidates through to the final declaration of the duly elected candidate. If any one of the activities is flawed through failure to comply with the applicable law, it affects the quality of the electoral process, and subject to the gravity of the flaw, it is bound to affect the election results. One such activity is the declaration of the results at every polling station. If any declaration is invalid by reason of non-compliance with the applicable law, it affects the quality and the result of the electoral process.”

The jurisdiction of this court therefore in determining this petition shall be circumscribed by the **Constitution**, the **National Assembly and Presidential Elections Act**, the **Rules and Regulations** made thereunder and the principles of free and fair elections as set out in the above laws, and where appropriate, under International Conventions and Treaties that Kenya is signatory to. The said principles of free and fair elections shall be interpreted by this court in the context that Kenya is a democratic state, and which is recognized as such by the community of nations.

As regards issue (ii) on the standard of proof that should be applied by the court in considering the issues in dispute in an election petition, it is now established that the standard of proof in election petitions is higher than that

which is applied in ordinary civil cases. As was held in the case of **Muliro vs. Musonye & another (2008) 2KLR (EP)52** at page 54, the standard of proof in establishing an election offence is higher than that of proof on balance of probabilities although it is not equal to the standard of proof beyond a reasonable doubt that is applied in criminal cases. Similarly, in **Ng'ang'a & Another vs. Owiti & Another (No. 2) (2008) 1KLR (EP) 799** at page 806, the court held as follows:

“The allegation in the petition as laid above is a grave one indeed. Consequently the party laying it is expected to present evidence that is cogent, consistent and credible. Election offences approximate to criminal charges. It has been said proof thereof should be beyond reasonable doubt. On our part the proof should be as such a high standard as to be above, and quite above the balance of probabilities in civil litigation.”

In **Onalo vs. Ludeki & 2 others (No. 3) (2008) 3KLR (EP) 614**, Rawal J held that the burden of proof that a person is guilty of an election offence is on the petitioner and his witnesses. She further held that an election offence has to be proved to the satisfaction of the court. The court cannot be said to be satisfied when it is in doubt. Where reasonable doubt exists, she held, it is impossible to say that the court is satisfied. Maraga J in **Joho vs. Nyange & Another (No.4) (2008) 3KLR (EP) 500** at page 507 succinctly set out what in his opinion constituted the burden and the standard of proof that ought to be discharged in an election petition:

*“I agree with counsel for the second respondent that the petitioner being the one seeking to nullify an election he has the burden of proof. As to the standard of proof, whereas I agree with the holding in **Mbowe –vs – Eliufoo [1967] EA 240** that it has to be proved to the satisfaction of the Court and that the Court cannot be said to be satisfied when it is in doubt, I would, however, not say that the standard of proof required is beyond reasonable doubt. Like in fraud cases, I would say that the standard of proof required in election petitions is higher than on a balance of probabilities. And where there are allegations of election offences having been committed, as the election court in **Joseph Wafula Khaoya vs. Eliakim Ludeki & Lawrence Sifuna Election Petition No. 12 of 1993** held a very high degree of proof is required.”*

This court is in agreement with the holding by the various courts in the cases cited above. In the present petition, the burden of establishing that any election offence was committed to justify the nullification by this court of the election of the 1st respondent as the Member of Parliament of Juja constituency is on the petitioner. To discharge this burden, the petitioner must adduce evidence that establish the alleged election offences and alleged electoral malpractices to a standard of proof that is higher than that applied in ordinary civil cases of proof on a balance of probabilities. It is this court's view that the standard of proof that must be discharged by the petitioner is that ordinarily applied by the court in civil cases where an allegation of fraud has been made. The court must be satisfied that the allegation of fraud has been properly established. That standard of proof is not akin to that required in criminal cases i.e. that of proof beyond reasonable doubt, but is higher than that which is applied in normal civil cases i.e. proof on a balance of probabilities. In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case is more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51%, as opposed to 49% of the opposing party, is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred. That is not the case in election petitions.

This court will now consider whether the evidence adduced by the petitioner establish his allegation that there were electoral offences and election malpractices in the conduct of the election of Juja parliamentary seat that vitiated the election of the 1st respondent as a Member of Parliament of the said constituency. In evaluating the evidence, the court shall answer issues (iii) and (iv) set out hereinabove. This court will consider the complaints raised by the petitioner in two parts; the first part will address complaints raised in regard to the conduct of the 1st respondent and the second part will deal with the complaints raised in respect of the conduct of the elections by the predecessor of the 2nd respondent and the 3rd respondent.

As regard the 1st respondent, the petitioner complained that the 1st respondent had by himself or through his agents committed an election offence and/or corrupt practice by printing, publishing, posting, advertisements, hand bills, placards and posters which did not disclose on their face the name and addresses of the printers. In his oral testimony before court, the petitioner testified that the posters that the 1st respondent used during the elections did not disclose the name and address of the publisher contrary to **Section 11(1) (b)** of the **Election Offences Act**. The petitioner produced one of the impugned posters as an exhibit in this case. It was the petitioner's case that by failing to disclose the name and address of the publisher, the 1st respondent had committed an election offence which ought to be taken into consideration by the court and thereby result in the nullification of the 1st respondent's election as a Member of Parliament of Juja constituency. The 1st respondent countered this evidence by producing into evidence a poster which the petitioner is alleged to have used during the elections which similarly did not contain on its face the name and the address of its printer or publisher.

This court has carefully considered the evidence adduced by the petitioner and the 1st respondent in regard to this alleged election offence. Having perused the election posters of the petitioner and the 1st respondent, it was clear to this court that both the petitioner's and the 1st respondent's posters did not bear on its face the names and addresses of its printers and publishers. **Section 11 (1)** of the **Election Offences Act** provides that in the event it is established that any person had committed the election offence specified in the **Section**, such a person shall be liable to imprisonment for a term not exceeding four (4) years. It is therefore evident that where any person is aggrieved by any election poster that does not bear on its face the name and address of its printer or publisher, such a person is required to lodge a criminal complaint with the police. The fact that a party to an election petition did not specify on the face of his election poster the name and the address of the printer or publisher cannot result in the nullification of an election. I therefore hold that the petitioner has failed to prove this allegation.

The petitioner alleged that the 1st respondent through his agents caused to be published and distributed a pamphlet which was defamatory of his character. The petitioner produced into evidence a newspaper cutting of "*The Standard*" newspaper dated 1st December 2007. The article complained of is titled "*AG appeals in Kabogo case*". The article alleges that the Attorney General had moved to the Court of Appeal to revive criminal charges which had been brought against the petitioner and other business men linked to the "*suspected tax evasion of KShs. 700 million at the port of Mombasa*". At the back of the photocopy of the article were written the words "*Hon. Kabogo is a murderer*" and "*Hon. Kabogo is a rapist*". According to the petitioner and his witnesses, PW3 Judy Wanjiru Maina and PW6 John Irungu Ruhiu, on 21st December 2007 at Githothua area within Juja constituency, supporters of the 1st respondent led by DW3 Morrison Muchira Muriuki were distributing the said leaflets with a view to disparaging the petitioner and misinforming the public concerning the character of the petitioner. PW6 John Irungu Ruhiu testified that he forcefully retrieved the said leaflets from the supporters of the 1st respondent who were then on motor vehicle registration No. KAL 688K. A fracas ensued between the supporters of the petitioner and the 1st respondent that resulted in both supporters sustaining injury.

According to PW6, he recorded a complaint at Ruiru police station. He was however disappointed that the police took no action. He was later surprised when he was charged together with two other supporters of the petitioner, Isaac Kirika Mburu and Daniel Njoroge Ndegwa allegedly on five counts of assault causing actual bodily harm to the 1st respondent's supporters namely, Morrison Muriuki, Titus Muchiri Muchai, Joseph Ndung'u Njoroge, Judy Waweru Wambui and Ruth Wanjiru Kamau. The 1st respondent in his testimony before court denied that he had either instructed or instigated the distribution of leaflets that were defamatory on the character and person of the petitioner. DW3 Morrison Muchira Muriuki put the blame for the fracas squarely at the court of the petitioner's supporters. Having

carefully evaluated the evidence adduced by the parties to this petition in regard to this aspect of the case, it was evident to the court that in the heat of campaign, the supporters of the 1st respondent did indeed distribute the newspaper article with the words complained of by the petitioner. Although PW6 complained to the police at Ruiru police station, and in fact had the complaint recorded at the occurrence book under OB No. 33 of 21st December 2007, the police took no action. The petitioner did not however adduce evidence to support his claim that the 1st respondent instigated or caused his supporters to distribute the said defamatory leaflets touching on his character.

This court's analysis of the evidence in this regard, leads its to the conclusion that indeed the supporters of the petitioner led by PW6 and the supporters of the 1st respondent led by DW3 had an altercation that resulted in a fracas that led to a few of them being injured. For the supporters of the petitioner to be charged later by the police, for allegedly assaulting the supporters of the 1st respondent, smacks of police partiality. The police were quick to take action in regard to complaint lodged by the supporters of the 1st respondent while on the other hand they were deliberately slow and disregarded, and were indeed not keen at all to investigate the complaint lodged by the supporters of the petitioner with a view to prosecuting the culprits. It was no wonder that when the Senior Resident Magistrate at Thika considered the evidence adduced by the supporters of the 1st respondent, it reached the conclusion that it was impossible to ascertain who assaulted who in the melee that ensued when the supporters of the petitioner and those of the 1st respondent confronted each other. (*See Judgment of the subordinate court in **Thika CMC Criminal Case No. 1278 of 2008 Republic vs. Isaac Kirika Mburu & 2 others***). The petitioner was therefore able to establish that indeed the 1st respondent's supporters distributed leaflets which were defamatory of him. He was however not able to prove that the violence that ensued when his supporters and those of the 1st respondent confronted each other was attributable to the 1st respondent. Having evaluated the evidence in this regard, this court is of the view that this isolated case, and indeed one off incident, did not amount to generalized violence that can in the circumstances vitiate an election. I hold that although the petitioner proved that the 1st respondent supporters distributed leaflets that were defamatory of his character, such distribution was localized in scope that it cannot be said to have materially and substantially affected the conduct and the results of the parliamentary election in respect of Juja constituency. I therefore hold that the petitioner, having not pleaded this aspect of his case in the petition, did not prove the complaint to the required standard of proof.

The third complaint which the petitioner raised against the 1st respondent in his petition is that the 1st respondent had influenced the 2nd and 3rd respondents in the appointment of presiding officers and election clerks with a view to rigging the elections in favour of the 1st respondent. The petitioner testified that the 1st respondent had influenced the appointment of some of his supporters to man the polling stations. The petitioner testified that the 3rd respondent was personally known to the 1st respondent prior to the holding of the general elections of 2007. The 1st respondent denied the allegation that he personally knew the 3rd respondent prior to the nomination date. The 3rd respondent on his part denied that he was personally known to any of the candidates who offered their candidature for the Juja parliamentary seat. Having evaluated the evidence adduced in this regard, I was not persuaded by the evidence offered by the petitioner in support of his claim that the 3rd respondent was personally known to the 1st respondent and therefore colluded with the said official to rig the elections in the 1st respondent's favour. The 1st respondent may have casually become known to the 3rd respondent, however, no evidence was adduced by the petitioner to establish any unlawful deed or act that was allegedly done by the 3rd respondent with a view to aiding the 1st respondent gain unfair electoral advantage against the petitioner in the said parliamentary elections. This court did not find the allegations that the petitioner made against the 1st respondent in regard to his conduct during the elections proved. The court holds that the

petitioner failed to establish the claim that the 3rd respondent was influenced by the 1st respondent in the employment of the presiding officers and polling clerks during the said parliamentary elections. That ground of the petition therefore fails.

Another complaint that the petitioner made against the 1st respondent is that the 1st respondent was guilty of the election offence of bribery. The petitioner and his two witnesses PW4 Henry Mugo Kumuri and PW5 Joseph Kang'ethe Nungari testified that the 1st respondent, through his agents one Godfrey Kaara Mwangi, who was the PNU civic candidate for Gitothua ward, bribed voters while they were in the queue while waiting to vote at Matopeni polling centre. According to the said witnesses, the said Godfrey Kaara Mwangi was distributing cash to voters who were in the said queue. PW4 and PW5 testified that the activities of the said Godfrey Kaara Mwangi caused distraction at the said polling centre to an extent that voting was temporarily stopped. They explained that it took the intervention of the police and particularly the OCS of Ruiru police station, who apprehended the said Godfrey Kaara Mwangi for the bribery to stop and for voting to resume. The fact that voting was temporarily disrupted at Matopeni polling centre was confirmed by one of the presiding officers who was called to testify. James Kanake (2nd and 3rd respondents' DW6) testified that there was commotion at the polling centre. He was however categorical that voting at polling station that he was in charge of, was not disrupted. The 1st respondent countered this evidence by the petitioner by testifying that it was the petitioner rather than himself that bribed voters. He called a witness, DW2 Macharia Kariuki who testified that he witnessed a known supporter of the petitioner named as Mr. Mbangi bribe voters outside Ngoliba polling centre.

Having evaluated the evidence adduced by both parties in regard to the bribery allegations, the court holds that the petitioner indeed established that Godfrey Kaara Mwangi bribed voters who were queuing outside Matopeni polling centre. This court however noted that the said Godfrey Kaara Mwangi was a civic candidate in the said elections. This court cannot therefore reach a conclusion with certainty that the said Godfrey Kaara Mwangi was bribing voters on his own behalf or on behalf of the 1st respondent. The said civic candidate was in the same party as the 1st respondent. The court is of the considered view that the evidence adduced by the petitioner and his witnesses would have been appropriate in a case filed challenging the election of the said Godfrey Kaara Mwangi as a councillor. It could be possible that the said Godfrey Kaara Mwangi bribed voters at the said polling station at the behest of the 1st respondent. This court is not in a position to be certain. In the circumstances of this case however, I am prepared to give the 1st respondent the benefit of doubt. The court holds that the 1st respondent failed to prove his claim that the petitioner also bribed voters. This is on account of the fact that his witness DW2 Macharia Kariuki confirmed that he did not actually see the said Mr. Mbangi bribe voters but rather heard that he had so bribed the said voters. The 1st respondent adduced no evidence to connect the said Mr. Mbangi with the petitioner other than stating that he was a known supporter of the petitioner. In the premises therefore, this court holds that the petitioner failed to establish to the required standard of proof that the 1st respondent bribed voters to such an extent that this court is persuaded to nullify his election on that ground. The petitioner therefore failed to prove any electoral malpractice or election offence as against the 1st respondent.

As regard the 2nd and 3rd respondents, the petitioner made several complaints in his petition which in his view impacted negatively in the parliamentary elections of Juja constituency that the same should be nullified. A prelude to what shall be stated henceforth is that in 2002 and 2007, the predecessor to the 2nd respondent, by Legal Notice No. 172 of 2002 and Legal Notice No. 178 of 2007, made extensive amendment to the election regulations with a view to entrenching certain electoral changes that would mandate presiding officers in polling stations to conduct elections, and thereafter count and tally the votes for each candidate before sending the results to the Returning Officer for the ultimate tallying before the winner of a parliamentary seat is declared to have been duly elected. The election

regulations, referred to as “*The Presidential and Parliamentary Election Regulations*” (hereinafter referred to as the *Election Regulations*), were made by ECK pursuant to the powers donated to it by the law to make such regulations under **Section 34(1)** of the **National Assembly and Presidential Elections Act**. The draft of the regulations, were, pursuant to **Section 34(2)** of the **Act**, approved by the National Assembly before its publication by ECK. The election regulations are meant to govern the conduct of the election from the time the voters are registered to the time the results of the elections are announced. It provides an elaborate procedure by which presiding officers are required to conduct an election and later announce results. The election regulations are meant to entrench and promote the principles of free, transparent and fair elections. It was in that regard that the petitioner made several complaints against ECK and the 3rd respondent in regard to the conduct of the parliamentary election of Juja constituency, which in his view was conducted contrary to the said election regulations.

The petitioner complained that ECK presided over the nomination of parliamentary candidates by the Party of National Unity (PNU). In support of his case, the petitioner produced a letter dated 12th November 2007, written by the then commission secretary of ECK, J. H. Tsola which directed all the districts election coordinators in the country (*employees of ECK*) to provide PNU with electoral officials, including returning officers, presiding officers and polling clerks who would assist PNU in their nomination exercise. Uncontroverted evidence was adduced in this petition which indeed establish that ECK presided over the nomination of both the parliamentary and civic candidates of the PNU political party at Juja constituency. The 2nd and 3rd respondents conceded that indeed the electoral body supervised the PNU Juja constituency parliamentary nominations but denied that this fact actually implied or meant that in the subsequent general elections that were later held they were partial to the 1st respondent who was the PNU candidate.

The petitioner, in particular, complained that the 3rd respondent was the returning officer in the PNU nomination, which according to the petitioner, he partially participated in but later withdrew on account of open bias exhibited in favour of the 1st respondent. The 3rd respondent denied participating in the PNU nomination. Having evaluated the evidence adduced in this petition in regard to that complaint, this court finds that the 3rd respondent has indeed established that he did not participate as the returning officer in the PNU nominations. However, there is evidence that many presiding officers, deputy presiding officers and polling clerks participated as electoral officials in the PNU nomination. For instance, PW2 Esther Wambui Mburu testified that she was appointed by ECK to be a presiding officer at Magogoni polling centre during the PNU nomination that were held on 16th November 2007.

The participation by ECK in the nomination of a political party that would later contest in the general elections was against the principles governing the conduct of election and especially as espoused in the **Code of Conduct** that ECK itself promulgated prohibiting any of its officials to be associated openly with a political party. The participation by ECK in the parliamentary nomination of PNU political party was contrary to its core function of being an electoral body that should be considered as independent and impartial in the conduct of elections. It was no wonder that the people of this nation lost faith with ECK during the subsequently conducted general elections of 2007 that resulted in its disbandment. In the case of Juja constituency, ECK, the predecessor of the 2nd respondent cannot absolve itself of the allegation made by the petitioner that by virtue of its participation in the PNU parliamentary nomination, an impression was created that it was partial to PNU political party during the general elections. Unfortunately for the 2nd respondent, as an electoral body that is supposed to conduct elections in a free, fair and impartial manner, any association with any of the contesting political parties, however innocent or however justifiable in the circumstances, will leave it with the tag of being partial to that political party, more so, if that political party is in power.

The main thrust of complaint made by the petitioner against the 2nd and 3rd respondents relate to the manner in which the elections were conducted; the manner in which the results were recorded in each polling station in the Form

16A; the manner in which the results were tallied at the tallying centre; and in the manner in which the final results were reflected in the Form 17A. The petitioner complained that there were eight (8) polling stations whose Form 16As lacked the signatures or names of the presiding officers. The petitioner testified that the Form 16As in respect of M. O. W. polling station (008-2), Kisiwa polling station (024-1) and Gachororo polling station (037-3) did not contain either the names or the signatures of the presiding officers. He pointed out that the Form 16As in respect of St. Patrick Polling station (010-4), Jamhuri Primary polling station (011-1, 011-2, 011-3 and 011-4) did not contain the ECK stamp validating the same. The 3rd respondent conceded to the fact that he had accepted and indeed tallied the results of the above polling stations even with the errors evident on them.

I have evaluated the evidence adduced by the parties in the case in that regard. **Regulation 35A(1) (b)** of the **Election Regulations** requires the presiding officer to record the total number of votes cast in favour of each candidate. **Regulation 35A(4)** of the **Election Regulations** requires that a presiding officer to sign the declaration set out in the Form 16A certifying the results. It is therefore evident that a Form 16A which is not signed by presiding officer cannot constitute valid results which can be accepted for tallying by a returning officer. A Form 16A which is not authenticated by the stamp of the electoral body cannot be said to contain valid results which can be validated. The 3rd respondent testified that it was not a legal requirement that the Form 16A be stamped before it could be validated. However, it was clear from the evidence adduced, that ECK required all the presiding officers to sign and stamp the Form 16As for the same to be considered valid. In the *Presiding Officer's Check List* issued by ECK on 31st October 2007, at page 19, the Commission directed the presiding officers to sign the Form 16As in the presence of the candidates or their agents. This court therefore finds that the petitioner has established to the required standard of proof that the 3rd respondent accepted invalid results which he tallied and included in the final results as contained in Form 17A.

The petitioner further complained that Form 16As in respect of six (6) polling stations namely Githunguri Ranching polling station (051-4), Ruera polling station (056-2), Twiga polling station (057-1), Thome polling station (065-1, 065-2) and Wendani polling station (069-1) were filled by persons whose names did not appear in the list of presiding officers and deputy presiding officers. In his testimony before court, the 3rd respondent, having produced into evidence the list of presiding officers and deputy presiding officers, conceded that indeed the names of the presiding officers in the said polling stations namely John Ngugi Kimani, Sammy Maina, George Thiong'o, Thomas Maina and Justus Urero did not appear in the said list of Presiding and Deputy Presiding Officers. He however explained that there was a possibility that the said presiding officers or Deputy Presiding Officers were the ones he had recruited after the original presiding officers or their deputies in the list were dismissed on disciplinary grounds. That may have been so. The 3rd respondent was required to update the list of presiding officers and deputy presiding officer before presenting it in court as evidence. As it were, having evaluated the evidence contained in the documentary evidence, this court cannot allow oral evidence to be adduced to vary the contents of such an official document of ECK. This court therefore holds that the petitioner established that indeed persons other than those in the list of presiding officers and deputy presiding officers were allowed to fill the Form 16As. The results in respect of the said polling stations cannot therefore be valid.

The petitioner listed thirty seven (37) polling stations where the presiding officers did not provide statutory comments as required by the law and further failed to allow the agents of the candidates to authenticate the results by signing on the Form 16As. It was the petitioner's case that failure by the candidates or their agents to validate the results meant that the results contained in the Form 16As were invalid. The thirty seven (37) polling stations are Munyu (004-1), MOW (008-1, 008-2, 008-3), Thika Primary (009-4), Jamhuri (011-1), Kenyatta Primary (015-4), Thika Technical (016-1), Kimuchu (019-1), Joy Town (020-1), Thika Stadium (021-5), Mugumoini (022-4), Moi primary (023-3), Karibaribi (027-1), Marimaini (038-2, 038-3), Githurai Kimbo (039-2), Ndiini (042-2, 042-4, 042-6), Mwiki (043-2,

043-6), Kumura (045-3), Murera (046-1), Githunguri Ranching (051-3), Ruiru Railway (054-1, 054-3), Matopeni (055-1, 055-2, 055-3, 055-4, 055-5, 055-6, 055-7) and Mwhiko (059-1, 059-2, 059-3). In all these polling stations, the presiding officers did not give statutory comments in the Form 16As. Neither did they give reasons for the failure or refusal by the candidates or their agents to sign the Form 16As.

Regulation 35A(5)(b) of the **Election Regulations** requires a presiding officer to request each candidate or their agents to append their signature on the Form 16A. If a candidate or an agent refuses or fails to sign the Form 16A under **Regulation 35A(7)** of the **Election Regulations**, the presiding officer is required to record the reasons for such failure or refusal by said candidate or his agents to sign the form. **Regulation 35A(8)** of the **Election Regulations** requires a presiding officer to record where the candidate or the agents are absent when the Form 16A is being filled. **Regulation 35A(9) & (10)** of the **Election Regulations** provides that the results of an election shall not be invalidated by the mere fact that a candidate had refused to sign the Form 16A or was absent when the Form 16A was being filled. It was the 2nd and 3rd respondents' case that failure by the presiding officers to make statutory comments or to give reasons for the failure by the candidates or their agents to validate the results in Form 16A by signing thereof should not by itself invalidate the results. Having considered the rival arguments made by the parties to this petition, it is clear to this court that the regulations, with a view to promoting transparency and accountability in the electoral process, requires candidates or their agents participate in the counting of ballots and thereafter the tallying of the results.

The participation of the candidates or their agents is not incidental or cosmetic to the process but is an important component of the electoral process. That is the reason why the election regulations provide that at each stage of the electoral process the candidates or their agents participate in the process. The presiding officers are required to ensure that at each stage of electoral process the candidates and their agents participate and in the event that a candidate or his agents refuses or declines to participate in the electoral process, a mechanism has been put in place for the presiding officer to give reasons for such failure or refusal by a candidate to participate in the electoral process. In the present petition, it was clear that the presiding officers in the thirty seven (37) polling stations mentioned above failed in their statutory duty when they failed to state in the Form 16As the reasons why some of the candidates or their agents failed or refused to sign the said Form 16A. This court is of the view that failure by a presiding officer to state reasons why a candidate or his agents failed or refused to sign Form 16A or failure to record the absence of such candidate renders the results contained in the said Form 16As invalid. **Regulations 35A(7)** and **(8)** of the **Election Regulations** is couched in mandatory terms requiring that "*the presiding officer shall ...*". A presiding officer has no discretion in the matter.

Another issue that was raised by the petitioner in his bid to invalidate the results of Juja constituency parliamentary election is the discrepancy between the results contained in the presidential and civic vote as contrasted with the results of the parliamentary votes. According to the petitioner, whereas the total number of votes cast in the parliamentary vote as contained in the results published by ECK was 114,808, the total number of votes cast in the presidential election was stated to be 119,050 while the total number of votes cast in the civic election was said to be 119,110. The petitioner testified that the difference of 5,156 votes and 5,216 votes in the presidential and civic votes as compared with the parliamentary vote was sufficient proof that the parliamentary vote had been rigged in favour of the 1st respondent. The respondents, and particularly the 3rd respondent, conceded to the fact that indeed the results of the parliamentary vote and that of the presidential and civic vote varied as pointed out by the petitioner.

The explanations offered by the respondents were illuminating; they stated that there could be a possibility that the presidential vote and the civic vote were the ones which had raised queries and not the parliamentary vote. Another explanation was that it was possible that voters at Juja constituency were sufficiently energized to vote in the presidential and the civic elections and not so in the parliamentary election. Another explanation offered was the one admitted by the 3rd respondent which was to the effect that results from certain polling stations in the constituency in respect of parliamentary vote was not included in the final tally as contained in Form 17A. Having carefully evaluated

the evidence adduced in this regard, it was clear to the court that the discrepancies between the presidential and civic elections on the one hand, and that of the parliamentary election on the other is such that it raises eyebrows. The said elections were conducted from one voters roll. As stated earlier in this judgment, the results of an election are contained in the statutory forms that are provided for under the **Election Regulations** i.e. Form 16A and Form 17A. The 3rd respondent cannot simply explain away the discrepancies in the voter turnout between three elections that were held on the same day and in the same polling stations by stating that the discrepancies could be as a result of his failure to include certain results in the final tally as contained in Form 17A. This court takes judicial notice of the fact that in normal circumstances, the tally of the total number of votes cast in the presidential, parliamentary and civic elections is expected to be more or less the same. There may be instances where a voter makes a conscious choice to vote in a particular election and not in the other election. Such instances are, however, few. The difference of over 5,000 votes between the parliamentary vote on the one hand and the presidential and the civic vote on the other, in the circumstances of this petition, is evidence of serious electoral malpractice that was apparent during the conduct of the elections at Juja constituency. The explanation given by the respondents cannot in the circumstances be said to be exculpatory; this court was not persuaded that such discrepancies in the total votes cast can be wished away in the manner proposed by the respondents.

In answer to the complaints made by the petitioner, the 3rd respondent, the returning officer, made the following concessions. He conceded that some of the results that were handed over to him by presiding officers of various polling stations in Juja constituency were not reflected in Form 17A. This is the official record of the final results of the Parliamentary Vote. He admitted that the results of Githunguri Ranching polling station No. 051 (4), Githunguri Ranching polling station No. 051(5), Ruera polling station No. 056(2), Twiga polling station No. 057(1), Thome polling station No. 065(1), Thome polling station No. 065(2) and Wendani Uchumi ground polling station No.069 (1) were not posted in the final tally reflected in Form 17A. He further conceded that five Form 16As in respect of Ngoliba polling station No. 012(2), Kilimambogo polling station No. 005(2), Gachororo polling station No. 037(5), Githurai Kimbo polling station No. 039(10) and Githunguri Ranching polling station No. 051(6) were missing from the file of the results which were produced in evidence by the 2nd and 3rd respondents. In regard to failure to include the results of the seven (7) polling stations in the Form 17A, the 3rd respondent attributed it to human error. In regard to the missing Form 16As for the five (5) polling stations, the 3rd respondent speculated that the said Form 16As could have been misplaced when they were being photocopied at the national tallying centre at Kenyatta International Conference Centre.

In the petitioner's view, the 3rd respondent's admission confirms the averment in paragraph 10 of his petition that the tallying and the totaling of the votes at the said elections were inaccurate or incorrect. He further stated that the admission by the 3rd respondent regarding the results left out in Form 17A confirms his assertion that the said results were false, fictitious and fraudulent and were neither correct nor accurate as pleaded in paragraph 12 of his petition. On his part, the 1st respondent argued that the court should refuse to read too much in the fact that the results of the said polling stations were not included in the final tally as contained in Form 17A. This is because the 1st respondent won in the particular polling stations and therefore the inclusion of the said results would only have resulted in the increase of the tally of the votes that the 1st respondent garnered in the said parliamentary election. A further complaint made by the petitioner in regard to the filling of the said Form 17A was that the same was not prepared, filled, signed or dated by the 3rd respondent. The petitioner further complained that none of the candidates signed the said Form 17A as required by the law. In answer to these complaints, the 3rd respondent testified that while it was admitted that he did not personally prepare or fill the Form 17A (the same having been filled by two officers assigned to assist him by the ECK on the polling day), he was responsible for the contents of the said Form 17A. He testified that although the petitioner

questioned the validity of his signature in the said document, he confirmed to the court that the signature in the form was one of the three (3) signatures that he signed official documents. He however conceded that the Form 17A was not signed by any of the candidates or their agents. He admitted that he did not date the Form 17A.

What does the law say in regard to the completion of Form 17A? **Regulation 40(1)** of the **Election Regulations** provides that:

“Immediately after the results of the poll for all polling stations in a constituency have been received by the returning officer, he shall, in the presence of the candidates or their agents –

- (a)
- (b)
- (c)
- (d)
- (e)
- (f) complete Form 17A set out in the First Schedule in which he shall declare the –
- (i) name of the constituency;
- (ii) total number of registered voters;
- (iii) votes cast for each candidate in each polling station;
- (iv) number of rejected votes for each candidate in each polling station;
- (v) aggregate number of votes cast in the constituency; and
- (vi) aggregate number of rejected votes
- (g) sign and date the form and –
- (i) give to any candidate or candidates agents present a copy of the form; and
- (ii) deliver to the electoral commission the original Form 16A together with 17A and Form 18.”

It was therefore clear that it was the duty of the returning officer to **personally** complete the Form 17A. **Regulation 40(1)** is set out in mandatory terms meaning that the returning officer **“shall”** perform the task. That task cannot be delegated to anyone else. It was apparent from the evidence adduced by the 3rd respondent that he did not train the persons who tallied the results in the said Form 17A. The 3rd respondent could not even remember their names. He told the court that he accepted the two persons to tally the results because he had been so instructed by ECK. That explanation will not do. It was evident that the 3rd respondent failed in his statutory duty to personally enter the results from the 231 polling stations as reflected in the Form 16As in Juja constituency in the Form 17A.

The 3rd respondent was further mandatorily required to make entries in respect of all the polling stations in Juja constituency as contained in the Form 16As. He cannot purport to abdicate from his statutory responsibility by casually pleading to be excused on the grounds that the non-inclusion of Form 16As in respect of the seven polling stations was understandable because it was occasioned by human error. The issue in regard to the manner in which the Form 17A is required to be filled was considered by Musinga J in **Manson Oyongo Nyamweya vs. James Omingo Magara & 2 others Kisii High Court Election Petition No. 3 of 2008 (unreported)** where at page 84 of his judgment the Learned Judge held as follows:

“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.”

This court agrees with the above holding by Musinga J.

In the present petition, it was apparent that the 3rd respondent failed to verify or confirm that the results filled in the Form 17A were the true and correct results of all the 231 polling stations in Juja constituency. The Form 17A was not

dated. It was evident that the 3rd respondent, if at all, filled the Form 17A in the absence of the candidates (*which is a mandatory requirement of the law*). That was the reason why the candidates, including the 1st respondent, failed to append their respective signatures on the said Form 17A. The said Form 17A cannot therefore be said to be a valid legal instrument or statutory form containing the declared results of Juja constituency. This is on account of the fact that the results contained therein do not reflect the true and correct results of the Juja Parliamentary election. This court could have evaluated the anomaly contained in the results in the said Form 17A with the actual ballots cast if it could have been in a position to order for the scrutiny and recount of the ballots. Unfortunately, as stated earlier in this judgment, this court could not possibly have ordered for the said ballots to be scrutinized when the integrity of nearly a third (66 out of 231) of ballot boxes had been seriously brought into question. It was apparent that the said ballot boxes were tampered with in the period between the time the defunct ECK was disbanded and the constitution of the 2nd respondent.

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

The irregularities manifest in the Form 16As, the Form 17A and in the results were indeed to a large extent conceded to by the 2nd and 3rd respondent. The 2nd and 3rd respondents, including the 1st respondent, were however of the view that the irregularities evident thereto and the mistakes committed by the presiding officers and the returning officer were not of such a nature or magnitude as to invalidate the results of the parliamentary election in respect of Juja constituency especially where as is apparent from the declared results the 1st respondent won the seat by over 19,000 votes. In support of their argument in that regard, the respondents cited **Section 28** of the **National Assembly and Presidential Elections Act** which provides that:

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

The 1st respondent cited **Halsbury’s Laws of England, 3rd Edition Vol. 14 at paragraph 261** which states that:

“An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election if the tribunal is satisfied that the election was notwithstanding those transgressions, an election really and in substance conducted under the existing law, and that the result of the election, was not and could not have been affected by those transgressions.”

On his part, it was the petitioner’s case that the irregularities that he has complained of and which he has established were so massive that they substantially affected the outcome of the results of the parliamentary election of Juja constituency. This court is cognizant of the requirement that no election should be invalidated because of minor irregularities which do not affect the substantially affect the outcome of the election as reflected in the official results.

Can the irregularities and malpractices cited above be considered as of such a nature or magnitude as not to

affect the outcome of the results of the parliamentary vote of Juja constituency? It was clear from the evidence that all the irregularities and electoral malpractices taken in totality seriously affected the credibility of the results that were announced and published by the 2nd and 3rd respondents. The fact that the said results reflect that the 1st respondent had won the parliamentary by more than 19,000 votes is no reason why the irregularities and malpractices should be condoned. If that were the case, then we would not have no problem with election results declared in respect of leaders of totalitarian regimes who are said to have won elections by a margin 99.9%. The validity of an election is not dependent on the results alone but is a factor of the entire electoral process as recognized under the Constitution, the **National Assembly and Presidential Elections Act** and the **Regulations** made thereunder and International law and the Conventions and Treaties which Kenya is signatory to and party to. The irregularities and electoral malpractices that were evident in Juja constituency were such that they materially affected the outcome of the results which were declared by the 3rd respondent. It was evident that the 3rd respondent accepted and tallied Form 16As which did not conform to the law and which could not, under any circumstances, be accepted as containing valid results. The Form 17A that the 3rd respondent relied on to declare the results of Juja parliamentary elections is riddled with irregularities that the same cannot be considered under any premises to constitute a statutory form which stands up to legal scrutiny. Taken in totality, the irregularities and electoral malpractices complained of by the petitioner are of such magnitude that the results of Juja parliamentary election held in the 2007 cannot stand the credibility and integrity test. The said election cannot be said to have been transparent, free and fair. This court therefore holds that the petitioner established to the required standard that there were indeed massive irregularities and electoral malpractices in the conduct and the declaration of results of Juja parliamentary election that negates and voids the said results.

Before this court concludes this judgment, this court wishes to observe that the events that occurred after the 2007 poll should serve as a wakeup call for the 2nd respondent as the body mandated to conduct elections in this country. The events that subsequently took place after the poll literally established that elections are a matter of life and death. Many innocent Kenyans lost their lives because of the way the 2007 elections were conducted. One may ask why courts should hold an electoral body to a high standard in the performance of its duties. I think if there is any statutory body whose actions should be considered to be above the board and which should perform its duties to the required standard of integrity and probity, it should be the electoral commission. The electoral commission has a duty to inculcate and imbue confidence in the electorate that its process is transparent, free and fair. I would be speaking for many Kenyans when I state that the events subsequent to the 2007 elections made many Kenyans stand up and take note that an electoral process cannot under circumstances be compromised. Many Kenyans were ashamed when our country was referred in similar terms and in the same breath with a neighbouring failed state. Kenya is not, and cannot be considered as a banana or a groundnut republic. This court will stand up and be counted as not countenancing or tolerating electoral irregularities and malpractices.

This court wishes to thank the parties to this petition who conducted themselves with decorum during the entire hearing of this case. I wish to thank in particular counsel who appeared for the parties to this petition for their industry and research in presenting their respective clients' cases. If this judgment does not meet the expectations of their clients, it shall not be on account of any failure on their part. Mr. Kimuli, thank you for valiantly standing up to your senior colleagues in the profession and ably representing your clients. Professor Githu Muigai, my teacher at the University and his junior Mr. Muthomi ably defended their client. The lack of success on their part is not a reflection on their excellent intellectual and legal ability. Mr. Havi and Mr. Omwanza, and who were occasionally joined by Richarch Kwach (*retired Judge of appeal*) acquainted themselves well in the prosecution of this petition. It suffices for this court to state that it was a pleasure and indeed a privilege to have counsel of such caliber, learning and experience to appear before it. This judgment is a reflection of their joint output.

So, after all is said and done, it is time for this court to pronounce the outcome of this petition. Taking into consideration all the glaring anomalies, the irregularities and the electoral malpractices cited in this judgment, including clear and blatant non-compliance with mandatory requirements of the law, by the presiding officers and the 3rd respondent, and more so the conduct which clearly made the elections which were conducted in respect of the Juja parliamentary seat not to be transparent, free and fair, this court pronounces and declares the said elections and the results thereto to be null and void. The 1st respondent was not validly elected as a Member of Parliament of Juja parliamentary constituency. A certificate to that effect shall issue forthwith and shall be served upon the Speaker of the National Assembly in terms of **Section 30(1)** of the **National Assembly and Presidential Elections Act**. The 2nd respondent should therefore proceed to conduct a By-election as required under the law. As regards costs, since the electoral malpractices and irregularities that were complained of were committed by 2nd and 3rd respondents, I will order that they pay the cost of the petitioner and the 1st respondent. No election offence was established as against the 1st respondent. The costs for counsel for the petitioner and the 1st respondent shall be certified for two advocates.

It is so ordered.

DATED AND DELIVERED THIS 16TH DAY OF APRIL, 2010.

L. KIMARU

JUDGE