



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Election Petition 5 of 2008

WILLIAM MAINA KAMANDA..... PETITIONER

VERSUS

MARGARET WANJIRU KARIUKI.....1ST RESPONDENT

MANASSEH MUGASIA.....2ND RESPONDENT

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

JUDGMENT

(1) This is a Petition filed by the Hon. William Maina Kamanda (hereinafter referred to as “**the Petitioner**”) pursuant to **section 44 of the Constitution of Kenya, section 19 of the National Assembly and Presidential Elections Act [Cap. 7] and rule 4 of the National Assembly Elections (Election Petition) Rules, 1993** to question the validity of the election of the Hon. Bishop Dr. Margaret Wanjiru Kariuki (hereinafter referred to as “**the first Respondent**”) as the duly elected Member of Parliament for the Starehe Constituency in Nairobi (“**the Constituency**”) at the General Elections which were held on the 27th December, 2007. The Petitioner and the first Respondent were among the seventeen (17) candidates who stood for election in the Starehe Constituency. At the conclusion of the elections, the first Respondent was declared as the winner with 29,496 votes. The Petitioner came second with 28,601 votes.

(2) Manasseh Mugasia (hereafter referred to as “**the second Respondent**”) was the Returning Officer appointed by the Electoral Commission of Kenya (the third Respondent and hereinafter referred to as “**the ECK**”) to conduct and supervise the elections in the Starehe Constituency. He was in that capacity the servant and agent of the ECK. On the basis of those results the second Respondent declared the first Respondent to have been duly elected. Consequent upon that declaration he submitted a return to the ECK as a consequence of which the first Respondent was gazetted by the ECK as the Member of Parliament for the Starehe Constituency. The ECK has since been replaced by the Interim Independent Electoral Commission.

(3) The Petitioner was a registered voter in the Starehe Constituency and therefore entitled to bring this petition. The petition shows that the total votes cast at the Parliamentary elections were tallied by the second Respondent as 70,853 votes and for the Presidential election the tally was given as 84,452 votes. The Petitioner claims that the difference between these two figures is *prima facie* evidence of a flawed Parliamentary election and on that ground he applied for and was

allowed his request for scrutiny and/or recount of the votes cast at the election. I have already dealt with the question of the necessity for a scrutiny and recount in my interlocutory ruling, to which I do not wish to add anything here.

(4) The Petitioner also alleges that the results that he received from his agents indicated that he had won the Parliamentary election in the Constituency by garnering 46,900 votes against the first Respondent's 29,496 votes. He further states that the first Respondent was also captured on camera two days after the election complaining that the Parliamentary elections had been rigged. The Petitioner believes that he won the election and for that reason he should be declared the Member of Parliament for the Constituency. The Petitioner further alleges that at the time the second Respondent announced the results the second Respondent had not received the results from a number of polling stations and therefore his tallying was premature and rendered the elections invalid. This failure the Petitioner contends adversely affected his overall position. The Petitioner also avers that in violation of **regulation 34(3) of the Presidential and Parliamentary Elections Regulations ("the Regulations")** his agents were not allowed to accompany the ballot boxes and sealed packets from various polling stations when they were being delivered to the Returning Officer (the second Respondent) for the purposes of tallying the results. The Petitioner further asserts that on the voting day various polling stations in the Constituency were opened late and the Presiding Officers at those stations did not extend time for voting to make up for lost time. He says that this failure adversely affected the voting as the stations were closed before some voters were able to cast their votes. The Petitioner also avers that when voting opened on the morning of the 27th December, 2007 the Presiding Officers in a number of polling stations refused to supply the Petitioner's duly authorized agents with the serial numbers of the ballot papers and boxes in breach of the **Regulations**. In his view this failure compromised the safeguards stipulated in **regulation 36** of the **Regulations**.

(5) The Petitioner also complains that in various polling stations and in their immediate precincts the first Respondent's agents were seen communicating with electors with a view to influencing how they would vote which contravened **regulation 26 of the Regulations**. In paragraphs 21-23 of the petition it is alleged that in various polling stations in the Constituency the Presiding Officers did not permit the agents of the Petitioner to sign the declaration form set out in Form 16A and that they were not given the opportunity to sign or record their reasons for refusing to sign those forms. The Petitioner says that his agents were not given copies of the declared results in a number of polling stations. He also says that his agents were denied the opportunity to ask for a recount.

(6) The allegation in paragraph 25 of the petition is that on or about the 29th December, 2007 the second Respondent publicly announced the results of the Parliamentary elections for the Petitioner and the first Respondent only. The results for the other fifteen (15) candidates were not publicly announced and the Petitioner says it was therefore impossible at that stage to determine the official voter turn-out. It is the Petitioner's case that this failure to publicly announce the results of all Parliamentary candidates violated **regulation 40(1)(d) of the Regulations**. The Petitioner further claims that the second Respondent did not after receiving the results from all polling stations in the Constituency tally the results in the manner prescribed by **regulation 40(1)(a) of the Regulations**. He also alleges that the second Respondent did not give his agents who were present at the time of announcing the results a copy of the completed Form 17A. There is an allegation in paragraph 28 of the petition that the Presiding Officers in breach of **regulation 35 A (5)(d) of the Regulations** failed to post and or affix copies of the declaration of the results at various polling stations. In paragraph 30 the Petitioner asserts that the ECK in dereliction of its constitutional duties and obligations did not supply adequate ballot papers, lamps and other requisite materials to all the polling stations in the Constituency thereby de-franchising some of the electors. It is alleged in paragraph 31 that the Electors' Registers supplied to the polling stations in the Constituency were incomplete and some electors' names were missing thereby denying such electors the right to vote. It is the Petitioner's contention that in the light of the violation of **the Regulations** which he has set out in the petition it was impossible to achieve a free fair and transparent election. He says these failures brought about a result which did not

reflect the overall will of the electors in the Constituency. On the basis of those allegations the election was heavily tainted with illegality and should therefore be declared null and void and that in lieu of the declaration of the first Respondent as the successful candidate the Petitioner should be declared the duly elected Member of Parliament for Starehe Constituency in place of the first Respondent.

(7) There are further complaints in paragraphs 33, 34, 35 and 36 of the petition which relate to the nomination of the first Respondent as a candidate by her Party the Orange Democratic Movement (“ODM”) but nothing really turns on this and I need not set them out herein as the ECK had properly accepted her candidature as a duly nominated candidate of her Party and no evidence whatsoever has been placed before the court by the Petitioner to contradict that position.

(8) The Petitioner avers in paragraph 37 that at various polling stations in the Constituency the first Respondent’s agents and supporters intimidated electors and threatened them with violence in breach of **regulation 24(4) and (5) of the Regulations** as well as the **Electoral Code of Conduct**. He also says in paragraph 38 that the first Respondent together with her supporters disrupted the tallying exercise at the Kenya Polytechnic polling station forcing the Police to use tear gas in the tallying hall. This created a stampede and in the commotion ballot boxes were opened and seals broken. The Petitioner further alleges in paragraphs 39, 40 and 41 that the first Respondent committed explicit electoral offences namely undue influence by threatening electors with violence and that as a Bishop of a Church known as Jesus Is Alive Ministries [“JIAM”] she influenced the members of her Church to vote for her. The Petitioner also says that the first Respondent and her agents bribed electors and election officials to ensure her election. In paragraph 43 of the petition the Petitioner alleges that in a number of polling stations the campaign materials of the first Respondent and her sponsoring Party were allowed into the polling stations.

(9) Finally the Petitioner avers in paragraph 45 that by reason of the non compliance with the provisions of **the Constitution the National Assembly and Presidential Elections Act the Regulations and the Election Offences Act** [Cap. 66] the Parliamentary election for the Starehe Constituency was not so conducted as to be substantively in accordance with the law or in compliance with the principles underlying those laws. The consequence he says is that those breaches and complaints affected the result of the said election.

(10) On the grounds which the Petitioner has put forward and which I have summarized in the foregoing paragraphs, the Petitioner sought the following prayers:

- “(a) **It be ordered that there be a scrutiny and recount of all the votes recorded as having been cast in the Parliamentary elections in the Starehe Constituency.**
- (b) **It be ordered that all the marked copies of the electors’ registers used in all the polling stations in the Starehe Constituency in the general elections held on 27th December, 2007, be examined to establish and determine the exact number of electors who cast their votes.**
- (c) **It be ordered and determined that the first Respondent was not qualified to contest Parliamentary election and was not legally and validly nominated to contest the Starehe Parliamentary seat.**
- (d) **It be ordered, determined and declared that the election of the first Respondent as Member of Parliament for the Starehe Constituency was null and void and she was not duly elected.**
- (e) **It be ordered that pursuant to Rule 4(3) of the National Assembly Elections (Election**

Petition) Rules, 1993 the Petitioner be declared duly elected Member of Parliament for the Starehe Constituency.

(f) It be ordered that the Respondents be condemned to pay the cost of this petition.

(g) Such further or other relief or orders be made as may be just.”

- (11) At the hearing of the petition the Petitioner gave evidence to elaborate on the allegations made in the petition and also called witnesses who gave evidence in support of those allegations. There is one allegation which I feel compelled to deal with straight away because I regard it as totally lacking in merit. This is the claim in paragraph 40 of the petition that the first Respondent in her capacity as a Bishop in JIAM commands total spiritual influence over the members of that Church and that because of that they were all co-ersed into voting for her. First the court did not have the benefit of the membership of that Church who were also registered voters in the Starehe Constituency and who because of the first Respondent's special powers were forced to vote for the first Respondent. Secondly the Petitioner did not call witnesses to testify that he or she fell under the spell of the first Respondent and failed to exercise his or her right to vote independently. In an attempt to prop up this allegation the Petitioner called a number of witnesses who upon cross examination turned out not to be even members of the first Respondent's Church. The allegations in paragraph 40 must therefore be rejected as baseless.
- (12) One of the witnesses called by the Petitioner was Ms. Irene Njambi Bulinga (PW2) from Mathare Ward and a registered voter in the Starehe Constituency. Her evidence was that at the material time she was a member of JIAM which she joined in February 2007. She deponed in her affidavit and repeated in her testimony that during the run up to the General Election she attended services at the Church at which the first Respondent as Bishop ordered all worshippers to vote for her at the forthcoming elections and repeatedly said that those who refused to vote for her would be cursed. Bulinga also said that the first Respondent said that she would take the Starehe Constituency by force. She said that she was so upset by this intimidation by the first Respondent that she stopped attending services at the Church before the election.
- (13) These allegations of undue influence made by Ms. Bulinga were put to the first Respondent when she gave evidence and they were strenuously denied. The first Respondent told the court that Ms. Bulinga was not a member of her Church and that her name does not appear in the register of members kept by the Church. She denied influencing members of her congregation to vote or cursing those who did not do so. She also said that as a leader seeking to become a Member of Parliament there was no way she could even attempt to force people to vote for her. The first Respondent also denied the claim by Ms. Bulinga that she had publicly sworn to take Starehe for Jesus. I have no hesitation in accepting the version of the first Respondent and I reject the testimony of Ms. Bulinga as there is no doubt in my mind that it was fabricated.
- (14) The Petitioner also called Mr. James Philip Kiilu (PW3) who was at the material time residing at the Mathare Hospital. He was appointed Assistant Returning Officer for Starehe Constituency by the ECK and in that capacity he went round most of the polling stations in the Constituency in the course of polling day. He told the court that around the Kenya Polytechnic polling centre he saw some agents of the first Respondent whom he did not name bribing voters. From their badges he deduced that these were the agents of the first Respondent and that he reported this both to the Police and the Returning Officer. He also claimed to have witnessed incidents of bribery at various polling centres including Kariokor, City Primary, Park Road, Kiboro and Mathare Youth Polytechnic but he took no action although he said he made a report to the Returning Officer. Though he made these claims he did not give any names or other particulars to anyone. This witness also testified that at the conclusion of the counting only the results of the Petitioner and the first Respondent were announced. Mr. Manasseh Mugasia the second Respondent who was the Returning Officer for Starehe Constituency gave evidence on his own behalf and was emphatic that he read out the results for all the seventeen (17) candidates. He dismissed Mr. Kiilu's claim that only two results were announced as false. On this point I accept

the evidence of the first Respondent and the second Respondent as against the evidence of the Petitioner and Mr. Kiilu.

- (15) The Petitioner also called Mr. Martin Baiya Kihiu (PW4). He was deployed as Deputy Presiding Officer at Mathare Youth Polytechnic stream No. 7 and he had five (5) polling clerks under him. It was his evidence that there were no agents for the Presidential election in his stream and that the only agents present there were for the Parliamentary and Civic elections. In his stream voting started at exactly 6.00 a.m. and closed at 7.00 p.m. It was his evidence that at some point during the day there was some commotion among the voters in the queue which he immediately reported to the Police and was quickly dealt with. Mr. Kihiu testified that there were a number of illiterate voters who were assisted to vote as the law requires though in one or two cases some agents out of ignorance claimed the “ownership” of these voters. Mr. Kihiu did not therefore allow the agents to direct these particular voters on how they should vote. He also said that earlier in the morning he had come across a group of people sitting in a circle who he said were sharing money. They told him that if he also wanted some money he should join the group but he declined. He could not identify who these people were although he said they were shouting ODM slogans and concluded they were supporters of ODM. This witness also said that some persons who he did not identify served voters with chicken and chips for lunch and that he reported this to the Police. It was also his evidence that by the time the final results were officially announced not all the results from all the polling stations had been received and in this regard he mentioned Parochial, St. Peter’s Claver’s, St. Teresa’s, City Primary, Moi Avenue, Park Road, Kariokor Social Hall, Kenya Polytechnic and Valley Bridge. He says that at the time the results were being announced the Presiding Officers for these centres were still standing in line along with their ballot boxes which they were waiting to hand in. This is a very serious allegation which a responsible election official would have brought to the immediate attention of the Returning Officer or a Commissioner of the ECK. Mr. Kihiu said that he did not report this to the Returning Officer but merely made a note in his ECK field note book which he did not produce. It is clear to me that Mr. Kihiu’s evidence was deliberately tailored to sustain the Petitioner’s allegations of irregularities. He is not a credible witness and no reliance can be placed on his testimony.
- (16) The next witnesses called by the Petitioner was Mr. Patrick Allan Weru (PW5) a resident of Mirema off Kamiti Road near Zimmerman. He is the Chief of Utalii Baba Dogo in Kasarani Division but is a registered voter in the Starehe Constituency. He voted at Parochial Primary School within the grounds of the Holy Family Basilica Cathedral. After casting his vote he went straight to the Kenya Polytechnic tallying hall. He did so out of his own interest as he was not an agent of any candidate or political party. He remained at the Kenya Polytechnic until the following day having spent the night there. He appears to have remained at the Kenya Polytechnic until the morning of the 30th December, 2007. He claims to have been in the tallying hall and sat at the front on the upper stage where only the ECK officials sat. Under cross-examination he admitted that he was not an accredited official of the ECK nor an observer. He simply sat there because he found an empty seat and nobody stopped him from sitting there. It was his evidence that he sat close to the Returning Officer. From that strategic position he saw a blue file on the table in front of the Returning Officer with the handwritten words “**Maina Kamanda 46,900 winner**”. He did not bother to check this figure with the Returning Officer but moved closer to him and asked him to announce the results but the Returning Officer told him that the results would be announced after the Presidential results had been announced. He also claims to have seen the Returning Officer fiddling with the results but he admitted under cross-examination that he did not report all this to anyone. He also claims to have seen the Returning Officer move from his seat to the end corner of the long table where he used white out and a blue marker to alter the results. The allegations made by this witness against the Returning Officer were denied by Mr. Mugasia. It is clear to me that the witness did not see what he claims to have seen but was simply fantasising. Mr. Weru struck me as a very loyal supporter of the Petitioner who believed he was serving the Petitioner’s best interest but in the event his evidence was completely worthless and I reject it.
- (17) The Petitioner’s next witness was Mr. Samson Mugacha Mwangi (PW6). He said that he is

closely associated with the Petitioner and on the 27th December, 2007 he was assigned the duty of overseeing all the Petitioner's polling agents. He was present in the tallying hall when the results were announced and the first Respondent was declared the winner. The Petitioner told him he would challenge the results in the court. It was also his evidence that as part of the Petitioner's preparation to file a petition he accompanied the Petitioner to the offices of Kilukumi & Company Advocates. They were advised to obtain material documents from the ECK. On the 8th January, 2008 the Petitioner sent the witness to the ECK offices at Anniversary Towers to collect Form 16A for the Starehe Constituency. At the ECK offices he was attended to by a Mr. Abdi who was unable to provide the documents immediately and asked him to collect them the following day at 3.00 p.m. He returned on the following day and was given a bundle of documents in an envelope. He did not inspect the documents but he was told that there were two Form 17As and the Form 16As for the Constituency. On the 14th January, 2008 in the company of the Petitioner they took the documents to the said Advocates. He produced the envelope containing the forms given to him by Mr. Abdi. Cross-examined by Mr. Chacha Odera learned counsel for the first Respondent he admitted that the figure of 46,900 votes which he said the Petitioner garnered was based on information he obtained from one of the Petitioner's agents whom he did not name. He admitted that he did not examine the forms for the purposes of working out his own calculations of the results. The witness also said that he did not open the envelope when he received it from the ECK but took it straight to the offices of the Petitioner's Advocates. He was not involved in any official capacity in the elections but was simply running errands for the Petitioner. He said that he understood from the Petitioner that his principal ground of complaint was that the results as announced by the Returning Officer differed markedly from the results given to him by his agents.

- (18) The next witness for the Petitioner was Mr. Alfred Ndani Mwangi (PW7). He was the Petitioner's agent at the Kenya Polytechnic polling centre. He was present at the tallying hall in the evening. It was his evidence that the Petitioner's agents from all the 204 polling centres handed to him (the witness) all the results as recorded by them. Some were in Form 16As others were hand-written on small pieces of papers. He computed the results in a book he had and his computation showed that the Petitioner had garnered 46,900 votes. He also added up the results of the first Respondent which numbered 29,000 votes. He said the agents who did not have Form 16As claimed that they had not been given any at the polling stations. It was also his evidence that when the results were finally announced on the 29th December, 2007 only those of the Petitioner and the first Respondent were announced and the first Respondent was the winner. The Petitioner was angry and tried to talk to the Returning Officer but he (the witness) could not hear what the Petitioner was trying to tell him. This witness also claims to have seen the first Respondent giving money to ECK officials on the raised platform (stage) in the tallying centre at about midnight on the 28th/29th December, 2007. He claims this money was given in the presence of the Returning Officer and he watched this activity from where he was sitting amongst numerous other people in the hall. The witness did not report this incident either to the Petitioner or to any other person in authority that he had seen the first Respondent bribing election officials. He admitted under cross-examination by Mr. Dan Kasina learned counsel for the ECK that he would not recall the names of the ECK officials who were involved in the alleged bribery incident though he claims to have mentioned it to Mr. Samson Mugacha Mwangi (PW6).
- (19) Ms. Cecilia Wairimu Njathi (PW8) was assigned some work by the Petitioner to oversee proceedings at St. Peter's Claver's Primary School. She was supposed to monitor how people voted and generally to ensure that everything ran smoothly. It was her evidence that the Presiding Officer at that station did not give the Petitioner's agents the results of the voting. She herself asked the Presiding Officer to issue the documents but he declined. She maintained that not one of the agents at St. Peter's Claver's was given the written results and she informed the Petitioner accordingly by phone. Though she claims to have entered all her observations for the day in her field book she did not produce it as evidence in this petition.
- (20) The last witness called by the Petitioner was Mr. Stephen Maina Gathoni (PW9). He was part of the Petitioner's campaign team and was assigned the duty of being the person overall in charge at

Kariokor Social Hall polling centre where there were sixteen (16) polling stations. He said that although the votes were counted at the centre no announcement was made. He said the results were announced at the Kenya Polytechnic but he could not remember who made the announcement. He testified that he remained at the Kenya Polytechnic until the very end when the first Respondent was declared the winner. He could not recall the number of candidates in respect of whom results were announced. Throughout the time he was at the Kenya Polytechnic he did not hear the results of Kariokor polling centre being announced. He admitted that the Petitioner had a total of thirty-two (32) agents at the centre but he did not know how many agents the first Respondent had. He did not report to the Petitioner that no results had been announced at the polling centre. The witness later changed his evidence to say that results for eight (8) stations were released at the centre but he personally was not given any documents. He said that at some point after the elections he went to the office of Mr. Mwangi who had his office at Rehema House. He said Mr. Mwangi was an employee of the Petitioner and while there he saw Form 16As with Mr. Mwangi. He had not seen them before that date. The witness also said that as they were making their way to the Kenya Polytechnic after the voting closed they were attacked by unidentified persons and scattered in different directions. They later regrouped at the tallying centre.

- (21) The Hon. Bishop Dr. Margaret Wanjiru Kariuki the first Respondent (RW1) gave evidence to answer the allegations made against her by the Petitioner and his witnesses. Apart from being an Assistant Minister in the Ministry of Housing Hon. Wanjiru Kariuki is also a Bishop in a Church known as Jesus Is Alive Ministries [JIAM]. In her evidence she denied the allegation that she displayed posters and campaign materials at various polling stations. She also denied the claim by one of the Petitioner's witnesses that she was seen bribing ECK officials at the Kenya Polytechnic hall on the 29th December, 2007. She denied ever meeting the Returning Officer or any ECK Commissioners before the election. She also denied the Petitioner's claim that at the end of the counting exercise only the results for herself and the Petitioner were announced. The first Respondent also denied that she threatened electors with violence and stopped them from voting. She emphatically denied the allegation by Ms. Irene Bulunga (PW2) that on a number of occasions during the run up to the election in her sermons in Church she ordered all the worshipers and faithful to vote for her and threatened to curse any one of them who failed to do so. This allegation was made to support the averment in the petition that the first Respondent used undue influence to procure votes. It is said that the first Respondent used the slogan "Starehe for Jesus" to woo voters and that because of this a good number of members of her Church who would otherwise have voted for the Petitioner did in fact vote for the first Respondent. This claim is totally ridiculous as it was not supported by any credible evidence. First not a single witness was called by the Petitioner to say that he or she fell under the spell of the first Respondent and against their better judgment voted for her. Secondly even if the first Respondent used the slogan "Starehe for Jesus" at rallies during her campaigns that of itself does not amount to an election offence. I find no substance in this allegation. The first Respondent also denied the Petitioner's charge that she claimed to have been anointed by God to be the Member of Parliament for Starehe. Again this was a mere allegation and no evidence was led in support of it.
- (22) Mr. Patrick Anyanziwa Opingo (RW2) who was the first Respondent's chief agent at Kiboro polling station testified that there was no incident of intimidation of voters at Kiboro polling station. He also said that at the end of the voting exercise the Petitioner's agents asked for a recount and it was given. He also said that all the agents signed Form 16A. When in cross-examination he was shown Form 16As which were not signed by anyone he disowned them.
- (23) Mr. Timothy Khaemba Wafula (RW3) who was the first Respondent's agent at Mathare Youth Polytechnic centre told the court that he did not see any incidents of bribery at the centre.
- (24) Ms. Roseline Soul Otambo (RW4) a retired teacher and hardware dealer at Kibera was employed as a Returning Officer at the Kenya Polytechnic polling centre. It was her evidence that no allegations of bribery were brought to her attention by anyone. When shown Form 16As for stations numbers 4 and 5 she doubted their integrity because they were not originals and were unsigned.

- (25) Mr. Joshua Mogere (RW5) who was the first Respondent's chief agent at St. Peter's Claver's polling station testified that there were six (6) agents working under him there. It was his evidence that the polling station opened promptly at 6.00 a.m. and polling continued until 6.00 p.m. He did not witness any incident of intimidation and none was reported to him by the agents under his charge. He denied having heard from the electronic media or otherwise that his candidate namely Bishop Wanjiru was claiming that the election had been rigged.
- (26) Mr. Benson Makori (RW6) an accountant by profession was the Deputy Presiding Officer at Kariokor Social Hall polling centre. It was his evidence that the station opened at 6.00 a.m. in the morning but closed an hour early at 5.00 p.m. because by that time there were no other persons waiting to vote. Mr. Makori further testified that at the end of the polling exercise he signed all the fourteen (14) Form 16As and he gave each agent who was present a signed Form 16A. He confirmed having signed all the Form 16As delivered to the agents as well as those he retained. These forms were also signed by the agents present. He announced the results after completing the forms. It was also his evidence that he left the tallying hall at the Kenya Polytechnic in the early hours of 28th December, 2007 and went home to eat and get some rest. He returned to the centre later that evening and was present when the results were announced. He told the court that the claim by the Petitioner that the Returning Officer announced only results for two (2) candidates namely the Petitioner and the first Respondent was untrue. The Returning Officer announced the results for all the seventeen (17) candidates.
- (27) Mr. Patrick Kinyua (RW7) was the first Respondent's chief agent at Parochial polling centre. There were fourteen (14) polling stations at the centre and the first Respondent had two (2) agents per station making a total of twenty-eight (28). All the other candidates were likewise represented. Though the station should have opened at 6.00 a.m. in the morning it was not opened until 8.00 a.m. because a number of ballot boxes had been inadvertently misdelivered. This was sorted out by the ECK officials and the delay was explained to all the agents who were all satisfied with the explanation. Because of that hitch polling was extended to well beyond 6.30 p.m. to compensate for the lost time. He also testified that at the time and during the handing over of the Form 16As and the ballot boxes to the Returning Officer no complaints were raised by any candidates or any of their agents. Shown some fourteen (14) Form 16As he pointed out that they were all photostat copies. He also confirmed that the number of votes in each form are written in original black ink but the names are in photocopy. The name "Parochial" and the station numbers are also written in black ink. He pointed out that none of the fourteen (14) forms were signed by the Presiding Officers. He also observed that though there is in each of the forms what looks like an original ECK stamp none of the forms bear any of the signatures of the agents or the candidates. He was emphatic that those were not the forms which were signed by the Presiding Officers or their deputies or the agents of the candidates at the Parochial polling station.
- (28) Mr. Duncan Okoma (RW8) was at the material time a Pastor at the Jesus Is Alive Ministries [JIAM]. He was one of the chief agents of the first Respondent the other one being Mr. Geoffrey Ombogo. They were not assigned to any specific polling centre but they supervised all the other agents. It was his evidence that he was at the Kenya Polytechnic hall on the morning of the 28th December, 2007 when the first Respondent entered the hall. She was accompanied by her aide. The witness was already seated and the first Respondent took a seat not very far from him. From where he sat he could see what she was doing. He said there was no truth at all in the claim by Mr. Patrick Weru (PW5) that at some point Bishop Wanjiru became unruly and climbed on a chair. If that incident occurred he would have seen it. At a certain point during the tallying when it appeared that the first Respondent was in the lead there was a commotion amongst the supporters of the candidates which forced the Police to lob tear gas to restore calm. After that commotion he was one of the persons selected to represent the first Respondent at the tallying that resumed. This arrangement was floated by the ECK and agreed to by all the candidates. He also dismissed as false Mr. Weru's claim that at some point the Returning Officer retreated to a corner where he started working on some files. His cross-examination also covered a video clip

introduced by Mr. Kilukumi (for the Petitioner) about which I will have something to say a little later on in this judgment.

- (29) Mr. Geoffrey Ombogo Makworo (RW9) is a member and a trainee Pastor of Jesus Is Alive Ministries [JIAM]. He was the first Respondent's other chief agent along with Mr. Duncan Okoma. He performed the same function in relation to the election as Mr. Duncan Okoma. He explained how both of them visited various polling centres to ensure that all the agents of the first Respondent arrived on time and performed their duties diligently. It was his evidence that he was at the tallying centre and witnessed the tallying exercise from the beginning to the end. In relation to the events which occurred at the Kenya Polytechnic tallying hall this witness in every material respect agreed with the testimony adduced by Mr. Duncan Okoma the other chief agent of the first Respondent. He could not recall the exact time when the tallying was completed but he put it at around 3.00 a.m. on the early morning of the 29th December, 2007. It was his evidence that the Returning Officer announced all the results for all the candidates. It was his testimony that all the first Respondent's agents had received Form 16As from the Presiding Officers which they had surrendered to Mr. Okoma who in turn delivered some to the witness having lost some during the tear gas incident at the Kenya Polytechnic hall. The witness produced in court twenty-nine (29) Form 16As. The witness also said that between the time the tallying was completed and the Form 17A filled and the time Mr. Mugasia announced the results no complaint was made by anyone that the announcement was premature or that the tallying had not been completed. This witness too did not hear the first Respondent say that the elections in the Starehe Constituency had been rigged as alleged by some of the witnesses who gave evidence on behalf of the Petitioner.
- (30) A great deal of the cross-examination of the first Respondent by Mr. Kioko Kilukumi learned counsel for the Petitioner was largely centred on a number of video clips covering the tear gas incident at the tallying centre and the announcement of the final results. This evidence was intended to prove that the first Respondent denounced the elections as having been rigged and that the Returning Officer only announced the results of the Petitioner and the first Respondent. Although the court allowed this evidence to be produced I am obliged to say that the proper legal basis for its adduction was never laid inasmuch as no witness was called to testify that he shot the video clips and processed them. I am therefore not inclined to place much reliance on this evidence.
- (31) The second and third Respondents called one witness Mr. Manasseh Mugasia who was the Returning Officer for the Starehe Constituency. He had had some previous experience prior to his appointment in the Starehe Constituency and he claimed to be familiar with all matters pertaining to the elections in the Constituency. He told the court that there were twenty-two (22) polling stations and that all polling stations were manned by Presiding Officers assisted by Deputy Presiding Officers who were directly answerable to him and his Deputy and Assistant. His Deputy was a lady called Ms. Grace Mugina and the two Assistants were Ms. Naima Salim and Mr. James Philip Kiilu. They were assigned special duties but in the course of the election they could be assigned additional responsibilities. It was his evidence that before the election he and Ms. Salim went to the ECK warehouse in the Nairobi Industrial Area to identify and collect election materials which they moved to the Kenya Polytechnic for storage. He said they had more than enough of all the materials required for the election which included statutory forms, like results declaration forms, Form 16As, Form 17As and Forms 8 and 9 for Civic elections.
- (32) He explained how before the voting opened he received a report of three (3) ballot boxes missing from Parochial polling centre. He traced these three to River Bank and took them to Parochial. As a result of this mishap polling at Parochial started at 8.00 a.m. and he ordered the station to remain open after 6.00 p.m. so that voting could continue to compensate for the lost time. As the Returning Officer he toured all the polling stations in the Constituency on that day. His Deputy and Assistants did likewise. He said that he did not receive any complaints of violence or intimidation from anybody nor did he receive any complaints of bribery. None of his officers reported any incidents to him either. Mr. Mugasia testified that upon declaration of results the results were publicly displayed on the door of the polling station or tent by posting or pinning

the statutory forms. These would be properly stamped and signed by the Presiding Officer. He did not receive any report that these statutory forms had not been displayed at any station nor did anyone complain to him that any agent had been denied any of these statutory forms. He said that although the official closing time was 5.00p.m. he instructed his officers to extend the time for voting where the station had opened or started late. It was his evidence that at the tallying centre at the Kenya Polytechnic he and his Deputy and Assistant received the ballot boxes for Presidential Parliamentary and Civic elections from the Presiding Officers. In respect of each box received he signed Form 5B which was also signed by the Presiding Officer and the agents who accompanied the ballot box. He did not receive any box in the Starehe Constituency election which did not comply with the statutory requirements. Upon receiving the boxes they were taken to the podium in the tallying hall. He said that by midnight on the 27th December, 2007 all the two hundred and four (204) ballot boxes had been received and the process of tallying commenced.

- (33) During the course of the tallying he said that tension began to build up in the hall between supporters of the Party of National Unity (“PNU”) and ODM. It had nothing to do with ballot boxes but it seemed to have been caused by the announcement of results for each polling station as numbers between the two leading candidates fluctuated from one number to the other. He had to appeal to the candidates to prevail upon their supporters to calm down. It was at this point that the riot police stormed the hall and threw tear gas. There was panic and stampede as people ran in every direction and a few people were injured including ECK officials.
- (34) In the course of this stampede there were several ballot boxes which were broken and they were found outside the hall. He enlisted the assistance of his staff the security officers and the agents of the candidates to secure these boxes. He took them into the hall. There were nine (9) of them and he explained to the public what had happened. Upon inspection it was found that the nine boxes had already been tallied. It was established that four of them were for the Presidential election three for the Parliamentary and two for the Civic election. Everyone concerned including the agents of the candidates agreed that the tallying process should continue. At the time this agreement was reached neither the Petitioner nor the first Respondent was present but their agents were agreeable. Mr. Mugasia denied ever receiving a complaint from the Petitioner that two ballot boxes from Dururuno polling station had been tampered with. He denied the claim by the Petitioner that at various stages during the tallying he told the Petitioner that he was winning. He did not communicate with the Petitioner or any other candidate during that exercise. The tallying continued until early in the morning on the 28th December, 2007. At the end of the tallying exercise he as the Returning Officer announced the results one candidate at a time in an alphabetical order being the order in which the names of the candidates appeared on the ballot papers and he did so starting from the first to the last. He read out all the seventeen (17) names. He denied the claim by the Petitioner that he announced only the results of the Petitioner and the first Respondent. There was no way he could have skipped any name as the agents of the candidates were also present. After announcing the seventeen results he then proceeded to declare the first Respondent as the winner and he received no complaints about the winner nor a demand for re-tallying. It was Mr. Mugasia’s evidence that if the Petitioner had asked for a re-tallying he would have granted it. After announcing the results he put his materials together and left the hall and headed for the National tallying centre at the Kenyatta International Conference Centre (KICC) accompanied by his Deputy and security personnel. The purpose of going to the KICC was to deliver the results for the Starehe Constituency.
- (35) At the KICC each Province had a tallying desk covering all the two hundred and ten (210) constituencies in the country. He delivered the results at the Nairobi desk. He handed over the Forms 16As, 17As and Form 16 in the original. They were checked from top to bottom and page by page. The Form 16As were the originals he had received from the Presiding officers at the tallying centre at the Kenya Polytechnic. He said he handed over in original two hundred and four (204) Form 16As. He could not remember the number of Form 17As he handed but there were quite a number and also in original. When shown the ECK file [Exhibit I] “Original Parliamentary 003 – Starehe Results – 2007 EP No. 5/08” he was emphatic that those were not the forms he

handed over at the KICC. In relation to Form 17As white out had been used and they were in several different handwritings. He had personally completed the forms himself in his own hand. Those forms also contained several alterations which were not made by him. The alterations were not initialled and he also observed gaps between the results of some of the stations in a polling centre. With regard to Form 16As which are completed by the Presiding Officer at each station the handwriting would be different in each case. The forms shown to him were photocopies and appeared to have been written in the same handwriting by the same person which suggested to the witness that they were not authentic. He said that he did not at any stage receive any information from the ECK that the documents he had submitted were not authentic nor did he receive any complaint that the forms he had delivered were photocopies and not originals. Mr. Mugasia dismissed as ridiculous the allegation by Chief Weru that he had seen the witness altering documents in the tallying hall.

- (36) The witness confirmed that he was an observer during the entire exercise of scrutiny and recount ordered by the court at the end of which the Hon. William Maina Kamanda had 49,310 votes and the Hon. Bishop Dr. Margaret Wanjiru Kariuki had 34,874 votes - a majority of some 14,436 votes. He admitted that there was a huge difference between these figures and the figures he announced and it was difficult to account for the difference. The witness said that after the election the ballot boxes were taken to the Nyayo National Stadium Gymnasium in the custody of the District Election Co-ordinator (DEC) for Nairobi. Except for the nine (9) boxes which were broken the rest of the boxes were in perfect condition. At some point he was called by the DEC a lady identified as Mrs. Mwera to assist in moving the boxes from the Nyayo National Stadium to the Government warehouse in the Industrial Area. He went to verify the condition of the boxes and found that they were not in the same condition in which he had delivered them. Over one hundred (100) boxes were not closed some were left open and it appeared that someone had tampered with the boxes. He said that he reported this to Mrs. Mwera who told him that she had already received a report to that effect. He was later provided with the transport and oversaw the transfer of the boxes to the Government warehouse. In May 2008 Mrs. Mwera got in touch with him again and requested him to arrange to deliver the ballot boxes to the court. According to Mr. Mugasia the Deputy Registrar who received the boxes noted that they were not properly closed.
- (37) The witness told the court that during the scrutiny they did not find two hundred and four (204) Form 16As inside the ballot boxes and that if any had been found they would have been in the original signed and sealed by the ECK officials as well as the agents of the candidates. In the course of the scrutiny sixty-eight (68) ballot boxes were found to be without Form 16As; one hundred and thirty-six (136) had Form 16As inside the boxes and one hundred and forty (140) boxes had Form 16As affixed outside the boxes on the lids; sixty-four (64) boxes had no Form 16As at all. It was his evidence that not all the ballot boxes had Form 16As on the outside and that some of the forms found during the scrutiny were neither stamped nor signed. He also noted that materials which were not supposed to be in the ballot boxes such as stamps were found in one or two boxes. The witness maintained that though the results revealed by the scrutiny differed substantively with the results he declared at the end of the election it is not possible that he had made a mistake when he announced the results because the original results had been checked by him his Deputy and Assistant. The witness said that when he inspected the boxes at the Nyayo National Stadium prior to moving them to the Industrial Area he noted that about one hundred (100) of them had been interfered with. In some of them the aperture was so wide one could put a hand inside the ballot box. The witness said that he had no control over the boxes after delivering them at the Nyayo National Stadium. He was unable to account for the 25,000 odd extra votes which were found during the scrutiny and recount. He denied announcing the wrong results. He also dismissed as outrageous the claim by the Petitioner that the first Respondent paid him a bribe of K.shs. 2,000,000/=. He also denied that he disappeared from the scene after announcing the results. It was the Returning Officer's evidence that the Petitioner did not ask for a re-tally. He denied a suggestion that he supervised an election which was marred by irregularities violence and bribery.
- (38) In answer to the question put to him by Mr. Kioko Kilukumi for the Petitioner the witness said

that he could not remember that the first Respondent complained to him on the 28th December, 2007 that the election had been rigged. He also denied the allegation that he had been in constant communication with the Petitioner on election day although he admitted that the Petitioner had telephoned him on a number of occasions prior to the 27th December. Mr. Mugasia also denied having confided in Philip Kiilu (PW3) that he had received the sum of K.Shs. 2,000,000/= to manipulate the election.

- (39) In cross-examination by Mr. Chacha Odera for the first Respondent Mr. Mugasia further told the court that he did not know Chief Weru and disputed the claim by Mr. Weru that he had a seat at the podium in the tallying hall. He emphasized that no agents or candidates were allowed to occupy seats on the podium in the tallying hall and he did not allow this during the tallying. During the scrutiny and recount the witness said that he saw two ballot boxes with rubber stamps inside them. He was surprised to find them because he had fully accounted for the rubber stamps which he had been issued to him which he had surrendered to the DEC after the election. He also said that both he and Mr. Kiilu were in agreement that only nine (9) boxes were broken when they took the lot to the Nyayo National Stadium for safe custody. He said that the decision to store the ballot boxes at the Nyayo National Stadium was taken by the ECK. Mr. Mugasia maintained that the result he announced was the correct one and doubted the integrity of the figures disclosed during the scrutiny and recount.
- (40) On the application of the Petitioner for scrutiny and/or recount I ordered this to be carried out and this was done over a period of seven (7) weeks. The exercise was supervised by Mr. S. N. Riechi a Chief Magistrate and the Deputy Registrar of this court. The parties and/or their agents and their respective advocates were present throughout the exercise. From the evidence adduced at the trial the ballot boxes were taken by the ECK from the tallying hall at the Kenya Polytechnic first to the Nyayo National Stadium Gymnasium and placed in the custody of the District Elections Co-ordinator for Nairobi (DEC) one Mrs. Rita Mwera. From there the ballot boxes were subsequently moved to the Government warehouse at the Nairobi Industrial Area where again they were left in the custody of the DEC. Following the order of this court for the ballot boxes to be produced and delivered to court the DEC released the boxes to the Returning Officer (the second Respondent) who delivered them to the Deputy Registrar of this court on the 23rd May, 2008.
- (41) In his evidence Mr. Manasseh Mugasia the Returning Officer told the court *inter alia* that when he inspected the ballot boxes at the Nyayo National Stadium Gymnasium before they were transferred to the Government warehouse and when he inspected them the second time at the warehouse before bringing them to court they were not in the same condition in which the boxes were when he handed them over to the ECK at the Nyayo National Stadium Gymnasium in January 2008. It was also his evidence that when he discovered that the boxes had been tampered with at the Nyayo National Stadium he told Mrs. Mwera about it and her response was that she already knew about it.
- (42) When Mr. Mugasia delivered the ballot boxes to the court on the 23rd May, 2008 they were received by Mr. Aggrey Muchelule who was at the material time a Chief Magistrate and the Deputy Registrar of the court. His report shows that he received two hundred and four (204) ballot boxes for the Starehe Constituency. He also noted that in accordance with rule 19 of the National Assembly Elections (Election Petition) Rules, 1993 read in conjunction with regulation 34 of the Presidential and Parliamentary Elections Regulations the same were not opened for his verification. He attached a document to show the sealed status of each box as required by regulation 34(2) of the Regulations. Mr. Muchelule's report shows that at the time he received the ballot boxes the seals on sixty-one (61) boxes were broken those on fifteen (15) boxes were opened and the seals on seventy-eight (78) boxes were not properly closed. His report also shows that the majority of the ballot boxes had at least one of the rivets missing. This report is consistent

with the evidence of Mr. Mugasia (the Returning Officer) on these points.

- (43) At the conclusion of the exercise of scrutiny and re-count Mr. Riechi prepared a report which he presented to court. In this report he summarized his findings as follows:

“REPUBLIC OF KENYA
HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURTS

ELECTION PETITION NO. 5 OF 2008

WILLIAM MAINA KAMANDA VERSUS MARGARET WANJIRU KARIUKI & 2 OTHERS

SCRUTINY OF STATUTORY ELECTORAL RECORDS BY ORDER OF COURT ISSUED
ON 22ND SEPTEMBER 2008

REPORT

Upon scrutiny of election documents and materials and a recount of votes, the following were discovered:-

1.	Total number of Ballot Boxes without polling day Forms	130	
2.	Total number of Ballot Boxes with polling day Forms.....	74	
3.	Total number of Ballot Boxes without packets – spoilt papers.....	124	
4.	Total number of Ballot Boxes with packets – spoilt papers.....	80	
5.	Total number of Ballot Boxes without packets of marked Register.....		167
6.	Total number of Ballot Boxes with packets of marked Register...	37	
7.	Total number of Ballot Boxes without counterfoils used Ballot Papers.....		21
8.	Total number of Ballot Boxes with counterfoils used Ballot Papers.....		183
9.	Total number of Ballot Boxes without packet – counted Ballot Papers.....		3
10.	Total number of Ballot Boxes with packet – counted Ballot papers.	201	
11.	Total number of Ballot Boxes without packets – Rejected/spoilt Bp		120
12.	Total number of Ballot Boxes with packets – Rejected/spoilt Ballot papers		84
13.	Total number of Ballot Boxes without complaints – written Agents	203	
14.	Total number of Ballot Boxes with complaints – written candidates Agents.....		1
15.	Total number of Ballot Boxes without PO’s statements –recount.....	204	
16.	Total number of Ballot Boxes with PO’s statements – Recount.....	0	
17.	Total number of Ballot Boxes without PO’s statement – rejected Bp..	203	
18.	Total number of Ballot Boxes with PO’s statement – rejected Bp	1	
19.	Total number of Ballot Boxes without Form 16A	68	
20.	Total number of Ballot Boxes with Form 16A.....	136	
21.	Total number of Ballot Boxes with Form 16A affixed outside.....	140	
22.	Total number of Ballot Boxes without Form 16A affixed outside.....	64	
23.	Total number of Ballot Boxes with broken seals.....	37	
24.	Total number of Ballot Boxes with unbroken seals (intact).....	167	
25.	Total number of Ballot Boxes without cast votes.....2 (one had civic)		
26.	Total number of Disputed votes.....	1,106	
27.	Total number of Rejected/Spoilt votes.....	1,125	
28.	Total number of Presiding Officers statement Retrieved from inside Boxes.....		2
29.	Total number of Valid votes.....	92,757	
30.	Total number of Ballot Boxes with Form 16A inside.....	138	
31.	Total number of Ballot Boxes without Form 16A inside.....	66	
32.	Total number of Ballot Boxes not on court list.....	4	
33.	Total number of Form 16A inside the Ballot Boxes not stamped but signed.....		84

34. Total number of Form 16A inside Ballot Boxes not signed and stamped.....	14
35. Total number of Form 16A inside the Ballot Box signed and stamped..	28
36. Total number of Form 16A inside the Ballot Box stamped but not signed.....	3
37. Total number of Form 16A affixed outside the Box signed but not stamped.....	66
38. Total number of Form 16A affixed outside the Box not signed and not stamped	9
39. Total number of Form 16A affixed outside the Box signed and Stamped.....	66
40. Total number of Form 16A affixed outside the Box stamped but not signed.....	4

S. N. RIECHI
DEPUTY REGISTRAR”

- (44) Mr. Riechi’s report also indicated the number of votes cast for each of the seventeen (17) candidates. The Petitioner the Hon. William Maina Kamanda had 49,310 votes and the Hon. Bishop Dr. Margaret Wanjiru Kariuki had 34,874 votes. The report also shows that there were 1,106 disputed votes, 1,125 rejected/spoilt votes and 92,757 total votes cast. There were 130 ballot boxes without polling day forms, 74 boxes with polling day forms, 167 boxes without packets of marked register, 37 boxes with packets of marked register. The report further shows that there were 68 ballot boxes without Form 16A, 136 boxes with Form 16A. There were 140 boxes with Form 16A affixed outside and 64 boxes without Form 16A affixed outside. There were 37 boxes with broken seals and 167 boxes intact. There were 138 boxes with form 16A inside and 66 boxes without Form 16A inside. There were 84 boxes with Form 16A stamped but not signed and 14 Form 16As in a ballot box neither signed nor stamped. 28 signed and stamped Form 16As were found inside the ballot boxes. 66 Form 16As affixed outside the boxes were signed but not stamped while 9 Form 16As affixed outside ballot boxes were neither stamped nor signed. 66 Form 16As affixed outside ballot boxes were signed and stamped and 4 affixed in similar manner were stamped but not signed.
- (45) I have set out a synopsis of the evidence given at the trial and the reports submitted by the two learned Deputy Registrars and I will now proceed to deal with the submissions filed by learned counsel for the parties before making any findings. But before I do that I think it is important to state that there are only two issues for my decision in this petition. The first issue is whether the election was conducted in accordance with the law and the relevant regulations. The second issue is whether the Hon. Bishop Dr. Margaret Wanjiru Kariuki the first Respondent was validly elected as the Member of Parliament for Starehe Constituency at the General Elections held in December 2007. Depending on the way I determine these questions the logical consequential orders will follow.
- (46) Mr. Kioko Kilukumi for the Petitioner submitted that the Petitioner in his petition raised several complaints among them that he garnered the highest number of valid votes cast yet the Returning Officer declared the first Respondent who received fewer votes as the winner; that the Returning Officer did not announce all the results of the Parliamentary candidates; that the statutory forms namely Form 16A and Form 17A were fraudulently altered and contained erasures effected by means of white out or substituted with photocopies. The said statutory forms were not duly signed by the Presiding Officers or their Deputies to authenticate the accuracy of the results and that they were also not signed by the agents of the candidates as required by law. In view of the testimony given in court and more specifically the discoveries made by Deputy Registrar Riechi during the scrutiny and re-count Mr. Kilukumi’s submission on this point is valid.
- (47) Mr. Kilukumi referred to the evidence gleaned from the video clips replayed in court in which the first Respondent was seen to be complaining in the tallying hall at the Kenya Polytechnic

before the final results were announced that the election had been rigged. From this he went on to suggest that the first Respondent knew that she had lost the election and it was his submission therefore that it was the Petitioner who won the election and should have been so declared. As I have already said elsewhere in this judgment and as no proper legal basis was laid for that evidence it is of no probative value and accordingly I must reject Mr. Kilukumi's submission to the extent based on that evidence.

- (48) Mr. Kilukumi's third submission was that since in the scrutiny the Petitioner received 49,310 votes as against the first Respondent's 34,874 votes it follows that the Petitioner was the clear winner. He urged the court to accept these figures as correct on the basis that no evidence was placed before the court to show that the Petitioner or any of his agents had access to any place or building where the ballot boxes were stored after the election. He pointed out that no evidence was led that the Petitioner or any of his agents had access to the ballot papers after the conclusion of the voting on the 27th December, 2007. He drew attention to the Regulations which provide that pending an election petition it is upon the Returning Officer to deliver the election documents to the election court and that if there is any evidence of interference it is the Returning Officer and the third Respondent (the ECK) that have to be held to account.
- (49) This submission is unsustainable and must be rejected because as Mr. Riechi's report clearly demonstrates a considerable amount of tampering with the ballot boxes and the statutory Form 16As came to light during the exercise of scrutiny and recount. I have already alluded to this earlier in this judgment. In this regard the evidence of the Returning Officer shows that he delivered the ballot boxes to the ECK after the conclusion of the election in the manner and form required by the Regulations. At some point before the boxes were delivered to the court pursuant to an order to that effect they were moved from the Nyayo National Stadium Gymnasium to the Government warehouse in the Industrial Area. Before they were taken to the Industrial Area the Returning Officer was asked by the District Election Co-ordinator one Mrs. Rita Mwera to go and inspect the boxes before they were moved. He obliged and he was shocked to discover that the boxes had been massively tampered with. He felt sufficiently concerned and he reported this to Mrs. Mwera who told him she was already aware but apparently took no further step in the matter. The boxes were then moved to the go-down in the Industrial Area but still under the custody of the ECK and specifically Mrs. Mwera. So by the time the boxes were being delivered to the court all the evidence of the tampering and interference was still intact to be seen and the entire scope of the interference is reflected in Mr. Riechi's report and I have already averted to it earlier in this judgment. Since there is before the court evidence that the documents were interfered with and the seals were broken it follows that the integrity of the documents cannot be vouched. It does not matter who as between the Petitioner the first Respondent the second or third Respondents or any other party whomsoever was involved in this criminal activity. The truth and effect of the matter is that it has far reaching consequences in the fate of this petition. Throughout the hearing of this petition neither the Petitioner nor the first Respondent nor the Returning Officer nor indeed the ECK who are all parties to this petition made any application for a witness summons to be issued directing Mrs. Mwera the custodian of the ballot boxes to attend court and testify about the condition of the boxes. So the Petitioner was as responsible as anyone else to ensure that that evidence was called.
- (50) The condition in which the boxes were found cannot rule out the possibility that at some stage additional ballot papers had been added in the ballot boxes. On the return announced by the Returning Officer the first Respondent had 29,496 votes and the Petitioner had 28,601 votes. In the re-count the Petitioner came top with 49,310 while the first Respondent had 34,874 - a majority of 14,436. Furthermore the Returning Officer's report shows that the total number of votes cast during the election was 70,853 [paragraph 7 of the petition] while the scrutineer's report puts the total number of votes cast at 92,757 a difference of 21,904 votes. Looking at these figures it would mean either that the Returning Officer gave wrong figures when he announced the results or that additional ballot papers found their way into the ballot boxes while they were in the custody of the ECK. On the evidence and for the reasons which I have given the court is unable to

determine one way or the other whether the results shown after the scrutiny (49,310 votes for the Petitioner against 34,874 votes for the first Respondent) represent the actual results of the election. Mr. Kilukumi’s submission therefore that the Petitioner had been shown to have won the election is unsustainable and I reject it.

(51) Mr. Kilukumi cited the case of Joho vs. Nyange and Another (No.4)(2008) 3 KLR (EP) 500 and urged me following my brother Maraga, J to disregard the tampering of electoral documents which happened in this case. My reading of that authority is that the tampering was of a very limited nature and did not affect the result. What happened in the present case was so extensive that it cannot be wished away.

(52) Mr. Kilukumi’s other submission was that because the scrutiny and recount gave the Petitioner more votes than the first Respondent I should if I allow the petition and in accordance with rule 4(3) of the National Assembly Election (Election Petition) Rules, 1993 declare the Petitioner as having been validly elected. With due respect this submission is totally misplaced because it is based on a provision which gives an example of what should be pleaded in a petition and the phrase “for instance” should have indicated to learned counsel that it is not intended to be a substantive provision. It would also appear that Mr. Kilukumi must have overlooked the provisions of section 30(1) of the National Assembly and Presidential Elections Act [Cap. 7] (“the Act”) which specifies that at the conclusion of the trial of a petition the election court shall determine the question raised in the petition and shall certify its determination to the Speaker. Mr. Kilukumi also overlooked the mandatory provision of section 44(1) of the Constitution of Kenya.

(53) In Election Petition No. 8 of 1988, Osogo vs. Chacha (Returning Officer) & Another (2008) 1 KLR (EP) 368 the court was asked to strike out a prayer seeking orders that the petitioner be declared as the duly elected candidate. Following the 1984 decision in Otieno Aggrey Ambala vs. Peter Waitthaka and Another (2008) 1 KLR (EP) 296 the court ruled that its duty under section 30(1) of the National Assembly and Presidential Elections Act [Cap. 7] is merely to certify to the Speaker after determining the question whether or not a person has been validly elected as a Member of the National Assembly. It is not the duty of the court to deal with the Speaker’s duties in section 30(2) of the Act as the court is not vested with such jurisdiction.

(54) The subsequent decision in Anaswa vs. Mberia and Another (2008) 1 KLR (EP) 359 re-stated the law on this point in the following terms (*Ibid.*, at pages 362 – 364)—

“In view of the apparent confusion regarding the jurisdiction of this court in relation to the election petitions as brought out in the submissions of the learned counsel for petitioner, we consider necessary for us to examine it before considering the other grounds raised. The jurisdiction of this court over election matters is derived from section 44(1)(a) of the Constitution of Kenya which reads:-

“(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.*” [*Emphasis added*].

This is further amplified by the National Assembly and Presidential Elections Act of which section 19(1)(b) reads:-

“19(1)(b) *An application to the High Court under the Constitution to hear and determine a question whether –*

(a), *or*

(b) *A person has been validly elected as a member of the National Assembly;*
or

(c)

Shall be made by way of petition and shall be tried by an election Court.”

It is patently clear from both the above statutes that this Court is conferred with only power to determine whether a “person has been validly elected to the National Assembly.” as underlined above [Emphasis added].

For this reason this Court has no authority to declare anybody duly elected as a member of National Assembly as suggested by Mr. Onalo. Of course, we are fully aware of the provision of rule 4(3) of the National Assembly and Presidential Elections Rules which stipulates that a petition shall conclude with a prayer that some specified person should be declared duly elected. Rule 7 of the same Rules also appears to allude to the same idea. Inasmuch as the provisions of these Rules are inconsistent with the provisions of the parent Act, the National Assembly and Presidential Elections Act, as far as we are concerned are invalid. [Emphasis added. Section 31(b) of the Interpretation and General Provisions Act (cap. 2) provides:-

“31. When an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation:-

- (a)*;
- (b) No subsidiary, legislation shall be inconsistent with the provision of the Act;*
- (c)*”

There is another helpful decision in the Election Petition No. 8 of 1983 of Masinde Muliro vs Ben Makosewe and Fredrick E. O. Gumo where the Court said at page 90 (green book):-

“It may be useful in this connection to confirm our interlocutory rulings the gist of which were that as the law now stands, embodies to the Constitution and section 19 of the National Assembly and Presidential Elections Act (cap.7), the question for the Court is whether a person has been validly elected as a member of the National Assembly. The power of court to declare another person validly elected, after a process such as a scrutiny does not exist. Attention should be drawn to the erroneous state of rules 4(3) and 7 of the National Assembly and Presidential Elections (election Petition) Rules which are ultra vires to the extent that they suggest that a petitioner may pray that some specified person should be declared duly elected.” [Emphasis added].

It now becomes clearer from the above quoted authorities that Mr. Onalo’s submission that the Petitioner should be declared duly elected as stipulated under rule 4(3) of the said Rules is to say the least, unsustainable.”

- (55) It is clear from the enunciations made in the foregoing decisions that the jurisdiction of the petition court is limited to determining only the question whether the person has been validly elected as a member of the National Assembly and that can only relate to a sitting member who was declared by a Returning Officer at an election as having been duly elected. In the present case the only person who was declared as having been duly elected as the Member of Parliament for the Starehe Constituency in the December, 2007 General Elections was the Hon. Bishop Dr. Margaret Wanjiru Kariuki the first Respondent in this petition. It follows that the sole question which the Petitioner has raised in his petition and asked the court to determine is whether the first Respondent was validly elected. There is no other question contemplated by section 44(1)(a) of the Constitution of Kenya and I so find and hold. If the petition is allowed all that the court is required to do is to issue a certificate as to the validity of the election to the Speaker of the National Assembly. What this means is that if I came to the conclusion that the first Respondent was not validly elected I would make a declaration to that effect and advise the Speaker accordingly. There is no power whatsoever for me under the law to go further and order that the

Petitioner is the person who should have been declared as the Member of Parliament for the Starehe Constituency. There is no jurisdiction in the petition court under the Constitution and the law to do that. Having come to that conclusion I do not find it necessary to consider the authorities from the other Commonwealth jurisdictions on which Mr. Kilukumi relied for this particular submission.

- (56) In his petition the Petitioner also alleges that the first Respondent bribed the Returning Officer in order to influence him to declare the result in her favour and he called as a witness Mr. James Philip Kiilu (PW3) who told the court that at some point Mr. Mugasia (the Returning Officer) had mentioned to him that the first Respondent had paid him the sum of K.Shs. 2,000,000/= which they could share and Mr. Kiilu said he declined the offer. This allegation was put to Mr. Mugasia during his testimony and he denied it. The first Respondent also denied emphatically that she bribed the Returning Officer. As between these three witnesses I accept the evidence of the first Respondent and the Returning Officer. I reject the evidence of Mr. Kiilu as a blatant falsehood. For the record I should point out that Mr. Kiilu was the Assistant Returning Officer for the Starehe Constituency appointed and paid by the ECK. Though he was under the duty to report this alleged incident to the ECK and the Police he chose instead to maintain a tomb-like silence (for reasons he could not explain) until he came to testify in court. It seems to me he simply turned coat and I do not wish to speculate why.
- (57) Another witness Mr. Alfred Ndari Mwangi (PW7) a denizen of Nairobi South C who was between jobs at the time he gave evidence told the court that at midnight on the 28th/29th December, 2007 in the tallying hall at the Kenya Polytechnic he saw the first Respondent take out money from her handbag in the glaring view of the candidates, their agents and supporters, the public, the Police, the press and the observers and gave it to the ECK officials. He did not report this incident to the Returning Officer nor to the Police nor even to the Petitioner who had appointed him as his agent at the Kenya Polytechnic polling centre.
- (58) There was also an allegation in the petition that the first Respondent was involved by herself or through her agents and supporters in committing acts of treating, violence and/or intimidation. No credible evidence was produced to support these allegations. Not a single Presiding Officer reported any act of treating violence and/or intimidation by the first Respondent. I have already dealt with the allegation concerning the Petitioner's complaint of undue influence by the first Respondent over members of her Church and I need say no more about it as I consider it utterly preposterous.
- (59) Mr. Kilukumi's final submission relates to the Forms 16As and 17A produced in court by the third Respondent [Exhibit 1A] the file said to contain bundles of both forms. Upon inspection they were not found to be original Forms 16As and 17A. They consisted of copies of the originals and most of them had obvious alterations. This position was also confirmed by the results of the scrutiny carried out by Mr. Riechi on the instructions of the court. Mr. Kilukumi submitted that there is no evidence linking the Petitioner with the interference/tampering with the election materials.
- (60) Mr. Chacha Odera for the first Respondent urged me to reject the allegations of election offences (bribery, intimidation, undue influence, treating, etc.) on the basis that no credible evidence has been placed before the court in support of those allegations. I agree with him entirely as I have already rejected the allegations earlier when dealing with the submissions of Mr. Kilukumi.
- (61) Mr. Chacha Odera's other submission was in relation to the interference with election materials. He drew attention to the fact that the Returning Officer told the court that the ballot boxes were delivered to the Nyayo National Stadium on the 7th January, 2008 and claimed that he

was surprised by the instruction given to him by the ECK to take the election materials to the Nyayo National Stadium instead of the Government warehouse where they had been kept the previous years. He further submitted that since the Petitioner was at the material time the Minister for Gender and Sports under whose umbrella the Nyayo National Stadium falls, he was better placed than the first Respondent to access and interfere with the materials. The first Respondent believed but without any evidence whatsoever to that effect that the Petitioner was assisted in this regard by a certain Mr. Joe Aketch said to be a close friend of the Petitioner and Mr. Samson Mwangi Mugacha [PW6] whom the Returning Officer said had been appointed to a parastatal associated with the Ministry for Gender and Sports. Apart from that wild speculation Mr. Joe Aketch was not called as a witness and the allegation as to the appointment of Mr. Mugacha was not put to him during cross-examination. It is on that evidence by association without proof that Mr. Odera relies to submit that the Petitioner had access to the election materials at the Nyayo National Stadium and therefore the interference therewith took place after the election. In making this submission Mr. Odera overlooked the gap left by the Returning Officer and the ECK in failing to call Ms. Rita Mwera (the DEC) in whose custody the Returning Officer says he left the materials after the election. In the absence of that crucial evidence I cannot say with any degree of certainty whether the tampering took place before or after the election. The case of Joho vs. Nyange (*Supra*) is consequently of no assistance to the court in this regard because in that case there was a definite finding that the interference took place after the election.

- (62) Mr. Musyoka Annan, learned counsel for the Returning Officer and the ECK, submitted that the election was conducted in accordance with the law and the Petitioner had failed to prove the allegations set out in his petition. For those reasons he urged the court to dismiss the petition with costs. At no point in the course of his submissions did Mr. Annan refer to that part of the evidence of the Returning Officer where he said that when he collected the ballot boxes from the Nyayo National Stadium and later from the Government warehouse he found the boxes to have been tampered with. This was an extremely grave allegation and the least I would have expected was that Mr. Annan would deal with it in his submissions. Equally in view of the gravity in the allegations and the fact that Mr. Mugasia said that he handed over the boxes to Mrs. Mwera in perfect condition (apart from the nine (9) which had been broken during the election) the second and third Respondents should have called Ms. Mwera as a witness for the ECK. At no time did learned counsel say that he could not get Mrs. Mwera to come and give evidence nor did he give any indication that he had any difficulty in getting Mrs. Mwera to attend court. No application was made to the court either by Mr. Annan or Mr. Mugasia to issue summons for her attendance. I am at a loss to understand why the second and third Respondents would conceal such material evidence from the court. Because of this failure it is impossible to ascertain who interfered with the election materials and at which point in time.
- (63) For the reasons I have given I am far from satisfied that the election was conducted in accordance with the law. This finding is consistent with the results of the scrutiny and recount which revealed serious manipulation with the ballot papers and other election materials but as I have already stated it is impossible to ascertain who interfered with the election materials and when.
- (64) The Petitioner accordingly succeeds and I answer the question raised by the Petition by holding and declaring that the first Respondent the Hon. Bishop Dr. Margaret Wanjiru Kariuki was not validly elected as the Member of Parliament for the Starehe Constituency. I therefore declare her election as such to be null and void. A certificate to that effect shall issue forthwith and be served upon the Speaker of the National Assembly in terms of section 30(1) of the National Assembly and Presidential Elections Act [Cap. 7].
- (65) For the reasons also which I have given I have rejected and dismiss the Petitioner's prayer (c) that he should be declared duly elected as the Member of Parliament for the Starehe Constituency in place of the first Respondent. As I have already said there is no power in this petition court to do that. An order of the court made without jurisdiction is vain and of no effect and I have already rejected the Petitioner's invitation to walk that path. In any event he has not been shown to have

won the election. Besides he himself admits in his petition [paragraph 45] and in evidence that the Parliamentary election in the Starehe Constituency was flawed. I must therefore add that a flawed election cannot produce a legitimate result on which the Petitioner can rely to claim the crown.

(66) The Petitioner's deposit may be returned to him.

(67) One final point on the aspect of costs. The general rule is that the successful party should have his or her costs. However, the circumstances of this petition are somewhat different in that although the Petitioner has succeeded on prayers (a) (b) and (d) in his petition (seeking orders for scrutiny and recount and the nullification of the first Respondent's election), I have rejected the Petitioner's prayer (c) as well as made findings that the other allegations made in the petition (that the first Respondent and/or her agents and supporters committed acts of treating, violence, intimidation, undue influence etc.) have not been proved and are rejected accordingly. For these reasons I award the Petitioner fifty per centum (50%) of his costs certified for two (2) counsel which shall be borne by the second and third Respondents jointly and severally. Each of them the first, the second and the third Respondents respectively shall bear their own costs.

Orders accordingly.

Dated and delivered at Nairobi this 30th day of July 2010.

P. Kihara Kariuki
Judge.