



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

**Petition 15 of 2008**

**THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT**

**(CAP 7. OF THE LAWS OF KENYA)**

**ELECTION PETITION FOR THE WAJIR SOUTH CONSTITUENCY**

**THE PETITION OF MAHAMUD MUHUMED SIRAT**

**BETWEEN**

**MAHAMUD MUHUMED SIRAT.....PETITIONER**

**VERSUS**

**ALI HASSAN ABDIRAHMAN.....1<sup>ST</sup> RESPONDENT**

**IBRAHIM HISH ADAN.....2<sup>ND</sup> RESPONDENT**

**INTERIM INDEPENDENT ELECTORAL COMMISSION.....3<sup>RD</sup> RESPONDENT**

**J U D G M E N T**

Mahamud Muhumed Sirat (*the petitioner*) was among the eleven (11) candidates who contested the Wajir South Constituency Parliamentary seat. The petitioner contested the election on the Orange Democratic Movement-Kenya political party ticket. Ali Hassan Abdirahman (*the 1<sup>st</sup> respondent*) also contested for the parliamentary seat on the KANU political party ticket. The 1<sup>st</sup> respondent was declared to be the winner of the election and was thereby declared as the duly elected Member of Parliament of Wajir South constituency. He was so declared by Ibrahim Hish Adan (*the 2<sup>nd</sup> respondent*) who was the Returning Officer of the said constituency. According to the results that were published by the predecessor of the 3<sup>rd</sup> respondent, the Electoral Commission of Kenya (ECK), the following were the votes that were garnered by each of the eleven (11) candidates:

<b><u>CANDIDATES</u></b>	<b><u>POLITICAL PARTY</u></b>	<b><u>VOTES CODE</u></b>
i) Abdikadir Haji Hassan	(CCU)	561
ii) Ali Hassan Abdirahman	(KANU)	4,444 (WINNER)
iii) Abdirizak Arale Nunow	(LDM)	1,852
iv) Amina Sheikh Kassim	(NPPK)	8
v) Bishar Abdi Ibrahim	(KENDA)	13
vi) Dahir Mahamad Haji	(KADD)	1,569

vii)Farah Ahmed Sheikh	(NRC)	2,920
Viii)Ibrahim Mohamed Abdille	(ODM)	2,007
ix)Mohamud Muhumed Sirat	(ODM-KENYA)	4,017
x)Mohamed Abdi Abdullahi	(DAWA)	21
xi)Mohamud Ali Saleh	(FORD-KENYA)	2,141

**TOTAL VALID VOTES CAST**

**18,553**

Seventy five (75) votes were rejected according to the certificate issued by the 2<sup>nd</sup> respondent. The total number of registered voters in Wajir South constituency was 32,165. The said certificate proclaimed that the percentage voter turnout was 56.14%. The 1<sup>st</sup> respondent was duly gazetted by ECK as the duly elected Member of Parliament of Wajir South constituency.

The petitioner was aggrieved by the declaration of the 1<sup>st</sup> respondent as the duly elected parliamentary member of Wajir South constituency. Pursuant to the provisions of **Section 44** of the **Constitution** and the **National Assembly and Presidential Elections Act** (hereinafter referred to as the **Election Act**), the petitioner, did on 21<sup>st</sup> January 2008, lodge the present petition challenging the validity of the election of the 1<sup>st</sup> respondent as a Member of Parliament. The petitioner raised several grounds in his petition which in his view established his claim that “*the whole election exercise and counting of the ballots was marred by irregularities which taken singularly and collectively rendered the said election process and the purported results unfair and undue hence they ought to be subjected to nullification in accordance with the law*”. The complaints set forth by the petitioner in his petition can be classified broadly into two categories: those alleging irregularities and breaches of law committed by the 1<sup>st</sup> respondent, and allegations of irregularities and breaches of electoral law committed by the 2<sup>nd</sup> respondent and ECK.

As regards the 1<sup>st</sup> respondent, the petitioner alleged that the 1<sup>st</sup> respondent, with the assistance of security officials who were partial to him, bullied and harassed the petitioner’s agents in the tallying room and thereby prevented the said agents from cross-checking the results which had been obtained by the petitioner. The petitioner complained that at the tallying room, the 2<sup>nd</sup> respondent and his officers acted on instructions of the 1<sup>st</sup> respondent during the entire tallying process. The petitioner complained that the 2<sup>nd</sup> respondent allowed the 1<sup>st</sup> respondent to transport ballot boxes and results from Dagahley, Diif, Udhole and Burder polling centres thereby casting doubt as to the credibility of the said results. The petitioner alleged that some of the ballot boxes from Dagahley polling stations were not properly sealed and therefore left room for manipulation, interference and tampering. The petitioner averred that the ECK allowed the 1<sup>st</sup> respondent to park his motor vehicles containing his election posters, at strategic positions outside polling stations thereby allowing the 1<sup>st</sup> respondent to have unfair advantage against the other candidates. The petitioner alleged that the 1<sup>st</sup> respondent caused his security guards to storm and cause chaos in the tallying room and the various polling centres and in particular at Dagahley Borehole polling centre, where the said security guards beat and threw stones at voters. The petitioner complained that Electoral Commission had allowed the 1<sup>st</sup> respondent’s security guards to intimidate voters and thereby unduly influencing them to vote in the 1<sup>st</sup> respondent’s favour. The petitioner accused ECK and its officials of colluding and condoning the actions of the 1<sup>st</sup> respondent’s security guards as in his view no attempt was made by ECK to stop the said breaches of the law.

The petitioner averred that the 1<sup>st</sup> respondent, his agents and supporters bribed voters with a view to securing their vote. He averred that the bribery of voters even took place while the voters were in the queue as they waited to vote. He further stated that the 1<sup>st</sup> respondent procured Somali refugees from the nearby refugee camps to vote in his favour. The petitioner stated that these irregularities took place, particularly at Dagahley Primary polling centre, and at Dagahley Borehole polling centre. He

averred that the 1<sup>st</sup> respondent's agents bribed ECK officials who were manning Dagahley Borehole polling centre in order to favour him.

In respect of the 2<sup>nd</sup> respondent and ECK, the petitioner made several complaints against them. The petitioner alleged that ECK had employed the 1<sup>st</sup> respondent's sister as the Deputy Elections co-ordinator of Wajir District who thereby influenced the registration of voters prior to the holding of the elections and thereafter was made to be in-charge of elections in Wajir South constituency thereby casting doubt to the impartiality of the electoral process and the results thereof. The petitioner complained that a number of the 1<sup>st</sup> respondent's supporters were deployed to be presiding officers, deputy presiding officers and clerks in several polling stations, and in particular at Dagahley and Diff polling centres, so that the said supporters could influence voters to vote in favour of the 1<sup>st</sup> respondent. The petitioner alleged that ECK and its officials in the constituency were engaged in massive electoral irregularities in that several polling centres were re-located without prior notice being given to the voters. The petitioner averred that because of the unannounced re-location of polling centres, the voters in the areas concerned, were denied the opportunity to exercise their constitutional right to vote. The petitioner stated that the irregular re-location of polling centres particularly affected voters at Dagahley primary polling centre, Dagahley Borehole polling centre and Arabalow polling centre.

The petitioner stated that the electoral officials in the constituency allowed ballot boxes and ballot papers to be mishandled, interfered with and to be tampered with by unauthorized persons during the transportation of the said ballot boxes from the polling centres to the tallying centre thereby raising doubt as to the propriety and fairness of the conduct of the said entire elections. The petitioner alleged that some polling stations lacked polling booths and thereby impeded the conduct of secret recording and casting of the ballots. In particular, the petitioner complained that presiding officers engaged in unlawful exercise of assisting illiterate and incapacitated voters to improperly mark their ballot papers instead of the voters being assisted by persons of their choice who had duly signed the oath of secrecy forms. The petitioner stated that the election officials at Dagahley polling centre locked out his agents when they raise complaints in regard to the manner in which the election was being conducted. He further stated that his agents were denied access to Udhole polling centre and thereby did not witness nor verify the voting exercise in the said polling centre.

The petitioner alleged that in some polling stations, particularly at Dagahley, the voting exercise took place until the wee hours of the following morning. This was contrary to election regulations. He complained that in the particular polling stations, the electoral commission failed to supply sufficient pressure lamps to enable the electoral process to be conducted in sufficient light. The petitioner complained that the electoral commission allowed persons who were not authorized to vote to cast their votes in favour of the 1<sup>st</sup> respondent. In particular, the petitioner alleged that the election officials allowed the use of blackbooks during the voting process so as to enable persons who had not been registered as voters prior to the elections to vote during the actual voting process. The petitioner averred that the said officials allowed Somali refugees from the nearby refugee camps of Dagahley, Dadaab, Ifor and Hagardere to vote, and in particular to vote in favour of the 1<sup>st</sup> respondent. The petitioner complained that the 2<sup>nd</sup> respondent had declared the 1<sup>st</sup> respondent as the duly elected Member of Parliament of Wajir South constituency without taking into consideration the complaints that he had made in regard to the conduct of the said elections.

It was for the above reasons that the petitioner urged the court, first to order the scrutiny of all the ballots cast in the constituency and thereafter declare that the said elections were conducted in a manner that was not free and fair and should therefore be declared null and void. The petitioner prayed for the court to nullify the election of the 1<sup>st</sup> respondent as the Member of Parliament of Wajir South constituency because the elections in the said constituency were not conducted in accordance with the law.

At the hearing of the petition the court heard eleven (11) witnesses who testified on behalf of the respective parties to this

petition. The petitioner called five (5) witnesses. He was the main witness in support of the petition. The petitioner's other witnesses were Mahat Osman Shalle, Abdirahman Mohammed Abdille, Ali A. Doll and Abdullahi Ahmed Mohamud. The 1<sup>st</sup> respondent testified in defence of the petition. He called one witness, Hassan Siyat Gure. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents called four (4) witnesses in defence of the case lodged against them by the petitioner. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents called, Issa Garore Irobe, the then District Elections Co-ordinator of Wajir District, Rukia Ali Hassan, the Wajir District Registration Officer, Hassan Osman Affey, the presiding officer of Dagahley Borehole polling station No.2 and Ibrahim Hish Adan, the Returning Officer of the elections that were held in Wajir South constituency. The hearing of the evidence adduced by the witnesses commenced on 12<sup>th</sup> May 2008. The court heard the evidence adduced by the petitioner. The proceedings were suspended on 5<sup>th</sup> June 2008. This was after a case was filed before the Constitutional and Judicial Review Division of the High Court at Nairobi regarding a dispute concerning the citizenship of the petitioner. After the said court rendered its decision, the hearing resumed on 1<sup>st</sup> March 2010. The hiatus of twenty one (21) months between the time the hearing commenced and the time the hearing of this election petition resumed was therefore caused by proceedings that were before the said Constitutional and Judicial Review Court.

The burden of proof of establishing the allegations of electoral malpractices and alleged misconduct on the part of the respondents is on the petitioner. This court will not interfere with the results of the parliamentary elections of Wajir South constituency unless it is established to the required standard of proof that the irregularities and electoral malpractices complained of by the petitioner are such as to render the said elections invalid and therefore null and void and subject to nullification. The petitioner is not only required to establish that such electoral malpractices and irregularities actually occur but that such electoral malpractices were of such magnitude that it substantially and materially affected the results of the elections that were conducted in respect of the parliamentary election of Wajir South constituency.

The courts in Kenya have had the opportunity to set out what they consider to be the standard of proof that ought to be applied in determining whether a petitioner established the allegations made in respect of electoral irregularities and malpractices. In **Onalo vs Ludeki & 2 others (No.3) (2008) 3 KLR (EP) 614** at page 675, Rawal J held as follows:

*“in any event, our court in Election No.1 of 2005 between **Hassan Ali Joho and Hotham Nyange** has adopted the standard of proof held in Tanzanian case of **Mbowe vs. Eliafoo [1967] EA 240** to the effect that the election offence 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. It went further to state on page 10 of the Judgment and I quote: “where a reasonable doubt exists then it is impossible to say that the court is satisfied”. The court in the said case also referred the case of **Joseph Wafula Khaoya vs Eliakim Ludeki & Lawrence Sifuna (Election Petition No.12 of 1993)** where it was held that a very high degree of proof is required. In short, our courts have been so far, reluctant to put in certain terms the standard of proof required in the Election Petition. However, it is certain that the standard of proof is not, in any event, the balance of probability.”*

In **Joho vs Nyange & anor (2008) 3 KLR (EP) 500** at page 507, Maraga J held thus:

*“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.”*

In the above case, Maraga J observed that generalized complaints in regard to allegations electoral malpractices will not suffice to invalidate an election. In the present petition therefore, this court will consider and evaluate the evidence adduced by the petitioner in support of the grounds put forward in support of this petition, in light of the evidence adduced by the respondents in rebuttal of the said evidence, gauged on the standard of proof that has been cited above i.e. that the petitioner must establish

the allegations of electoral malpractices, breaches of electoral law and allegations of electoral irregularities to the standard that is higher than the normal standard of proof applied to civil cases, which is proof on balance of probabilities, but is lower than the standard of proof that is applied in criminal cases i.e. proof beyond any reasonable doubt.

Having read the pleadings filed by the parties in support of their respective opposing positions, and having considered the evidence that was adduced by the witnesses in this election petition, including the submissions, both written and oral, made by counsel for the parties to this petition, the following are the issues that emerged for determination by the court:

- (i) Whether the petitioner established to the required standard of proof the allegations of electoral malpractices and breaches of the law made against the 1<sup>st</sup> respondent.
- (ii) Whether the petitioner established to the required standard of proof the allegations of electoral malpractices, electoral irregularities and breaches of electoral law made against the 2<sup>nd</sup> respondent and ECK, the predecessor of the 3<sup>rd</sup> respondent.
- (iii) Whether the allegations of electoral malpractices, irregularities and breaches of electoral law are substantial and of such magnitude that it would lead this court to invalidate the election of the 1<sup>st</sup> respondent as the duly elected Member of Parliament of Wajir South constituency.

From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the petitioner's case which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular, the petition.

As regards the first issue, the petitioner testified that the 1<sup>st</sup> respondent used the security officers attached to him, in his then capacity as an Assistant Minister for Trade, to harass and intimidate voters to vote in his favour at Dagahley Borehole polling centre. The petitioner and his witnesses testified that the supporters of the 1<sup>st</sup> respondent threw stones on the roofs of the polling stations at Dagahley primary school with a view to disrupting the elections. The 1<sup>st</sup> respondent in his testimony, while admitting that he had paid a visit to the polling stations at Dagahley primary school denied the allegations that the security officer attached to him intimidated and harassed the voters with a view to influencing them to vote for him. The 1<sup>st</sup> respondent testified that he was in the said polling centre for a period of about twenty minutes and therefore could not have had the time, if at all, to disrupted the elections as claimed by the petitioner. Hassan Osman Affey, a presiding officer at one of the polling stations at Dagahley Borehole polling centre corroborated the evidence adduced by the 1<sup>st</sup> respondent when he testified that the election at his polling station went on smoothly without disruption of any kind. He testified that when the 1<sup>st</sup> respondent visited his polling station, he witnessed the voting process for a short while before leaving. The 1<sup>st</sup> respondent's witness, Hassan Siyat Gure, the 1<sup>st</sup> respondent's agent at a polling station in Dagahley Borehole polling centre, denied the allegation that the elections were disrupted at the said polling centre, either by the security detail attached to the 1<sup>st</sup> respondent or by the 1<sup>st</sup> respondent's supporters.

This court has evaluated the evidence adduced by the parties to this petition in this regard. It was clear to the court that the allegation made by the petitioner and his witnesses to the effect that the 1<sup>st</sup> respondent's security detail and supporters disrupted the voting at Dagahley primary school polling centre was not supported by credible evidence. The evidence that the petitioner adduced in support of this allegation was inconceivable. It was incomprehensible that the 1<sup>st</sup> respondent could cause

chaos at a polling centre that he considered to be one of his strongholds. The evidence adduced by the petitioner did not support the allegation that the 1<sup>st</sup> respondent's security detail intimidated voters to vote for the 1<sup>st</sup> respondent at the said polling centre. The presiding officer at one of the polling stations at Dagahley Borehole polling centre testified that ECK had assigned security officials to man the said polling centre. This court finds incredible the suggestion that the single security detail of the 1<sup>st</sup> respondent could have singlehandedly influenced voters who were waiting in the queue for their turn to vote. The allegations that stones were thrown on the iron sheet roof at the polling centre was not supported by any credible evidence. This court therefore hold that this allegation against the 1<sup>st</sup> respondent was not proved. The 1<sup>st</sup> respondent did not disrupt the conduct of elections at Dagahley polling centre.

The second allegation that the petitioner made against the 1<sup>st</sup> respondent is that the 1<sup>st</sup> respondent colluded with the election officials in order to give him advantage during the electoral process. In particular, the petitioner testified that the 1<sup>st</sup> respondent used his sister, Rukia Ali Hassan (Rukia), who was the then Wajir District Elections Registration Officer based at the headquarters, firstly to register voters beyond the statutorily provided period of registration, and secondly, by influencing the partial recruitment of election officials who were slated to preside over the said elections. The petitioner and his witnesses testified that Rukia allowed persons who had not been duly registered as voters in Wajir South constituency, to have their names irregularly included in the blackbook, a registration document kept at the Wajir District Election Co-ordinator's office. It was the petitioner's evidence that there was widespread misuse of the blackbook during the election process which enabled the supporters of the 1<sup>st</sup> respondent who were not registered voters to irregularly vote for the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent denied that he had interfered in the electoral process in the manner suggested by the petitioner. While admitting that indeed Rukia was his elder sister, the 1<sup>st</sup> respondent denied that she had participated in any manner whatsoever in the electoral process at Wajir South constituency. Garore Irobe, (Irobe), the then District Election Co-ordinator of Wajir District, denied the suggestion made by the petitioner that Rukia had allowed unqualified persons to be registered as voters beyond the statutorily provided period. He explained that it was virtually impossible for a person who was not duly registered as a voter to be so registered after the electoral roll had been closed. He testified that the use of the blackbook caused disquiet in the whole country and therefore complaints in respect of its use was not unique to Wajir South constituency. It was his further testimony that it would be impossible for new names to be added in the blackbook after the close of the registration period because an entry was usually made closing the last entry recorded in the book. He further testified that Rukia did not participate in the recruitment of election officials, that task having been assigned to the Returning Officers of the respective constituencies. Ibrahim Hish Adan (Adan), the Returning Officer of Wajir South denied that Rukia had influenced him during the selection and appointment of electoral officials of Wajir South constituency. Rukia herself testified that she did not participate directly, either in the recruitment of the election officials or in the registration of voters.

Having evaluated the conflicting evidence adduced in this regard, it was clear to the court that it would have been impossible for Rukia to register new voters after the electoral roll had been closed. The District Elections Co-ordinator adduced evidence which exhaustively established how voters were registered, and how the registers containing the names of the voters were generated. According to Irobe, once the electoral roll was closed, the register was prepared at the headquarters of the then ECK. This court believed his testimony when he testified that it would be impossible, firstly for a voter to be issued with a voter's card beyond the statutorily provided period of registration, and secondly, it would be difficult for such a voter's name to be inserted in both the blackbook and the electoral register. This court therefore hold that the petitioner failed to prove the allegation that Rukia manipulated the electoral register and the blackbook with a view to aiding and assisting his brother win the Wajir South parliamentary seat.

The petitioner did not also establish the allegation that Rukia influenced the appointment of the supporters of the 1<sup>st</sup> respondent or his relatives as presiding officers, deputy presiding officers and polling clerks. This court believed the evidence adduced by the Returning Officer which was to the effect that there was a panel established consisting of several senior election officials who shortlisted and finally recruited the presiding officers, deputy presiding officers and polling clerks on the basis of criteria

which the electoral commission had published before hand. This court is of the view that even if Rukia had influenced the appointments of the said election officials, the swapping of presiding officers and deputy presiding officers within the four constituencies in Wajir District after the recruitment of the said officers, rendered the said complaints invalid. This court shall return to this aspect of evidence later in this judgment.

This court therefore holds that the petitioner did not prove the allegation that the 1<sup>st</sup> respondent, through his sister influenced the unlawful registration of voters beyond the period stipulated by the laws and further, the allegation that she had influenced the recruitment of election officials to constitute of those who were partial and biased in favour of the 1<sup>st</sup> respondent. To remove any suspicion of partiality on the part of election officials holding critical positions in a constituency, may be the 3<sup>rd</sup> respondent may in future consider dispatching such officers who are closely related to the candidates to other constituencies where objection will not be raised by any of the contesting candidates.

As regard the allegation that the 1<sup>st</sup> respondent had parked the motor vehicles emblazoned with the 1<sup>st</sup> respondent's campaign posters strategically outside polling stations on the polling day, this court found the allegation not proved. The petitioner's witness claimed that a motor vehicle belonging to a supporter of the 1<sup>st</sup> respondent was parked outside Diif primary polling centre during the polls. No cogent evidence was adduced to establish this allegation.

As regard the allegation that the 1<sup>st</sup> respondent had been allowed by the 2<sup>nd</sup> respondent and ECK to transport ballot boxes from Dagahley, Diif, Udhole and Burder, this allegation was not proved. The petitioner's own witnesses who were agents at Diif polling centres and Dagahley polling centres testified that the ballot boxes from polling stations within Diif and Dagahley locations were transported using motor vehicles which had been specifically hired for the purpose by the electoral commission. The District Elections Co-ordinator and the Returning Officer testified that sufficient motor vehicles were hired by the electoral commission to facilitate the transport of the ballot boxes and the election materials to and from the various polling stations within Wajir South constituency to the tallying centre at Habaswein.

The claim by the petitioner that the ballot boxes, especially the seals, were tampered with during transportation from the various polling stations to the tallying centre was incredible. This was because evidence was adduced by the respective agents of the petitioner and the 1<sup>st</sup> respondent, and also by the Returning Officer that agents of various candidates, polling clerks and security officials were transported in the same motor vehicle that the ballot boxes were being ferried. It would be impossible for the ballot boxes to be tampered with, unless all the people on the motor vehicle, including agents of the various candidates and the security officers colluded. The petitioner claimed that the electoral commission hired motor vehicles belonging to the 1<sup>st</sup> respondent and his relatives to be used during the elections. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent denied this allegation. The District Election Coordinator adduced evidence in regard to the manner in which the vehicles which were used during the elections were procured by tender. It was clear to the court that the petitioner did not establish that indeed any of the relatives of the 1<sup>st</sup> respondent were favoured during the tendering process in regard to the hiring of the motor vehicles that were used during the elections. This court holds that allegation not proved.

The petitioner alleged that the 1<sup>st</sup> respondent had bribed voters with a view to influencing them to vote in his favour. The petitioner and witnesses, Ali Abdullahi Doll, Abdirahaman Mohamed Abdille and Mahat Osman Shalle testified that the 1<sup>st</sup> respondent's supporters and agents bribed voters especially at Dagahley Borehole polling centre, Dagahley Primary polling centre and Diif Primary polling centre. They testified that the supporters and agents bribed voters as they were about to enter the said polling stations, and also while they were in the various queues while they were waiting for their turn to vote. According to the petitioner, the 1<sup>st</sup> respondent's supporters and agents, in full view of the election officials and security officers manning the said polling stations, bribed voters to vote in favour of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent denied the allegation that he had bribed voters at Dagahley and Diif. The Returning Officer told the court that he had not received any complaint regarding allegation of bribery either by the presiding officers of the respective polling stations or by any of the candidates.

This court is in agreement with the submission made by counsel from the 1<sup>st</sup> respondent which was to the effect that due to the

seriousness that the allegations of bribery is considered in election petitions are under consideration, a person making claims of bribery must prove the bribery so that the court is left in no doubt and can therefore conclusively make a finding that indeed voters were bribed with the knowledge and consent of the candidate. In that regard, this court agrees with the English position as stated in **Halsbury's Laws of England, 3<sup>rd</sup> Edition, Volume 14** , paragraph 384, at page 220. It states thus:

*“Proof of bribery. Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the election. The judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be, such as they can allow in certain conditions in cases of treating of undue influence by agents. For this reason clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive. Bribery, however, may be implied from the circumstances of the case, and the court is not bound by the strict practice applicable to criminal cases, but may act on the uncorroborated testimony of an accomplice. The court strips the proceeding in each case of every colour, every dress, and every shape to discover its real and true nature. The court has always refused to give any exhaustive definitions on the subject, and has always looked to the exact facts of each case to discover the character of the transaction.”*

In the present petition, the petitioner was required to prove to the required standard of proof that indeed the petitioner or his agents bribed the voters. It is not enough for the petitioner to state that he saw certain persons acting at the alleged behest of the petitioner bribe voters. The actual act of bribery must be described in sufficient detail for the court to reach determination that indeed such bribery took place. There must be sufficient evidence to establish nexus between the person giving the bribe and either the 1<sup>st</sup> respondent or his known agent. Knowledge of the 1<sup>st</sup> respondent or his agents in the act of bribery must be established. This is because bribery is an electoral offence under **Section 10** of the **Election Offences Act**, and once established, may result in the nullification of an election. The petitioner and his witnesses did not adduce any evidence to connect the persons who were allegedly bribing voters with the 1<sup>st</sup> respondent. The credibility of the petitioner's case on the allegation of bribery would have been boosted if the petitioner procured a voter or voters to testify in support of his case in regard to the allegation of bribery. Having evaluated the evidence adduced in this regard, this court is of the considered view that the allegation of bribery of voters by the 1<sup>st</sup> respondent was not proved.

As regard the allegations that the petitioner made faulting the conduct of the elections by the 2<sup>nd</sup> respondent and ECK, this court would like to make several observations that are pertinent to the decision that the court will ultimately render in respect of this election petition. The first observation is that from the evidence adduced by all the parties to this petition, it was common ground that Wajir South constituency is situated in a semi-arid region of North-Eastern Province of Kenya. The constituency is largely populated by the Somali ethnic community. The population is largely pastoralist. The pattern of life in the constituency is influenced and dictated by the availability of water and pasture. There are water dams and water pans which have been established in various areas of the constituency. These water dams and pans are seasonal. They fill up during the rainy season but dry up during the dry season. Boreholes have been sunk which provide permanent sources of water. There are large settlements with relatively high populations within the environs of such boreholes. The population in areas which do not have permanent settlements at any one time is thus influenced by the availability of water and pasture. The communities in the area therefore migrate from one area to another depending on the availability of water and pasture. Another pertinent factor that emerged during the hearing of the petition is that Wajir South is populated largely by four (4) clans of the Somali ethnic community. The four clans are Mohamed Zuber, Bahageri, Geri and Makabul. The petitioner, the 1<sup>st</sup> respondent and the Returning Officer acknowledged the fact that clanism was one of the major determining factors in any election. Clan affiliation to a large extent determines who would represent the constituency in parliament. The 1<sup>st</sup> respondent hails from the clan with the highest population. Another important factor is that although members of the various clans lived in mixed communities, the majority of the members of the four clans lived within a certain definable area in the constituency. The petitioner and the 1<sup>st</sup> respondent testified with confidence in regard to areas that they considered to be their respective strongholds on the basis of where their respective clans have established settlement.

Another factor which the court noted during the hearing of this petition is that due to the pastoral nature of the population within Wajir South constituency, ECK established mobile polling stations. These stations were identified as such in the gazette

notice that was published by ECK. The mobile polling stations were referred to as such, because there were set up in areas where members of the pastoral community are resident at the particular time of the elections. Another factor, which was common ground from the evidence adduced by the petitioner, the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent (and also corroborated by their respective witnesses) is that the illiteracy levels among adults in Wajir South constituency is about 90%. i.e. about 90% of the adult population, and therefore the voting population, is illiterate. During the 2007 parliamentary election for the constituency, the majority of the voters were therefore assisted to cast their vote on account of their illiteracy.

The petitioner complained that the electoral commission had relocated two (2) polling stations, being Dagahley Borehole polling centre and Arabalow polling centre without notifying in advance voters who were registered in those polling centres of the relocation of the said polling centres. According to the petitioner, the electoral commission made the decision to relocate Dagahley Borehole polling centre a day before the elections from its previous location at Dagahley Borehole (referred to in evidence as the old borehole) to Dagahley Primary School. It was the petitioner's case that the relocation of the said polling centre, without the candidates being consulted, and without adequate notice being given to the voters, meant that voters, who would otherwise have voted, were denied opportunity to cast their votes on the election day. The petitioner testified that the irregular relocation of Dagahley Borehole polling centre, which had 3,334 registered voters, (and which was about 10% of the registered voters of Wajir South constituency), affected the results of the parliamentary elections because a significant portion of the electorate was denied an opportunity to vote. In the case of Arabalow polling centre, the petitioner testified that due to the irregular relocation of the polling centre, only one (1) voter had the opportunity to vote in that polling centre.

On his part, the 1<sup>st</sup> respondent testified that the local leadership at Dagahley trading centre consisting of the area chief, the elders and the civic election aspirants had indicated to him that they would prefer the Dagahley Borehole polling centre to be relocated from the old borehole, which had been abandoned, and was about three kilometers away from the trading centre, to Dagahley primary school which was newly constructed in 2004. The 1<sup>st</sup> respondent told the court that he learnt of the request by the local leadership in the early part of December 2007. The 1<sup>st</sup> respondent became aware of the decision that had been made by the electoral commission to relocate the polling station on 25<sup>th</sup> December 2007. The 2<sup>nd</sup> respondent, the Returning Officer, testified that some of the candidates had approached him as early as 7<sup>th</sup> December 2007 requesting him to relocate the polling centre from the old borehole, which had no facilities, to Dagahley primary school, which had facilities and was in a secure environment. He testified that on his visit to Dagahley prior to the elections, the local leadership made the same request for the relocation of the said polling centre. The 2<sup>nd</sup> respondent did not however make any decision in regard to the request that had been made for the relocation of the polling centre. The 2<sup>nd</sup> respondent did not convene a meeting of all the candidates, or consult the candidates in regard to the request that had been made for the relocation of the said polling centre.

What was apparent from the evidence adduced by Hassan Osman Affey, the presiding officer of Dagahley Borehole polling station No.2, is that the decision to relocate the said polling centre was made a day before the elections i.e. on 26<sup>th</sup> December 2007. It was evident that the relocation of the said polling station was not publicized to the members of the public for a sufficient period prior to the said relocation. **Regulation 6 (1) (d)** of the **Presidential and Parliamentary Election Regulations** (hereinafter referred to as "**the Election Regulations**") provides that the electoral commission shall publish in the Kenya gazette a notice specifying all the areas that have been established as polling centres. **Regulation 25 (1)** of the **Election Regulations** allows a presiding officer to transfer a polling station where the proceedings in his polling station "*are interrupted by a riot, open violence, flood, natural catastrophe, shortage of equipment or other materials at a polling station or other administrative difficulties or other cause ...*"

**Regulation 25 (2)** of the **Election Regulations** provides as follows:

*"The discretionary powers of a presiding officer under subregulation 910 shall include a power in the circumstances therein mentioned to transfer the proceedings to another polling station in the same constituency, and where he does so-*

*(a) he shall advertise the fact in such manner as he thinks sufficient to bring it to*

*the notice of electors; and*

*(b)the polling area for the polling station from which the proceedings are transferred shall, for all the purposes of these Regulations, be deemed to be part of the polling area of the polling station to which the proceedings are transferred.”*

In the present petition, it was evident that the Returning Officer was aware for a period of about a month prior to the holding of elections that the local leadership at Dagahley location had expressed their desire for the relocation of the Dagahley Borehole polling centre from the old borehole to Dagahley primary school. The reasons advanced by the members of the local community at Dagahley were valid. They requested for the said polling centre to be relocated because of the facilities that had become available at Dagahley primary school since elections were last held in 2002. The primary school was an ideal location to conduct the elections because it had permanent classrooms and was secured with a natural fence. It can therefore be surmised that there were cogent administrative reasons for the said polling centre to be transferred from the old borehole, which had no physical facilities to the primary school.

However, the decision made by the presiding officer to transfer the said polling centre was irregular. It was unlawful. There was no reason why the Returning Officer did not publicize the decision to move the polling station a few weeks prior to the elections. The election regulations cited above prohibit the arbitrary transfer of a polling station without the electorate being notified in advance. The only exception is in cases where there are emergencies. It was clear that the voters were not given adequate notice, nor did the presiding officer publicize the fact that the polling centre would be relocated sufficiently for the voters to be made aware of the relocation to the new location. By any stretch of logic, it cannot be said that twenty four (24) hours constitutes sufficient notice to voters. Taking into consideration that Dagahley Borehole polling centre had 3,334 registered voters (constituting about 10% of the registered voters of Wajir South constituency), the complaint made by the petitioner that the unlawful relocation of the said polling station significantly affected the conduct of elections in the said polling centre is valid. The registered voters at Dagahley Borehole polling centre were not given adequate notice of the relocation of the polling centre. There was no emergency which necessitated the movement of the said polling centre twenty four (24) hours prior to the opening of the polls. I therefore hold that the petitioner established that indeed the relocation of the said polling centre significantly affected the outcome of the results from the said polling centre. Similarly, no cogent reasons were given by the electoral commission why Arabalow polling centre was relocated at short notice without adequate notice being given to the voters. The transfer of the said polling centre was therefore irregular and contrary to the law.

Another complaint that the petitioner made against the conduct of the elections by the 2<sup>nd</sup> respondent and the ECK was in respect of the manner in which the elections were conducted at Dagahley Borehole polling centre, particularly in polling stations No.2 and No.4 (referred to in the evidence as stream No.2 and stream No.4). The petitioner testified that the presiding officers in the two polling stations allowed voting to continue beyond the stipulated closing time of 6.00 p.m. According to the petitioner, the presiding officers in the said polling stations allowed persons, who were not registered voters, to vote in the said polling station well past midnight. In his view, the said presiding officers allowed the said irregularity with a view to aiding the 1<sup>st</sup> respondent. He stated that the 1<sup>st</sup> respondent provided a generator to the said polling stations to enable unqualified persons, particularly Somali refugees from the nearby refugee camps to vote for the 1<sup>st</sup> respondent. The petitioner's testimony was corroborated by the evidence of his agent at the said polling station (i.e. stream 2), Mahat Osman Shalle. The 1<sup>st</sup> respondent's own witness Hassan Siyat Gure confirmed that indeed voting at stream 2 was going on even after the counting of votes had been completed in the other polling stations after midnight. This evidence was further corroborated by the testimony of the Returning Officer who testified that he was notified by the presiding officers of the said polling stations that voting went on beyond the official closing time of 6.00 p.m. All the witnesses who were on the ground, including Mahat Osman Shalle, Hassan Siyat Gure and Hassan Osman Affey testified that polling at Dagahley Borehole polling centre commenced as required by the law at 6.00 a.m. However, there was evidence that the actual voting started at 7.00 a.m.

It was on the basis of the complaints made by the petitioner in regard to alleged unlawful persons being allowed to vote

especially in regard to the conduct of elections at stream 2 and 4 at Dagahley Borehole that the court ordered that there be a scrutiny of the ballots. The scrutiny of the ballots established indeed there were irregularities in the conduct of the election at the said stream 2 at Dagahley Borehole polling centre. The scrutiny established that indeed there were no ballot papers in the ballot box in respect of parliamentary elections at the said polling station. The Form 16 A of the said polling station indicated that 332 electors voted. None of the agents of the candidates appended their signatures on the said Form 16 A. The petitioner was said to have secured 73 votes while the 1<sup>st</sup> respondent secured 110 votes. This court was not therefore able to verify whether or not the persons who were claimed to have voted in the said polling centre actually voted. As regard stream 4 of Dagahley Borehole polling centre, it was noted in Form 16 A that the petitioner had secured 65 votes while the respondent had secured 127 votes. The total number of persons who voted in the said polling stations was said to be 377. Five agents of the candidates who signed the Form 16 A refused to sign the said Form 16 A and gave reason for their refusal to sign as “*unfair election process*”. The scrutiny of the ballot at stream 4 at Dagahley Borehole polling centre confirmed the results contained in the Form 16 A. The Returning Officer explained the absence of the ballot papers in respect of stream 2 at Dagahley Borehole polling centre to be on account of human error. He speculated that there was possibility that the ballot papers in respect of the said polling station were wrongly placed in either the presidential or the civic ballot box. He however conceded that the error committed by the presiding officer of the said polling station in not placing the ballots cast in the ballot box of the parliamentary vote was contrary to regulations.

Having evaluated the evidence adduced by the parties to the petition in this regard, it was clear to the court that indeed the presiding officers of stream 2 and 4 at Dagahley Borehole polling centre breached the law by allowing voting to continue in their respective polling stations beyond the stipulated hours. Guidelines were issued by ECK which stipulated that voting could only take place for eleven (11) hours from 6.00 a.m. to 5.00 p.m. on the voting day. A presiding officer had the discretion to extend the hours of voting if he opened the polling station late. The hours to be compensated by the extension was supposed to be equivalent to the hours that were lost before the voting process started. This is provided for under **Regulation 25 (3)** of the **Election Regulations** which provide that:

*“A presiding officer may extend the hours of polling at his polling station where polling has been interrupted under this regulation or for other good cause, and shall, where polling in that polling station has started late, extend the hours of polling by the amount of time which was lost in so starting late.”*

In the case of Dagahley Borehole polling centre, it was evident from the evidence adduced by the witnesses mentioned that the presiding officers of the two polling stations i.e. stream 2 and stream 4 unlawfully extended voting hours beyond that which was provided by the law. Even if this court were to take it that voting started at the said polling stations at 7.00 a.m., the time which the polling stations should have been closed was 6.00 p.m. Taking into account the number of voters who voted in the said polling stations, it was inconceivable that voters were at the queues within the polling stations at the time the polling stations ought to have been closed. There was no justification in law for the said presiding officers to allow voting to go on up to 10.30 p.m. and past midnight respectively in the two polling stations. It was little wonder that the agents of the candidates noted that the entire voting process was unfair. This court finds that the petitioner established to the required standard of proof that indeed there was irregularity and breaches of the law by presiding officers in the conduct of the elections at Dagahley Borehole polling centre, stream 2 and stream 4 that was inimical to free, fair and transparent conduct of the elections.

As regard the complaint made by the petitioner to the effect that Somali refugees had been allowed to vote at Dagahley Borehole polling centre, this court holds that the petitioner did not prove this allegation. The scrutiny of the ballots ordered by the court did not support the assertion by the petitioner that Somali refugees voted during the 2007 general elections. Save for stream 2 where the court did not have an opportunity to verify the actual votes cast, (because the said ballots were missing in the parliamentary ballot box), the scrutiny of the ballots in respect of all the other polling stations did not reveal the allegation made by the petitioner that unauthorized persons were allowed to vote. That claim was not proved. As regard the allegation that the 1<sup>st</sup> respondent supplied a generator to Dagahley Borehole polling centre to enable polling to take place at night, upon evaluation of the evidence adduced, it was clear to this court that the allegation had no basis. The District Election Coordinator and the Returning Officer testified that each polling station was supplied with a gas lamp which emitted sufficient light to

enable the entire election process take place. This allegation was made by the petitioner. His witness, Mahat Osman Shalle did not corroborate this claim by the petitioner. That allegation was not established.

As regard the complaint made by the petitioner to the effect that elections were conducted in a manner that was irregular, unlawful and therefore not free and fair in that voters who were illiterate were not given an opportunity to express their actual wish on whom they preferred to vote for, this court has evaluated the evidence adduced. It was apparent that there was consensus in the evidence adduced by the petitioner, the 1<sup>st</sup> respondent and the Returning Officer that the majority of voters (upward of 90% being illiterate) were assisted during the parliamentary elections at Wajir South in the 2007 General Elections. It was evident from the said evidence that was adduced in regard to the manner which persons who are illiterate voted that the principle of the secrecy of the ballot was thrown out of the window. A practice emerged, which practice was condoned by election officials, by which agents of the various candidates were allowed to mark ballot papers on behalf of the illiterate voters. The evidence that was adduced by the witnesses especially in regard to the conduct of the elections at Diff primary polling centre, at Dagahley Borehole polling centre and at Dagahley primary school polling centre, established that illiterate voters were required to either loudly state the candidate of their choice upon entry into the polling station or were asked by the agents to state who their preferred candidate was so that the agent for the stated candidate could mark the ballot paper on his or her behalf. Such voter was denied the opportunity to exercise his right to vote in secrecy. It appeared as if the candidates encouraged this breach of the law with a view to roping in members of their respective clans to vote for them. The petitioner approved this practice. The 1<sup>st</sup> respondent thrived in it. In his evidence before court he told the court the following:

*“... whether voters are illiterate or not, because of clan dynamism, the voters know whom you (sic) vote for. Illiteracy will not affect the way they will vote. We have safety guard measures, the agents are from my sub-clan. The agents will ensure each aspirants interest is catered for. Most of the voters were assisted...it is more transparent for an agent to mark the ballots for the illiterate voters. There is strong clan bond, a voter cannot change his mind easily when he goes to the polling station. It is not easy to mislead such a person, because the agents are there. It is not possible to have a secret ballot in that sense of the word in Wajir South. Secret ballot is not easy in an area where there is rampant illiteracy. People would not accept an illiterate voter who does not have a person to assist him not be allowed to vote.”*

The Returning Officer candidly told the court that the volatile clan dynamics in Wajir South constituency was such that he was initially reluctant to accept his appointment as the Returning Officer of the constituency. Due to the fact that the candidates appeared to be aware of the practice that has taken root during past elections in the constituency, several candidates approached the Returning Officer and requested him to have presiding officers and deputy presiding officers from other constituencies to man the elections in the constituency. The Returning Officer with the consent of ECK, acceded to the request made by the candidates. The presiding officers and deputy presiding officers who had been recruited from Wajir South constituency were sent to preside elections in Wajir West constituency while those who were recruited from Wajir West are the ones who presided over the elections in Wajir South constituency. Unfortunately, the polling clerks who were recruited from Wajir South were retained to man the elections in the said constituency.

The right to vote for a person of your choice in a secret ballot is a basic human right. It is a fundamental human right that is recognized by international conventions and by our Constitution and electoral law. **Article 21** of the **Universal Declaration of Human Rights** (1948) provides as follows:

*“(i)Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.*

*(ii)Everyone has the right of equal access to public service in his country.*

*(iii)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 free voting procedures.”*

The **Universal Declaration of Human Rights** is a non-binding international instrument. Kenya ratified the

**International Convention on Civil and Political Rights (1966)** on 1<sup>st</sup> May 1972. **Article 25** of the said convention provide 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.”*

**Section 42 A** of the **Constitution** was repealed by **Act No.10** of **2008**. That Section enjoined ECK, the former electoral body to be responsible, for among other functions, the promotion of free and fair elections. The theme regarding the role of the electoral body to promote free and fair elections was amplified in **Section 41 A** of the **Constitution** that was introduced by the said amendments in **Act No.10** of **2008**. **Section 15** of the **Presidential and Parliamentary Elections Act** provides that every person who is entered in the register of electors shall be entitled to vote in an election held in the constituency where he has registered. It is clear from the above law that the right of a voter to vote for a candidate of his choice without being coerced or intimidated is enshrined in our laws. That right can only be guaranteed by the electoral body putting in place mechanisms that will enable such a voter to express his wish in a secret ballot. Where an electoral body breaches this fundamental requirement of the law in the conduct of the elections, such elections cannot be considered to be free and fair, and therefore valid.

**Regulation 31** of the **Election Regulations** sets out circumstances under which voters who are illiterate or incapacitated can vote. **Regulation 31 (1)** provides that the presiding officer shall permit such voter to be assisted by a person of his own free choice. **Regulation 31 (2)** provides that no person other than the one chosen by the voter shall be allowed to enter the compartment where the voter is casting his vote. **Regulation 31 (4)** requires a person who is assisting an elector to vote to take an oath of secrecy by the presiding officer in a manner prescribed by the law. The amendment made to **Regulation 31 (4) (d)** of the **Election Regulations** by **Legal**

**Notice No.178 of 2007** prohibits a person who has had the occasion to assist one voter to assist another.

Having evaluated the facts of this petition it was evident that the petitioner established serious breaches of the law by the electoral body which allowed agents of candidates to assist illiterate and incapacitated voters without swearing an oath of secrecy, and secondly, in allowing the said agents to assist more than one voter in a polling station. It was clear to the court that the presiding officers at Diif primary polling centre, at Dagahley Borehole polling centre and at Dagahley primary school polling centre abdicated their responsibilities to ensure that incapacitated and illiterate voters were given an opportunity to vote for a person of their choice without intimidation or being coerced to disclose their preferred choice upon gaining entry into the polling stations. It appeared to the court that the said presiding officers, deputy presiding officers and polling clerks were overwhelmed by the numbers of illiterate voters who presented themselves to the said polling stations that they allowed agents of the candidates to have free reign. The number of illiterate voters who presented themselves to the polling stations is no excuse for the said election officials to abdicate from their legal responsibilities to ensure free and fair elections. Taking in consideration the clan dynamics in Wajir South constituency, the said presiding officers were required to guard against such breaches of the right of illiterate voters by the agents of the candidates. In their closing submission, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents seem to suggest that that was the best way in which the election could have been conducted in the circumstances. This court was surprised, nay, taken aback, that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents seem to be suggesting that blatant breaches of the law should be condoned if the circumstances permitted. This court refuses to be persuaded by such argument. Electoral laws are enacted to be applied equally to all the constituencies in the country except where the law has specifically given exceptions after taking into account the special circumstances of the particular voter or the particular voting area. Illiteracy is not a unique phenomenon of Wajir South constituency. There are illiterate voters in other constituencies in the country who are given the opportunity to exercise their constitutional right to vote for a candidate of their choice in a secret ballot in accordance to the law. This court therefore holds that the petitioner has established this ground to the required standard of proof as pleaded in his petition. The failure by the electoral officers to allow the illiterate voters to express their wish in a secret ballot meant that the said electoral officials breached the law.

The issue that remains for this court to determine is whether the breaches of the law established by the petitioner are of such magnitude as to lead this court to invalidate the elections. **Section 28 of the National Assembly and Presidential Elections Act** provides that:

*“No election shall be declared to be void by reason of 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 results of the elections.”*

The Court of Appeal recently had occasion to interpret this section in light of the evidence regarding electoral malpractices that had been established in an election petition. In **James Omingo Magara vs. Manson Onyongo Nyamweya & 2 others CA Civil Appeal No.8 of 2010** (unreported) Omolo JA held at page 17 of his judgment that the election court must ask itself several questions before it can reach a determination that even though there were breaches of the law, such breaches did not affect the results of elections. He states thus:

*“... The court must still ask questions similar to those asked by the learned trial judge. In which polling stations were those votes cast? Who presided over the poll in the stations? How many voters were registered in that station? How many of them actually voted? How many votes did each candidate get in each polling station? I agree with the learned judge that the matter must go beyond simple arithmetic and certain basic questions such as ones listed must be easily answerable.”*

In the present petition it is clear that the electoral malpractices and breaches of the law which the petitioner has established are of such fundamental nature that they bring into question the credibility of the entire parliamentary election that was conducted in Wajir South constituency in the 2007 general elections. The irregularities and electoral malpractices established by the petitioner, taken in totality, are of such magnitude that this court cannot reach a determination that the said elections were transparent, free and fair. The voters of Wajir South constituency, the majority of who are illiterate were not given the

opportunity by ECK to exercise their free will in electing a member of parliament of their choice. The said voters were intimidated and coerced to vote for candidates from their respective clans. The electoral officials in the aforementioned polling stations allowed the agents of the candidates to run amok and run the show in the polling stations. The said election officials abdicated their responsibility of ensuring that the electorate of Wajir South constituency elect their member of parliament in the manner prescribed by the law.

Before concluding this judgment, I wish to thank counsel for the parties who appeared before this court during the entire hearing of the petition. All the counsel on record acquainted themselves well through their industry in research and conduct during trial. This judgment is a reflection of their joint output. Of course, this court takes ownership of any inadvertent mistake, either of law or of fact.

In conclusion, taking into consideration all the anomalies, irregularities and electoral malpractices, including clear and blatant non-compliance with mandatory requirements of the law by the presiding officers in the mentioned polling stations, and by the 2<sup>nd</sup> respondent, this court finds that the election conducted in Wajir South constituency in 2007 was not transparent, free and fair. This court therefore pronounces and declares the said elections and the results thereto to be null and void. The 1<sup>st</sup> respondent was not validly elected as a Member of Parliament of Wajir South constituency. A certificate to that effect shall issue forthwith and shall be served upon the Speaker of the National Assembly in accordance with **Section 30 (1)** of the **National Assembly and Presidential Elections Act**. The 3<sup>rd</sup> respondent shall proceed to conduct a by-election as required under the law. The respondents shall pay the petitioner's cost.

**DATED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JULY, 2010**

**L. KIMARU**

**JUDGE**