



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA
Election Petition 6 of 2008 (NBI E/P 18/08)

ABDULREHEMAN HASSAN HALKANO.....PETITIONER

AND

1. ABDI NASSIR NUH

2. JOEL G. MWAMBURI

3. ELECTORAL COMMISSION OF KENYA.....RESPONDENTS

JUDGMENT

On 27th December 2007, Presidential, Parliamentary and Civic Elections were held in Kenya. The elections were held under the provisions of the National Assembly and Presidential Elections Act (Chapter 7, Laws of Kenya) (hereinafter referred to as “the Act”) and the Parliamentary and Presidential Elections Regulations and Rules made thereunder (hereinafter referred to as “the Regulations” and “the Rules”). The Petitioner herein, Abdulrehman Hassan Halkano, (hereinafter “the petitioner”), was one of the voters in the said elections. He was so registered in Bura Parliamentary Constituency (hereinafter referred to as “the constituency”). The 1st respondent, Abdi Nassir Nuh, was one of the seven candidates for the parliamentary elections contesting the Bura constituency seat. The 2nd respondent, Joel G. Mwamburi, was the returning officer for the said constituency while the 3rd respondent, The Electoral Commission of Kenya, was conducting and supervising the entire elections.

At the close of balloting and counting of the votes, the 2nd respondent announced the results of the elections and the results showed that the 1st respondent had won the said parliamentary seat having garnered 6,259 votes. The other 6 candidates got votes as follows:-

<u>Name</u>	<u>Party</u>	<u>Votes</u>
Wario Ali	KANU	6,000
Suba Mohamed O. Said	ODM	2,530
Dulow Hirsi Sheikh	NARC KENYA	2,345
Loka Mahadhi Ali	DP	81
Maro Mohamed Odha	SHIRIKISHO	58
Takano Hussein Dado	DARAJA YA WAKENYA	27

From the above showing, Wario Ali of KANU was second to the 1st respondent who contested the seat on an ODM-Kenya ticket.

The 3rd respondent gazetted the results on 30th December 2007. The petitioner was not satisfied with those results and has petitioned this court seeking the following reliefs that:-

- a) There be a scrutiny of the votes recorded as having been cast in the aforesaid Parliamentary Election in Bura Constituency.**
- b) There be a scrutiny of the rejected and spoilt ballot papers.**
- c) There be a scrutiny of the counterfoils of the votes cast.**
- d) There be a recount of the ballot papers cast at the said election.**
- e) The said Parliamentary Election held on 27th December 2007, in the said constituency be determined and declared null and void.**
- f) It be determined that the 1st respondent has not been validly elected as the Member of the National Assembly for Bura Constituency.**
- g) The said election of the 1st respondent as the Member of the National Assembly for Bura Constituency be determined and declared null and void.**
- h) Such election offences and corrupt practices on the part of the 1st respondent as are disclosed and found before the court be reported to the Speaker of the National Assembly.**
- i) The respondents be condemned to pay the petitioner's costs.**
- j) Such further, other and consequential orders as the court may make.**

The above reliefs are sought on the basis of various breaches which may be summarized as follows:- that the said parliamentary election in the said constituency was not carried out in accordance with the provisions of the Act or any Law or in accordance with the principles of natural justice; that the tallying and totaling of the votes cast at the said election were not only inaccurate and incorrect but the same was conducted unfairly; that the 1st respondent and or his agents and or persons acting on his behalf prevented other agents from being near the tallying area and interfered with the tallying process; that the 1st respondent, and or his agents and or persons acting on his behalf, used violence and other means to cause disruption in the tallying process; that the 1st respondent prevented and the 3rd respondent failed to ensure arrangements for the presence of the other candidates at and during the tallying of the votes and that the tallying and final count were not witnessed or verified, as required by law; that the conduct of the election in the said constituency by the 2nd respondent and his officials prejudiced the election results due to diverse breaches of statutory rules; that forms 16 and 16A were not signed by various agents and in fact only a few were available; that at a polling station called Charidende, voting took place for about 24 hours contrary to the Law; that the 1st respondent had nomination papers for both KADDU and ODM-K parties; that at three polling stations namely Bangale, Kamaguru and Huruma there was double voting; that the 1st respondent influenced the Administration by holding meetings with high ranking Administration Police Officers; that one presiding officer a Mr. Bashir was posted by the 3rd respondent to a polling station called Boka but was on the same day transferred through the influence of the 1st respondent to a polling station called Pamba Trading Center as a result of which the 1st respondent garnered 521 votes as against the next candidate who got 114 votes;

As a result of those complaints, the petitioner sought the reliefs already stated above. In support of the petition, the petitioner filed several affidavits of evidence including one by himself. A total of 13

affidavits were relied upon and the deponents of those affidavits testified and were cross examined.

The respondents have opposed the petition. The 1st respondent filed one affidavit in opposition and the 2nd and 3rd respondents filed their affidavits in opposition through the 2nd respondent and 3 other witnesses. The deponents of the affidavits testified and were cross examined. The affidavits in opposition and their deponents denied the various allegations made by the petitioner in his petition.

The burden of establishing all the allegations in the petition is on the petitioner who had to establish the same on a standard higher than that applicable in ordinary civil cases (proof on balance of probabilities) but lower than the standard of proof required in ordinary criminal cases (proof beyond reasonable doubt).

I will consider the complaints raised by the petitioner in his petition in the following clusters. Those made against the 1st respondent; the ones made against the 2nd and 3rd respondents and those raised against all the respondents together. As against the 1st respondent, the petitioner complains in paragraph 20 (h) of the petition that he, his agents and supporters campaigned in and around certain polling stations contrary to the regulations by making false, deceptive and misleading allegations against KANU party which was the petitioner's party. In his answer to a request for particulars of the said paragraph, the petitioner replied that the request was a fishing expedition and that he was not obliged to supply evidence and further that the particulars sought were ambiguous. No evidence of the allegation in the end was adduced leaving the complaint in paragraph 20 (h) of the petition unproven. In the premises, I find that neither the 1st respondent nor his agents or supporters campaigned within the precincts of any polling station. Neither did they make false, deceptive and/or misleading allegations against the KANU party. The allegation in the said paragraph therefore fails.

In paragraph 11 of the petition, the petitioner complains that the 1st respondent and/or his agents and or persons acting on his behalf, contrary to the law prevented other agents from being near the tallying area and interfered with the tallying process. In the particulars supplied, the petitioner stated that the persons or agents who acted on behalf of the 1st respondent and who prevented other candidates' agents from being near the tallying area were security officers manning the tallying centre. The petitioner further stated that the other particulars requested were unknown to him but were within the possession and knowledge of the 2nd and 3rd respondents. Having failed to supply the particulars of the persons or agents who acted on behalf of the 1st respondent in preventing other agents from being near the tallying area or those who interfered with the tallying process, the petitioner's attempt to remedy the failure at the hearing fell far short of establishing the allegation. The 1st respondent of course denied the allegation and swore that the names in the affidavit evidence of the petitioner were imagined. I remain unpersuaded that the 1st respondent and or his agents and or persons acting on his behalf, contrary to law, prevented other agents from being near the tallying area and interfered with the tallying process. I therefore find and hold that the allegation in paragraph 11 of the petition has not been proved and the same fails.

In paragraph 12 of the petition, the petitioner complains that the 1st respondent and or his agents and or persons acting on his behalf used violence and other means to cause periods of disruption in the tallying process and that the integrity of the said process was broken several times. In answer to a request for particulars of this paragraph, the petitioner stated that to supply the names of persons and agents who acted on behalf of the 1st respondent and who allegedly used violence and the other means alleged would be to furnish evidence. The petitioner's preferred candidate Ali Wario (PW 2) narrated general complaints of threats he encountered at a polling station called Charidende where he was shouted at and asked to leave by persons he believed were the 1st respondent's supporters because they held his placards.

The evidence of PW 2 in any event did not implicate the 1st respondent and did not suggest that the alleged supporters acted at the behest of the 1st respondent. On his part the 1st respondent denied the allegation in paragraph 12 of the petition. The alleged incidents of threatened violence were not documented. PW 2 was satisfied with oral and mobile phone reports. He did not make any report to any police station. In the premises the evidence tendered on the allegation in paragraph 12 falls far short of satisfying me that indeed the incidents complained of occurred. I therefore find and hold that the

allegation in the said paragraph has not been proved and must as such fail.

In paragraph 13 of the petition, the petitioner complains that the 1st respondent prevented and the 3rd respondent failed to ensure arrangements for the mandatory presence of the other candidates at and during the tallying of votes. In answer to the 1st respondent's request for particulars of the allegations in the said paragraph, the petitioner stated that the particulars as to the manner in which the 1st respondent prevented the mandatory presence of other candidates were well within the knowledge of the 1st respondent. The 1st respondent denied having any role to play in the arrangements at the tallying centre or at all. The petitioner did not adduce any evidence to support the allegation in paragraph 13 of the petition. The paragraph therefore was unproven and therefore fails as against the 1st respondent.

Paragraph 23 of the petition alleges that the 1st respondent had nomination papers for both KADDU and ODK-K parties. The basis of that allegation appears to have been reports that appeared in both print and electronic media viz Nation Newspapers, Standard Newspapers, KTN and NTV stations. No evidence was adduced in support of that allegation. The 1st respondent denied the allegation and stated that he contested the seat on an ODM-Kenya ticket and the 2nd respondent accepted his nomination papers as such. The complaint in paragraph 23 of the petition was therefore not proved at all.

In paragraph 25 of the petition the petitioner alleges that the 1st respondent influenced the Administration by holding meetings with high ranking Administration Police Officers (5 of them) before he was declared the winner and after which all the agents for other parties/candidates were chased out of the counting hall. When requested to particularize the allegation in the said paragraph, the petitioner stated that the 1st respondent was fishing for evidence which, he, the petitioner, was not obliged to give. The petitioner sought to establish the allegation through the affidavit and the evidence of PW 2, Wario Ali. He testified that when he went to the tallying centre he found 5 senior security officers in the tallying room with the 2nd respondent and the 1st respondent and when he complained, some people including two of his agents were allowed into the room. The witness did not explain the manner and form in which the 1st respondent influenced the said officers. In any event there is no allegation that the said security officers took over the role of the 2nd respondent at the tallying centre and after all when PW 2 complained his two agents were allowed in the tallying room. The petitioner himself was not at the tallying centre at the time. On his part the 1st respondent denied holding any meeting with the security officers and swore that he saw no need to do so. The evidence relied upon by the petitioner to establish the alleged influence of the 1st respondent is not only inadequate but unreliable as none of the said officials was called as a witness. It should be appreciated that the standard of proof of such an allegation is higher than proof on a balance of probabilities. In my view, the petitioner failed to establish the allegation even on a balance of probabilities test.

In the premises, the allegation in paragraph 25 of the petition was not proved at all. That allegation must therefore fail.

The fate of the allegation in paragraph 26 of the petition is the same as that of the preceding paragraph. The petitioner alleges in that paragraph that one Presiding Officer a Mr. Bashir was posted by the 3rd respondent to Boka polling station but on the same date, through the influence of the 1st respondent, the said Presiding Officer was transferred to Pamba Trading Center as a result of which influence, the 1st respondent got 521 votes against the next candidate who got 114 votes only. When requested to particularize, the manner in which the 1st respondent influenced the transfer of Mr. Bashir from Boka polling station and how he influenced the 521 votes in his favour, the petitioner was contended with the answer that either the particulars sought were within the knowledge of the 2nd and 3rd respondents or that the 1st respondent was fishing for evidence. In his oral testimony in court the petitioner specifically failed to explain his allegation in paragraph 26. The petitioner did not adduce any further illuminating evidence to prove the said allegation. The 1st respondent denied the allegation. Looking at the material relied upon by the petitioner to establish the allegation, I have no hesitation in finding that the allegation in paragraph

26 of the petition was not proved at all let alone to the required standard to establish such an allegation.

I turn now to the allegations of breaches made against the 2nd respondent alone. The same are found in paragraphs 15, 16, 18, 19, 20 (b), (c), (d), (e), (f), (j), 21, 22 and 24 of the petition. Some of the allegations are intertwined and I will consider them together. First the petitioner alleged various breaches that occurred at various polling stations. In paragraph 19 of the petition, the petitioner alleges that counting at polling stations was rendered incapable of the reliance required by law to establish a lawful election, by reason of there having been no or no adequate lighting at the polling stations after sunset. The paragraph does not identify the particular polling stations that suffered from inadequate lighting. It is therefore not surprising that particulars of the allegation were sought. In answer thereto, the petitioner identified two polling stations where pressure lamps supplied were allegedly faulty. The stations identified were Hosingo and Shabaha. The petitioner himself did not testify on the allegation. The only evidence on the allegation was given by PW 2, Wario Ali. He testified that while he was at Hosingo Polling station, he noted inadequate lighting and complained as any body could tamper with the counting process. The 2nd respondent denied the allegation in paragraph 19. He swore that every polling station within the constituency was supplied with a variety of utility items including gas lamps to ensure sufficient lighting for the proper conduct of the election process. I am not satisfied that anything much turns on the allegation in paragraph 19. PW 2 did not allege that the alleged inadequate lighting indeed affected the counting process. He merely alluded to the possibility of the counting being tampered with but was not positive that the counting at Hosingo and Shabaha was indeed tampered with.

I believe the 2nd respondent that he made adequate arrangement for sufficient lighting after sunset. Indeed, save for the two polling stations complained about, the petitioner himself alleged widespread night voting elsewhere. Inadequate lighting is not alleged in those polling stations. In the premises, I find and hold that the petitioner has not proved the allegation in paragraph 19 of his petition and the same fails.

In paragraph 24 of the petition, the petitioner alleges that at Bangala, Kamaguru and Huruma polling stations, there was double voting as the 2nd respondent did not take the necessary action to rubber stamp the identity cards of voters after voting. When requested to particularize who had voted more than once, the petitioner stated that those particulars were with the 2nd and 3rd respondents. In his own evidence in court the petitioner did not attempt to establish the allegation in paragraph 24. His witness Ali Wario (PW 2) testified that at the said polling stations he noted that voting cards were not being embossed after voting and that failure, according to PW 2, allowed double or multiple voting. That was the nearest the petitioner came to establishing the allegation in paragraph 24 of the petition. But in my view, that was not enough. No evidence or sufficient evidence of actual double voting was adduced. The 2nd respondent was categorical in his denial of the alleged double voting. He swore that embossing of voter's cards was not the only security employed to prevent multiple voting. In addition to embossing the cards, the names of the voters were crossed out in the register and the voter's small fingers would be immersed in indelible ink for easy recognition if they would attempt to vote more than once. It is illustrative that PW 2 did not mention the additional safe guards stated by the 2nd respondent. Once more I find that nothing much turns on the alleged double voting. The allegation remains unproven and accordingly fails.

In paragraph 22 of the petition it is alleged that at Charidende polling station, voting took place for about 24 hours which was contrary to the provisions of the Law. When requested to furnish particulars of the voters who voted beyond the prescribed duration, the petitioner stated that those particulars were within the possession and knowledge of the 2nd and 3rd respondents. In his evidence in court, the petitioner testified that the complaint in the said paragraph had been laid on information from his agent at Charidende. The name of the agent who supplied the information was not given neither was he called as a witness. The petitioner however called one Maka Hajir (PW 9) who swore that he had been informed by his colleague Hassan Hussein that the 1st respondent through the Assistant Chief of Charidende had instructed the Presiding Officer at the said polling station to keep the station open until all people who were looking after cattle voted. PW 9 further swore that as a result of the said directive, voting in the said station went on till the following morning i.e. 28th December 2007 at 5.00 a.m. PW 9's testimony on the allegation in paragraph 22 is suspect. I say so because the witness himself was a Presidential agent for

Onkomondukub polling station. His concentration would be expected to be at that polling station. Besides, he appears to have relied on hearsay in concluding that voting at Charidende polling station took place as long as he says it did. The petitioner did not explain why he did not call their agent at Charidende to substantiate the allegation in paragraph 22 of the petition. The 2nd respondent denied that polling at the said polling station went on for 24 hours. I find him more credible taking into account that only about 400 voters are recorded to have cast their votes at that station for the entire period. In the end, I find and hold that the petitioner has not established the allegation in paragraph 22 to the required standard of proof. The allegation therefore fails.

In paragraph 18 of the petition, it is alleged that the 2nd respondent by himself and or his officials unlawfully refused to allow a number of other candidates' agents to attend and carry out their duties in the manner prescribed by the Regulations at various polling stations in the constituency viz: Matagala, Gelmodo and Dukanto for the whole day on polling day and the polling was unverified and without the safe guards entrenched by law for the said period and did not constitute a valid process. The allegation is so vague that no wonder particulars of the same were requested. In answer thereto the petitioner identified 3 agents as follows: Mohammed Galgalo (Dakanto), David Dara Elema (Gelruad) and Barisa Buneya Elema (Matagala). Barisa Boneya Elema was called as a witness. He testified as PW 12. He testified that supporters of the 1st respondent could not allow him to act as a KANU agent at Matagala polling station as the said supporters threatened to kill him. He did not give evidence which supported the petitioner's allegation in paragraph 18.

Mohamed Galgalo was also called as a witness. He testified as PW 11. He admitted that he was not the only agent at Dukanto polling station. There were other agents for other candidates at the station. He testified that he was threatened by supporters of the 1st respondent and could not therefore perform his duties as PW 2's agent. He further stated that when he complained to the Presiding Officer at the said station, he was informed that his security could not be guaranteed. It is illustrative that PW 11 did not blame the 2nd respondent for his failure to act as an agent at Dukanto polling station. There was no other and better evidence to prove the petitioner's allegation in paragraph 18 of the petition. In the premises I am not satisfied that the said paragraph has been proved to the required standard of proof. The allegation in the said paragraph therefore fails.

I turn now to what in my view are the more serious allegations raised by the petitioner against the 2nd respondent. Those allegations are contained in paragraph 20 (b), (c), (d), (e), (f) and (g). Allegations in paragraph 20 (b), (c), (d) and (e) may be considered together. The allegations in those sub paragraphs will be better appreciated if the allegation in paragraph 20 (a) against the 3rd respondent is also considered. The allegations are expressed in the petition as follows:-

“20 (a) The 3rd Respondent brought Ballot papers meant for Budalangi Constituency and distributed them in six (6) Polling Stations in Bura Constituency while the Ballot Papers meant for Bura Constituency were taken to Budalangi Constituency and thus creating a mix-up which brought about confusion and chaos in the entire electoral process.

(b) The said mix-up caused unnecessary delay in voting and the voters in the said six (6) Polling Stations in Bura Constituency, waited for the whole day to vote but were turned away at the end of the day by the 2nd Respondent, the latter intimating that he had not received the ballot papers and that the voters should return the following day to vote.

(c) As it turned out, and after the voters' had been turned away as aforesaid, the ballot papers arrived very late in the evening and some voters from nearby who had not gone away to their homes were allowed to vote throughout the night by the 2nd respondent.

(d) On the following day, the voters who had been turned away as aforesaid, returned to the aforesaid Polling Stations to vote only to be informed by the 2nd Respondent that the voting had taken place at night and that there was no more voting.

(e) The 2nd Respondent allowed some voters to vote at night contrary to the provisions of the Law whereas other voters had been turned away as aforesaid.”

There are certain facts that are agreed in the above paragraphs. The first one is that of the mix-up of ballot papers. The 2nd respondent freely admits that there was indeed a mix-up of ballot papers of 6 polling stations with those of Budalangi Constituency. Secondly, it is not disputed that the polling stations involved were Amani, Shirikisho, Shikaadabu, Chewele, Makini and Baraka. Thirdly, there is no dispute that as a result of the mix-up, a delay in the voting was occasioned in the six polling stations. The impression created in paragraph 20 (b) of the petition that no voting took place at all at the 6 stations on election day i.e. the 27th of December 2007 is obviously not correct. At Amani polling station, on the testimony of the petitioner, the 2nd respondent had availed some ballot papers and voting commenced in the afternoon of 27th December 2007. The Petitioner himself voted at that station at 3.00 p.m. on that day. PW 4 Nassir Mramba Baroba, testified that voting at Chewele polling station took place between 9.00 p.m. and 11.00 p.m. when the correct ballot papers had been supplied. PW6, Nuro Abarufa testified that voting took place between 6.30 p.m. on 27th December 2007 and 2.30 a.m. on 28th December 2007 at Shirikisho polling station. In his response to the allegation in paragraph 20 (b) of the petition, the 2nd respondent testified that by 2.30 p.m. of polling day i.e. 27th December 2007, the correct ballot papers for the six polling stations had arrived and were distributed to the said stations whereupon the voting exercise commenced immediately thereafter. In view of the evidence on record, the allegation in paragraph 20 (b) is misleading. The petitioner's case that no voting took place at the six polling stations and that voters were turned away at the end of the day by the 2nd respondent is therefore not well founded. The petitioner has not proved to the required standard of proof that the 2nd respondent intimidated the voters at the said polling stations that the voters return the following day. The petitioner attempted to buttress his allegation in paragraph 20 (b) and (e) of the petition by introducing, through PW 2, a list of names of voters who were allegedly turned away when they turned up to vote on 28th December 2007. The respondents discredit that list. The 2nd respondent swore that the said list is fake and does not reflect the true position and further that the list contained ECK officials, voters who in fact voted and voters of other polling stations other than the six polling stations affected by the mix-up. The 2nd respondent further swore that in fact the voter turnout at the said polling stations compared quite favourably with the turnout in other stations unaffected by the mix-up. In the 2nd respondent's view, despite the delayed voting at the six polling stations, they were not adversely affected. In support of his contention the 2nd respondent exhibited evidence of the turnout in various polling stations vis-à-vis the turnout in the six affected polling stations.

The 1st respondent supports the 2nd respondent that indeed the list of names relied upon by the petitioner to establish that voters were turned away from the said six polling stations is fake. He swears that he has personally perused the voters' register for Bura Constituency which shows, *inter alia*, that some of the people on the list were ECK officials in distant polling stations and failed to vote due to their responsibilities. Others were people who had actually voted while others are voters registered elsewhere. The 1st respondent further revealed that some of the people on the petitioners' list bear the same Identity Card numbers.

The detailed response of the respondents to the allegations made by the petitioner in paragraph 20 (b), (c), (d) and (e) has convinced me that the petitioner and his witnesses have not been candid with regard to what actually happened at the six polling stations which were affected by the mix-up. I also find it strange that none of the persons who were alleged to have been turned away from the said stations was called as a witness. In fact it is the 2nd respondent who called one Ali Kano Wako, 2RW3, who testified that he was not turned away as alleged by the petitioner. The witness swore that his failure to vote was because he was a Presiding Officer at Adelle Polling Station of Madogo/Maroro ward during the same election. The 2nd respondent also called Mwanajuma Balagha Maro, 2RW1 who testified that she voted at the Chewele Polling Station in the evening of polling day contrary to the allegation made by the petitioner that she had been turned away. Ali Babisani Waravesa 2RW2 also swore that he voted at the same polling station on polling day contrary to the petitioner's allegation that he had not voted.

I therefore find and hold that the petitioner's allegations in paragraph 20 (b), (c), (d) and (e) have not been proved to the required standard of proof. The same therefore fail.

In paragraph 20 (f) of the petition, the petitioner alleges that the 2nd respondent allowed the 1st respondent's supporters to openly campaign in and within the precincts of polling stations contrary to the Regulations. This allegation is akin to the allegation in paragraph 20 (h) of the petition which I have already found unproven. The allegation in paragraph 20 (f) of the petition in the absence of proof of the allegation in paragraph 20 (h) could not be established. The same accordingly fails.

In paragraph 20 (g) of the petition, it is alleged that the 2nd respondent denied the candidates the right to have the votes cast recounted in spite of various oral requests to do so contrary to Regulation 37 (1). When requested to particularize the allegation, the petitioner failed to identify specific polling stations where the requests for recount had been made. He, however, identified PW 2, Ali Wario, as one of the candidates whose request for a recount had been denied. The petitioner did not specify the particular polling station at which PW 2 requested for a recount which was denied. In his testimony however, PW 2 stated that his agents at Bilbil and Charidende polling stations requested for a recount at those polling stations which requests were refused by the Presiding Officers. PW 2 further swore that he personally requested for a recount at the Bura Country Club Tallying centre which request was also declined by the 2nd respondent.

With regard to the request for a recount made by PW 2 at Bura Tallying Centre, the 2nd respondent contended that such a request could not be acceded to because the Tallying Centre is not the proper forum for a recount. I have perused the relevant Regulations. It would appear that the 2nd respondent's position is well founded. This issue will be looked at further while considering the allegations made by the petitioner with respect to Tallying at Bura County Club Tallying Centre.

With regard to the allegation made by PW 2 that his agents at Bilbil and Charidende polling stations were denied a recount, the 2nd respondent stated that as he received results from all the polling stations, at no time were complaints raised by any polling agent, candidate or presiding officer. The agents who allegedly requested for a recount at the identified polling stations, did not confirm PW2's allegations. In any event the alleged requests were allegedly made orally. No record of such requests would obviously be kept. Taking everything into account, I believe the 2nd respondent that when he received results from the two polling stations, no complaints were made by PW 2's agents. My conclusion is, therefore, that neither PW 2 nor his alleged agents requested for a recount at Bilbil and Charidende polling stations which requests were declined. The petitioner's allegation in paragraph 20 (g) has therefore not been proved to the required standard of proof.

I turn now to the petitioner's allegations in paragraph 10, 15, 16 and 20 (j). Those paragraphs complain about the tallying process. The process took place at Bura County Club. The pith and marrow of the complaint is that the 2nd respondent should have rechecked and recounted individual votes cast for each candidate polling-station by polling-station and announced the same before declaring the final results. The complaint is expressed by the petitioner's preferred candidate, PW 2, in paragraphs 47, 48 and 51 of his affidavit as follows:

"47. That I objected to the said announcement because the 2nd respondent was purporting to declare final results each candidate i.e. Civic, Parliamentary and Presidential, had obtained in Bura Constituency yet he had not announced what results each said candidate had obtained at each Polling Station.

48. That I further told the said 2nd Respondent that it was necessary for him to announce results of each Polling Station so that my Agents and I would be in a position to tally and verify the final results.

51. That it was thus impossible to tally the results from each Polling Station because of the 2nd

Respondent's said failure to announce the results of each Polling Station as soon as he received them..."

The 2nd respondent testified that the position taken by PW 2 is erroneous. In his view, once the results gathered from various polling stations are received at the tallying centre, only the consolidated results from all polling stations within the constituency are announced as opposed to results of every individual polling station.

The Regulation that governs tallying is Regulation 40 of the Regulations. It reads as follows:-

"40. Announcement of election results.

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

(a) tally the results from the polling stations for each candidate without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a polling station exceeds the number of registered voters in that polling station, he shall disregard the results of the account of that polling station in the announcement of the election results and make a statement to that effect;

(b) examine the ballot papers marked "rejection objected to" and "disputed" and confirm or vary the decisions of the presiding officers with regard to the validity of these valid papers.

(c) publicly announce to persons present the total number of valid votes cast for each candidate in case of an election for the president;

(d) publicly announce to persons present the total number of valid votes cast for each candidate in case of a parliamentary election.

(e) publicly declare to the persons present the candidate who has won the parliamentary election for the constituency."

A plain reading of the above provisions shows that PW 2's stand is not correct. The 2nd respondent had no obligation to announce the results of each candidate obtained at each polling station. It is also evident that PW 2 does not allege the existence of any of the conditions prescribed in the said provisions that would entitle the 2nd respondent to exclude the results of any polling station. PW 2 does not also allege that the 2nd respondent took into account any ballot that he ought not have taken into account. Indeed the provisions of regulation 40 (a) specifically forbids the recounting of validly cast votes at the tallying centre.

In the premises, the petitioner's allegations with regard to the tallying process contained in paragraphs 10, 15, 16 and 20 (j) of the petition are premised on an incorrect interpretation of Regulation 40 of the regulations. Further, the petitioner has not placed sufficient evidence before the court to demonstrate that the tallying process was otherwise flawed. The petitioner stated that he had agents in all the polling stations in the constituency. One would have expected that even before the tallying process commenced at Bura County Club, the petitioner or his preferred candidate would already be armed with results from each polling station save of course for the votes which were disputed or rejected. It would only be the disputed or rejected votes that would await resolution by the 2nd respondent.

In the premises, I find and hold that the allegations in paragraphs 10, 15, 16 and 20 (j) of the petition have not been established to the required standard of proof. The allegations therefore fail.

Before winding up this judgment, it is opportune to briefly discuss the report of the Deputy Registrar on the scrutiny and recount which I ordered when all the evidence in the petition had been given for reasons

given in the Ruling on the petitioner's application for the scrutiny and recount. I delivered that ruling on 4th July 2008. In the event, the Senior Deputy Registrar, Mr. Nzyoki who carried out the scrutiny produced his report on 30th July 2008. The Learned Senior Deputy Registrar testified that the total votes garnered per candidate in respect of the 79 ballot boxes subjected to the scrutiny were as follows:-

<u>Candidate</u>	<u>Number of votes</u>
1. Dulow Hirsi Sheikh	2,373
2. Loka Mahadhi Ali	81
3. Maro Mohammed Odha	71
4. Nuh Nassir Abdi	6,268
5. Soba Mohammed Omar Said	2,538
6. Takano Hussein Dado	30
7. Wario Ali	5,975

The Learned Senior Deputy Registrar further reported that the identified disputed votes were 16. He produced his record of the scrutiny, the exhibits and his report.

Counsel for the petitioner identified various documents that were not available during the scrutiny. Counsel for the 2nd and 3rd respondents referred to other documents which explained where the missing documents could be. I accept that not all documents expected to be scrutinized may not have been available during the scrutiny. But is the non-availability of those documents sufficient to nullify the election of the 1st respondent? I think not. First, the petitioner's application for scrutiny was predicted on the grounds that there was a small difference between the votes cast for the petitioner's preferred candidate (PW 2) and the 1st respondent; that the spoilt ballot papers were only 126; that there were arithmetical mistakes in the final votes tally and that there was no tallying at the tallying centre. Despite the scrutiny, the candidates showing remains almost the same, the petitioner's preferred candidate losing 25 votes and the respondent increasing his lead by 9 votes. The total votes cast remain the same.

Secondly, the petitioner's preferred candidate has never alleged that any vote he should have been credited with was not so credited or that the winning candidate, the 1st respondent, was credited with any vote that he should not have been credited with. The discrepancies in the material scrutinized, referred to by counsel for the petitioner, do not in my view change the parties' positions.

Thirdly, the scrutiny was not intended to alter the petitioner's basis for challenging the election of the 1st respondent. The results of the scrutiny could on the other hand have crystallized the petitioner's filed complaints. They did not. In my view the results of the scrutiny vindicate the 2nd respondent to some extent. He was accused of irregularly obtaining 100 ballot papers from one polling station to be used at Amani polling station which was one of the polling stations affected by the mix-up of ballot papers. The 2nd respondent in doing so believed that he was being vigilant and concerned that the people at Amani polling station should have a chance to exercise their constitutional right to participate in the election of their Parliamentary Representative. Little did he know that his diligence and concern would translate into a reason for challenging the entire election exercise. To be fair to the petitioner, his view on the issue of the 100 ballot papers was more in consonance with those of the 2nd respondent than that of his counsel. Infact the petitioner voted with one of those ballots.

It must now be obvious that the fate of the allegations in paragraphs 9 and 14 of the petition has been sealed. In paragraph 9, the petitioner alleges that the election for the Constituency was not carried out in

accordance with the provisions of the Act or the Regulations or in accordance with the principles laid down therein or in any law relating to such election and or in accordance with the common law where applicable or the principles of natural justice. In paragraph 14, the petitioner complains that the mandatory provisions of Regulation 35 A of the Regulations were breached by the 2nd respondent and abetted by the 1st respondent. That regulation governs the preparation for the counting of votes. The allegations in paragraphs 9 and 14 cannot stand on their own. The petitioner had to establish the rest of the complaints in order to demonstrate the failure to comply with the statutory provisions. Since my findings on the rest of the allegations made by the petitioner are now known, the allegations in paragraphs 9 and 14 must go the same way. Breach of the provisions of the Act or the Regulations or the principles laid down therein or in any other law relating to the election or common law or the rules of natural justice was not established to the required standard of proof. The allegations in paragraphs 9 and 14 of the petition accordingly fail.

The only allegation which the petitioner proved in part is contained in paragraph 20 (a) namely, that the 3rd respondent brought ballot papers meant for Budalangi Constituency and distributed them in six (6) polling stations in Bura Constituency. The second limb of paragraph 20 (a) of the petition namely that the mix-up of the ballot papers brought about confusion and chaos in the entire electoral process was not however established to the required standard of proof. That limited and insignificant success of the petitioner cannot however vitiate the entire election exercise. The mix-up did not materially affect the results of the election. The results in my view are a true reflection of the expression of the will of the people of Bura Parliamentary constituency.

In summary therefore, what I have discussed above shows that the petitioner has not placed before me evidence which supports his petition which seeks the nullification of the 1st respondent as Member of Parliament for Bura Constituency. The petitioner had the burden to establish those allegations which he made in his petition to a standard higher than that of proof on a balance of probabilities. He did not discharge that burden. The petitioner did not also place any evidence before me that disclosed commission of any election offence or corrupt practice by any of the respondents. There may have been a few flaws such as the manner in which some Form 16A's were completed and failure to secure some material that should have been secured after the election. The petitioner did not however place before the court sufficient evidence that disclosed commission of any election offence and the burden in that regard was even higher falling just short of proof beyond reasonable doubt.

In the premises, this petition must and is hereby dismissed. With regard to costs, the 3rd respondent's mixing-up of ballot papers meant for Budalangi Constituency with those of 6 polling stations in Bura Constituency in my view was the primary basis of filing this petition. The petitioner may have felt justified to complain. I can fathom no explanation for the mix-up and none was proffered. For that reason and in exercise of my discretion, I decline to award costs to the 3rd respondent. The petitioner shall however pay the costs of the 1st and 2nd respondents.

A certificate to issue pursuant to Section 30 (1) of the Act certifying that the allegations made by the petitioner in his petition challenging the election of Abdi Nassir Nuh as the Member of Parliament for Bura Constituency have not been proved. Abdi Nassir Nuh accordingly remains the duly elected Member of Parliament for Bura Constituency.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 29TH DAY OF SEPTEMBER 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Gikandi for the Petitioner, Kilonzo Jr. for the 1st Respondent and Lumatete for the 2nd and 3rd Respondents.

F. AZANGALALA

JUDGE

29TH SEPTEMBER 2008