



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Election Petition 2 of 2008

**IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT
(CAP 7) LAWS OF KENYA**

**THE PRESIDENTIAL AND PARLIAMENTARY ELECTIONS REGULATIONS, THE
NATIONAL ASSEMBLY ELECTIONS (ELECTION PETITION) RULES AND THE ELECTION
OFFENCES ACT (CAP 66) LAWS OF KENYA.**

AND

**IN THE MATTER OF THE PARLIAMENTARY ELECTIONS FOR BOMACHOGE
CONSTITUENCY**

BETWEEN

SIMON NYAUNDI OGARI 1ST PETITIONER

ZAPHANIAH MORARO NYANG'WARA 2ND PETITIONER

VERSUS

1. HON. JOEL OMAGWA ONYANCHI..... 1ST RESPONDENT

2. TOBIAS GITAHU MACHARIA..... 2ND RESPONDENT

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

JUDGMENT

The Petitioners filed their joint petition on 15th January, 2008 following the Parliamentary elections for **Bomachoge Constituency** that were held on the 27th day of December, 2007. The petitioners were among the candidates in the aforesaid election for the National Assembly seat, hereinafter referred to as “*the election*”. The first respondent was one of the candidates in the said election and was declared to be the winner. The second respondent was the Returning Officer duly appointed by the third respondent as its official to conduct the said election. He was made a party to this petition by reason of his conduct and

the conduct of certain election officials subordinate to him. The third respondent is a commission established under **Section 41** of the **Constitution** with powers to conduct Presidential, Parliamentary and Civic elections in accordance with the provisions of the **National Assembly and Presidential Elections Act** and the Rules and Regulations made thereunder.

In the said elections, there were twenty eight (28) candidates and the official results that were gazetted were as shown hereunder:

| <u>Candidate</u> | <u>Votes</u> |
|------------------------------|---------------------|
| 1. Joel Onyancha | 9, 076 |
| 2. Ogari Simon Nyaundi | 7, 221 |
| 3. Nyaundi Albert Mbaka | 7, 133 |
| 4. Nyang'wara Zephaniah M. | 5, 746 |
| 5. Nyamwamu Cyprian Orina | 1, 084 |
| 6. Obure Ferdinand O. | 824 |
| 7. Oirere B. O. Naftal | 704 |
| 8. Oseko Isaac Mbaka | 621 |
| 9. Samwel M. Ongori | 581 |
| 10. Mogeni S. Osoro | 539 |
| 11. Siaga Moses Nyandieka | 450 |
| 12. Obondi Lugard Mogusu | 442 |
| 13. Omweno James Ombasa | 339 |
| 14. Michoti Davit Mogendi | 337 |
| 15. Onuko Nyabere | 318 |
| 16. Momanyi Peter Jim | 316 |
| 17. Nyakora Musa Ondari | 309 |
| 18. Ondabu Jason | 308 |
| 19. Mogaka Ben Omambia | 299 |
| 20. Ototo Arnold B. M. | 266 |
| 21. Nyakweba Samson Nyameyio | 262 |
| 22. Omboga J. Ondego | 261 |
| 23. Onyancha Koina | 242 |

| | |
|------------------------------|-----------|
| 24. Atati William Moturi | 215 |
| 25. Nyamwange Credius Oigara | 191 |
| 26. Ontiri M. Macharia | 165 |
| 27. Omwema Nathan Ogesare | 139 |
| 28. Omwega Zacharia Nyangena | <u>93</u> |

TOTAL **38,481**

(i) The Petitioners' pleadings.

The Petitioners stated that the election was not conducted and carried out in accordance with the provisions of the National Assembly and Presidential Elections Act (hereinafter referred to as "***the Act***") and the Rules and Regulations made thereunder. They said that the counting of the votes cast at the election was not accurate nor was the tallying of the votes from polling centers in tandem with the results announced by the second respondent. They alleged that their agents' protests and demands for rechecking and verification of results from each polling station were ignored by the second respondent.

Against the first respondent and/or his agents, it was alleged that they used violence, intimidation and coercion to cause periodic disruptions in the tallying process in a manner that undermined the integrity of the whole process. It was further alleged that the first respondent prevented the petitioners' agents from accessing the tallying hall at Tendere Secondary School by jamming the entire hall with his supporters. In the said hall, it was alleged, the third respondent failed to ensure proper arrangements for the mandatory presence of the petitioners' agents during the tallying of the votes and the said tally and its final count and totaling were not witnessed and verified as required by law and the same affected the outcome of the said election.

Further, the petitioners stated that the mandatory provisions of **Regulation 35A** of the Presidential and Parliamentary Elections Regulations (hereinafter referred to as

"the Election Regulations" were breached by the first respondent. It was further alleged that the second respondent aided and abetted the first respondent. It was further alleged that the second respondent breached Election **Regulation 37** by refusing to conduct a re-tally upon request by the Petitioners and/or their agents. As a result, the petitioners contended, the declaration of the first respondent as the winner of the said election was not justified. According to the petitioners, a true re-computation of the total votes cast for each candidate from Form 17A (the tallying form) showed different figures which they tabulated in the petition. The petitioners further averred that incompetent recording and computation of vote totals in Form 17A by the second respondent and/or his officials affected the outcome of the said election.

The petitioners further alleged that the second respondent either by himself and/or his officials unlawfully refused to allow their agents to attend and carry out their duties in the manner prescribed by the Regulations in various polling centers namely, Nyansara, Motontera, Rianchogu, Kiabugesi, Nyamasege, Eberege, Nyakoiba, Itongo, Man'gere, Nyaburumbasi and Nyataro II, among many others, for a period of about three hours with the process commencing at about 9.00 a.m. As a result, polling in the said centers was unverified and without safeguards entrenched by law and this did not constitute a valid process as several voters were disfranchised; the petitioners alleged.

The polling centers which were also used as counting venues were said to have been too small to accommodate all the candidates' agents, third respondent's officials, security officers and observers thus making the counting process unreliable. The petitioners added that there was inadequate lighting at the polling station after sunset.

The petitioners further stated that there was a huge discrepancy between the number of votes cast for

presidential candidates on the one hand and parliamentary candidates on the other which showed that the voting, tally and the counting process were, on the face thereof, incorrect. Whereas a total of **38,481** votes were announced as having been cast for parliamentary candidates, the total votes cast for presidential candidates was **45,725**, a difference of **7,244** votes.

The petitioners stated that the ballots cast for the Presidential candidates were as follows:

| <u>Candidate</u> | <u>Votes</u> |
|----------------------------|--------------|
| 1. Mwai Kibaki | 26,967 |
| 2. Raila Odinga | 18,070 |
| 3. Ng'ethe D. Waweru | 83 |
| 4. Nazlin Omar | 45 |
| 5. Ngacha Karani Joseph | 312 |
| 6. Mwangi Pius Muiru | 52 |
| 7. Musyoka Stephen Kalonzo | 177 |
| 8. Kenneth Matiba | 19 |
| 9. Kukubo Nixon J | <u>0</u> |

TOTAL 45,725

Another allegation that was made against the second respondent was that he excluded valid results from twenty eight (28) polling stations and went ahead to announce the results where he declared the first respondent as the duly elected member of parliament for Bomachoge Constituency. It was alleged that the 28 stations accounted for over 20% of the total registered voters in the constituency. The petitioners contented that they were adversely affected by the second respondent's exclusion of the 28 stations from the final tally.

The Petitioners made several other allegations against the first respondent and his agents. The allegations included:

- (a) bribing voters to induce them to vote for him.
- (b) Using his position as an Assistant Minister to influence Chiefs to campaign for him.
- (c) Holding himself out as the official Government candidate thus getting several Public Officers to campaign for him.

The petitioners alleged that the first respondent had thus committed election offences as per **section 9** of the **Election Offices Act** Cap 66 **Laws of Kenya**.

Several officials of the third respondent under the second respondent were said to have openly campaigned and canvassed for votes for the first respondent in the polling stations and later involved themselves in altering the verified results in Forms 16A from various polling centers in favour of the first respondent. Statutory documents and forms which the second respondent was supposed to keep and safeguard were said to have been altered without being countersigned and the voters' registers supplied to polling stations were incomplete such that some people who were validly registered to take part in the

elections could not vote. It was further alleged that the first respondent by himself, his agents and/or persons acting on his behalf and Public Officials under the supervision of Gucha District Commissioner used a Government vehicle, to wit, **GK A681 G**, to campaign for him and the said District Commissioner followed up the voting and counting of the votes at Tendere tallying centre from where he was chased away by the Gucha District Elections Coordinator.

The foregoing matters were said to have been reported to the second respondent who took no action. As a result, the petitioner contended that no free and fair election was held in the said constituency. The petitioners prayed for the following orders:

“(a) There be a scrutiny of votes recorded as having been cast in the aforesaid Parliamentary Election for Bomachoge Constituency in the Election held on the 27th December 2007.

(b) There be a scrutiny of the rejected, void and spoilt ballot papers from all polling stations.

(c) There be a scrutiny of the actual voters’ Registers used at all polling stations within Bomachoge Constituency during the said Parliamentary Election.

(d) There be a recount of all valid ballot papers cast at the said Election.

(e) The said Parliamentary Election held on the 27th December, 2007 in Bomachoge 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 Bomachoge Constituency.

(g) The said election of the 1st Respondent as the member of the National Assembly for Bomachoge Constituency be determined and declared null and void and a certificate to that effect be issued to the speaker of the National Assembly.

(h) Such election offences and electoral malpractices on the part of omission and commission by the 2nd Respondent as disclosed and found by this Honourable Court be reported to the Honourable Attorney General for appropriate action.

(i) The Honourable Court do find that the 1st Respondent has committed serious electoral offences and order him barred from participating in subsequent elections for a period of at least five years or as the court may deem just and expedient.

(j) The Respondents be condemned to pay your petitioners’ costs and the incidentals to this petition.

(k) Such further, other and consequential orders as this Honourable Court may lawfully make”.

(ii) The hearing.

Pursuant to **Rule 18** of the **National Assembly Elections (Election Petition) Rules** the petitioners and their witnesses delivered to this court’s deputy registrar their affidavits. The affidavits were read by each petitioner and their witnesses and they form part of the record of the trial. Each of them was cross examined and re-examined as by law provided. The same applied to the respondents and their witnesses. However, a few of the third respondent’s witnesses were permitted to give evidence without having delivered their respective affidavits. Those were witnesses whose evidence was fairly short. They had also been summoned to attend court to testify within a fairly short notice. Under **Rule 18(5)** the court is empowered to grant such leave to witnesses.

It is not necessary that I set out the depositions made by the parties and their respective witnesses. I will only consider the said depositions, albeit briefly, for purposes of highlighting the main issues that were

raised by the respective parties and their witnesses.

Mr. Edward Aboki Begi, an Advocate of the High Court of Kenya, was one of the main witnesses for the first petitioner. He was the first petitioner's campaign coordinator. At **Nyansara Primary School polling station** number 203/031, the home ground of the first respondent, the witness alleged, there were long queues of voters but voting did not commence until after 9.30 a.m. after he raised concerns with the Returning Officer. The witness alleged that he received credible reports that the first respondent had requested that casting of ballots be delayed as he was on his way to deliver "**gifts**" (which the witness took to be bribes) to the voters as inducement to vote for him. In cross-examination, Mr. Begi named the first petitioner's father as one of the people who gave him the aforesaid information. At the same polling center, the witness saw a Mr. Christopher Mauti addressing voters urging them to vote for the first respondent. Thereafter he started to dish out money to voters, urging them to vote for the first respondent. Mr. Begi said that he protested to the Returning Officer who asked Christopher Mauti to leave immediately. There were no police officers attached to the said station and so the said agents could not be arrested.

Mr. Begi also visited **Rianchogu Primary School polling station** where he was informed by one Abdi Ong'ong'a that the first respondent's agents were openly canvassing for votes for the first respondent through open bribery within the precincts of the polling center. Mr. Begi said that he made a complaint to the presiding officer. He also named four other polling centers where he received reports of bribery and the specific people who were allegedly bribing voters. Mr. Begi further stated that at various polling centres he found some named civil servants actively involved in the first respondent's campaign within the precincts of the polling centres. One of the named persons was David Nyanchongi, the Chief, Sengera Location, who was alleged to have been openly campaigning for the first respondent at **Sengera Girls' High School, polling center number 203/111**.

The said Chief swore an affidavit and denied the said allegation. He said that he only voted at the said polling centre and left. He denied having ever seen Mr. Begi during and after the election. The said Chief added that Mr. Begi had not named the Presiding Officer whom he allegedly complained to, if at all it was true that he had seen him campaigning for the first respondent at the said polling centre as alleged.

Another allegation that was raised by Mr. Begi was that on 28th December, 2007 he received a call from the second petitioner who complained about tampering with election results at **Tendere Secondary School tallying centre** by the Presiding Officers, the second respondent and several tallying clerks who were named as Alice Bitutu, the Assistant Returning Officer, George Nyangwara, Joash Orina, Arori and Ontita, all teachers at Tendere Secondary School.

Mr. Begi said that the second petitioner, who was also his client, instructed him to demand a physical verification of the votes cast, recount of the votes and retally of the same to authenticate certain figures which were being read in the tallying hall. He acted on the said instructions by writing a letter addressed to the chairman, Electoral Commission of Kenya, through the District Elections Coordinator, Gucha. The letter that was exhibited as annexure E.A.B 2(a) in Mr. Begi's affidavit was undated but was stamped as having been received by the District Elections Co-ordinator (hereinafter referred to as "**the D.E.C.**") Gucha, on 29th December, 2007. The said letter was closely scrutinized during the hearing. The letter did not bear the name of Mr. Begi as the author thereof. It was written in such poor language that it is doubtful if it could actually have been authored by an advocate of Mr. Begi's standing. The contents of the letter were mainly complaints against the District Commissioner, Gucha. A recount of the votes was also demanded.

After announcement of the results, Mr. Begi said he was instructed by the second petitioner to demand from the second respondent the following:

- (i) **Signed Forms 16A from the 130 polling centres used in tallying votes for verification.**
- (ii) **Tallying sheet, form 17A.**

(iii) The signed form of the declared results per each candidate relied upon in declaring the first respondent as the winner.

Mr. Begi said that together with the petitioners and Albert Mbaka Nyaundi, one of the candidates, among others, demanded for the said documents from the second respondent. Mr. Begi alleged that the second respondent admitted that mistakes had occurred in the tallying of the votes but regretted that he had become **functus officio**, having already declared the results. He said that they could only question the process through an election petition. The second respondent was said to have given to Mr. Begi and the petitioners an incomplete Form 17A, a bundle of purportedly announced results in Forms 16A from a number of polling stations and a sheet from where he declared the winner of the parliamentary results. The witness testified that the Forms 16A and 17A supplied to them by the Returning Officer had very many anomalies. Among other shortcomings, it showed that results from 28 polling centres were not accounted for. Forms 16A had been altered but were not countersigned and mandatory information that was required under the law to be included therein was missing.

After the filing of this petition, Mr. Begi said that he received credible reports that another set of documents had been prepared which factored in results from all the polling centres within the constituency. On instructions from the first petitioner, Mr. Begi went to the office of the third respondent at Gucha to see the DEC. Mr. Begi obtained from the DEC copies of the following documents:

- (a) A completely filled out Form 17A which included the twenty-eight untallied polling centres.**
- (b) A record of polling centres indicating the number of registered voters, number of streams, ballot papers issued and number of booklets.**
- (c) A list of documents which were sealed and inserted in the ballot boxes as required under rule 37.**

Form 17 contained various alterations, it was alleged, most of which favoured the first respondent.

William Moturi Atati, the second witness, was also one of the Parliamentary candidates in the said parliamentary election. He testified that prior to the said election and during the election there was massive use of members of the Provincial Administration and in particular Chiefs and their Assistants, to canvass for votes in favour of the first respondent who was perceived to be the government favoured candidate. The witness also alleged that the first respondent used his position as an Assistant Minister to intimidate Chiefs and their Assistants to recruit agents to canvass for votes.

Although the witness named some Chiefs and their Assistants, none of them was called to testify as to how they were intimidated by the first respondent, if at all. The witness also admitted that he did not make any report to either the police or the Electoral Commission of Kenya regarding the alleged misuse of the Provincial Administration to campaign for the first respondent.

William Moturi Atati further testified that at **Mokomoni Primary School** where he voted, the Presiding Officer and polling clerks purported to assist illiterate voters. That was not proved. But assuming that was so, it was not demonstrated that any cheating occurred as a result. In any event, none of the agents who were at the said polling station raised any complaint to that effect.

The witness further testified that he was at the tallying hall when a dispute arose regarding results from **Motontera Primary School** because the Returning Officer returned figures that had not been announced on the ground. The Returning Officer refused to rectify the figures. That, the witness added, confirmed the fear among many agents that results of the election were being manipulated in favour of the first respondent.

The Presiding Officer at that polling station (Motontera) was **Luka Cheruiyot A. Langat**, witness No.17. He produced a copy of the Form 16A which he had kept and disowned Form 16A that was brought to court. His form 16A showed results which were different from those which were announced at

the tallying centre. The witness also produced his field note book whose contents were similar to those in Form 16A which he kept. The witness confronted the Returning Officer and told him that the results which he had announced were wrong. However, the Returning Officer did not change the results, Mr. Atati stated.

Mr. Atati repeated the assertion that the Returning Officer announced the election results before he had tallied results from twenty eight (28) polling stations which, according to him, had a total of 14, 227 registered voters. That favoured the first respondent, he added.

That evidence was corroborated by **Margaret Bonareri Atina** who was the first petitioner's tallying agent. She said that the second respondent did not have results from some polling stations when he declared the first respondent as the winner. When protests were raised, the second respondent brushed aside the complaints and said that even if the results from the remaining stations were brought they could not make any difference. That was on 28th December, 2007 at about 6.00 a.m. The witness added that the second respondent told those who were dissatisfied with the results that he had announced that they were at liberty to go to court.

Regarding bribery of voters by the first respondent's agents, Margaret Atina testified that she saw Engineer Maoga and one Jacob Mogaka dishing out money and Christmas gifts to voters in a number of polling centres so as to influence them to vote for the first respondent.

Musa Ondara Nyakora, witness No.4, also testified that he witnessed similar cases of voter bribery at various polling centres. He also testified about announcement of the results by the second respondent before the results from all polling centres had been received. The witness also talked about some discrepancies between the votes that were being announced by the Returning Officer and the actual ones that the candidates and their supporters had.

Francis Nyabuto Nyangwara, witness No.5 was the tallying agent of the second petitioner. He testified that several Forms 16A were received at the tallying hall and accepted by the second respondent even when they had not been duly signed by various Presiding Officers and the candidates' agents. He added that many Presiding Officers refused to issue agents with duly signed Form 16A. The witness cited the results from Motontera polling centre where the second petitioner scored 267 votes but the second respondent announced nil votes forcing the witness to protest loudly. He moved forward to show the Returning Officer the true results which were with the second Petitioner's agent. The second respondent directed Security Officers who were there to remove the witness out of the hall, which they did.

While outside the tallying hall, the witness said that he found ballot boxes being sealed outside the polling centre. He saw ballot boxes from Kiru, Nyabioto, Oroche, Keberesi, Kebabe and Riyabu Primary Schools. Some presiding officers were ticking the votes which they had entered in the ballot boxes while others were filling fresh Forms 16A which they later forwarded to the Returning Officer, the witness claimed. He added that he called the second petitioner to come and witness the goings on and when he arrived he sought for an explanation. None was given to him but instead the police pushed him away, it was alleged. The witness said that he reported what he had seen to the Returning Officer but nothing was done.

When P.W.5 was cross-examined about the alleged incident, he said that it occurred at about 4.00 a.m and that there were no lights outside except moonlight. It was therefore doubtful if he was able to identify the source of the alleged boxes.

The second petitioner accused the Returning Officer of having recruited several people as Presiding Officers and their deputies whose names had been proposed by the first respondent with a view to assisting in rigging the election. He named some of the people who were so appointed as Joseph Omambia and one Kiage. He also named Alice Bitutu, a tally clerk, whom he said was either married to or cohabiting with the first respondent's personal Assistant, Evans Onyancha. The second petitioner said that when he raised that complaint with the Returning Officer, the latter told him to look for strong agents who could not be compromised as it was too late to make any changes in the aforesaid appointments.

Although the second petitioner lamented that most of his agents were threatened not to act for him and others were compromised to accept change of votes in his favour, he did not attribute all these misdeeds to the first respondent. After all, he was contesting against 27 other candidates and it was not possible to state with any degree of certainty that it was the first respondent who was responsible for what befell his agents.

The second petitioner accused the first respondent of bribing voters. He stated that on the polling day, at Motontera Primary School, one Omambi Gasuku, an uncle of the first respondent, was seen by one of his agents, Daniel Mogoi Nyangwara, bribing voters with Kshs.100/= and he was chased away. When he was chased away, he went to Moteiribe primary school, polling centre number 203/057 and continued to bribe voters. That information was given to the second petitioner by his agents, Evans Omwenga Ouru and Gideon Mogoi. However, these alleged informers were not called to testify and their allegations bear no evidential value. The second petitioner added that one of his supporters, Ezekiel Ogongo, saw the first respondent bribing voters personally at Itongo Polling Centre and when the supporter complained about it, the first petitioner left Kshs.2,000/= with Mrs. Siteri Orina to continue bribing voters and the said Mrs. Orina even bought Mr. Ezekiel Ogongo a soda.

That is a serious allegation but it was not proved because Mr. Ezekiel Ogongo was not called as a witness neither was Mrs. Siteri Orina.

The second petitioner said that he reported the complaint regarding bribery to the Returning Officer but he casually turned him away saying that he was not brought to the constituency to control bribery.

The second petitioner further accused the Returning Officer of announcing results which were different from the actual ones as recorded at various polling centres. He gave examples of the following stations:

(a) Motontera Primary School – the Returning Officer announced that he got nil votes while his agent had Form 16A showing that he scored 267 votes. Form 16A that was annexed to the second Petitioner’s affidavit shows that he had 267 votes at that station and the first respondent had 16 votes.

(b) Itongo Primary School - the Returning Officer announced results from one stream where the second petitioner had garnered 120 votes and left out another stream where he had obtained 127 votes making a total of 247 votes. He annexed to his affidavit Form 16A showing the said results.

(c) Riyabu Primary School - the Returning Officer announced nil votes for him but his relatives there told him that he had received 138 votes. The second petitioner said that this was one of the stations where his agents had been chased away by supporters of the first respondent.

(d) Results from Eberege Primary School polling center had nil votes in Form 17A while Form 16A showed that the second petitioner had 51 votes.

(e) At Kiabugesi primary school polling center-in Form 17A the result in the second petitioner’s favour indicated one (1) vote while Form 16A showed 170 votes.

(f) At Riama Primary School polling Centre Form 17A showed 9 votes in favour of the second petitioner while Form 16A showed 92 votes.

The second petitioner further stated that he received reports from tallying clerks that different Form 16As were being “*manufactured*” to tilt the elections in favour of the first respondent and ballot boxes were being interfered with at the tallying center by officers of the Provincial Administration and some Presiding Officers. Upon getting that information he visited the tallying centre at Tendere and he saw a ballot box from Nyakoiba Primary School being sealed outside the tallying hall by the Presiding Officer guarded by Administration Police who were under the supervision of the Returning Officer. When he

asked what was happening, the latter asked police officers to chase him away from the tallying center.

The second petitioner further alleged that he found the Gucha DEC, Mr. Atika, chasing away the Gucha District Commissioner from the tallying centre for interfering with the tallying process. The said District Commissioner was then driven away in his vehicle registration number GKA 681G. That averment was denied by Mr. Atika who said that it was the District Commissioner's driver who was at the tallying centre and not the District Commissioner.

The second petitioner further testified that the Returning Officer declared the first respondent as the winner of the elections before he had received results from all the polling stations. After the announcement, the second petitioner, Mr. Begi Advocate and several other candidates followed the Returning Officer to the Electoral Commission offices at Ogembo where they demanded to be supplied with statutory documents relied upon in declaring the results. After a lengthy meeting in which the Returning Officer is said to have admitted that there were "**massive irregularities during the whole process**", he gave them copies of Forms 16A from all the 130 polling stations and tally sheet Form 17A for the parliamentary results. The second petitioner said that a quick perusal of the documents supplied by the Returning Officer revealed the following:

- (i) That results from 28 polling centres were not tallied.**
- (ii) That the results in Forms 16A had been tactfully and deliberately altered in favour of the first respondent.**
- (iii) That most Forms 16A which were used to announce the results were received and accepted by the Returning Officer at the tallying hall were not duly signed by the Presiding Officers and the candidates' agents as required by law.**
- (iv) That results for 24 candidates were not included in the declared results except for four candidates, the petitioners, the first respondent and Albert Mbaka Nyaundi.**

The second petitioner annexed to his affidavit copies of all the documents that were supplied to them by the Returning Officer. The second petitioner said that upon comparison of Form 17A and Forms 16A he discerned manifest alterations and/or differences in the votes recorded therein and was convinced that his vote tally was reduced by 3,598 votes. If those votes had been taken into account, he would have been the winner, he claimed. He further stated that the Form 17A which was presented to the third respondent at Nairobi showed different results from the ones which had been given to them by the Returning Officer.

The first petitioner's evidence.

I will now turn to the evidence adduced by the first petitioner. He stated that prior to the date of the General Elections there were reports in the electronic and print media that there were plans to rig the elections in favour of Party of National Unity (P.N.U) candidates and as a result he briefed his Campaign Manager, Coordinators, Agents and Supporters to be extra vigilant during the whole of the electioneering process. Through that vigilance, he discovered that there was a scheme to rig the Bomachoge Parliamentary Election in favour of the first respondent who was the PNU candidate. He pointed out various anomalies regarding appointment of some of the election officials. The major ones are:

- (a) That the second respondent was, vide a Gazette notice published on 26th October 2007 appointed as the Returning Officer for Mosop Constituency whilst Mr. Samson Wasonga Owiti and Mr. Wycliffe Mayaka Bwagani were respectively listed as the Returning Officer and Deputy Returning Officer for Bomachoge Constituency.**
- (b) By a Gazette notice published on 9th November, 2007, Tobias Gitahi Macharia (the second respondent) was listed as the Registration Officer for Bomachoge Constituency and Mr. Bwagani as his deputy.**

(c) Having reported at Mosop Constituency, the second respondent was instructed to move over to Bomachoge Constituency as a Returning Officer, though he was never Gazetted as the Returning Officer for the Constituency.

The first petitioner alleged that the Returning Officer requested the first respondent for a list of his close allies and supporters to be recruited as Presiding Officers, Deputy Presiding Officers and clerks. In that regard, the Principal of Tendere Secondary School, Mr. Robert Arori, who is an avowed supporter of the first respondent, submitted ten names of staff members of that school, including himself, who were appointed as election officials in different capacities as follows:

- (i) Robert Arori – Presiding Officer, Tendere Primary School.**
- (ii) Joash Orina – Presiding Officer, Mwobo Tea Buying Centre.**
- (iii) Joel Omagwa – Presiding Officer, Oroche Primary School.**
- (iv) Evans O. Ayao – Presiding Officer, Tangi Tea Buying Centre.**
- (v) Mr. Arori, Mr. Orina, Mr. Omagwa, Mr. Nyangwara, Mr. Ontita – Tallying clerks, Tendere Tallying Centre.**

All the Tallying clerks were said to have been recruited from the staff of Tendere Secondary School where the tallying centre was located. That was intended to favour the first respondent. It was further alleged that the school had been a major and constant beneficiary of Constituency Development Fund allocations which was under the control of the first respondent.

Mr. Astariko Atika, the D.E.C. said that the Returning Officer was the one who recruited the personnel for the purpose of conducting the election. But on his part, the Returning Officer stated that he sat in the recruitment panel and that the recruitment was done through perusing applications and curriculum vitae of all applicants. However, there was no denial that the aforesaid ten members of staff of Tendere Secondary School were all picked. The DEC said it was in appreciation of the fact that the school had in all the past elections been used as a tallying centre and had availed its facilities for use by the ECK.

The first petitioner also complained of bribery and voter influence by agents of the first respondent and late opening of polling stations in his strongholds. He reported these issues to Presiding Officers and Security Officers at the concerned polling centres but they were reluctant to take any action. He further stated that his tallying agents were unable to properly access the tallying hall as they were prevented by the first respondent's supporters who had jammed the entire hall. The third respondent had failed to ensure proper arrangements for mandatory presence of all the candidates' agents and in particular his agents. He added that the first respondent, his agents and other persons acting on his behalf were using violence, intimidation and coercion to cause periodic disruptions in the tallying process.

The first petitioner averred that different Forms 16A were being prepared at the tallying centre and the mastermind of that exercise was Alice Bitutu and the staff of Tendere Secondary School, aforesaid. That was being done in the presence and/or direction of the Returning Officer, it was claimed. He further claimed that his tallying agents informed him that ballot boxes were being interfered with by Provincial Administration Officers. The first Petitioner also cited serious discrepancies between the votes that were announced by the Returning Officer and those which had been announced at the various polling centres by Presiding Officers.

Another allegation made by the first petitioner was that the Returning officer declared the first respondent as the winner of the elections before he had received results from all the polling stations, despite strong protests by several candidates. The Returning Officer announced results of the leading four candidates but the results of the other 24 candidates were not announced. No document with the said results was left or pinned at the tallying centre for public information, scrutiny and/or verification as by law required, the first petitioner stated. As a result of the above acts of omission on the part of the

Returning Officer, the first petitioner and other candidates instructed Mr. Begi Advocate to write a letter to the Chairman, Electoral Commission of Kenya (E.C.K) to demand an immediate recount and re-tally pursuant to **Regulation 41(6)** of the **Election Regulations**.

After announcement of the results, the first petitioner, some other candidates and their respective supporters followed up the Returning Officer to the E.C.K Offices within Ogembo Township and demanded to be supplied with various statutory documents that were relied upon in declaring the first respondent the winner. The Returning Officer locked himself up in the office and even tried to sneak out secretly but he found the premises surrounded by members of the public. Late in the evening he agreed to meet the petitioners and the other complainants. It was alleged by the first petitioner that at the said meeting the Returning Officer admitted that there had been election irregularities and flaws but said that since he had already declared the first respondent as the winner, any dispute relating to the said election had to be resolved by an Election Court. The Returning Officer gave to the complainants the following documents.

- (i) An incomplete tallying Form 17A.**
- (ii) A bundle of Forms 16A.**
- (iii) A handwritten Summary Sheet titled “Parliamentary Elections” from which the results were purported to have been read from.**
- (iv) A handwritten summary Sheet titled “Bomachoge Constituency Presidential Results”.**

According to the first petitioner, the aforesaid documents revealed major inconsistencies when compared with the documents that he and his agents were in possession of. He highlighted in details the inconsistencies and shortcomings of the said documents and the manner in which they did not reflect the true results of the election in Bomachoge Constituency. I will revert to this issue later as I deal with the findings of the scrutiny exercise of Forms 16A, 17A and the ballot boxes that was carried out with consent of all the parties.

With regard to the results for Presidential election in the constituency, the first petitioner stated that the figures given by the Returning Officer showed that **7,244** people voted for the Presidential Candidates but walked away without voting for any parliamentary candidate yet each voter had been issued with three ballot papers – for Presidential, Parliamentary and Civic elections. It could not make any sense that so many people in the constituency would have decided not to vote in the parliamentary election where they reside yet cast their votes in Presidential election.

Having filed the petition, the first Petitioner learnt that another set of statutory documents had been prepared by the second and third respondents to replace some of the original published documents and the other set of documents were at E.C.K Offices at Ogembo. He instructed Mr. Begi Advocate to request for copies of the said documents. The said advocate was given by the DEC a completely filled Form 17A which now included results from the earlier 28 untallied polling centres and a record of polling centres indicating the number of registered voters, number of streams, number of ballot papers and booklets issued for the purposes of the said elections. When he compared Form 17A that was given to them by the Returning Officer and the Form 17A that was obtained from the ECK Offices at Ogembo, the latter showed that the total number of voters was **44,426** while the former had a total of **38,481** voters. He pointed out many other anomalies between the said documents. The same are set out in his affidavit. But one of the major observations is that only 9 out of all the 130 polling centres showed consistency in the number of votes received per candidate in Form 16A, Form 17A that was given by the Returning Officer and Form 17A that was obtained from the ECK offices at Ogembo.

The first petitioner annexed to his affidavit a letter dated 29th January, 2008 addressed to the Chairman, ECK, by the Returning Officer wherein he stated that many used and unused ballot papers were not inserted in ballot boxes as by law required. Since he could not re-open the ballot boxes the said ballot papers were surrendered to the DEC. The Returning Officer did not explain how that anomaly

occurred.

The second and third respondents' defence.

The two parties were represented by the firm of Nchogu, Omwanza & Nyasimi Advocates. The said advocates drew several affidavits for various witnesses. There are however some sharp variances on some vital issues deposed to by different witnesses. In my view, this shows that the said advocates did not attempt to edit the contents of the said affidavits to bring harmony to the same. Instead, I believe the said advocates dutifully presented to court what was actually stated to them by their witnesses and left the duty of determining which of the witnesses told the truth to the court. I commend the said advocates for that.

The second and third respondents opened up their defence by calling **Kennedy Onyoni**, a clerk employed by ECK at its offices at Gucha District, Ogembo Township. In his affidavit, he stated that on 29th December, 2007 Mr. Wycliffe Bwagani, the Deputy Returning Officer for Bomachoge Constituency, caused to be delivered to the ECK offices at Ogembo ballot boxes which he received and recorded in the black book. The exercise was witnessed by **Mr. Kefa Aminga** from the District Commissioner's office. However, Mr. Bwagani did not accompany the ballot boxes, they were merely delivered in a lorry and were escorted by some police officers. The boxes were kept in a store and the witness gave the key to the DEC in the evening when he returned.

Mr. Onyoni said that 8 of the ballot boxes were open and were empty.

Astariko Otieno Atika, the DEC, testified that he was employed by the ECK from 2nd January, 2002. His job description includes coordination of election activities in Gucha district and also being a link with election officials in the district and ECK headquarters at Nairobi. In the elections held on 27th December, 2007, he was the D.E.C overseeing three constituencies in the said district namely, Bomachoge, Bobasi and South Mugirango. Mr. Atika stated that the second respondent was the one who recruited the personnel for the purposes of conducting the general elections in the constituency.

On 25th and 26th December, 2007 the DEC received ballot boxes and issued them to the Returning Officers of the three Constituencies in Gucha district. He stated that on 27th and 28th December, 2008 he received several complaints from various candidates regarding various malpractices. They related to bribery and interference with tallying process. He confirmed that on the night of 27th December, 2007, he chased away a driver of Mr. Joseph Rotich, the District Commissioner, Gucha, from Tendere tallying centre. It had been reported of the said driver that he was manipulating the tallying process. The official vehicle of the District Commissioner was parked outside the tallying centre. The DEC telephoned the D.C. and complained to him about the conduct of his driver. The DEC also telephoned Mr. Matagar, the ECK Commissioner in charge of the District and informed him.

On the morning of 28th December, 2007, the DEC received a call on his cell phone from the second petitioner requesting him to intervene and have the Returning Officer do a re-tally of election results as he claimed his agents had raised disputes over tallying in some polling stations. The DEC advised the second petitioner to write a letter to the Chairman ECK through the DEC'S office and deliver the same to his office for transmission to the Chairman. At that time the DEC was at Nyamarambe within South Mugirango Constituency, he stated. He reported back to his office on 29th December, 2007 and found two letters from S. G. Mbaabu & Company Advocates and M/S. A. G. A. Etyang & Co. Advocates. He forwarded the said letters to the Chairman, ECK. On the same day, Mr. Atika went on, he received a schedule from Mr. Kennedy Onyoni showing the ballot boxes that were delivered to him. The ballot boxes and all other election materials were in a store which had police security round the clock. On 29th May, 2008 the ballot boxes and other election materials were brought to court as earlier ordered. The ballot boxes and the other election materials were delivered to court by Mr. Bwagani, Deputy Returning Officer, among other officials. On the same day, Mr. Bwagani wrote to the ECK Secretary at Nairobi and informed him that 8 of the 151 delivered ballot boxes were unsealed and empty whereas in December, 2007 after the general elections he had handed over 151 sealed ballot boxes and other materials to the

DEC and the OCPD who placed them under lock and key.

The ECK Secretary sought an explanation from Mr. Atika vide a letter dated 3rd June, 2008. On 5th June, 2008 the DEC wrote to the Chairman ECK and explained that the ballot boxes were delivered on 29th December, 2007 when he was engaged on official duties in South Mugirango Constituency with the OCPD, the District Intelligence Officer and the DCIO, Gucha.

Regarding copies of the documents that Mr. Atika gave to Mr. Begi, he stated that sometimes in February 2008, Mr. Begi, who is personally known to him, went to his office and requested for Forms 16A and 17A. The DEC stated that these were public documents and ordinarily the same were supposed to be supplied to the candidates and/or their agents immediately upon the announcement of parliamentary elections. Mr. Atika availed copies to Mr. Begi from copies which he had. Mr. Atika referred to a circular dated 4th January 2008 from the ECK Secretary to all District

Coordinators to ensure:

“.....that you obtain photocopies of result slips i.e. Forms 16A and 17A for each polling station within your district and keep them under your personal custody without failure. Nonetheless, ROS and Presiding Officers (POS) must retain their original result documents”.

Pursuant to that circular, the Returning Officers in his district had left him with photocopies of Forms 16A and 17A and retained the originals thereof. The photocopies which he supplied to Mr. Begi were therefore photocopied from the copies that had been left to him by the Returning Officer. He denied having ever seen a circular dated 9th January, 2008 from the ECK Secretary that instructed District Election Coordinators not to release any documents relating to the election without consent of ECK headquarters.

With regard to Polling Day forms 1B, 2B, 3B, 4B and 5B, the DEC said that the same were issued to Presiding Officers who were supposed to fill them after conducting elections in polling centres and insert them in the ballot boxes.

Lastly, Mr. Atika said that Mr. Bwagani was in charge of ECK election materials and the DEC surcharged him Kshs.12,496.85 for materials that were not accounted for.

In cross examination, Mr. Atika stated that there was no way he could have interfered with the ballot boxes and other election material after they were delivered to ECK stores at Gucha because they were under police guard for 24 hours.

Regarding clerks at Tendere polling centre, the DEC testified that the Returning Officer gave him a list of Tallying Clerks who were assisting him at the tallying centre and the DEC realized that those same clerks had been appointed and served as Presiding Officers and so he refused to pay them. It was improper for them to be paid as Presiding Officers and as Tallying Clerks.

Regarding the ballot boxes, the DEC explained that it was the responsibility of the Returning Officer to return all the ballot boxes intact and if he realized that any was tampered with he was supposed to make appropriate enquiry about the same and notify the ECK headquarters.

As regards the copies of Forms 16A and 17A that were left in his office by the Returning Officer, the DEC said that they had white outs and alterations. He denied having altered any of the forms. He said that between 28th and 30th December, 2007, the Returning Officer was keeping the election documents in his office. The DEC said he had no access to the Returning Officer's Office.

The Returning Officer, Mr. Tobias Gitahi Macharia, testified and clarified the controversy regarding his appointment as the Returning Officer for Bomachoge Constituency. He annexed to his affidavit a **Corrigenda** to Gazette Notice No.10558 vide which he had been named as the Returning

Officer to replace Samson Wasonga Owiti. He also annexed to his affidavit as annexure “**TGM 2**” the ECK Guidelines for recruitment of temporary election officials. The job description and requirements of a Returning Officer are clearly set out in the said guidelines. Mr. Macharia has served as a Returning Officer in different constituencies since 1992 elections. Having been a Returning Officer in four consecutive parliamentary elections he is no doubt knowledgeable in Election Rules and Regulations. The Returning Officer was in charge of the recruitment of other elections officials in the constituency but the list of the selected candidates was ratified and approved by the ECK Commissioner in charge of this area, Mr. Jeremiah Matigaro, Mr. Macharia stated. All the Presiding Officers, their deputies and clerks were trained on how to conduct the elections according to the relevant law, Rules and Regulations.

The Returning Officer further stated that on 17th December, 2007 he convened a meeting of all candidates for both Parliamentary and Civic vacancies and in that meeting no single candidate raised any issue of any suspicion about him or challenged his integrity as a Returning Officer. On 26th December, 2007 the Returning Officer received from the DEC ballot boxes and delegated the duty of distribution and dispatch of the same to his deputy, Mr. Bwagani, who in turn distributed the materials to the respective Presiding Officers.

Regarding the alleged bribery claims and interference or intimidation by the Provincial administration, the Returning Officer said that no such complaint was ever made to him by anyone. At the tallying hall, there were six gas lamps which lit the hall sufficiently and the hall was able to accommodate

about 700 people, the witness stated. He proceeded to appoint George N. Nyainya, Evans O. Ayao and Joash Orina to assist him in the tallying exercise, although the three had been appointed and had worked as Presiding Officers during the day. He said that he had power to hire them under **Regulation 10(1)** of the **Election Regulations**. Alice Moraa Ongubo, the Assistant Returning Officer also did assist in tallying the results. He further explained that the ballot boxes were brought in by Presiding Officers accompanied by Security Officers and agents and were surrendered to the Deputy Returning Officer, Mr. Bwagani, who would in turn take an inventory of the election materials and place them in the store.

With regard to the issue of **Montotera polling station**, the Returning Officer deposed that when a complaint was raised following his announcement of the results, he summoned the Presiding Officer and the Centre agents and he proceeded to correct the anomaly with the second petitioner being awarded 267 votes. However, that was denied by the Presiding Officer, Luka Cheruiyot Lagat.

The Returning Officer denied having tampered with any ballot boxes on the night of 27th December 2007. He also denied having announced interim or provisional results or having declared the first respondent as the winner before he had received all the results from the polling stations. He also said that he never saw the Gucha District Commissioner in the tallying hall and added that if he had gone there would have heartily welcomed him as the Chairman of the District Security Committee.

Regarding the election results, the Returning Officer averred that he used his field notebook to tally the results and that he used all Forms 16A. In paragraph 6 of his affidavit, he had stated that the field notebooks were issued to all election officials to diarise activities or details that were thought to be significant in preparation of the elections.

After announcing the results on the morning of 28th December, 2007 Mr. Macharia started his journey to Nairobi but as he approached Keroka he received a call from the DEC that it was not safe to travel as chaos had erupted. On the morning of 29th December he started his journey again but once more the DEC called to inform him that the security situation had not improved. He said that he returned to Ogembo and kept his materials in the DEC’s Office. On 30th December, 2007 the Returning Officer flew to Nairobi from Suneka Airstrip and presented the Bomachoge results to ECK. While still in Nairobi, the Returning Officer added up the figures in all the Forms 16A and realized some discrepancies in the tallying but the first respondent still remained the winner, it was alleged. He had given the total number of voters as 38,481 but after adding up the figures properly he realized that the total was 45,402. He realized this discrepancy after about 2 weeks.

Upon cross examination, Mr. Macharia admitted that whereas ECK Guidelines required applicants for the position of a Returning Officer to be aged between 45 and 60 years, he was 70 years old when he was engaged by the ECK in December, 2007. He however said that he was not an applicant for that position, he was selected by the ECK because of his wide experience. He denied that he was too old to be given such a demanding job.

Regarding Forms 16A, the Returning officer said that the forms that he received from the Presiding Officers were properly filled and signed by each Presiding Officer and all the agents as by law required. They were all intact at the time of announcement of the results, he stated. All the agents had copies of the forms, he added. When he went to the ECK offices at Ogembo on the 28th of December 2007 after announcement of the results, he had all the forms in tiptop shape. In paragraph 29 of his affidavit he deposed that soon after declaration of the results he started his journey to Nairobi to deliver the results and the statutory forms but when he was told about the security situation, he returned to Ogembo ECK offices and had the documents kept in the safe by the DEC. He saw the DEC closing the safe and the office where the safe was. By that time there was 24-hour security at the place. On the morning of 29th December, 2007 he collected his bag from the safe and started his trip to Nairobi again. He did not say that the bag and the contents therein seemed to have been tampered with. When he failed to travel he again returned the bag to the safe until the 30th day of December, 2007 when he flew to Nairobi.

Upon arrival in Nairobi, he realized that some of the Forms 16A were not signed. With regard to Form 17A, some figures had been altered. He suspected that the alterations may have been done between 28th and 30th December, 2007 when he had left the bag in the custody of the DEC. However, he did not make any enquiry, he just went ahead to hand in the results and the forms to the ECK at Kenyatta International Conference Centre, the National Tallying Centre. He said that he did not know who made the alternations and even suggested it could have been the devil! He was emphatic that the forms 16A, which were before the Court, were not the same ones that had been handed over to him on the night of 27th December, 2007. However, most of the Presiding Officers who testified before this court had photocopies of the same Forms 16A that were delivered to Nairobi by the Returning Officer yet there was no evidence that they had been in contact with the DEC between the 28th and 30th December, 2007.

As for Form 17A, this was filled after announcement of the results. The Returning Officer said that he did not take with him Form 17A when he was travelling to Nairobi. He said he had filled some data in his notebook so that he could use it to prepare Form 17A when he got to Nairobi. He would also have used the figures in the forms 16A to complete Form 17A; he stated. He added that there were two sets of Forms 16A, one of them he took to Nairobi and the other one he had left with Alice Ongubo, Joyce Siocha and Bernard Obara who were completing Form 17A. He did not explain why there were two sets of Forms 16A. On 29th September, 2008 the Returning Officer wound up his answers to Mr. Katwa's cross examination by stating that before he left for Nairobi, he had given to the DEC Forms 16A so that he could photocopy them, which he did.

On 30th September, 2008, upon further cross-examination by Mr. Katwa, the Returning Officer changed his evidence dramatically. He said he left the three clerks, i.e. Alice Ongubo, Joyce Siocha and Bernard Obara, with his note book and not Forms 16A so that they could complete Form 17A. He again said that he travelled to Nairobi on 29th December 2007 with Form 17A as well as Forms 16A. He reiterated that the figures in Forms 16A were not used to complete Form 17A, it was information from his note book. The evidence about the note book also changed, he said he travelled to Nairobi with the note book and the information contained therein was absolutely accurate. That notwithstanding, he said that when he compared the votes as recorded in Forms 16A, 17A and his notebook they did not tally. The Form 17A that he delivered to Nairobi was neither signed by the candidates nor their agents because they had all left by the time it was ready, the Returning Officer claimed. He said that he did not counter check Form 17A after it was handed over to him by his three clerks; he just took it to Nairobi as it was. I think this was unacceptable negligence, if at all there was any truth in the averment. He admitted that the Form 17A had mistakes that must have come from his note book, even though he still insisted that his notebook had no mistakes. He personally filled in the information in his notebook, he said.

The Returning Officer did not mention all these issues in his Evaluation report to the ECK which he annexed to his affidavit as annexure “**TGM 8**”. He stated therein that the parliamentary votes cast were **38,481**. He did not state that he later realized they were **45,402** though he had allegedly told ECK about the mistake which he admitted to have made.

With respect to Tendere polling station, the Returning Officer said that he signed Form 16A at the top but the same was not signed by the Presiding Officer and the agents. There was no statutory declaration as to why the same was not signed by the appropriate signatories. His explanation for signing that particular Form 16A was that it had been presented to him by an agent who told him that there were serious arguments over the votes entered therein. This information was not entered in his note book. The Returning Officer’s note book showed that at Tendere polling station the first respondent had 68 votes which was not sourced from the 6 Forms 16A in respect of that station. The form which had the total, form 35A, was prepared by Robert Arori and it showed that the first respondent obtained 101 votes in that station. He could not explain how the figure of 101 was arrived at. He admitted that as regards the figures for that station the figures in Form 16A and those in his note book did not agree, yet according to him, all the figures in his note book were sourced from Forms 16A. One other discrepancy in the same station is that Form 16A showed that candidate Koina Onyantha had 3 votes whereas in his note book, the Returning Officer had given him 8 votes.

There were many more discrepancies in the same station between entries in Forms 16A and those in the Returning Officer’s note book. It is important that I bring out a few others so that any one can tell whether the Returning Officer’s insistence on the validity of his note book entries can stand.

- (i) Form 16A shows Michoti Mogendi had 6 votes but in the R.O’s note book he is given 5 votes.
- (ii) The second Petitioner is shown to have received 24 votes in Form 16A but the note book shows 32 votes.
- (iii) Albert Nyaundi is shown to have received 73 votes in Form 16A but in the R.O’s note book he recorded 120 votes.
- (iv) The first Petitioner has 21 votes according to Form 16A but the R.O’s note book shows 54 votes.

When asked to give an explanation for the aforesaid discrepancies, the Returning Officer had this to say:

“This is a mystery which I cannot explain. I do not blame any of the other parties for all these mistakes”.

In the same polling station, similar discrepancies also appeared between the entries reflected in Form 17A compared to those in the Returning Officer’s note book.

- (a) The first respondent had 24 votes as per Form 17A but the R.O’s note book shows 68 votes.
- (b) The first petitioner had 44 votes but the R.O noted 54 votes.
- (c) Ombogo J had 48 votes as per Form 17A but the R.O’s note book shows one(1) vote.
- (d) Omweno James had 13 votes as per Form 17A but the R.O’s note book shows 158 votes.
- (e) Ondabu Jason got 5 votes as per Form 17A but the R.O’s note book shows nil (0) votes.
- (f) Migiro Samuel had 18 votes as per Form 17A but the R.O.’s note book shows he got 40 votes.
- (g) Peter Momanyi had one (1) vote as per Form 17A but the R.O’s note book shows 25 votes.
- (h) Cyprian Nyamwamu had 284 votes as per Form 17A but the R.O’s note book shows 116 votes.

The above are just but a few of the many cases of glaring discrepancies between the entries in Forms 16A, 17A and the R.O's note book.

But even after he had been taken through all those entries, the Returning Officer adamantly stated: ***“what I took to Nairobi was correct”***. He asserted that the Forms 16A and 17A that he took to Nairobi were different from the ones that were sent from ECK headquarters in Nairobi to ECK's Office at Ogembo and eventually delivered to this court. However, there was no denial that Form 17A that came from Nairobi was the original and the one that was left at Ogembo was a photocopy.

Upon further cross examination, the Returning Officer said that all the Presiding Officers had handed over to him all Forms 16A before he announced the result. He was personally checking each form to ensure that it was properly signed by each Presiding Officer and all the agents. However, before he announced the results he realized that some forms were not properly signed. So what had happened to them in the intervening period? He now changed and said that he may not have properly checked them. The only other possibility is that someone may have tampered with them.

Then suddenly the Returning officer made a complete about turn. He said:

“I wish to retract my earlier statement that all Forms 16A were signed”.

Pressed to explain his earlier stand that the DEC may have tampered with the forms when he left them in his safe, the Returning Officer stated:

“Before I announced the final results, the DEC had not come into contact with Forms 16A”.

The Returning Officer could not therefore blame the DEC for the unsigned and unstamped Forms 16A that are before the court.

With regard to Form 17A that he handed over to the ECK at Nairobi, the Returning Officer said that it showed that the first respondent had more votes than he had recorded in his note book. He admitted that the DEC was not involved in filling Form 17A.

Regarding return of the ballot boxes, the Returning Officer said that it was his deputy, Mr. Bwagani, who returned them on 28th December, 2007. He said that he did not know that 8 boxes were empty. However, he confirmed that when the Presiding Officers were bringing them in they were all intact and all had some contents. He said there was a document that showed the polling station where each of the boxes came from. That document was said to have been given to Mr. Bwagani. He did not know how the ballot boxes were tampered with.

In cross examination by Mr. Nyakemo for the first respondent, the Returning Officer said that basing the Parliamentary results on the correct figure of 45,402 votes, the presidential votes in the constituency were still more than the parliamentary ones by 350 votes. He denied having given any incomplete Form 17A to the petitioners, saying that at the time he was announcing the results, Form 17A had not been completed. However on 29th December, 2007, when he failed to travel to Nairobi and returned to Ogembo, he found the Petitioners waiting for him. They wanted him to sign copies of Forms 16A and 17A but he refused. He said they had not asked for those forms at Tendere when he was announcing the results. He extracted figures from Forms 16A into his note book which he relied upon to announce the results. Mr. Nyakemo took the Returning Officer through results from several polling stations as captured in Forms 16A that were before the court and contrasted them with the results shown in Form 17A and those in the R.O's note book. I will highlight two polling centres:

(a) At **Getare Polling Centre**, Form 16A showed that the first respondent had 10 votes yet Form 17A showed 1000 votes.

(b) At **Keberesi Primary School polling centre**, the Returning Officer announced that the first Petitioner got 36 votes but Form 16A that is before this court shows 361 votes. The figure had been

inflated because in his own affidavit, the first petitioner stated that he got 36 votes in that station.

The Returning Officer further testified that Form 17A that came from Gucha (Ogembo) was not exactly the same as the original that came from Nairobi. In the copy from Gucha, the first respondent is shown to have got 66 votes at **Mosobeti polling centre**, but the one from Nairobi shows 666 while the R.O's note book shows 66 votes. In my view the only explanation for this is that either the Returning Officer inflated the figure before he took the form to Nairobi having photocopied the same, or someone else in Nairobi tampered with the form by adding a figure "6" to the original 66 which is the correct one.

At **Kerongorori polling centre**, the first petitioner got 28 votes but returns from Nairobi showed 286 votes.

Regarding filling of Forms 16A, the Returning Officer admitted that most of them were not properly filed. Very few had the statistical part on the top filled but the Returning Officer said that he was not concerned with that. He said that the Presiding Officers had been trained for only 3 days and according to him that was not sufficient training period.

Wycliffe Mayaka Bwagani, the Deputy Returning Officer testified that when the ballot boxes were being returned by the Presiding Officers, none of them was empty and all their seals were intact. He added that he delivered them to the ECK's offices at Ogembo on 28th December, 2007 at around noon. He said the DEC was there but he sent Kennedy Onyoni to take delivery of the ballot boxes. He said that there was a typed document which he signed at the time of delivery of the boxes and not the handwritten document dated 29th December, 2007 and signed by Mr. Onyoni. He was therefore shocked to find that some of the ballot boxes were empty and others tampered with when they were being collected for delivery to court.

In cross-examination he stated that he kept a copy of the document that was signed in acknowledgment of receipt of the ballot boxes on 28th December, 2007. He kept it in a file which he later handed over to the DEC. Mr. Bwagani could not remember the names of the police officers who accompanied him as he returned the ballot boxes. He could also not tell the registration numbers of the vehicles that were used to transport the ballot boxes. He did not have copies of the vehicle work tickets. He recorded all these events in his note book but he claimed to have misplaced it.

Bruno Isohi Shioso, an Acting Superintendent of Police, was the District Criminal Investigations Officer, Gucha at the time of the elections. He testified that on 28th December, 2007 at about 10.00 a.m, he left Ogembo accompanied by Mr. Richard Ngetich, OCPD Gucha, Mr. Alfayo Wasike, the Security Regional Coordinator and Mr. Atika, the DEC. They travelled in motor vehicle registration number GKA 937 G to Nyamarambe in South Mugirango Constituency where it had been reported that a security breach had occurred and the public was agitated and was planning to burn the Nyamarambe tallying centre. The work ticket for the aforesaid motor vehicle was annexed to Mr. Shioso's affidavit. They kept vigil until late into the night. On the morning of 29th of December, 2007 they left Nyamarambe and went round South Mugirango Constituency to assess the security situation. They arrived at Ogembo, DEC's office, at about noon where they found a huge crowd, which equally seemed agitated.

The third respondent also called eleven witnesses who served as Presiding Officers during the elections. I will consider the evidence adduced by a few of them.

Elijah Oigoro Onyanha was the Presiding Officer at **Amatagaro Polling Station**. He testified that after close of voting exercise, they started counting. He filled Form 16A and signed it but did not stamp the same. The form was also signed by 18 agents. He said that some candidates did not have agents. He handed over the form to the Deputy Returning Officer because the Returning Officer was not there at about 9.00 p.m. when he went to the tallying hall. He remained with a copy of the form. When he was shown the Form 16A from his station that was before the court, he said that it was not quite like the one that he had handed in to the Deputy Returning Officer.

Wilfred Masege Ondambu was the **Presiding Officer at Ogembo County Council Polling Station**. He stated that the Form 16A that was before the court was not the form that he filled after counting of ballots. The one that was before the court was not signed by himself and the handwriting therein was not his. He said that all the agents in his station signed Form 16A but the one that was before the court had not been signed by any agent. He said that he had handed over to the Deputy Returning Officer a properly filled, signed and stamped Form 16A. Unfortunately he did not retain a copy of the same, he stated. So, what did the Deputy Returning Officer do with the Form 16A that was given to him by this witness?

Joseph Moracha Omambia was the Presiding Officer at **Nyakoiba Polling Station**. The Form 16A that he filled had names of only 14 candidates and was signed by only 7 agents. The other 14 candidates were said to have got no votes at all. The presiding officer did not see the point of putting down their names and indicating nil votes against their names. He handed over the ballot box to the Deputy Returning Officer. He denied having opened the box at Tendere as alleged by the second petitioner. He also denied having chased away any agent from the polling centre.

Robert Momanyi Arori was the Presiding Officer at **Tendere Primary School polling station**. He was also the Principal of Tendere Secondary School. He denied that he was recruited through the influence of the first respondent. He said that at the invitation of the DEC, he gave names of some of his staff members who were recruited as election officials. This was because ECK wanted to appreciate the services rendered by his school during past elections. After counting the ballots he filled the results in Form 16A. He filled quite a number of those forms and gave them to agents and observers. He said that after he had completed the form and announcing the results, he walked out. He was then told that some one had a strange form that had been presented to the Returning Officer. He looked at the results therein together with some agents and found that the figures did not agree with the ones which he had announced. The dispute was resolved. He did not know why the Returning Officer had to sign the form. Of the six sets of Form 16A before the court, the witness stated that he had signed only two of them. He denied any knowledge of the others. But even those two were not signed by all the agents. No reason was given for that omission. He did not also make any statutory report.

Luka Cheruiyot A. Lagat was the Presiding Officer, **Motontera Polling Station**. He was shown two Forms 16A. He said that he had signed one of them but denied having signed the other. According to the witness, Nyaundi Albert Mbaka got 59 votes and the second petitioner had 267 votes. He kept his own copy of the form which showed the results. He had also entered the figures in his field note book. When he went to the tallying centre, he handed over to the Returning Officer the forms. After about 30 to 45 minutes the results were announced by the Returning Officer. He said that the second petitioner was announced as having got nil votes while Nyaundi Albert Mbaka was said to have scored 267 votes. That caused an uproar from the second petitioner's agents and supporters who knew that he had scored 267 votes. The Returning Officer called Mr. Lagat to verify what the actual votes were. The Returning Officer showed the Presiding Officer a Form 16A that contained the results and the latter said that it did not bear his signature. The form had different results and had not been signed by any agent. The Presiding Officer showed the Returning Officer his Form 16A and his note book in an effort to convince him that the results which he had announced were wrong. According to the Presiding Officer, the Returning Officer did not change the results with respect to the second petitioner. He just said that he had noted the issue in his note book. The witness said that it was only the Returning Officer who could tell how the results were altered through preparation of another Form 16A.

In cross examination by Mr. Nyakeno, the witness said that immediately after counting the ballots at the polling station, he had telephoned the Returning Officer and given him the results.

Zachary Marita was the Presiding Officer at **Keberesi Polling Station**. The station had two streams. He filled Form 16A but it was not signed by any agent. He said that by the time he was filling it all the agents had left. He handed it over to the Presiding Officer with his signature only. He did not make any Statutory comments thereon. He did not indicate the number of valid votes cast. The Returning Officer did not question him about it. According to the witness, the first petitioner got 36 votes and that was the figure announced by the Returning Officer. The Presiding Officer was surprised to see the Form 16A in

court showing that the first petitioner scored 361 votes and not 36. It was clear that the form had been tampered with.

Robert Omare Tengeya, the Presiding Officer at **Mangere Primary School Polling Station** also testified that he presented to the Returning Officer Form 16A which was signed by himself only. He said all the agents at the station got excited after announcement of the results and went away before they had signed the forms. However, the same agents had signed the returns in respect of Presidential elections. His explanation was that he announced the results before the agents had signed Form 16A.

In respect of **Mosobeti Polling Station**, the Presiding Officer was **David Ogega Thomas**. The Form 16A that he gave to the Returning Officer was signed by only 3 agents. The form showed results for only 21 candidates. He said the other 7 candidates got no votes. The Form 16A that was shown to him in court showed that only 6 candidates got nil votes. The form that he presented showed that the first petitioner got 7 votes and the first respondent 66 votes but the forms in court showed their results as 107 and 660 votes respectively. It was obvious that the Form 16A that he presented had been interfered with, he stated.

Alfred Momanyi Makote was the Presiding Officer, **Getare Polling Station**. He was called as a witness by the first respondent. He testified that he applied to be recruited as a Clerical Officer but he was surprised when he was appointed as a Presiding Officer because he did not consider himself qualified to serve as a Presiding Officer. He was trained as a Presiding Officer for 5 days and according to him, that training period was too short. He found the training rather difficult.

The witness testified that his station opened at 7.00 a.m and they had no security the whole day. When he asked for security, he was told that Getare is a peaceful area and he had no reason to worry. Fortunately, he did not encounter any security problem. I would however say that this was a real gamble on the part of the ECK. Provision of Police Security in a Polling station is essential.

The witness further testified that the Form 16A that he filled was signed by only 2 agents. He said that the first respondent got 10 votes in that station but the form that was shown to him when he testified showed that the first respondent scored 1000 votes. That was not possible because the ECK register showed that the station had only about 330 registered voters.

After counting and announcing the results at the polling station, he was not able to deliver the results to the Tallying Centre because he had no transport and it was raining. Their driver had gone on a drinking spree and did not return. He tried to telephone ECK officials without any success.

Consequently, the Presiding Officer and his five clerks spent the night at the polling station. He managed to deliver the ballot box, other election materials and Form 16A to the tallying centre on the morning of 28th December, 2007. The Form 16A that he presented had names and results for only 14 candidates. According to him, there were only 14 candidates, he was not aware that there were 28 candidates.

THE FIRST RESPONDENT'S TESTIMONY.

In his affidavit, the first respondent stated that although he was declared the overall winner of the 2007 Parliamentary election for Bomachoge Constituency with 9,076 votes, from his records and information from his agents, he believed he had more votes than actually declared. He dismissed the evidence of Mr. Begi Advocate as frivolous, vexatious and an abuse of the court process because it consisted of wild and unsustainable allegations which he denied in total. He stated that according to information given to him by his agent at **Nyansara Polling Station**, one Nyameri Mogunde, many people who would have voted for him were chased away by the first petitioner's supporters. The first respondent denied having appointed any one in the aforesaid station or anywhere else to bribe voters to vote for him. He also denied that any civil servant campaigned for him within the precincts of any polling station or elsewhere or at all.

Regarding events that took place at Tendere tallying hall, the first respondent stated that all was calm

until the early hours of 28th December, 2007 when the second petitioner's agents started shouting and harassing the tallying clerks and the Returning Officer after it became apparently clear that the first respondent was emerging as the winner. Thereafter, a brother to the second petitioner, one Jason Nyangwara and other supporters started stretching their muscles in an attempt to scare people in the hall and thus disrupt the tallying process but they were overcome by security personnel manning the hall.

As regards Form 17A, the first respondent stated that some of the figures that were announced at Tendere tallying centre were different from those appearing in the said form, an indication that the results had been tampered with.

On 20th January, 2008, the first respondent requested for Form 17A through the Returning Officer. The Returning Officer advised him that he could only get the same by applying for it through the Chairman, ECK, and supplied him with a circular dated 9th January 2008. The circular from the Secretary, ECK, to all District Election Coordinators, directed them to ensure that Forms 16A, 17A and other accountable documents are not released to anyone without express authority from the Chairman, ECK. He accused the DEC of having contravened the said circular by releasing copies of Forms 16A and 17A to Mr. Begi.

Referring to results from Motontera Polling Station, he said that it was true the second petitioner had been given no votes but the Presiding Officer, Luka Lagat, admitted that he had made a mistake and the same was rectified. However, this was denied by the said Presiding Officer when he testified.

The first respondent accused the petitioners and Mr. Begi of colluding with the DEC to fabricate evidence that they had raised several complaints with the Returning Officer which were not addressed.

As regards results from 28 polling stations that were alleged to have been left out before the final results were announced, the first respondent stated that the petitioners and their agents were present when results from all those polling centres were being announced. In his view, Form 17A and some Forms 16A had been tampered with to create false evidence in this petition. It appeared to him that the alterations were done much later after the final results had been announced. He added that the alteration of his votes in certain polling centres to higher figures than announced was deliberately done to create a wrong impression that the elections were rigged in his favour. He cited two examples where his actual votes were increased from **10** to **1000** and **66** to **666** respectively.

The first respondent denied having ever committed any election offence as alleged by the petitioners.

The first respondent further denied having influenced the employment of several election officials, especially from Tendere Secondary School, with a view to assisting him to rig the election. He referred to the evidence of the DEC as to how the recruitment was done.

The first respondent averred that from Forms 16A issued to his agents by various Presiding Officers and which were eventually given to him and from his own records, he had garnered a total of 12,195 votes, the first petitioner 5,933 votes, Albert Nyaundi 6,912 votes and the second Petitioner 7,600 votes. He annexed to his affidavit copies of some of the Forms 16A which were allegedly given to his agents by Presiding Officers. They included forms for **Sengera Primary School polling station No.008** and for **Sengera Girls' High School, polling station No.111**.

The copy of Form 16A from **Sengera Primary School** shows that the agents who signed the same are:

- 1. David O. Mugendi**
- 2. Richard Begi**
- 3. Jane M. Magembe**
- 4. James Kibwaro**

The copy of Form 16A from **Sengera Girls' High School** was signed by the following agents:

1. David O. Mugendi

2. Richard Begi

3. Jane M. Magembe

The first three agents in the two different polling stations are the same. Can one person be an agent in two different polling

Stations at the same time, participate in counting of ballots in each station at more or less the same time and sign Form 16A accordingly? The answer is obviously in the negative.

The original Form 16A in respect of Sengera Primary School shows that it was signed by 6 people who are totally different from those who are alleged to have signed the copy annexed to the first respondent's affidavit.

The original Form 16A from Sengera Girls' High School was not signed by any agent at all.

From the foregoing, it is likely that David O. Mugendi, Richard Begi and Jane M. Magembe who are shown to have been agents in two different polling stations may have committed a crime amounting to an election offence. I direct the **District Criminal Investigations Officer, Gucha**, to carry out appropriate investigations and with advice from the Attorney-General's Office, to take appropriate action in the circumstances.

SCRUTINY OF BALLOT BOXES, FORMS 16A & 17A

On 9th June, 2008, it was agreed by consent of all the parties to this petition that the ballot boxes, Forms 16A and 17A be scrutinized. It was agreed that the exercise be presided over by this court's deputy registrar in the presence of parties and/or their representatives. The exercise was started on 16th June 2008 and went on upto 27th June, 2008. Each Form 16A from all the 130 polling stations was thoroughly scrutinized. Form 17A and all the ballot boxes were also inspected. The deputy registrar took down very detailed notes and prepared a report. The notes and the report are part of the proceedings in this petition. The findings were, to say the least, shocking and unexpected.

BALLOT BOXES

Out of the 151 ballot boxes delivered to court, 8 were reported by ECK to have been empty on the 29th May, 2008 when they were delivered to court. However, during the scrutiny exercise, it was realized that there was one more empty ballot box. The serial numbers of the empty ballot boxes are contained in the proceedings. One ballot box was found to be having the seal of ECK and another seal but was empty. There were 42 ballot boxes which were open. 22 ballot boxes had no ECK seals. Very many boxes had seals which had been tampered with. Out of all the 151 ballot boxes, only 39 of them were in good order.

FORMS 16A

None of the forms complied with the provisions of **Regulation 35A(4), (5)(b), (6), (7), (8)**. Many did not contain the names of all the candidates, many also did not contain the names of all the agents, many agents did not sign the forms and no reasons were given for that omission. Many forms did not have names of the Presiding Officers, others did not even bear the name of the polling station, many did not have ECK or Presiding Officer's rubber stamp, others did not show the total number of registered voters, total number of valid votes cast, total number of rejected votes and total number of disputed votes. Only

about 10 contained Presiding Officer's Statutory comments.

FORM 17A

The form contained very many figures which did not tally with those contained in Forms 16A. There were some alterations and cancellations. The form was not signed by any of the candidates or their agents.

ANALYSIS AND FINDINGS REGARDING THE MAIN GROUNDS OF THE PETITION:

Having summarized all the evidence that was adduced by the Petitioners and their witnesses in support of the various grounds of the petition and the evidence by the respondents and their witnesses in rebuttal thereto, I will now proceed to make a brief analysis and finding on each of the major grounds of the petition.

1. Bribery of voters by the first respondent and/or his agents:

There were various allegations made by Mr. Edward Begi, (PW1), Margaret Bonareri Atina, PW2, Musa Nyakora, PW4, and the second petitioner, PW6. I do not need to go over the specific allegations as I have already outlined the entire evidence in considerable detail. According to PW1, he witnessed voter bribery at Nyansara and Nyakoiba polling stations, among other places. He mentioned some people who told him about the alleged bribery incidents. Those people did not testify. None of the recipients of the bribes was ever called to testify.

Jeremiah Okemwa Kimori who was said to have bribed voters at Kineni Polling Centre testified and denied Mr. Begi's allegation. He was cross-examined and his evidence remained unshaken.

PW2 testified that voters were given Christmas gifts at Magena Market but she did not name any person who was given the alleged gifts and none of the recipients of the gifts was called as a witness.

The second petitioner alleged that one Begi Nyamora was bribed with Kshs.5000/= to accept change of figures in favour of the first respondent. The said Begi Nyamora was not called as a witness.

Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it is not easy to prove bribery, especially where it is done in secrecy. In such cases, perhaps bribery may be inferred from some peculiar aspects of a case but when it is alleged that the bribery took place publicly and in the presence of many people, the court cannot be satisfied by anything less than the best evidence which is always direct evidence given first hand.

In **NTWIGA V MUSYOKA & 3 OTHERS** (NO.2) (2008) 2KLR (EP) the court cited **MOHAMED JAHAZI VS SHARIEF NASSIR A. TAIB**, Election Petition No.9 of 1983, where it was held that the burden of proof throughout rests on the petitioner and the quality of evidence that is advanced is to be considered with a thoroughness and gravity which is commensurate with the dire consequences that can follow by virtue of the provisions of **section 6** of the **National Assembly and Presidential Elections Act** and **Section 35** of the **Constitution**.

I find and hold that the allegation of bribery was not proved and dismiss the same.

2. Open Canvassing for votes within the polling stations.

Mr. Begi named one polling station where this took place as Rianchogu Primary School. Abdi Ong'ong'a who was alleged to have given PW1 that information was not called as a witness.

He also named David Nyanchongi, the chief of Sengera location. The said chief testified and denied that allegation.

This ground, which is closely connected to the first ground above, was not proved. I dismiss it.

3. **1st Respondent using his position as an Assistant Minister to influence Chiefs to Campaign for him.**

It was alleged that the Gucha District Commissioner arranged a meeting with Chiefs, Assistant Chiefs and other Provincial administrators and agreed to prevail upon village elders to campaign for the first respondent. The second petitioner alleged that Chiefs in the constituency were given Kshs.100,000/= each to campaign for the first respondent. The second petitioner said that he saw chiefs buying blankets, mattresses and cows. The court was not told which chief in particular was seen buying any of the said items, where they were bought at, how much they cost etc. Even if any chief bought any or all of the aforesaid items, it cannot be concluded that he must have received money from the first respondent. Cows, blankets and mattresses are ordinary things and there is nothing unusual about a Chief purchasing any or all of the above. If this allegation had any truth, a report to that effect ought to have been made. The evidence put forward was scanty and speculative. In the absence of cogent evidence, this allegation cannot stand and I reject the same.

4. **Interference by the Gucha District Commissioner with the tallying process.**

It was alleged that on the night of 27th December, 2007 the Gucha District Commissioner was in the tallying hall

interfering with the tallying process at Tendere and was chased away by the Returning Officer. That was denied by the Returning Officer. However, Mr. Atika, the DEC, testified that the District Commissioner's official driver was at the hall and when he was told that he was interfering with the tallying process he chased him away. Mr. Atika did not tell the court what exactly the driver was doing. The District Commissioner's official vehicle registration number GK 681G was said to have been parked outside the hall. It was not stated that the District Commissioner was there. Even assuming he was there, the court was told that he was the Chairman of the District Security Committee which was in charge of provision of security during the election period. Many security agents were within the venue on that particular night. The Returning Officer ought to have acted on that complaint and sought an appropriate explanation from the District Commissioner. A D.C.'s driver cannot use his official vehicle without authorization by the D.C. That notwithstanding, the Petitioners failed to establish how the D.C. or his driver interfered with the tallying process and I dismiss the allegation.

5. **1st respondent holding himself out as the Official Government Candidate and getting several Public Officer to campaign for him.**

In my view, the fact that the first respondent was an Assistant Minister at the time does not necessarily mean that he had the clout or disposition to intimidate members of the Provincial Administration to campaign for him. It is a fact that during the elections held in 2007 several cabinet ministers and even the then Vice President who were all in the same political party as the first respondent did not make it. I find that this allegation which was made by the petitioners and several witnesses was not proved to the required standard.

6. **Violence, intimidation and Coercion at the tallying hall.**

It was alleged that the first respondent, his agents and his supporters jammed the tallying centre, intimidated and coerced the tallying staff. It was alleged that they made it impossible for the petitioners' agents to access the tallying hall. They were further alleged to have caused violence therein.

The first respondent denied the allegation and stated that it was the second petitioner's brother and his supporters who started stretching their muscles in a threatening manner and had to be escorted out of the hall by security personnel who were at the tallying centre. The Returning Officer said that the exercise was generally peaceful. According to **Regulation 40(2)**, the Returning Officer should have allowed only the following persons to be at the tallying centre:

- (a) **The Presiding Officers and other election officials on duty;**
- (b) **Police Officers on duty;**
- (c) **The candidates;**
- (d) **One agent for each candidate;**
- (e) **Duly accredited election observers; and**
- (f) **A member of the ECK.**

The Returning Officer seems to have allowed the candidates' general supporters to enter the tallying centre. That was wrong.

That notwithstanding, none of the petitioners' agents was called to testify that he was unable to access the tallying hall by the first respondent's agents. There is evidence that the petitioners' agents recorded results in the tallying hall through out the tallying exercise. It may not be denied that there was tension and occasional shouting between agents of different candidates but that is not unexpected or unusual in such an exercise. One would be naïve to expect such a process to be conducted with royal solemnity and tranquility. That is why security is always provided during tallying of votes. From the evidence on record, it can be concluded that the atmosphere in the tallying hall, particularly in the morning hours, was charged with anxiety attributable to several factors. It would be unfair to blame the first respondent singularly for that. In determining an allegation of this nature, the important thing to consider is whether the acts complained of affected or may have affected the final outcome. In this case that was not established. I therefore reject that ground.

7. Polling Centres were too small and there was inadequate lighting.

The second Petitioner testified that the polling centres which were also used as counting venues were too small to accommodate all the candidates' agents, E.C.K Officials, Security Officers and observers. As a result, the counting process was unreliable, he alleged. He said that ECK should have looked for bigger venues like Churches and Tea buying centres. He also complained that there was inadequate light during the counting exercise in the evening.

The DEC told the court that before polling centres are gazetted, they are inspected and assessed by ECK officials to ensure that they are suitable. There was no evidence that this was not done. It is also on record that several Tea buying centres were used as polling centres. But of greater significance is that none of the petitioners' witnesses said that the size of any of the polling centres affected either the voting or counting exercise. There was also evidence from the DEC that each polling centre was provided with several gas lamps. None of the Presiding Officers who testified said that there was insufficient light as to make counting of ballots difficult or unreliable. The same can also be said of lighting of the tallying centre. My conclusion is that this allegation was not proved and must fail.

8. Late opening of some polling stations.

Mr. Begi testified that he visited Nyansera Primary School polling station and found long queues of voters lining up but the exercise did not commence until after 9.30 a.m. after he raised concerns with the Presiding Officer. The Presiding Officer was not called by any of the parties to tell the time when the station opened. But even if it were to be accepted that the said polling centre opened late for whatever reason, no person registered to vote in that station was called to testify that he was unable to vote because the station opened late. In any event, a Presiding Officer has power to extend voting time to enable all the people who are present in a polling station to cast their ballots. The Returning Officer said that he did not receive any complaint to that effect. For these reasons, I conclude that this ground was not proved and I reject it as well.

9. ECK officials campaigned and canvassed for votes for the first respondent on the polling day.

The people who were cited are George Nyangwara, Joash Orina, a Mr. Ontita and Mr. Robert Momanyi Arori. These were all teachers at Tendere Secondary School and had been recruited by E.C.K. as Presiding Officers. It was alleged that they were recruited through the influence of the first respondent. This was not proved. The DEC explained the circumstances under which they were recruited. These people may have been qualified in their own right but it was wrong for ECK, a public body, to employ them simply because it wanted to express its appreciation to the school for the services which it had rendered to ECK during past elections.

Employment of election officials should and must be done on merit and there must be transparency in the recruitment exercise.

But having said that, I must add that it was not established that the said persons openly campaigned and canvassed for votes for the first respondent on the polling day. I will however deal with their perceived role in the handling of Forms 16A and 17A at a later stage.

10. Breach of Mandatory Provisions of Regulation 35A of the Election Regulations.

This was one of the major grounds in this petition and arguments on the same including scrutiny of Forms 16A took nearly half of the time spent in hearing this election petition. Evidence on record shows that the electorate in Bomachoge Constituency conducted themselves peacefully in the process of casting their ballots but problems seemed to have started during and after counting of the votes.

The entire election process was governed by, **inter alia**, the provisions of the Constitution of Kenya and the National Assembly and Presidential Elections Act together with the Rules and Regulations made thereunder. The Election Regulations were made by the ECK in accordance with the provisions of **section 34** of the **Act**. It is important to note provisions of **section 34(2)** that:

“No regulations shall be made under this Act unless a draft of the regulations has been laid before, and has been approved by resolution of the National Assembly.”

The current regulations were revised shortly before the 2007 elections. These regulations spell out vital details as to how transparent, free and fair elections have to be conducted and their importance cannot be down played. **Regulation 35A** is couched in peremptory language that leaves no room for a Presiding Officer, candidate or agent to choose whether to comply with it or not, except where the regulation otherwise so states. That discretion on the part of a Presiding Officer is very limited and is only in deciding whether he should uphold or reject a complaint made by a candidate or his agent in disputing the inclusion of a ballot paper or objecting to the rejection of a ballot paper.

It is important to consider in some detail the provisions of **Regulation 35A**. It starts with:

- Mandatory requirement for the Presiding Officer to open each ballot box in the presence of the candidates or their agents, as may be present. The Presiding Officer empts the contents of the ballot box onto the counting table and with assistance of polling clerks proceeds to count the votes polled by each candidate.

The Presiding Officer then records the total number of votes cast in favour of each candidate.

- A candidate or his agent has a right to dispute the inclusion in the count of a ballot paper or object to the rejection of a ballot paper. Where a candidate does so, the Presiding Officer has to consider that dispute but he has power to uphold or reject the complaint.

- The Presiding Officer, the candidates or their agents are required (and the word used is “**shall**”) to sign a declaration in Form 16A which shows the name of the polling station, the total number of registered electors for the polling station, the total number of valid votes cast, the number of votes cast in

favour of each candidate, the number of votes that were rejected and the number of disputed votes. The Presiding Officer, the candidates or their agents cannot and must not ignore that declaration. That declaration is what authenticates the entire counting process and proves that there was transparency in the exercise. The words of the declaration are explicit that:

“We, the undersigned, being present when the results of the count were announced, do hereby declare that the results shown above are true and accurate count of the ballots in ... polling station, constituency”.

- **Any candidate or agent present who is not willing to sign the declaration has to write down the reasons for the refusal and if the candidate or agent refuses or fails to do so, the Presiding Officer has to record the fact of the refusal or failure as above. This in effect means that a candidate or agent can refuse or fail to sign the declaration and refuse or fail to state the reasons thereof and where that happens the Presiding Officer must record that fact. Each Form 16A has a space for a Presiding Officer’s statutory comments. Those comments are very important.**
- **Upon signing the declaration as above the Presiding Officer proceeds to announce the results before communicating them to the Returning Officer.**
- **The Presiding Officer is required to provide each candidate or agent with a copy of the duly completed Form 16A and,**
- **Affix a copy of the declaration of the results at the public entrance to the polling station or at any other place convenient and accessible to the public at the polling station.**
- **Where any candidate or agent is absent, the Presiding Officer must record the fact of their absence.**

The above summarized procedure is fairly simple and straight forward but is essential in an election and has to be adhered to. A Presiding Officer who, without reasonable cause, refuses and or fails to comply with the requirements of Regulation 35A in so far as performance of any of the duties spelt out therein commits an offence and is liable to be prosecuted and imprisoned for a term not exceeding five years as provided for by **section 4** of the **Election Offences Act Cap 66**.

Presiding Officers must realize that the conduct of an election is a very important national exercise that is funded by public funds, that is, taxes paid by the general populace, and if an individual is privileged to serve as such an official thereat, he must be guided by the given Regulations. I say so because most of the Presiding Officers who testified in this petition displayed a very casual attitude as to how they went about their duties. Some simply said that they did not see the importance of filling the statistical part of Form 16A, that is, stating:

- (i) the total number of registered voters;**
- (ii) the total number of valid votes cast;**
- (iii) the total number of rejected votes;**
- (iv) the number of disputed votes;**
- (v) the number of valid votes cast in favour of each candidate.**

Some Presiding Officers did not sign their part in Forms 16A; others did not even request the candidates or their agents to sign the required declaration, etc. Suffice to say that none of the 130 forms that were presented before this court was properly filled in compliance with regulation 35A. However, some of the Presiding Officers testified that they signed their forms, had them signed by all the agents and generally complied with all the statutory requirements but their forms were substituted with incompetent ones. But

such were the minority.

Some Presiding Officers said that their training period was too short. Another one said that he did not consider himself qualified to have been appointed a Presiding Officer and was candid enough to tell the court that he applied for a clerical job and was surprised when he was appointed a Presiding Officer. In fact he found the training of Presiding Officers rather difficult. One may then ask, why did ECK appoint such a person as a Presiding Officer? Were there no better people to consider?

The Electoral Commission of Kenya, in formulating the said Regulations and the Legislature in passing the same intended that each and every regulation therein be adhered to as much as possible in conducting Presidential, Parliamentary and Civic elections. Electoral justice cannot be guaranteed without adherence to the said regulations.

Refusal and/or failure to play a game by its rules is a recipe for chaos. And here we are not talking of a sport; it is the exercise of choosing people's representative to the August house. That important exercise must be conducted in the most open, fair, free and transparent manner as possible. That can only be achieved if all the parties concerned, the electorate, ECK and its officials, the candidates and their agents do what is expected of each by the law.

Form 16A is a very important document and must be filled meticulously by all concerned. Ideally, each candidate and every Presiding Officer ought to retain a duly completed form or copy thereof before the forms are forwarded to ECK. In the event of any election petition touching on the form then it would be easy to determine whether the counting process was undertaken fairly. I think Forms 16A should have serial numbers and other security marks such that ECK can record the form numbers given to each polling station. That way, chances of introducing fake Forms 16A will be minimized.

In this petition, ECK and its official did not explain why they performed so poorly in the preparation and handling of important statutory documents. ECK did not show that it complied with its Guidelines of recruiting election officials and neither did it demonstrate that the appointed officials were properly and adequately trained. The Presiding Officers did not sufficiently explain why they did such shoddy job. It was either deliberate or they were not properly trained or were outrightly incompetent.

From the forgoing, I find and hold that there was breach of mandatory provisions of **Regulation 35A** by the second and third respondents. The Presiding Officers were serving under the Returning Officer.

11. HANDLING OF FORMS 16A AND 17A BY THE RETURNING OFFICER AND ECK.

The Presiding Officers handed over Forms 16A to the Returning Officer or his deputy. It was upon the Returning Officer to ensure that the forms were well taken care of.

The Returning Officer was by law obliged to adhere to **Regulations 40 and 41**. **Regulation 40(1)** requires him to wait until the results for all polling stations in the Constituency are received before tallying of the results commences. That was not done. There was evidence that tallying started before all the results from the polling stations came in. The results from **Getare polling station** were brought on the morning of 28th December, 2008 simply because the station did not have means of transport to enable the presiding officer, **Alfred Momanyi Matoke**, deliver the results to Tendere tallying centre. The presiding officer explained that the station had been assigned a vehicle and a driver. However, the driver went on a drinking spree and never returned.

Under **Regulation 40(b)**, the Returning Officer is supposed to examine the rejected ballot papers or those which were disputed and confirm or alter or vary the decision of the Presiding Officers with regard to the validity thereof.

This may not have been done. The Presiding Officer at **Mesabakwa Primary school Polling Station** said that there were three (3) rejected or objected ballot papers in respect of the first respondent. There was no evidence that the Returning Officer examined them as required but he added them to the first

respondent's votes.

The Returning Officer said that he was copying the figures recorded in Forms 16A into his note book and that he used the information which he had personally recorded in the note book to declare the results and announce the winner of the election. It was demonstrated that there were several instances where the entries in Form 16A did not tally with those recorded in the note book. The note book is not a statutory document and cannot be relied upon, particularly where it contradicts the contents of a statutory document like Form 16A. Much as the Returning Officer tried to defend the accuracy of the figures in his note book, it was obvious that it contained very many mistakes. This strange document known as a note book cannot be relied upon as a basis for declaring results of an election.

There was evidence that some Forms 16As were being changed right there at the tallying centre. **Luka Lagat**, the Presiding Officer at Motontera said that when a dispute arose over the results that were announced from that station, the Returning Officer called him. He realized that the Returning Officer had a form that did not bear the Presiding Officer's signature. How could that have been possible? One plausible explanation that was advanced was that the tallying clerks who were assisting the Returning Officer and whom he later tasked with the responsibility of filling Form 17A were manipulating Forms 16A. This was even suggested by the Returning Officer.

After publicly declaring the winner of the election, the Returning Officer, in the presence of candidates or their agents present, ought to have completed Form 17A. See **Regulation 40(1)(f)**. Form 17A should show:

- (i) The name of the constituency;**
- (ii) Total number of registered voters;**
- (iii) Votes cast for each candidate in each polling station;**
- (v) Number of rejected votes for each candidate in each polling station;**
- (vi) Aggregate number of votes cast in the Constituency and;**
- (vi) Aggregate number of rejected votes.**

The form is then supposed to be signed and dated. Any candidate or agent present is entitled to a copy. The form is thereafter delivered to ECK together with originals of Form 16A.

The data in Form 17A is supposed to be sourced exclusively from Form 16A. In this petition, it was not clear whether the data was sourced from Forms 16A or from the Returning Officer's note book or both because the Returning Officer kept on changing his evidence.

Form 17A was never signed by any candidate or agent. It is not even dated. No one can tell for sure when it was completed. It contains many figures which do not tally with those in Forms 16A. We have a scenario where Forms 16A are inaccurate as well as Form 17A. This was not be denied.

The Returning Officer advanced three theories as how Forms 16A may have been interfered with and possibly substituted all together:

These are:

- 1. Mr. Atika, the DEC, may have altered some of the figures therein when he left his bag in the safe since the DEC was the only person who had the key to the safe.**
- 2. Alice Ongubo, Joyce Siocha, and Bernard Obara and other clerks who were completing Form 17A may have been the ones who did it.**

3. ECK head office, Nairobi, may have interfered with Forms 16A & 17A.

Considerable effort was made to demonise Mr. Atika and blame him for any alteration in Forms 16A and 17A. The initial stand of the Returning Officer was that all Forms 16A that were handed over to him were properly signed by the Presiding Officers and the agents. He then announced the results and took the forms to ECK offices at Ogembo. Later he took the bag which contained the forms. Upon his arrival at Nairobi to hand them in he realized that they had been tampered with. The DEC seemed the perfect scapegoat.

Later, the Returning Officer realized his contention that Forms 16A that were presented to him by the Presiding Officers were not properly signed and he changed course. He said that before he announced the results the DEC had not come into contact with Forms 16A.

When the Returning Officer was going to Nairobi to deliver the results and the forms, he photocopied them, that is Forms 16A and 17A, left copies with the DEC and took the originals with him to Nairobi. How could Mr. Atika have had anything to do with the contents of the original forms which he did not handle? What the DEC gave to Mr. Begi, whether procedurally or otherwise, were photocopies of the copies, which he had been left with by the Returning Officer. Even assuming Mr. Atika and Mr. Begi made any alteration to the copies before they photocopied them which was not proved to have been the case, the originals were already in Nairobi. The court received those originals and it was clear that they had many shortcomings as already highlighted.

My assessment of Mr. Atika's evidence and demeanour was that he was telling the truth and all the above allegations made against him had no basis.

Equally, ECK headquarters was not shown to have interfered with the forms in any way. It is only the Returning Officer, the clerks he was working with at the tallying centre and perhaps some agents of the petitioners and the first respondent who may know how the said forms were tampered with. But the buck stops at the Returning Officer's desk because he is the one who is charged with the responsibility of handling Forms 16A and 17A after an election before he delivers them to ECK. The preparation of Form 17A is the sole responsibility of the Returning Officer. **Regulation 42(1)** requires all documents relating to an election to be retained in the safe custody of the Returning Officer for a period of three months after the results of an election have been declared.

The Returning Officer did not give credible evidence. His denial of even some of the most obvious facts and insistence on his innocence in the circumstances was, to say the least, baffling. In a manner of speech, charcoal is ordinarily black and when it gets wet it does not turn white. Likewise, if a candidate in a given station got, say 73 votes and the figure was recorded in Form 16A and in the Presiding Officer's note book then he handed over the form to the Returning Officer, who by mistake or otherwise recorded a different figure, either higher or lower, when it is proved that the entry in the Returning Officer's note book is incorrect, one would have expected the Returning Officer to own up but not insist that he is right and the mistake was made by another person, not him! The Returning Officer's evidence was so inconsistent that it was difficult to tell where the truth lay. However, it was clear to this court and to any objective hearer of his testimony that the Returning Officer was contradicting himself, perhaps in a desperate attempt to cover up some serious flaws in the handling of Forms 16A and 17A by himself, some Presiding Officers, some tallying clerks and generally ECK.

One other aspect that adversely affects not only the credibility of the Returning Officer's evidence but also the final outcome of the 2007 Bomachoge Parliamentary elections is that to date, all the official records held by E.C.K and presented to this court show that in the said Constituency, out of 70,590 registered voters, only **38,481** voted, equivalent to **54.52%** of the registered voters, whereas according to the Returning Officer's admission, the actual number of voters in the parliamentary elections were **45,402** meaning the voter turnout was **64.31%**. The Returning Officer presented Forms 16A and 17A showing the first figures aforesaid, that is 38,481. Those are the results which were announced by ECK at Kenyatta International Conference centre and eventually gazetted. Of those votes, the first respondent was shown to have garnered 9,076 votes, the first petitioner 7,221 votes and the second petitioner 5,746

votes. There was also another candidate who performed fairly well, Nyaundi Albert Mbaka with 7,133 votes.

More than two weeks after announcement of the results, the Returning Officer realized that the total number of valid votes cast was 45, 402, a difference of **6,921 votes!**

According to him, he verbally reported to an official of ECK at Nairobi about his mistake and he was told that as long as the winner remained the same there was no problem. No witness was called to verify this assertion. If indeed ECK was given this information by its Returning Officer, what action did it take to rectify the anomaly? It seems nothing was done because none of the witnesses who were called by ECK said anything about this issue. Can the second and the third respondents stand innocent in the face of such glaring irregularity? On 29th January, 2008 when the Returning Officer wrote to the Chairman, ECK, he did not capture the aforesaid serious discrepancy on the vote totals.

One may wonder, apart from the Returning Officer, who else verified how the extra 6,921 votes were shared between the 28 candidates? If indeed all Forms 16A were there when the final results were announced, how could such an error be made and go unnoticed by all the tallying clerks, the candidates and their agents? This seems to give credence to the petitioners' assertion that the results were announced before results from 28 polling stations were tallied.

On the other hand, if results from all the 130 polling stations were tallied before the total valid votes were announced as 38,481, it means that the entries in Forms 16A were subsequently changed so that the total number of valid votes cast was now shown as 45,402. Either way, that kind of confusion cannot be said to have yielded transparent results.

If the Returning Officer was diligent, he ought to have realized that the total of the Presidential votes in the constituency being 45,725, a total of 38,481 parliamentary votes was unreasonably low. He would then have checked the records more thoroughly before announcing the result. In light of the above, the validity of Forms 16A and Form 17A is highly questionable. There is more than sufficient proof that the results reflected therein are not genuine.

12. PROPRIETY OF BALLOT BOXES

There is no dispute that the ballot boxes were tampered with. 9 of them were empty when they were delivered to court. Many had no seals, others were open and only 39 ballot boxes were in good order. The Deputy Returning Officer, Mr. Bwagani, had been assigned the responsibility of collecting the ballot boxes from the Presiding Officers and was to deliver them to ECK Offices at Ogembo. Mr. Bwagani said that he returned the ballot boxes intact to the ECK Offices at Ogembo where they were received by Mr. Kennedy Onyoni, a clerk, on behalf of the DEC. He said the DEC was there when the boxes were being delivered and he kept on coming out of the office to check on the exercise. Kennedy Onyoni testified that Mr. Bwagani did not accompany the ballot boxes; he only sent some casual workers and police officers to accompany the boxes. Mr. Onyoni had documentary evidence that the ballot boxes were delivered on 29th December, 2007 in the absence of the DEC. He noted that 8 boxes were empty. Mr. Bruno Shiocho, the D.C.I.O Gucha, confirmed that they were with the DEC and other Security Officers in South Mugirango on 28th December, 2007.

On 29th January, 2008 the Returning Officer wrote to the chairman ECK informing him that there were some used and unused ballot papers that were supposed to have been inserted in the ballot boxes but were not, they had been surrendered separately. He said that it was Mr. Bwagani who was responsible for collecting election materials from Presiding Officers. When Mr. Bwagani was cross-examined on this issue he denied any knowledge of the same.

None of the Presiding Officers who testified stated that they handed in used or unused ballot papers to

Mr. Bwagani.

They all said that they put them inside the ballot boxes and sealed them. In the circumstances, it means that some people opened the sealed ballot boxes while they were still at the tallying centre or else where before they were delivered to the ECK Offices at Gucha. That may explain why some of them were found empty on 29/12/2007. This also supports the petitioners' evidence that they saw some people outside the tallying hall opening up ballot boxes, though I doubt if they could see their serial numbers given the scanty light outside the hall.

There is a dispute between the DEC, the Returning Officer and his deputy as to when and in whose hands the ballot boxes were tampered with. That is not for this court to determine. All the three are Senior Officials of ECK. The law requires the Returning Officer to keep all election materials in good condition for three months following an election. That was not done and the Returning Officer and ECK by extension are to blame.

CONCLUSION

From all the evidence on record and what I have stated herein, I make the following concluding remarks:

(a) The Presiding Officers did not comply with very essential and mandatory provisions of **Regulation 35A** of the Presidential and Parliamentary Election Regulations. Without competent Form 16A, it is not possible to certify who was validly elected as the member of Parliament for Bomachoge constituency.

(b) The Returning Officer (second respondent) conducted the tallying process in a most unsatisfactory manner and breached some mandatory provisions of **Regulations 40 and 41** of the aforesaid Election Regulations. The entries in Form 17A do not entirely reflect the results in Forms 16A irrespective of whether Forms 16A are themselves competent or not.

(c) The Returning Officer and other officers of ECK failed to safeguard vital election materials before and after declaration of the results.

(d) Section 28 of the National Assembly and Presidential Elections Act provides as follows:

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

I find that non-compliance with mandatory provisions and principles of law as cited hereinabove by Presiding Officers, the Returning Officer and other officials of ECK affected the result of the election. It cannot be said that the election was conducted in strict compliance with the relevant law and particularly the National Assembly and Presidential Elections Act and the Regulations made thereunder.

(e) The election was not transparent, free and fair as required under **Section 17A** of the said Act.

Consequently, it is declared null and void.

(f) The first respondent was not validly elected as the member of Parliament for Bomachoge Constituency. A Certificate to that effect shall issue to the Speaker of the National Assembly in terms of **Section 30(1)** of the Act.

(g) I do not find the first respondent guilty of any election offence.

(h) The second and third respondents shall bear the petitioners' costs of this petition as well those of the first respondent.

DATED, SIGNED and DELIVERED at KISII this 19th day of December, 2008.

D. K. MUSINGA.

JUDGE.

Judgment delivered in open court in the presence of:

1. Mr. Bett HB for Mr. Katwa for the petitioners.
2. Mr. Nyakeno and Mr. Osoro for the first respondent.
3. Mr. Osoro HB for Mr. Omanza for the second and third respondents.
4. Mr. Kemo, Principal State Counsel for the Attorney-General.

D. K. MUSINGA.

JUDGE.