



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MOMBASA**

**Election Petitions Nos 1 & 2 of 2005**

**Joho v Nyange & another (No 4)**

(Consolidated with Election Petition No 2 of 2005 (pursuant to the Order of this Honorable Court made on 101' November, 2006)

Elections - irregularities in elections - allegations of electoral malpractices and irregularities - nature of irregularities which may justify the nullification of an election nature of irregularities which may be excused or ignored determination of whether an election has been conducted substantially in accordance with the law National Assembly and Presidential Elections Act (cap 7) section 28.

Practice and Procedure evidence nature of election petition proceedings

- incidence of the burden of proof in election petitions standard of proof applicable to election petitions nature of evidence to be given in election petitions petitioners not to make generalized allegations of irregularities

- duty to establish the allegations with cogent, credible and consistent evidence.

Following the death of the Hon Karisa Maitha who had been elected as the Member of Parliament for Kisauni Constituency of Mombasa District in the Parliamentary and Presidential elections held in December of 2002, the parliamentary seat was declared vacant and a by-election was held on 16<sup>th</sup> December, 2004. Among the eleven candidates who contested the seat, the results of the elections showed that Hon Anania Mwaboza garnered 8,374 votes against 7,293 votes garnered by Mr Ali Hassan Joho, the second candidate. The other nine candidates polled less than 1000 votes each. Consequently, Hon Mwaboza was declared the winner and the duly elected MP for Kisauni.

Two election petitions were filed in the High Court at Mombasa challenging the election, one by Mr Joho and the other one by his supporters who were also voters in the constituency. The two petitions were consolidated and heard simultaneously. The petitions raised allegations of numerous electoral malpractices, irregularities and election offences both against Hon. Mwaboza and the Electoral Commission of Kenya. These included violence, oathing, bribery, the frustration of voters from participating in the election and interfering with ballot boxes.

During the hearing of the petition, the Court ordered that a scrutiny and re-count of all the votes cast in the election be done under the supervision of the Court's Deputy Registrar. The result of the scrutiny and recount revealed a possible post-election interference with the sealed ballot boxes and ballot papers. A total of 1,125 ballot papers were missing, 121 had additional markings and there were inconsistencies between the ballot papers and the official forms of ECK officials. The missing votes had been cast in favour of Hon Mwaboza and it appeared that when the double marked votes were excluded, Mr Joho, the petitioner, scored 17 votes more than Hon Mwaboza.

**Held:**

1. Election petitions are no ordinary suits but disputes in rem of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent, credible and consistent evidence. For instance, where allegations of bribery are made, instances of the bribery should be given.
2. The burden of proof in election petitions lies with the petitioner as he is the person who seeks to nullify an election. While the proof has to be done to the satisfaction of the Court, it cannot be said that the standard of proof required in election petitions is proof beyond reasonable doubt. Like in fraud cases, the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences a very high degree of proof is required.
3. Though there were incidents of violence in the by-election for Kisauni constituency, the voting exercise was not affected.
4. An election will be nullified if it is not conducted substantially in accordance with the law as to elections. It will also be nullified, even though it is conducted substantially in accordance with the law as to elections, if there are errors or mistakes in conducting it which, however trivial, are found to have affected the result of the election.
5. Some errors in an election are nothing more than what is always likely in the conduct of human activity. If the errors are not fundamental, they should be excused or ignored. But where deliberate irregularities or forgeries are committed, different considerations should be given as to the effect, if any, that those errors have on the election before it is vitiated. This is what is provided for in section 28 of the National Assembly and Presidential Elections Act (cap 7).
6. Regulation 39(3) of the National Assembly Elections (Election Petition) Rules, 1993 requires the Presiding Officers to put the counted ballot papers which are not disputed, the rejected ballot papers and the disputed ballot papers in separate packets and seal them with Electoral Commission of Kenya (ECK) seals in an empty ballot box. The (ECK) having provided a form (Form 1 (B)) for recording the serial numbers of the seals used, those forms should be properly completed and where the results are disputed, the sealing will be mandatory.
7. In this case, the failure by the ECK officials to keep a proper record of or account for the ballot papers supplied to them or their failure to 1 (show which seals were used to seal the ballot boxes after counting were minor omissions that did not affect the election or its result.
8. The election had been conducted substantially in accordance with the law governing elections.

Attorney General ordered to investigate and take action against the tampering with the election materials.

**Cases**

1. Kibaki v Moi (2008) 2 KLR (EP) 351 2(
2. Ng'ang'a & another v Owiti & another (2008) 1 KLR (EP) 799
3. Re Kensington North Parliamentary Election [1960] 2 All ER 150
4. Mbowe v Eliufoo [1967] EA 240
5. Khaoya v Ludeki & another (2008) 1 KLR (EP) 590
6. Masinde v Bwire & another (2008) 1 KLR (EP) 547 2\_4

7. Morgan v Simpson [1974] 3 All ER 722

8. Kombe v Omar & 2 others (2008) 3 KLR (EP) 391

9. Okada, Nicholas Wanyama v James Charles Nakhwanga Osogo & another Election Petition No 26 of 1979

Statutes 3(

1. National Assembly and Presidential Election Act (cap 7) section 28

2. Election Offences Act (cap 66)

3. Presidential and Parliamentary Elections Regulations (cap 7 Sub Leg) regulations 34, 35A, (4), 39(3)

4. National Assembly Elections (Election Petition) Rules, 1993 ( cap 7 3\_4

Sub Leg) rule 6

June 28, 2007, the following Judgment of the Court was delivered.

Following the death of Hon Karisa Maitha who was the Member of Parliament for Kisauni Constituency in Mombasa District, a by-election (was held in that Constituency on the 16<sup>th</sup> December 2004 in which eleven candidates contested. According to the results announced by the Returning Officer, Hon Mwaboza Anania Mwasambu garnered 8374 votes and Mr Joho Hassan Ali 7293 votes. The other nine candidates polled less than 1000 votes each and are not involved in this petition. Hon Mwaboza was accordingly declared the MP for the area.

Not being satisfied with that result Mr Joho Hassan Ali filed this petition being Mombasa High Court Election Petition No 1 of 2005. His supporters Messrs Said Abdalla Salim and Edward Christopher Oduor who are also voters in the same constituency filed another petition High Court Election Petition No 2 of 2005.

As required by Rule 6 of the National Assembly Elections (Election Petition) Rules the two petitions were consolidated and treated as one. As they contain 57 paragraphs each and are word for word and paragraph for paragraph the same, I will in this judgment refer to them simply as the "petition" and to Mr Joho Hassan Ali as "the petitioner" but the latter expression shall except where otherwise stated include the petitioners in Election Petition No 2 of 2005. I will refer to the by-election as "the election".

In the petition the petitioner alleges that the election was a total fiasco as it was not conducted in accordance with the provisions of the National Assembly and Presidential Elections Act, cap 7 of the Laws (the Act) and the Presidential and Parliamentary Regulations made thereunder (the Regulations), the Electoral Code of Conduct or even in accordance with the principles of natural justice and that there were instances of contraventions of the Election Offences Act. He in particular alleged that the election was marred by acts of violence, oathing, bribery and innumerable irregularities.

Regarding violence the petitioner alleged that during the campaign the second respondent and or his agents and supporters hurled abusive racial remarks at him calling him a drug peddling Arab whose place is in jail and not in Parliament; that the second respondent and or his agents and supporters used other defamatory remarks and racial insults against the petitioner and that because the second respondent did that in the presence and with the support of the government officials he was believed and that led to wide spread violence which bordered on genocide; that on various occasions the second respondent and his supporters or agents attacked the petitioner's home thereby damaging his property and injuring his brother; that on polling day the second respondent and his supporters engaged in numerous acts of violence at Ziwa La Ngombe, Kongowea, Mtopanga,) Burhaniya, Mlaleo and Mwakiringe polling stations thus scaring voters from voting at those Polling Stations; that the second respondent and or his

supporters and agents intimidated voters that if they voted the petitioner they would be chased from their homes; that on the poll day the second respondent and or his supporters and agents went from polling station to another campaigning and chasing away voters.

The other allegations made against the second respondent were those bribery, oathing and transporting or importing into the Constituency voters from as far as Malindi and Msambweni.

Regarding bribery the petitioner alleged that the second respondent participated in "voter buying activities in several places in the constituency and that on the polling day the second respondent and or his support went to several polling stations giving voters money and cajoling them to vote for him.

On oathing it is alleged that the second respondent and or his support administered oaths at Kaya Bombo and Kaya Fungo in Kaloleni Division binding voters to vote for him and threatening that those who did not do so be cursed; that on an unspecified date at Kongowea in the house of one of his supporters the second respondent met his supporters and they all took an oath to cause violence as a means of winning the election after which the supporters were supplied with crude weapons; and that on the eve of the election day the second respondent and or his supporters undertook oathing activities at Nyali Bridge where three cows' eyes were sewed while alive before they were drowned in the sea.

Several allegations were also made against the Returning Officer, first respondent, and his subordinates. They were that in several poll stations the Presiding Officers refused to open and show the candidal agents empty ballot boxes before voting commenced; that in some poll stations the ballot boxes were kept in dark corners where the agents could not see them; that in other polling stations including Ziwa La Ng'oni the election officials left the ballot boxes unattended thereby allowing second respondent's agent to stuff them with marked ballot papers; that during the voting exercise some Presiding Officers openly campaigned for the second respondent urging voters to vote for him; that in various Polling Stations the petitioner's agents were not only chased away but were also denied their right to vote; that in some stations the petitioner's agents were not allowed to witness the marking of the ballot papers by Presiding Officer for the illiterate voters; that in collusion with the second respondent's agents the presiding officers chased away some voters on false allegations that their names were not on the registers and thereafter voted for the second respondent in place of those voters; that in a number of polling stations the Presiding Officers failed to keep order by allowing people to invade those stations; that in some stations the petitioner's agents were chased away before counting started; that the counting exercise was not transparent as the candidates' agents were not shown the ballot papers to verify for whom they had been cast before they were counted; that after counting the ballot boxes were not sealed as required; that in some stations Presiding Officers turned down the petitioner's agents' requests for recounts; that at the tallying centre the results announced by the Returning Officer were different from those announced by the Presiding Officers at the polling stations and many other allegations.

Before the hearing of the petition commenced the petitioner applied for scrutiny and re-count of the votes. In a considered ruling I dismissed that application mainly on the ground that given the margin of over 1000 votes the petitioner had to first lay a basis for scrutiny before it could be ordered. During the hearing the petitioner renewed that application which I allowed and the scrutiny and re-count of votes was done over a period of several days under the supervision of Miss Ndungu, the Deputy Registrar of this Court, to whom I am greatly indebted for her patience in spite of unsavory remarks made by some people against her. I will in due course refer to the results of that exercise.

In the hearing proper each of the parties called several witnesses. The allegations of bribery and oathing did not find as much as mentioned in the affidavit of the petitioner or those of his witnesses. As a matter of fact the petitioner conceded under cross-examination that he had no evidence to offer on those allegations.

Where allegations of bribery are made, instances of the same must be given as was done in the case of Nicholas Wanyama Okada vs James Osogo & another, Election Petition No 26 of 1979. In that case evidence was led of people being invited to the respondent's supporters' homes where the respondent's brother dished out goodies to them. Therefore to successfully prove election petitions cogent, credible and

consistent evidence is required.

The petitioner did not also say anything about the alleged derogatory racial epithets hurled at him that could easily have led to genocide. In the circumstances I dismiss all those allegations as baseless.

Also for dismissal are some wild allegations made against the Electoral Commission Officials that they chased away the petitioner's agents; that they refused to allow the petitioner's agents to witness the marking of the ballot papers for the illiterate voters; that they campaigned and marked ballot papers for the second respondent; that they left the ballot boxes unattended thereby allowing the second respondent's agents to stuff them with marked ballot papers and that they kept ballot boxes in dark corners. I call these allegations wild because not an iota of evidence was called to prove them. Not even one of the petitioner's 208 agents was called to say that any particular Presiding Officer refused to open the ballot boxes to allow the agents to confirm that they were empty before voting commenced. Not even one of those agents was called to say that he was chased away from any polling station disenfranchised. And no evidence was called to show that ballot boxes were stuffed with marked ballot papers by the Electoral Commission Official or even by the agents of the second respondent. Those allegations are therefore also dismissed.

The petitioner also alleged that the counting exercise was flawed in that the ballot papers were not shown to the agents to verify for which candidate they were cast before they were counted. This allegation, like the ones I have referred to as wild is quite serious. It has, like the others, been denied by the first respondent and his witnesses. Those denials find support in the International Observer's Report, a copy of which is annexed to the first respondent's affidavit, which assessed the voting exercise as fair and well managed by the ECK Officials. As regards the counting of votes the Observers said that the process was:

"very transparent with all the observers and party agents given a chance to confirm the votes cast. International observers monitored the tallying at a central location from 1930 to 1230, noting no concern with the integrity of the process."

Besides the International Observers' views that the counting of the votes was open and transparent with the candidates' agents present, I cannot myself think of a more important role of a candidate's agent than to be present in the counting hall to ensure that the counting exercise is properly carried out and that all votes cast in favor of his principal are credited to him. As not even one agent was called to say that he was thrown out of any polling station or to disown his signature on Form 16A which the candidates' agents signed after counting, I cannot therefore accept the petitioner's generalized allegations that his agents were thrown out of the polling stations when counting was done or that their request for recounts were denied. One wonders how they could have been refused re-counts when they had already been chased away. Moreover, in cross examination the petitioner said he could not remember in which polling stations recounts were refused.

Election petitions are no ordinary suits. Though they are disputes in *rei foudt* between certain parties, election petitions are nonetheless disputes of great public importance *Kibaki vs- Moi*, Civil Appeal No 172 of 1999 (This is because when elections are successfully challenged by-election ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents; social and economic activities. It is for these reasons that I concur with the election court's decision on *Wanguh Ng'anga & Another vs George Owiti & Another*, Election Petition N0 41 of 1993 that election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are therefore not the kind of evidence required to prove election petitions. As I have said, they should be proved by cogent, credible and consistent evidence. Those generalized allegations also are therefore dismissed.

Which brings me to the question of the standard and burden of proof required in election petitions.

Relying on the case of *Re Kensington North Parliamentary Election* [ 1962 All ER 150 counsel for the petitioner submitted that the petitioner does not have the burden of proving the petition. He said instead the Court is supposed to consider the whole evidence before it and determine the petition.

Counsel for the second respondent did not show that view. They submitted that the petitioner does not only

have the burden of proving the petition but he has also to prove all the allegations therein beyond reasonable doubt. They relied on the Tanzania case of *Mbowe vs Eliufoo* [1967] E. 240 for that proposition. In that case it was held that the burden of proof in election petitions lies with the petitioner because it is he who seeks to have the election declared null and void. As to the standard of proof that the Court held that allegations in a petition have to be proved "to the satisfaction of the court" and that the Court cannot be satisfied if it is in doubt. Where a reasonable doubt exists then it is impossible to say that the Court is satisfied.

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

In the circumstances going by this standard if I find that the improprieties alleged against the ECK officials that they campaigned and even marked ballot papers in favor of the second respondent; that they were opaque in the counting exercise or that they chased away voters and the petitioner's agents and turned down request for re-counts have only been alleged but not proved at all leave alone proved to the required standard and are therefore also hereby dismissed.

I now want to deal with the allegations of violence and the irregularities noted during scrutiny and the recount of the votes. I will start with those of violence.

More than half of the 57 paragraphs in the petition allege one form or the other of violence. In his evidence the petitioner said that apart from reports he received from his agents of violence in several polling stations he himself witnessed violence at Mtopanga and Ziwa La Ng'ombe Polling Stations. At the latter, he said, he was also told that Hon. Joseph Kamotho and Hon Reuben Ndolo, who were in his camp and had earlier on campaigned for him, had been assaulted.

The petitioner's witnesses, Sergeant Patrick Mulei PW2 and Michael Ouma Ochieng PW4 also testified that there was violence at Ziwa La Ng'ombe. Sergeant Mulei testified that as the police officer in charge of security in Kongowea and Bamburi polling stations on receipt of a report of violence at Ziwa La Ng'ombe he rushed there with reinforcements and rescued Hon Kamotho and Hon Ndolo who had been attacked and were surrounded by a mob chanting slogans in support of the second respondent. Michael Ouma Ochieng PW4 who was a registered voter at the same polling station said on arrival there at about 2.30 to cast his vote he was assaulted by the same mob and prevented from voting. He annexed to his affidavit a copy of the P3 form he was issued with as proof of the assault.

Though I do not believe the evidence of Michael Ochieng that he was assaulted on the polling day as the P3 form indicates that he was assaulted on 19<sup>th</sup> December 2004, I am nonetheless satisfied from the evidence of Sergeant Mulei that there were incidents of violence on the polling day particularly outside Ziwa La Ng'ombe and Mtopanga polling stations.

But that violence cannot be blamed solely on the second respondent's supporters. The petitioner's supporters also must have been involved in it as the names given in the particulars show that the petitioner's supporters were moving from one station to another. Hon Kamotho and Hon. Ndolo who were admittedly his supporters, having completed campaigning for him and not being registered voters in the constituency, had no business going to the polling stations on the polling day. I find that by going to Ziwa La Ng'ombe on the polling day the two gentlemen incited the violence which erupted there.

It was the evidence of the petitioner's witness, Vincent Oracha Gero PW3, that on instructions of Hon Dzoro and Hon Mungatana, Maweni Primary school polling station was closed at 3.30 pm for more than an hour and many voters went away without voting.

Although I agree that Hon Dzoro and Hon Mungatana went to Maweni Primary school polling station where they also had no business going on polling day, I do not in the least believe that evidence. Again no agent was called to testify on the alleged closure of that station. Besides the fact that the allegation was denied by the Presiding Officer who said that when she saw a crowd forming at the gate to the polling station, she went there and ordered the two honourable members to go away which they did, I cannot imagine how a polling station could be closed on the orders of non-election officials. That is a very serious allegation and one would have expected not only the petitioner's agents but even those of other candidates to hit the roof but there is nothing of the sort.

Counsel for the petitioner invited me, nay, urged me to find that due to the violence that occurred at several polling stations on polling day, the petitioner's voters were scared away and did not vote for him. That, they said, affected the election and the same must be nullified.

I do not agree with that submission. Counsel did not give me the figure of the voters who were turned away by the violence. The petitioner himself said in cross examination that he did not know the names of those voters and did not give any figure. All we have are the names of some 3000 voters in the particulars who were allegedly disenfranchised by the violence.

Counsel for the second respondent on their part were very uncomfortable with those names. They said the names were manipulated and repeated to exaggerate the figure. Noting, as I do, that those names have been interchanged and duplicated that submission is not without basis. The petitioner having not advanced any evidence on those names I cannot rely on those particulars. In any case any information given in answer to a request for particulars simply forms part of the pleadings and is not evidence.

Apart from Michael Ouma Ochieng PW4 and Vincent Oracha Gero PW3 whose evidence I have cast aspersions on and two or three friends of theirs they said they were with when they were assaulted and prevented from voting, even if they were to be believed, there is no evidence of voters having been scared off from voting. Sergeant Patrick Mulei PW2 said that on seeing police the mobs that were out of Ziwa La Ng'ombe and Mtopanga polling stations vanished leaving voting to continue smoothly.

In the circumstances I find that though there were incidents of violence, which as I have said involved supporters of both the petitioner and the second respondent, the voting exercise was not affected. The skirmishes were outside the polling stations and there is no evidence that they affected the voters who were queuing in the polling areas.

That leaves us with the most vexed issue of the irregularities discovered during the scrutiny and re-count of votes.

It is common ground that there were errors and mistakes noted in the election documents especially regarding the number of ballot papers supplied to the polling stations and the remaining ones. And according to the respondents some ballot boxes and election documents were tampered with which assertion the petitioner disputes.

The thrust of the submissions by counsel for the petitioner on this issue is that the first respondent, that is the ECK officials, in collusion with the second respondent perpetrated such numerous and serious irregularities that leave this Court with no option but to conclude that the election was not conducted substantially in accordance with the law as to elections and that non-compliance thereof affected the result of the election. They, for instance, argued that contrary to the Election Regulations the records for polling stations like Maweni are a complete muddle. They do not show how many ballot papers were supplied to them and some stations cannot account for those shown to have been supplied to them. They further argued that contrary to Regulation 34 documents from several stations show that there was no or no proper sealing of the ballot boxes before voting and after counting.

With regard to the results of the scrutiny and inspection carried out as ordered by this Court counsel for the petitioner contended that they were anything but what the first respondent announced. They said taken as a whole when the double marked votes are excluded, the petitioner won by 17 votes and should have

been declared the winner. They dismissed the allegation that the ballot boxes and the election documents were tampered with as totally untenable as the seals on the ballot boxes with double marked votes and missing ballots were found intact.

In answer to the question as to why the petitioner's agent did not object and instead signed Forms 16A with inaccurate results, according to them, counsel for the petitioner submitted that the agents, as testified by the petitioner's chief coordinator Mr Mohammed Khamis, all the candidates' agents were made to sign all the forms before voting started. That notwithstanding they cited the case of Dr Fredrick Masinde -vs- Henry Bwire & another, Election Petition No 9 of 1993 and submitted that failure to object cannot be held against the petitioner as there can be no estoppel against a clear provision of a statute.

For their part, while admitting that there were errors like failing to record the correct number of ballot papers supplied to or used in some polling stations and failing to keep proper records of the sealing of the boxes before voting and after counting, counsel for the respondents submitted that those are minor irregularities that cannot vitiate an election. They contended that Forms 1(B), 2(B) and 3(B) are not statutory forms and failure to properly complete them is no violation of any provision and is therefore of no consequence.

Counsel for both the respondents were categorical that the tampering with some of the ballot papers was a deliberate act to create or manufacture evidence in support of this petition. Counsel for the second respondent for instance, echoing the second respondent's sentiments, wondered how the second respondent could have tampered with the ballot papers and rig himself out of Parliament. They concluded that the interference with the election materials cannot avoid the election as it was done after the election had ended and the results had been announced. They urged me to dismiss this petition with costs.

I have given serious consideration to these rival submissions and the evidence on record especially on this issue and more so because of these serious allegations. In my view the errors made and the irregularities

committed in this petition fall in to two categories. The first one are the errors or mistakes, that I would call innocent even though negligent mistakes. The second category are those deliberate irregularities or forgeries that were committed. In respect of the first category I would like to say this: Error is to human. Some errors in an election like this conducted under a frenetic schedule are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental they should always be excused and

ignored. But where deliberate irregularities or forgeries are committed

different considerations come into play. In either case, however, serious

consideration should be given as to what effect, if any, that those errors,

whether innocent or deliberate, have on an election before the same is

vitiated. As I have said if they are minor and do not affect the election or

its result they should be ignored. This is what I understand section 28

of the National Assembly and Presidential Elections Act to be providing

for when it declares that:

"No election shall be declared void by reason of a non-compliance with any written law relating to that election if it appears that the election was conducted in

accordance with the principles laid down in that written

law, or that the non-compliance did not affect the result of the election."

The law is therefore clear as to when an election can be nullified. An

election will be nullified if it is not conducted substantially in accordance

with the law as to elections. It will also be nullified, even though it is conducted substantially in accordance with the law as to elections, if there are errors or mistakes in conducting it which, however trivial, are found to have affected the result of the election.

But when is an election said not to have been conducted substantially in accordance with the law as to elections to which errors or irregularities can affect the result of an election?

To start with I do not think that anybody is in doubt as to the law as to the parliamentary elections which we are here concerned with. It is the National Assembly and Presidential Elections Act, cap 7 of the Laws of Kenya together with the Rules and Regulations made thereunder.

It is not every non-compliance or every act or omission in breach of the election regulations or procedure that invalidates an election for being non-

- compliant with the law. As I have said minor breaches will be ignored. An election is said to be non-compliant with the law as to elections when it is conducted in violation of the principles of an election by ballot. This is how Stephenson L.J. expressed this point in the case of *Morgan vs Simpson* [1974] 3 All ER 722 at P 731.

"For an election to be conducted substantially in accordance with that law there must be a real election by ballot and no such substantial departure from the procedure laid down by Parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot. Instances of such substantial departure would be allowing voters to vote for a person who is not in fact a candidate or refusing a qualified candidate on some illegal ground or disenfranchising a substantial proportion of qualified voters."

And the result of an election is affected when the cumulative effect of the irregularities reverses it. For instance when a large proportion of the voters are by some blunder in the conduct of the election as happened in *Harrison Garama Kombe Vs Ali Omar & Others*, Civil Appeal No 52 of 2006 (CA) do not turn up to vote, the result is said to be affected.

Can the election in this case be said to be no real election by ballot or travesty of an election by ballot or a sham or is its result affected? The petitioner says it can and bases himself on the acts or omissions of the Electoral Commission officials like, first, their failure to make a proper record of the number of ballot papers issued to polling stations like Mawer and accounting for them as well as failing to properly record the seal used to seal the boxes and, secondly, their omission or failure to reject double marked ballots.

Counsel for both the respondents on the other hand did not place any premium on that record. As I have said they argued that Forms 1 (B),

2(B) and 3(B), unlike Form 16A, are not statutory and failure to complete them properly is no violation of any law and cannot therefore be a basis for invalidating an election let alone condemning it.

I do not share the views of Counsel for the respondents on that contention. Regulation 39(3) requires the Presiding Officers to put the counted ballot papers which are not disputed, the rejected ballot papers and the disputed ballot papers in separate packets and seal them with ECK seals in an empty ballot box. The ECK having provided a form (Form 1(B)) for recording the serial numbers of the seals used, I hold that those forms should be properly completed and where the results are disputed the sealing will of course be

mandatory.

With regard to the failure to keep proper records, I have carefully examined those records. In Maweni Primary School stream 4 it is true that according to the serial numbers stated on Form 2(B) 900 ballot papers were issued but the station accounted for 800. It is not alleged that more than 800 votes were cast in that station. As a matter of fact only 154 votes were cast and that is the figure that appears on Form 16A for that station. 800 ballot papers were issued to Bamburi Social Hall polling station but the Presiding Officer purported to account for 1000 ballot papers. In that station also no more than only 179 votes were cast with one ballot spoilt. In stream 2 of that station only 500 ballot papers were issued but the Presiding Officer purported to account for 850 ballots. There are a few such other cases.

Having carefully examined those forms I am satisfied that the errors in them are arithmetical in calculating the number of ballot papers supplied and failure to correctly record the serial numbers. Those are minor irregularities which should be ignored.

There are other acts or omissions like failure to record the serial numbers of the seals used to seal the ballot boxes after counting which I also consider to be minor omissions. This is because since the 2002 elections, unlike in the previous years when counting of votes in every constituency was done in one centre the counting of votes has been at the polling stations. So failure to record the serial numbers of the seals placed on the ballot boxes or even failure to seal them at all after counting when there is no objection to the results announced at the Polling Stations is in my view not fatal.

Taking all these factors into account I am satisfied that failure by the Electoral Commission officials to keep a proper record of or account for the ballot papers supplied to them or failure to show which seals were used to seal the ballot boxes after counting are minor omissions that did not affect the election or its result.

The most serious allegation in this petition is the one of tampering with the ballot boxes and the election documents. The allegation first came from the Electoral Commission of Kenya in whose custody the election materials were. The first respondent Mr Hotham Nyange who was the Returning Officer said when he handed the results of the election to Mr Chege at the ECK headquarters in Nairobi on the 17<sup>th</sup> December 2004, he was allowed to take photo copies of all the Forms 16A. This is the form provided for in Regulations 35(A)(4) on which Presiding Officer records the election result of the Polling Station concerned after the votes are counted. The details to be recorded on that form are the total number of registered electors in that stream or station, total number of votes cast, total number of rejected votes, total number of disputed votes and total number of valid votes cast in favor of each candidate. The form has also a space on which to write the name of each candidate and the number of valid votes cast in his favor.

Mr Nyange said that when the hearing of this petition commenced he was surprised to find that some of the originals of that form which he had handed over to Mr Chege and copies of which he had taken had been altered. So he went home and fetched the copies he had taken and has annexed them to his affidavit. He said that the results he announced are those contained on those copies and not the ones on some of the originals or the copies given to the petitioner that are annexed to affidavit of Said Abdalla Salim which were taken from the original after the alterations.

I have compared the originals of those forms with the copies annexed to Mr Nyange's affidavit. Some of them have been so crudely forged that they do not require the eye of a document examiner or any microscopic examination to see that. There are for instance, superimpositions as well as alterations to the figures on the original of Form 16A for Mtopanga Primary School polling station stream 3 to show that the petitioner garnered 238 votes at that station while on Mr Nyange's copy for the same stream he is shown to have polled only 38 votes. At Ziwa La Ngo'mbe polling station stream 3 the last figure of the votes cast in favor of the second respondent has been erased leaving him with only 22 votes. On Nyange's copy he is shown to have garnered 226 votes at that stream. The original of Form 16A for Majaoni Primary School polling station stream 3 has 107 votes against the petitioner's name while Nyange's copy shows only 7 vote against his name. Form 16A for Shimo La Tewa Primary school pollin, station stream

3 has 100 votes for the petitioner while Nyange's copy has nil vote against his name. According to Mr Nyange's copies for Serar Primary School polling station streams 1 and 2 the petitioner polled 59 and

45 votes respectively. On the originals he has 159 and 145 respectively. A Fort Jesus stream 2 where the petitioner polled only 58 votes according to Nyange's copy he is shown on the original to have garnered 158. Lastly at Hajam Jamaat Hall stream 3 where the original shows 485 votes again, the petitioner's name on Nyange's copy he has only 85 votes.

The effect of all these forgeries was to increase the petitioner's votes by 80 and reduce those of the second respondent by 204 votes. As the results on Mr Nyange's copies have the signatures of the candidates' agents including those of the petitioner's agents, and correspond with those on the other documents, I believe Mr Nyange's evidence that the copies annexed to his affidavit are the ones with the correct result. I want to commend him for having thought of taking those copies without which we could perhaps have not been able to resolve this issue.

As I have already stated the petitioner applied for scrutiny and re-count of votes even before the hearing of the petition commenced declaring that if the second respondent had fairly beaten him, he could withdraw this petition. I dismissed that application. Later on during the course of the hearing he renewed the application and because of the allegations of tampering with the election materials that had been made in the course of cross-examination I granted it and ordered a scrutiny and re-count of all the votes cast in the constituency. That as I have said was done under the supervision of Miss Ndungu, the then Deputy Registrar of this Court. The results were as shocking as they were confounding. While the seal for the following ballot boxes were found intact the results in them were markedly different from what was in Forms 16A

1. Ballot Box No 8 for Maweni Primary School stream 4 had 151 vote missing.
2. Ballot Box No 9 Kagunjo Primary School stream 1 had 327 vote missing.
3. Ballot Box No 38 for Mlaleo Primary School stream 3 had 47 double marked votes.
4. Ballot Box No 4 for Bashir Primary School stream I had 184 vote missing.
5. Ballot Box No 41 of Frere Town Primary School stream 2 had 14 votes missing.
6. Ballot Box No 48 for Frere Town stream 3 had 121 double marked votes.
7. Ballot Box No 51 of Maweni Primary School stream 3 had 71 votes missing.
8. Ballot Box No] 02 for Ziwa La Ngombe Primary stream 1 had 182 votes missing.

This gives us a total of 1125 missing and 121 double marked votes. The counterfoils for all the above missing ballot papers were found which, together with the figures on Forms 16A for those stations, confirmed that the missing ballots were actually cast. In all the above stations the actual votes found cast in favor of the second respondent as compared with the figures on Forms 16A were less by 1191 votes. There were also instances where the petitioner's votes and even those of other candidates were different from those recorded on Forms 16A but those were very few.

I have carefully examined the double marked ballot papers and I have no doubt in my mind that they have additional markings which were definitely made after the votes had been counted. Some of them are marked with blue and black pens while others are marked for two or three candidates. In some the marks are clearly extended from the second respondent's box into the boxes of other candidates. Like in the case of interference with Forms 16A that I have already referred to, the forgeries on the double marked ballot papers are clear to the naked eye and do not require the expertise of a document examiner to tell us that

they are forgeries. Looking at some of them even a child in lower primary school can tell you that they have been interfered with. There is no way all those 121 double marked ballot papers could have escaped the attention of the candidates' agents and the international observers who stated in their report, and I repeat, that "the counting process observed at the polling stations attended by international observers was very transparent with all observers and party agents given the chance to confirm the votes cast." Besides that I cannot understand how so many voters could make marks against the names of two and sometimes even three or four candidates on one ballot paper. That is why I say confidently that I have no doubt that those votes were interfered with after the votes had been counted.

It is common ground that the contents of any properly sealed ballot box cannot be accessed without breaking the seals. That was the evidence of a number of witnesses including the first respondent himself. What is, however, intriguing is that the ballot boxes whose contents were interfered with had their seals intact.

For a ballot box to be securely sealed it must have a seal at the aperture and one on each of the two sides. The holes provided for seals at those points can only accommodate or allow one seal. If force is used it can take a second one. So the candidates' respective party seals were round the ECK ones. To access the contents of the box one does not need to break all the seals, one only needs to break the two on its sides.

In this case the Deputy Registrar's record does not show whether the seal that were said to be intact were on the sides of the boxes, on the aperture or round the party ones. Even counsel for the parties who were present scrutinizing and are the ones who read the numbers of the seals to the Deputy Registrar could not say for sure where those seals were placed.

I have examined the originals of Forms 1(B) for the boxes whose content were interfered with. Those of Ziwa La Ngombe Primary School stream I Bashir Primary School stream 1 and Mlaleo stream 3 had only two ECI seals each. Those of Kagunjo Primary School stream I and Frere Town stream 2 had only one ECK seal each while that of Frere Town stream had no ECK seal. The ballot box for Maweni Primary School stream had one of the two ECK seals altered.

As I have said it is not clear which seal was placed where. If party seal were used to seal the sides of the boxes and the ECK ones were tied round them it was possible to break those party seals and replace them with other party seals and put the recorded ECK seals round them.

Whoever it was that interfered with those boxes could also have used other means that I cannot think of. Whatever method that was used, one thing is quite clear to me. Access was gained into those ballot boxes and their contents were tampered with. What I am however unable to say is who exactly it is that tampered with the ballot boxes and their content; Whoever it is, he or she cannot have been serving the interests of the second respondent. This is because the interference tended, in the main, to reduce the second respondent's votes while increasing those of the petitioner. For instance all the double marked votes were marked for the second respondent and someone else or the marks on them were extended from the second respondent's box to those of other candidates. From the boxes tampered with 1125 votes went missing and the second respondent's votes were lessened by 1191 votes. In the circumstances I agree with the second respondent's advocates' assertion that the missing votes were in favour of their client.

Taking all this into account I think both the respondents' advocates are right in asserting that the interference with the election materials was meant to manufacture evidence for this petition.

With all these clear interferences with the ballot boxes and the election materials I need not bother myself with the examination of the oft disputed votes which in any case were less than 100 and could not have made much difference if there were no missing votes. All I need determine is whether those interferences render the election void.

I have already stated that for an election to be said not to have been conducted in accordance with the law as to elections it must be clear to the Court that the violations of the law in conducting the election render it a sham or left the ordinary man wondering whether there was a re-election by ballot. And even if the

election was conducted in accordance with the law it can also be avoided if it is shown that the violations of the law or the mistakes made affected its result by reversing it or where it is clear that the violations led to a large proportion of the electorate being disenfranchised.

I have already held that the few incidents of violence did not interfere with the voting process and no significant number, if any, of voters were disenfranchised by the violence or any other factor. I have also held that the mistakes of the ECK officials in the conduct of the election were minor and of no consequence. It follows therefore that the election was conducted substantially in accordance with the law as to elections. It cannot therefore be said to be a sham or a travesty of an election by ballot.

As I have also stated unlike in the previous years when votes from Polling Stations in any one constituency were taken to one centre where they were counted, this election was held under the new regulations pursuant to Regulations 35A the votes were counted at the polling station in the presence of the candidates' agents and the international observer. The results were recorded in Forms 16A which were taken to the tallying centre for tallying and the announcement of the final results and copies of which were given to the candidates' agents and others pinned on the walls in the polling stations.

Having discounted the possibility of any interference with the election materials before counting it follows and I find that the interferences do not affect the result of the election. In the upshot I hold that the election was carried out in accordance with the law as to elections and the few irregularities noted did not affect its result. Consequently this petition is for dismissal and I hereby dismiss it with costs to the respondent.

On costs I would like to observe that we have no less than three hotly contested applications in this petition with the ruling on one of them going up to the Court of Appeal. The hearing of the petition itself has taken quite a lot of time not to mention the tedious scrutiny, inspection and re-count of votes which took several weeks. Taking all these into account I find this an appropriate case to certify and I hereby certify for two counsels for each of the respondents.

Before I end this judgment I think I am under an obligation to make some orders regarding the tampering with the election materials.

It cannot be gainsaid that the Electoral Commission of Kenya being the body charged with the conduct of elections in our country occupies a very important position in the nascent democracy of our country. If it flounders we shall have faith neither in the electoral process itself nor in our leaders. We cannot therefore afford to have it discredited or its integrity doubted.

In my own assessment as a citizen of this country, I think the Commission has done a splendid job especially since the 2002 general election. I therefore want to believe that the tampering with the election materials that was done in this case was, in collusion with outsiders, the work of a negligible number of its officials who should be exposed so that its integrity is not questioned. In the circumstances I order that the Attorney General do conduct investigations and take appropriate action against those who tampered with the election materials in this case. For that purpose I order that copies of this judgment be served upon the Attorney General and the Electoral Commission of Kenya.

Lastly I salute counsel for all the parties for a job well done which made my work easier than it would have been.