



IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS

Election Petition 1 of 2003

IN THE MATTER OF THE CONSTITUTION OF KENYA

THE REPUBLIC OF KENYA

AND

**IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT
CAP.7**

AND

**IN THE MATTER OF THE PARLIAMENTARY AND PRESIDENTIAL REGULATIONS ACT
AND RULES MADE THEREUNDER**

AND

THE ELECTION OFFENCES ACT CAP.66

AND

**IN THE MATTER OF THE ELECTION FOR THE BUDALANGI CONSTITUTENCY THE
HUMBLE PETITION OF PETER AGWELI ONALO PETITIONER**

VERSUS

ELIAKIM LUDEKI1ST RESPONDENT

BITA SAUTI RAPHAEL WANJALA2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA 3RD RESPONDENT

JUDGEMENT

This petition was the first one to be filed after the general election of 2002 and challenges the election of 2nd Respondent herein, from the Budalangi Constituency.

It passed through able hands of many judges, but eventually it fell on my lap as from 1st January, 2007 after I was gazetted to preside over this petition vide Gazette Notice No. 9541 dated 24th November, 2006.

By consent of all parties present on 30th January, 2007 I gave directions to hear the petition de novo amongst other required directions.

This court, from the commencement of hearing of the petition, was caught up with several applications filed by either side and coped up with their onslaught within its stride.

Be that as it may, Petitioner in his petition prays: to wit:

- “(a) That the said election for the Budalangi Constituency be declared null and void.
- (b) That there be scrutiny of the nomination documents and registers used in the said election.
- (c) That this Honourable court do make a report to the speaker of the National Assembly
- (d) That the Respondent be jointly and/or severally condemned to pay the costs of this petition
- (e) That such further or other orders be made as this Honourable may deem just and expedient”

Prayer No. (b) was exhausted during the hearing of this petition before other judges. There were prayers and/or directions sought to inspect the ballot boxes for election documents but never carried any further.

The main complaints and/or allegations by the Petitioner against the 1st and 3rd Respondent are contained in paragraphs 10, 16, 17, 18, 19 and 20 of the petition.

10. Subsequently, the First Respondent having exhausted his authority of nominations, the First Respondent unlawfully and without any colour of right on 26th November 2002, purported to cancel the valid nominations of your Petitioner and in his place purported to accept the nomination of the Second Respondent whose application he had correctly declined to accept on 25th day of November 2002 at about 12.30 p.m. or thereabouts.

16. THAT the First Respondent and the Third Respondents acted contrary to the Law in purporting to cancel the valid nomination of the Petitioner.

17. THAT the First and Third Respondents failed to give your Petitioner any opportunity to be heard when reversing his valid nomination nor did the Third Respondent inform the Petitioner of the purported cancellation.

18. THAT the First and Third Respondents failed to provide any or any adequate security during the said nominations and instead succumbed to the violent threats and incitements to violence by the Second Respondent.

19. THAT in the result the nominations and/or elections in the said constituency were conducted contrary to the provisions of the Constitution of Kenya, the said Acts and the Regulations.

20. THAT your Petitioner was unable to offer himself in the parliamentary elections for the said constituency held on 27th December 2002, by reason of the unlawful actions of the Respondents jointly and severally.

Those against the 2nd Respondent are contained in paragraphs 13, 14, 15, 21, 22, 23, 24, 25 and 26

13. THAT the Second Respondent and his supporters in the presence of the First Respondent and other election officials threatened, intimidated, and used violence on election security personnel officers, on your Petitioner's supporters or suspected supporters and others in the vicinity in particular, on 25th November, 2002, at about 12.30 p.m. at Budalangi Divisional Headquarters and the Second Respondent in the company of his marauding supporters violently entered the First Respondent's office and forcefully

took possession of documents that had been submitted by other candidates including your Petitioner's nomination papers and accompanying documents and tore and threw them at members of the public in orgy of violence.

14. The Petitioner states that the acts of the Second Respondent in unleashing violence at the said station on 25th November, 2002 and the Second Respondent's threat to repeat the chaos on 26th November, 2002 were illegal and in contravention of the Election Offences Act, Cap. 66 Laws of Kenya.

15. THAT subsequently the Third Respondent found the Second Respondent guilty of such electoral offence under the said Act, the Electoral Law and Regulations made thereunder a conviction which inter alia are reportable to the Speaker of the National Assembly by this Honourable Court.

21. THAT before and during the election on 27th December 2002, the Second Respondent was by himself, his agents and other persons guilty of the election offence of treating before and during the said parliamentary elections in that he directly or indirectly gave or provided or caused to be given or provided or was accessory to giving or providing or paid or engaged to pay wholly or in part expenses of giving or providing food, drink, refreshment or provision and money or other means or devise to enable the procuring of food, drink or refreshment to or for persons in the said constituency for the purpose of corruptly influencing the said persons and other persons to give their votes at the said election contrary to the Election Offices Act, Cap. 66 Laws of Kenya.

22. THAT the Second Respondent's agents and/or campaigners were positioned at specific and strategic points along the routes leading to and within polling stations bribing, intimidating the voters for the Second Respondent.

23. THAT the Second Respondent is guilty of the offence of bribery in that he himself, his agents and other persons acting on his behalf directly or indirectly gave money and gifts to the voters, before or during the said election in the said constituency contrary to the Election Offences Act, Cap 66 Laws of Kenya.

24. THAT the Second Respondent was unlawfully nominated and irregularly and illegally contested the said election in the said constituency.

25. THAT the Second Respondent is guilty of an offence of election violence.

26. THAT the Second Respondent is guilty of inciting his supporters and or agents into violence, an offence under the Acts and the Regulations.

The Petitioner has given particulars as requested by the three Respondents.

The Petitioner also got produced on record of this case his Originating Summons being O.S No.1774 of 2002 challenging the decision of 1st Respondent to declare the 2nd Respondent as nominated candidate of National Alliance (Party) of Kenya (hereinafter referred to as 'NARC'). The said file was produced in evidence by Mr. Joseph Orangi Gitangi (PW.4). It can be noted that the said Originating Summons was dismissed as the orders sought by the Petitioner therein were not available.

With this brief introduction, I shall now proceed to deal with the evidence adduced before me and on behalf of the parties.

Evidence and Remarks of the court

(A) Case of the Petitioner

The Petitioner called 10 witnesses and did not present himself as a witnesses before closing this case, but offered to be cross-examined by the Respondents.

1st witness to adduce evidence was Elisha Jacob Musoma. In his affidavit sworn on 7th July, 2006 and read and adopted as his evidence on 8th March, 2007, he stated that he was one of the candidates for the last general election for Budalangi Parliamentary seat having been nominated by National Labour Party (NLP).

After presenting his papers and paying the requisite fees around 10.00 a.m. on 25th November, 2002, he was validly nominated by 1st Respondent who was the Returning Officer appointed by Electoral Commission of Kenya (3rd Respondent) (hereinafter referred to as 'ECK').

As per his affidavit he got confirmation from ECK Officials (names not given) that the Petitioner's papers were accepted and that he had been declared duly nominated "on NARC" (*sic*) and then he left.

After presenting the papers and being accepted he left for his home (2 Km away) and around noon he heard noise and gun shots coming from the direction of the Divisional Headquarter and saw supporters of the 2nd Respondent (clad in T-shirts) running past his home. He gathered after inquiry that there was chaos as the 2nd Respondent had gone to Divisional Headquarters with his supporters and destroyed all electoral documents which had been presented and the Returning Officer had been beaten.

As called upon by ECK officials he went back on 26th November, 2002 with copies of the documents of nomination and receipt of payment of Shs.5,000 and he was again declared validly nominated.

Before representation of his papers the 1st Respondent apologized and told him that 2nd Respondent and his supporters had unleashed violence at his office, tore up and destroyed documents presented.

On the same day according to his affidavit, while at about 6.30 p.m. he was driving to Mau Mau Trading Centre via Ruambwa Bridge he saw a crowd gathered and he got out of the car and nearing the crowd he saw 2nd Respondent and retreated in fear of trouble from him.

But however he has sworn that he saw 2nd Respondent distributing money to the crowd in denomination of Shs.200 and Shs.50/- notes to the gathering of about 20 persons who according to his belief were prospective voters. He also heard someone complaining that he should be given Shs.200 in lieu of Shs.50/- as it is discrimination when his vote is equal to others. The he stated and I quote

"I left the vicinity once the 2nd Respondent discovered my presence and his supporters started booing me".

Then mentioning next day "he stated that on the polling day on the 27th December, 2002 at Musoma Primary School polling station (where he had registered as a voter), he found a group of 2nd Respondent's supporters numbering 5 or 6 lined up on the route and even inside the polling station and saw them dishing out money in KShs.50 denomination.

Even inside the voting room he found 2nd Respondent's agents and supporters literally campaigning and saying 'vote for Wanjala and his Councilors'.

After casting his vote he reported to the Presiding Officer, Mr. Joseph Ogao in the adjacent room about these incidents.

He left the polling station after the agent was ejected and was told by the Presiding Officer that as regards bribery he would take up the matter with security officer. He did confirm of such reporting to him later.

In cross-examination by the Learned Counsel for 1st and 3rd Respondent, he said that the Nomination room was Sizable and that when he asked whether he was the first candidate to present, he was told that the Petitioner had come earlier and after being validly nominated he left. He was with his Proposer and

two Seconders who were outside the door. He also said that in the room there was no security but police men were 'out there' meaning at a distance of 100 meters. He added that the people running away from whom he gathered the information were also saying that 'they had taught him a lesson'. But stated categorically that he did not identify any one from the crowd. He saw the crowd after 15 to 20 minutes after he heard the gun shots.

He also stated that on 27th December, 2002 only agents of 2nd Respondent were dishing money but did not know their names but had pointed them out to the Presiding Officer.

I may at this juncture note that the Presiding officer Mr. Joseph Ogao has not adduced evidence before the court.

During cross-examination by the Learned Counsel of the 2nd Respondent, he testified that he could not recall if he received a certificate but he was given a document which he did not bring to the court.

He agreed that he had not given any names of supporters of the 2nd Respondents or the one from whom he received the information.

He also confirmed that in the Answer to the 2nd Respondent request for particulars, the incidents of Mau Mau Trading Centre or that of Ruambwa is not mentioned.

He also agreed that he had mentioned those incidents to the Petitioner before he filed this petition.

He also agreed that he did not report the incident of bribery to the police but did the same to the Presiding Officer.

In re-examination he stated that the crowd was using Luhya language and cannot say whether they could reach his home within 15 – 20 minutes and that they were able to talk to him with the speed they were running.

He was shown and agreed that in the answer to the request for particulars it is stated that the 2nd Respondent had dished out money during the election as follows among other places (*emphasis mine*).

PW.2 was Alex Ogesa Onalo who read and adopted his affidavit sworn on 7th July, 2006 as his evidence. He was the Secunder of the Petitioner and accompanied him on 25th November, 2002 with his proposer Michael Onalo Wanzala. According to his evidence they reached Divisional H.Q. at around 8.55 a.m. and the Petitioner handed over to the 1st Respondent his NARC Nomination clearance certificate validity whereof was confirmed. 1st Respondent also requested the Petitioner's ID card and NARC card which were checked and confirmed. Their documents were also verified with other documents from the Petitioner and after the payment of Shs.5000 fees and thereafter he quoted the wordings of (declaration) and that the 1st Respondent nominated the Petitioner in priestly (sic) manner.

In cross-examination the witness agreed that he was brother to the Petitioner. Inside there were six ECK Officials including the 1st Respondent and police were not inside the room, but were outside in verandah. 1st Respondent was very careful in verifying the documents and was not in the rush. They were in the room for about 25 to 30 minutes. They were with about 100 supporters and left the Divisional Headquarters with them driving slowly to keep pace with walking supporters. The supporters congratulated the Petitioner who did not address them and there was no ceremony either. There was no breach of peace.

He also stated that the 1st Respondent did not take oath on Bible but affirmed when he declared the Petitioner as nominated NARC candidate.

The third witness Chief Inspector Isaac Kasembeli was called as a witness under a court order on an

application made by the Petitioner. He is an O.C.S of Port Victoria Police Station since November, 2005. He took over the charge of the station with all documents including Occurrence Books. He brought O.B. of the year 2002. He had gone through events of November and December, 2002 to check on incidents relating to election of 2002. He was referred to several incident recorded as regards violence and one of them also relates to an assault on the observers after he attended a rally conducted by the 2nd Respondent. The 2nd Respondent also reported on 9th December, 2002 complaining against Prof. Ojiambo his opponent. In short there were various reports of violence alleged to have been committed by supporters of almost all the political parties, of course including NARC party, which party the Petitioner and the 2nd Respondent represent.

He also testified that he was not aware whether any actions were taken as regards these complaints.

In cross-examination, he stated that the Petitioner had not made any report in the Police Station from 25th November, 2002 to 28th December, 2002. Similarly Mr. Osogo, who was also a Parliamentary candidate for Budalangi did not make any report during that period. So was the case with prof. Ojiambo who was also a Parliamentary candidate for the said constituency. He also stated that he did not recall having any report from Mr. Jacob Musoma (PW.1) whom he did not know. He denied, similarly, having received any report from the 1st Respondent, the Returning Officer.

He referred to O.B. No.26 of 17th December 2002 wherein 2nd Respondent had complained that he had information that a group of people who had bought NARC T-shirts were planning to terrorize innocent people in order to tarnish his name. I state this incident as it was not referred during examination-in-chief.

He referred to other reports made on 9th December, 2002 complaining attack on supporters of 2nd Respondent and NARC, as well as report of threat to life made by an Assistant chief on 20.12.2002 which threat was made by supporters of SDP – the Party whose candidate was Mr. Osogo.

He agreed that most of the complaints were against KANU Political Party supporters and that in none of the reports referred by him 2nd Respondent was directly implicated. During his tenure at Budalangi he agreed that he had come across many Wanjalas, Osogos and Ngumos.

In re-examination he agreed that he would not know if the other candidates including the Petitioner made any reports to other police stations or to ECK.

PW.4 is also the witness produced as a result of the court order.

Mr. Joseph Orangi Gitangi is the Executive Officer attached to Central Civil Registry at Nairobi High Court (Law Courts).

He produced the court file of H.C.C.S (O.S.) No.1774 of 2002.

In cross-examination he agreed that the said case was between the Petitioner and 1st and 3rd Respondents herein. 2nd Respondent was not a party. It is also state that the file did not contain any affidavit of service on the Respondents after oral statements was made from the Bar by the counsel for the Petitioner that the ECK was served but it refused to acknowledge. The Originating Summons was finally dismissed with directions to come before the court by way of petition.

The next witness (PW.5) is James Charles Nakhwanga Osogo.

Vide my ruling dated 20th March, 2007 paragraphs 4, 9, 11, 12, 13, 14, 15, 16 and 22 of the affidavit sworn by this witness were struck out.

I may mention here as well, that in the same ruling I also struck out:

1. Paragraphs 7 and 12 (d) and (e) of the affidavit sworn by Mayuko Onyango Regina and
2. Paragraphs 11 and 15 of the affidavit sworn by Prof. Ojiambo Joseph Bernard.

The affidavit of PW.5 was sworn on 7th July, 2006 and after reading the paragraph allowed to be properly on record, he adopted the same as true.

In short, it is deponed that he was one of the candidates in Budalangi Constituency Parliamentary Election in the year 2002. That on 19th November 2002, which was the eve of NARC nomination day, he heard the 2nd Respondent directing his supporters to go round the constituency and break legs of all those persons who were opposed to his candidature and that made him shy away from NARC candidature and he stood on the ticket of Social Democratic Party.

He also wrote a letter dated 2nd December 2002 to Chairman of ECK about Electoral Violence perpetrated by 2nd Respondent. He annexed the letter as (Exhibit JCNO.1). He also wrote another letter dated 9th December 002 (Exhibit JCNo.2).

He alleged bribery of voters on the polling day by 2nd Respondent and his supporters. He did not specify the polling stations. But he did write a letter (Ex.JC No.3) to Presiding Officer of Budala Primary School alias Rukala Primary School informing about bribery.

He then stated that due to letter by 1st Respondent and his letters the 2nd Respondent, himself and Prof. Ojiambo were summoned to appear before the committee of ECK to discuss the issue of violence and bribery.

He also deponed that 1st Respondent called meeting on 16th December, 2002 to discuss the security situation in the constituency which meeting was attended by District Officer and O.C.P.D. Busia.

He also complained to 1st Respondent as regards 2nd Respondent appointing his supporters as Polling Officials (Ex.JC No.4). He named the supporters and agents of 2nd Respondent involved in bribery as James Omondi Aloo, Clement Ojiambo Mundenyo and James Nadebu, who were bribing voters at Polling Station No.019.

He deponed that the Electoral Conduct Management Committee while hearing complaint No.2 of 2002 arising from various complaints of violence, vote buying and bribery perpetrated by 2nd Respondent found him guilty of electoral violence and fined him KShs.50,000. He exhibited summons and conviction (Ex.JC.No.5). He gave statement of violence which took place on 25th November, 2002 orchestrated by 2nd Respondent to ECK.

In cross-examination by Mr. Kyalo the Learned Counsel for 1st and 3rd Respondent and in response to paragraph 5 of his affidavit he reiterated that he heard the 2nd Respondent uttering those words outside the NARC office.

He also agreed that he did not see 2nd Respondent himself dishing out money in response to contents of paragraph 15 of his affidavit, and that letter mentioned in paragraph 18 was based on information he received from other persons, but he did not name the person.

As regards contents of paragraph 21, he agreed that the polling officials are normally appointed by Returning Officer and who are the employees of ECK. He reiterated that he had not seen personally any incident of voter bribery.

As regards his complaints of appointment of Presiding Officer, (Ex.No.4) after lengthy questioning, he stated that he picked up the 32 names of Presiding Officers from the list of 43 and that he picked up only

those who were the Presiding Officers and not the Deputy Presiding Officers.

Thereafter he stated that what he had written about an ECK Official drinking was based on what he was told. Similarly he agreed that he did not see the person named by him in paragraphs 23 and 24 of his affidavit, giving bribery. He only came out to cast his vote as he was suffering from gout.

In short what came out was that what he had deponed and complained was not from his own knowledge except his allegation that he heard 2nd Respondent outside the NARC office, previous to party nomination.

In response to cross-examination by Mr. Orenge, the Learned Counsel for the 2nd Respondent he agreed that he had participated in all post independence elections except in 1963. He agreed that all ECK officials as well as polling agents of the candidates were supposed to take an oath. He went through the process of voting inside the polling room. He visited one Polling Station namely Domaday where there was no complaint. He agreed that he did not visit Budala Primary School Polling station and has not mentioned the name of the person who gave him information as he did not find it necessary. He also stated that when he wrote complaining that 80 percent of Polling officers are NARC supporters he was talking about all the three elections which were held on the same day. He also agreed that he did not mention 2nd Respondent in his letter, once again, as he did not find it necessary. He similarly agreed that in none of his letters he had mentioned 2nd Respondent having taken part in mishandling and that although he has mentioned them as 'known supporters' he had not given any basis thereof.

He stated that he was at the nomination centre on 25th November 2002 when the incident of violence took place and further stated that he said the same thing to ECK committee. When confronted with the minutes of the committee he stated that as per paragraph 3 of his letter of 2nd December, 2002 the committee ought to have understood that he was present. I may note that the minutes does not state that he was present at the scene of incident, so is the letters.

I may at this point quote the second and third paragraphs of his letter of 2nd December, 2002:

“The ugly violence was caused by the so called NARC or was it the Ford Kenya candidate together with his Civic candidates and his horde of youth thugs.

They destroyed every Electoral Commission paper that was in the office where the Electoral Commission of Kenya were receiving nomination papers. The poor officials were humiliated, robbed of their personal property and the property of the ECK itself. The nomination documents which had been accepted by the Electoral Commission officials including my own were seized and were later being ruthlessly destroyed at the candidates' shop in Port Victoria”. (emphasis mine).

This emphasized last part of the statement has to be noted very carefully and if this witness wants this court to believe that he was also present at or outside 'the candidates shop' there is nothing before me to support the same. I add that no other witness has stated this fact including the 1st Respondent.

After being shown the lists prepared by 1st Respondent for the Presiding Officers and Deputy Presiding Officers, he conceded that his list of officials enclosed as Ex. JC. No.4 included officers whose designations he was not aware of. He did not know the 1st Respondent till he presented his papers and was not aware whether some of the officials mentioned in his list also were appointed as such in last election. He said because he had complained against them, he would not agree that they were appointed due to their past experience.

He also stated that he presumed that he was sworn under Bible before he gave his statement before Electoral Conduct Management Committee and that he was not asked any question by 2nd Respondent or any lawyer, or any candidate i.e. Prof. Ojiambo. Similarly he did not ask any question to 2nd Respondent. He also agreed that he did not see the 1st Respondent at the hearing of ECK Committee.

It is agreed that 2nd Respondent removed him from his Parliamentary seat as an opposition member in 1997. Before that he was an Assistant Minister in the Government.

He as earlier stated, agreed that he did not accuse the 2nd Respondent in the letter of 27th December, 2002, nor did he state that the persons named were supporters of 2nd Respondent. He also agreed from the experience of a veteran politician, that the Presiding Officer cannot supervise the activities outside the Polling Station.

He stated that he did not go to the police, or to D.O. or to Chief as regards the incidents mentioned by him as ECK was in charge of the election.

In re-examination nothing much arose, except he stated that after he lost the petition against him as regards the previous election, he was not prosecuted as it was his agents who committed election offence and not him.

PW.6 is Christopher Ongamo Orido. On application made by the counsel for the Respondents, paragraphs 3, 4, 5, 6, 8, 9 and 10 of his affidavit were struck out vide my ruling of 25th April, 2007. he was not called after the said ruling. The next witness, pending the said ruling, was Senior Superintendent of Police Kiplagat Kerich (PW 7). During July 2001 to March 2002 he was the O.C.P.D. Busia, but corrected the said evidence by stating that he was O.C.P.D. Busia during July, 2002 upto March, 2003. Port Victoria Police Station at Budalangi is under his command. O.C.S. Port Victoria was in charge of Budalangi and he was to oversee the operation of Nomination day to be held on 25th November, 2002.

On the Nomination day, he started his visits to other places and around mid-day when he was leaving Nyambala, he received a message on police communication that there was a problem at Budalangi Nomination Centre, and that there has been violence at the centre. He proceeded to go there and on reaching the centre he found O.C.S. and Returning Officers along with other officers on duty. He was with DCIO and other officers.

On being briefed by O.C.S. along with Returning Officer, he directed O.C.S. to institute investigation with DCIO, i.e. the O.C.S. had to open the file of the incident which he presumed was an inquiry file.

He followed the matter and was informed that they were looking for key witnesses. He saw some statements on the file and thus had requested the current O.C.P.D. to avail the file to the court. He also stated that the incident was supposed to have been recorded at Port Victoria Police Station but he himself did not see the same record.

In cross-examination he stated that he had not been sent any inquiry file on his table but he gave instructions to open one. He could not confirm whether his instructions were followed. He also agreed that once such file is opened, it is required to be brought to O.C.P.D. He also agreed that the time from the occurrence of incidents of 25th November, 2002 to March, 2003 when he left the station was adequate to find witnesses.

On receipt of summons, he contacted the current O.C.P.D., Busia and was told that O.B was produced before the court. He was also required, as per summons, to produce photographs which, if they were taken should be in the inquiry file, and that record of opening the file has to be recorded in the register. In any event he was required to bring the inquiry file or its register as per the summons. During his visit to Budalangi Nomination Centre, he did not see any photographs but recalled that DCIO had told him that they were taken and were put in the file. No candidate even the Petitioner or the 1st Respondent had complained to him about incident, neither had any member of the public. He also agreed that he had not put his hand on the report of incident of 25th November, 2002, at Port Victoria or Bunyala Police Station.

He also stated that he did not recall the Returning officer he saw on 25th November, 2002, but the Petitioner introduced him to me in the court.

PW.8 is Senior Superintendent of Police Kipkeyo the current O.C.P.D. of Busia District. He gave evidence prior to PW.7 who was stood down without any objection from the Respondents.

In his evidence, he simply stated that he was unable to trace and produce the inquiry file as required by summons of the court served upon him. He took over his duties as from July, 2006. He also explained his non-attendance in response to earlier summons.

In cross-examination, he conceded that the issue of inquiry file was only raised by PW.7 and the same was not mentioned in the summons. According to him after a complaint is recorded in O.B. and statement from the complainant is taken, the inquiry file is opened. The opening of such inquiry file is recorded in a register kept for the purpose wherein its movements are also recorded. It is of 'A' paper size. He stated that he could not find any document for 2002 and they were available only from 2003. He was told that the file was opened at DCIO office but no one told me so when he inquired. The register for such file is kept at all the police stations and he opined that no such file was opened as no complainant had filed any statement which was the basis to open such a file.

He also agreed that in Busia no complaint was recorded in O.B. and since his taking over the duties no one has come to inquire about its progress or non action. Hand over was regular without any complaint of any missing file. He took over the duty from Mr. Simon Lapaso. He reiterated that in the inquest of public riot, the inquiry file cannot be opened immediately. After the situation is calm the complainant has to lodge the complaint to the Police Station. He insisted that according to him the inquiry file by this time would have come back from the Hon. A.G. and since it has not happened no inquiry file was opened according to him. He also stated that if a register is filled up and the order of disposals is given the same can be complied with.

PW.9 Mayuka Anyango Regina read and confirmed the contents of her affidavit sworn on 7th July, 2006. She was an important witness for the case of Petitioner. As indicated herein before, paragraphs 7 and 12 (d) and 12 (e) of her affidavit sworn on 7th July, 2007 was struck out. I also note that she had affixed her left thumb print on the affidavit.

However, the contents of her affidavit was read over to her and translated in Kiswahili upon which she confirmed the correctness of its contents.

According to her evidence, she was at all material times on executive committee of Ford Kenya which allied to form NARC Party.

On 26th December, 2002 at about 10 a.m. on verbal invitation, she went to 2nd Respondent's flat at Port Victoria. Then she stated that she saw many people inside the house of 2nd Respondent while other well known agents and supporters of 2nd Respondents were milling outside. The people were called inside the flat as per the polling station. She was in company of Marabii Bwire Ainea described by her as a 'die hard' supporter of 2nd Respondent. They were called in by Michael Cango a nominated councilor described as a person in charge of the roll-call of the would be recipients of the money for distribution in the polling areas in the constituency. They were called as representatives from Bulwani Polling Station No.22. Without stating earlier she averred that a sum of KShs.12,000/- was handed over to one Mr. Paul Oyindi Masinde by the 2nd Respondent and she and Ainea were to identify the voters at Bulwani Polling Station to be given money and they proposed the names of such voters.

They distributed the money from 6.00 p.m. to midnight distributing Shs.50/- notes to induce voters to support the 2nd Respondent. I do note that she did not mention any names of the voters who were given the money.

Without showing the source, she averred in paragraph 10 that various representatives of other polling stations had their lists and 2nd Respondent decided on the quantum of the amount to give.

She then witnessed representatives and close associates being given various sums of money.

I may note here her earlier testimony to the effect that people were called separately according to polling stations and she has not specified how then she witnessed payments to people representing other polling stations.

Be that as it may, she named Edward Obwanda Osunga, Dan Ogutu, Christine Namaidi Obello and stated they were given Shs.5000/- for Osieko Polling Station (which they complained were very little).

She then named Sammy Odiero Benedict and Anditi the representatives of Eyanga Polling Stations. Sum of KShs.6,000 was given to Conrad Odera and she saw other representatives of the same polling stations named Peter Adongo and Hendrika Anyango Ouma. Then she added that the said sum was also meant to cover Maduwa Primary School Polling (sic) No.031.

Lastly she saw Roselyn Anyango Musumba being given Shs.4,000 in KShs.50/- notes in respect of Musoma Primary School Polling area.

She also averred that they ensured to assign youths in the guise of assistants for illiterate voters so that they could ensure that the recipient of money voted for 2nd Respondent. She and Ainea were also given Shs.200/- each beside KShs.2000/- for Bulwani Polling area.

In cross-examination, she stated that she was invited personally by the 2nd Respondent in the evening of 25th December, 2002 when he met her at his residence at Port Victoria.

She met many people there and most of them were his 'die hard' supporters. She participated in preparing voters list by telling the names. She reiterated that even if she would be imprisoned for what she had stated she would still say the truth. She then said Shs.12,000/- was carried by Paul Masinde.

In cross-examination by Mr. Orengo, she said she talked about Bulwani Polling Station and that she was an agent of a candidate (without naming) and had an appointment letter. She also took an oath of secrecy. She was taught the duties of an election agent and narrated them. She agreed that she did not give names of persons whom she gave the money or whom Edward Obanda or Michael also paid. She also did not give names of youths appointed at Polling stations as mentioned in paragraph 14 of her affidavit.

She then told about her membership of Ford Kenya and also that of 2nd Respondent. She supported 2nd Defendant in 1997 and 2002 election which he contested from NARC ticket. She also agreed that even though she knew giving bribery was an offence, she did not report to police or chief.

She did not agree that she was close to 2nd Respondent and averred that she did not differ with him and stated that despite that when the Petitioner asked her to give evidence against 2nd Respondent, she agreed to do so.

She denied that she did not distribute shoes given to her by the 2nd Respondent and instead sold them for her purposes. According to her the dancers themselves took the shoes.

She then agreed that in the past 2nd Respondent had given her financial assistance in cash or kind.

She conceded that she cannot read or write and that she would not say that she has not mentioned any names included in the list, although she participated in preparing the list by giving names of the voters in Bulwani Polling Area. She agreed also that each candidate from three levels of election were having two agents. Although she said she was a polling agent of a candidate she averred that she was not inside the polling room and the agents of the 2nd Respondent were inside the room.

She also agreed that 2nd Respondent was coordinating election campaign for NARC for whole of Budalangi Constituency.

She denied that Shs.12,000/- was to give to agents towards their allowances.

She said that a letter for invitation by the 2nd Respondent was read over to her by Mr. Ainea and agreed that at the prior hearing (the previous day), she was asked whether the letter was written and agreed that it was. Then she said it was the 2nd Respondent who invited her orally on 25th November, 2002. She also agreed that in her affidavit also she has mentioned verbal invitation and agreed that when affirming this fact she did not tell the truth when she said it was a verbal invitation and took her stand by saying that she was invited by a letter and not by verbal invitation.

In re-examination, she stated that the shoes were distributed by 2nd Respondent along with clothes and scarves in the office of Ford Kenya on 23rd December. 2002.

She also stated that she did not report the matter to the police or chief as ‘one does not take a goat to a hyena’.

She finally agreed that her husband asked her to assist the Petitioner as he had filed a suit in the court. She also stated that her husband had earlier told her that the Petitioner had won the nomination for NARC.

PW.10 was Prof. Ojiambo Joseph Bernard who read and confirmed his affidavit sworn on 7th July, 2007. Paragraphs 11 and 15 of his affidavit struck out as hereinbefore mentioned. He was candidate in respect of Budalangi Constituency for Parliamentary election, 2002 contesting on KANU ticket. In his affidavit he averred that on the nomination day i.e. on 25th November 2002 he arrived at 10.00 a.m. to the Nomination Centre – D.O.’s office accompanied by his 500 supporters. He was the 3rd candidate to present his nomination papers. He only recalled that the Petitioner was the first one but did not recall who was the one ahead of him.

After presenting his papers he went to KANU office which is at a distance of about 200 meters from the nomination centre.

While at office around 11.30 a.m., he heard gun shots and people scampering in all directions. He could see tear gas smoke in the air and he left his office for his safety.

Without mentioning when he did, he averred that he went back to KANU’s office and saw it destroyed. He asked the chairman of KANU branch one Nicholas Okede to report to police which he did to an officer present at D.O.’s office. He was also asked by 1st Respondent to resubmit his nomination papers which were destroyed by 2nd Respondent and his supporters.

I would like to quote paragraphs 18 of his affidavit namely:

“That the Returning Officer informed me that the 2nd Respondent became wild and acted violently grabbing and destroying all electoral materials including theft of money collected from candidates, mobile phones and diabetic treatment medicine.”

The 1st Respondent also showed him a lot of documents torn by the 2nd Respondent and his supporters during his orgy of violence.

He also averred that ECK summoned him with 2nd Respondent and Mr. Osogo to discuss issues concerning that incident. They were asked to explain what occurred which he did and ECK then laid charges against 2nd Respondent and found him guilty and convicted him accordingly.

In re-examination he stated that his only concern was to know who presented the nomination papers first. It took him about half an hour inside the nomination room.

He saw the tear gas smoke and people scampering and heard gun shots around 11.30 a.m.

As regards the ECK meeting where he was summoned to appear, he stated that the three of them were at ECK for about three to four hours but he was not quite sure whether he was present when the ECK made its decision.

In response to questions from Mr. Orengo he said he was inside the nomination room with his proposer, seconder and six subscribers.

He also stated that Hon. Osogo had presented his papers and he was around. Although he had not stated in his affidavit, he also testified that 2nd Respondent was also there and that he saw his supporters, after he stated earlier that when he was leaving he heard a candidate coming but did not bother to check as his papers were accepted,

He agreed that he did not make any statement as regards violence and burning of KANU office. He also suggested that before election, he did not report to KANU Headquarter also as they were all busy campaigning.

When shown that Hon. Osogo had also complained against him to be preparing for violence in his letter of 9th December, 2002, he responded that Hon. Osogo's allegations against him were not true but those against 2nd Respondent were true.

He left Nomination Centre compound around 11.00 a.m. and when he was leaving office after commotion he heard a candidate coming in but did not bother to check as his nomination had gone through.

He also agreed that he went with 500 supporters but did not know how many Petitioner had. He also said that some were chanting his names. He could not say amongst the crowd which candidate had the biggest crowd.

He agreed that, at that time, it would take between three to four hours to reach Kisumu from Budalangi via Siaya and that it would take longer if one went through Burada. In his re-examination he said he thought it was to and fro when he gave the estimate of hours. This he said after he was confronted with his earlier testimony before another court. He also agreed that in that testimony he said that 2nd Respondent gave his nomination papers around 11.30 a.m.

Going back to ECK meeting, he said he did not recall giving evidence under oath and that they were not sworn. They were all in the same room. No questions were asked by anyone. 1st Respondent, he thought, was there but did not give any statement and that he thought that the chairman of the committee and his secretariat were writing.

This was the close of the Petitioner's case after Mr. Onalo, without making any affidavit offered himself for cross-examination.

(B) Case of 1st and 3rd Respondents

The 1st witness from 1st and 3rd Respondent was Inspector John Ndagwa from Administration Police Force. He was the Officer in charge of the A.P. Force at D.O.'s office, Budalangi.

At 6.00 a.m. on 25th November, 2002 the 1st Respondent and his three officers arrived at Nomination Centre at 6.00 a.m. The Petitioner came at around 6.30 a.m. with his five or so supporters and stayed in the Nomination Room for about 30minutes. He then gave order of other candidates arriving. The time of arrivals indicated was thereafter changed during his evidence.

The 2nd Respondent arrived at around 11.30 a.m. accompanied by 2 lorry loads, 1 canter and 2 Nissans of supporters.

As per information from 1st Respondent, 2nd Respondent was told by him that he had cleared Petitioner as nominated candidate of NARC and asked him to wait outside to consult with the ECK Headquarters of Nairobi.

When he was outside D.O.'s office, he saw 2nd Respondent and his supporters briefly retreat but after about 30 minutes, they stormed back in the hall and he heard noise and shouts of 'thief'! This fact is totally contrary to the evidence of 1st Respondent. Moreover, he did not say what was happening outside when the 2nd Respondent was there for about 30 minutes.

Then he became curious. At that time he was summoned by the 1st Respondent into the hall and found main door locked from inside and he went around the room and broke a window to gain entry. (This part of his evidence made me think how he could hear the summons by the 1st Respondent who was locked inside with noise and shouts!)

He further stated that on gaining entry he saw 1st Respondent and his staff crying for help. They were roughed up and all files and voters registers had been torn up. (I wonder how he could distinguish and describe the torn papers). According to information from 1st Respondent, the money collected were stolen and so was his mobile phone and medicines.

He then grabbed 2nd Respondent and demanded to know why he created breach of peace. He also persuaded him to leave the room which he agreed. After taking him outside he then ordered his askaris to fire in the air and over hundred and two rounds were fired. It is pertinent to state that he did not mention tear gas.

Thereafter 2nd Respondent and some of the councilors (not named) left in rush saying they needed to clear the matter with NARC H.Q. He allowed them to leave as arresting them could have resulted in aggravation of the charged atmosphere.

He then removed ECK officials, and locked them in D.O.'s office and requested the D.O. Mr. Otieno to call the OCPD, Busia who came at about 12.30 p.m. He briefed him who promised to carry out further investigation.

OCPD left with 1st Respondent in order to book a formal report at Busia. This court has not been shown any report to that effect nor did 1st Respondent mentioned that he did so.

He did not thereupon follow up the matter.

The next day the nomination exercise was repeated peacefully. The Petitioner did not appear to present his papers.

In response to questions from the Petitioner he stated that he is a resident of Budalangi. He corrected the arrival of the Petitioner from 6.30 a.m. to 8.00 a.m. and that the O.C.P.D. arrived at 2.00 p.m. This he stated after stating that he did not have a watch. One can wonder which timing is correct out of the two.

After reiterating his earlier statement as to what transpired when 2nd Respondent arrived, he added that when he came out and waited for 30 minutes, he told his supporters that if he did not remove the name of the Petitioner there would not be an election at Budalangi as he had stealthily entered. He did not say then what happened and did not become alert. When he entered the room he saw the 2nd Respondent lining up near the table of 1st Respondent followed by late John Roha, Michael Congo, Kadogo Munyolo and Odhiambo Aggrey. He did not recall others. It is pertinent to note that he did not see who had torn the documents or who had stolen the things. He did not mention about a walking stick in the hands of the 2nd Respondent or pieces thrown thereof.

He saw them holding the 1st Respondent, and he and his Deputy were crying. His supporters were members of Ford Kenya which moved with NARC. He saw the torn files and papers which according to him was criminal offence.

2nd Respondent left when they were trying to contain the crowd. After he locked 1st Respondent and Officials in D.O.'s office, he heard iron sheets of KANU's office being damaged.

He conceded that he and the Petitioner hail from same location Bunyala East location. He denied he corrected the times under the instructions from the lawyer but he did so on his own and he reiterated except for two corrections his timings for arrivals of other candidates are correct.

The nomination room was prepared by removing other furniture from the room usually used as the D.O.'s clerk's office. Around 20 people could stand in that room. In the nomination room, two long tables and 10 chairs were arranged in the morning of 25th November, 2002. His two officers were placed in the room and other five A.P. officers and five regular police officers. The O.C.S. Port Victoria was not present. On his inquiry, he was told that O.C.S. was on duty attending the court. Even Deputy O.C.S. was not present. He did not agree that the nomination day was a very important day. He stated O.C.S. was present on 26th November, 2002. He said he was under the command of the 1st Defendant on the nomination day and he was told to keep the crowd outside the D.O.'s office compound.

The 2nd Respondent on arrival parked his vehicles outside the office and was accompanied by 50 supporters and Prof. Ojiambo came with 25 people, (Prof. Ojiambo himself testified that he came with 500 supporters).

All his 10 officers and himself were armed with G.3 Rifles. The A.P. Force's main duties are to protect important personality and government buildings and offices.

He then stated that 2nd Respondent was held by him by force as he resisted but he listened to him and left the room. Then he said that he did not state in his affidavit that he saw 2nd Respondent holding the 1st Respondent, after being shown paragraph 9 of his affidavit and also after reiterating its contents.

According to him he recorded the incident of violence in the O.B. kept in their office, but did not record my statement to the police.

He agreed that he had power to arrest any person committing offence, but he did not arrest 2nd Respondent on 25th or even on 26th November, 2006 as well as his supporters Michael Congo, Aggrey Odhiambo or John Roho. He agreed that the Petitioner did not come on 26th November, 2002 and did not know why.

He did not recall for which party either Mr. Osogo or Prof. Ojiambo was nominated.

He testified that the two officers who were in the nomination room made their statements and the same were sent to District Commandant of A.P. Force. I may only note that none of these officers is called to give evidence.

Although he did not agree to estimate how long it takes to travel from Budalangi to Kisumu, he did agree that some patches from Budalangi to Siaya are rough although the road was of tarmac. Same is the position with roads to Bumala, as Budalangi area is prone to flooding. But according to him there were no heavy rains during that period.

He agreed that D.O. was present during the incident in his office.

In re-examination he once again stated that when he grabbed the 2nd Respondent, he did not resist, and then added that he did not leave the room voluntarily and he was forced to leave.

Although he stated during cross-examination that he was not aware that NARC carried out party Nomination, he stated in his re-examination that his force provided security during the said nomination exercise. He also stated that he was in the nomination room for 20 minutes and was observing what was happening.

I shall have to comment on this part of his evidence, as the same is unbecoming of an officer who said that he walked out with 2nd Respondent and he then gave orders for firing in the air. Why he had to wait for 20 minutes in the room when the situation was serious to make him order firing and when his two officers were inside the room. Did he simply observe for 20 minutes inside the room which can take only 20 persons standing?

2nd witness from ECK was Dorice Mwanika Makhudo who took part in general election of 2002 as a Presiding Officer of Sifugwe Polling Station. She was with her Deputy Presiding Officer and Polling clerks and two security officers. In the polling room there were party agents for the candidates.

In her affidavit sworn on 7th May, 2007 she had averred that between 4.30 p.m. to 5.30 p.m. on 27th December, 2002, the 2nd Respondent visited Sifugwe Police Station and on arrival addressed his agents and supporters within the demarcated areas. She went out and told him that what he was doing was wrong. Then he entered the polling room and demanded to be given her notebook. She resisted by saying that the notebook was for her but the 2nd Respondent grabbed the same and wrote thereon. After writing he threw the notebook. She read the contents which were the complaints that she had allowed strangers coming in NISSAN to vote and that she was marking ballot papers for illiterate voters. She responded by saying “Mheshimiwa why are you spoiling work at my station?” as it was all untrue. She put her notebook on the desk and walked out. His agents talked to him and 2nd Respondent picked up the notebook and tore off 2 pages on which he had written. I shall later in my ruling comment on this paragraph 10 of her affidavit.

Then she came out and after a short meeting with her officials the voting resumed.

She recalled another incident of 27th December, 2002. Between 10.00 a.m. to 11.00 a.m. on the polling day a SDP agent called her from the polling room which she did and was shown one NARC agent bribing voters queuing on the line with KShs.40/- (I shall comment on this piece of evidence later on). I can only observe that she had not named that agent. Be that as it may, she asked the agent to leave lest he be arrested. The agent complied.

She entered all the details of these incidents in her notebook which she also placed in her final report submitted to the 1st Respondent.

In response to questions put by the Petitioner that she knew John Bosco, Victor Opiyo and his brother Ignatius Opiyo and received reports that they were bribing voters but when she went out she did not see them giving the money and thus she did not enter the same in his notebook.

She also testified that she suspected that the man bribing was wearing a T-shirt with the name of 2nd Respondent underneath the light shirt. This piece of evidence needs to be seen with consternation for obvious reasons.

I also observe that after she stated that she did not enter the incident of bribery by Opiyo brother, she went ahead and stated that she made its report and when the 2nd Respondent tore the pages that was the last incident recorded.

She also informed the 1st Respondent about tearing of her note-book by the 2nd Respondent when she went to him to deliver ballot boxes. The 1st Respondent called Herman Ogula the NARC Coordinator when 2nd Respondent was also present and he apologized to her. This evidence is denied by the 1st Respondent.

She recalled that one Makuyu was one of the Polling agent was a lady but did not recall her names. She also agreed that there was no agent specifically appointed by 2nd Respondent. But then the next day she stated that Parliamentary candidate appoints the agent. She agreed that she did not name either the person or the voter who she saw giving and taking bribery. She reiterated that she was opposed to 2nd Respondent writing in her note-book let alone his complaints.

After reiterating severally that she was trained properly to perform her duties and took oath of secrecy, she said that she did not have any method or arrangement for the complaints from candidates or agents or voters. She denied that Prof. Ojiambo (PW.10) wrote complaints in her note-book.

She reiterated that the 2nd Respondent addressed agents and supporters. There was one queue of voters and it was interrupted, and agreed that she did not state that fact in her affidavit although it was relevant. She also agreed that voters were not in party uniforms. She also conceded that the percentage of illiterate voters in her Polling Station was about 50. She assigned one of the clerks for them and some youths assigned were also with those voters.

In re-examination she stated that she sent the person bribing out of the station but did not report to the police or got him arrested.

1st Respondent then took the witness stand and read and confirmed the contents of his affidavit sworn on 30th April, 2007.

He was the Returning Officer for Budalangi constituency during 2007 General Election.

According to him the Petitioner arrived at about 9.00 a.m. on 25th November, 2002, to the Nomination and presented papers including NARC's clearance certificate duly signed by NARC Election Board Chairman Wanjala Welime and Alex Muthithi its Secretary.

He cleared the Petitioner after scrutiny of his papers as the validly nominated candidate to contest the Budalangi Constituency seat on the NARC ticket.

At around 11.45 a.m. the 2nd respondent arrived with his supporters and demanded to be cleared to contest the same seat on a NARC ticket. He submitted his nomination papers which included a NARC clearance certificate No.2095 duly signed by the aforesaid party officials. He explained to the 2nd respondent that he could not accept his paper as he had already received similar papers from the petitioner and had cleared him. He gave the papers back and requested the 2nd respondent to allow him some time to consult the ECK. 2nd respondent obliged and left the nomination room. But after a short while the 2nd respondent and his supporters lost patience and began shouting that 2nd respondent be cleared led by 2nd respondent. They stormed into the nomination room and caused commotion by banging table and tore up any stationary on sight including voters register, books, receipt and all documents on the table.

The commotion lasted about half an hour when the Administration Policemen managed to push out the rowdy supporters of the 2nd respondent. He realized then that he had lost all money collected from the candidates, his brief case containing ID and driving licence, bank passbook, mobile phone, diabetes and hypertension medicines. He himself tried to appeal for calm but in vain.

Due to commotion the nomination exercise was suspended. He went to Busia to report the incident and collect fresh record from the District Co-ordinator of Elections.

On 26th November 2002 at around noon the 2nd Respondent came back to represent his papers and after scrutiny thereof and a letter signed by NARC officials as aforesaid directing that 2nd respondent had been nominated by NARC and further requiring not to clear anyone else for Parliamentary seat on a NARC ticket. That letter is annexed to his certificate "EL1".

On the basis thereof as well as due to lack of previous day's records the 2nd respondent was nominated.

He then displayed the names of all Parliament and civil candidates approved by ECK on public notice board throughout the shopping centre. No one including the petitioner lodged any complaint.

He denied allegation from the petitioner that he cleared the name of 2nd respondent due to the intimidation. This fact he has averred in the affidavit drawn and filed by his counsel.

He then personally wrote a detailed report on 7th December 2002 concerning the serious incident of 25th November 2002.

Thereafter he called a meeting of all candidates also attended by District Security Team, and it was agreed that all players would ensure that peace prevailed during the election period.

It was a peaceful election and he did not receive any complaints neither did his officers or the police.

He then specified he did not receive any incidents of any bribery by the 2nd respondent, his agents. Police also did not receive any such report. He once again reiterated that there was no report of inducement of voters through use of money, food and/or drinks by 2nd respondent and/or his agents. He specifically denied that no presiding officer complained that 2nd respondent complained on the day of the election thus he contradicted the evidence ECK W(2).

He denied all allegations by the petitioner to the effect that he had employed persons of questionable integrity and that he was indifferent, callous and unfair to him.

Save for the incident of 25th November 2002, he denied the Petitioner's allegation that the election was rigged, unfairly conducted, interfered with and influenced by 2nd Respondent or at all. This fact is relevant and the submissions made by counsel for ECK to the contrary shall have to be taken into consideration with caution.

In response to questions from Mr. Onalo, he testified that he saw for the first time a guideline purported to have been published by ECK Chairman which enumerated the documents which a candidate aspiring to be nominated should be carrying. He however stated that all the candidates including the Petitioner presented all those documents but which were destroyed by 2nd Respondent and his supporters. He stated that he did not have any composite list from any party. He also responded that if he was told that the Petitioner left for Nairobi after nomination, his agent or supporter should have seen the Notice of finally nominated candidates which he had posted after the close of business on 26th November 2002 and disagreed that this action of placing notice was useless for the Petitioner. He had to rely and act upon the authority from the NARC on 26th November 2002. He also agreed that Petitioner produced a clearance certificate from NARC.

He also agreed that the list of all nominated candidates was published in Newspapers and that also could serve as a notice to the public.

As per his evidence all other candidates returned on 26th November 2002 with photocopies of their respective documents and if they did not have photocopies they could fill in fresh forms. He declined to accept suggestions from Mr. Onalo that as a result of destruction of his nomination papers, 2nd respondent got the nomination.

He also agreed that the terrain of Budalangi made it difficult to travel.

He denied the veracity of evidence of ECKW2 Dorice that there was a roundtable meeting with her and the 2nd Respondent where 2nd Respondent apologized to her. He also stated that it is not within his knowledge that the presiding officer has to make a separate report to that recorded on the note-book

provided to him/her. He did not recall having seen a report from Sifungwe Polling station. He also did not remember having seen any report from Musoma Primary School Polling Station. This evidence thus almost makes the evidence of Doris (ECK W (2), unreliable.

He also agreed that his letter to Chairman ECK was referred to by the Committee of ECK in its ruling.

According to him the security on 25th November 2002 was adequate. There were about 20 security officers around the centre. 2nd Respondent had more supporters who overpowered these officials. He saw his supporters in uniform.

The next day he asked for 25 security officers.

In response to questions from Mr. Orengo, he stated that he did not recall whether the Petitioner presented his membership card for NARC Party.

He was shown the annexed ANN PLO 1 from the affidavit of the Petitioner filed in H.C.C.S 1774/02. He confirmed that the Electoral card of the Petitioner bears the name of National Alliance of Kenya Party and not NARC and the earlier party was not in the election process. He also read paragraph 7 of the said affidavit which averred that the Petitioner attached copies of his ID card, voters card and Party and membership card.

He agreed that in 2002 the nomination process was to last for two full days and close of nomination was 4.00 p.m. the second day. He conceded that two candidates from the same political party are not acceptable as per regulation 16(4) of the Election Regulation.

If there are two members then the Returning Officer has to determine the validity of nomination between the two. The Party also sponsors the candidate and it is not for him to decide for the party.

He conceded neither the Petitioner nor NARC party complained against nomination of the 2nd Respondent and that no one complained as to integrity of election officials appointed by him and that 2nd Respondent did not approach him to appoint anyone.

He also reiterated that he did not receive any complaint of bribery against the 2nd Respondent.

He conceded that NARC nomination had been completed before 25th November 2002, but did not know its outcome.

On 25th November 2002, apart from the supporters of the candidate general public were also around and he would not pinpoint supporters of any candidate including those of the 2nd Respondent. There were nominations for many candidates including that of civic and Parliamentary election. There were many wards of Busia and Port Victoria Council and NARC had candidates from all the wards. They came with their supporters.

Thereafter he said:

“there was a large crowd in the nomination room and 2 or 3 supporters of 2nd Respondent held me and I did not see 2nd Respondent actually taking the stationary, taking money or snatching his brief case, did not hear 2nd Respondent telling the crowd to beat him up or take away money or the brief case. The room was filled with supporters and could not hear or see precisely”.

He denied that after commotion he was locked in a room but stated that he was taken to the next room. OCPD came when situation was calm. All other candidates were required to come with photocopies of their documents. No one including Electoral Commission of Kenya, challenged the manner in which the nomination was conducted.

He conceded that on 25th November 2002 the O.C.S. was there and he knew him. No one asked him to write a statement and he saw the Petitioner again when he was served with this petition. He did not appear before Electoral Commission Kenya Committee.

In re-examination he stated that he would doubt the handwritten sponsorship letter from a political party. That he only refused to accept the nomination papers from the 2nd Respondent as he wanted to find out the truth and that there was time to do so.

I only comment on this evidence that this witness has not told what steps he wanted to take and did take when he asked the 2nd Respondent to wait. He also kind of watered down the contents of his letter of 7th December 2002 although no questions asked thereon.

The 4th witness was Gabriel K. Mukele the Vice-Chairman of Electoral Commission of Kenya.

As per his affidavit as a result of a complaint (GKM1), a letter dated 9th December 2002 from Mr. Osogo (PW 5), the Electoral Commission of Kenya constituted an Electoral Conduct Management Committee to hear and determine the complaints of violence, assault, intimidation and voter bribery from some Constituencies including Budalangi.

As per his affidavit the 2nd Respondent appeared before the said Committee chaired by him on 21st December 2002 together with his 2 accusers namely Prof. J.B. Ojiambo and Mr. James N. Osogo.

I would wonder how he named the said two as accusers when the same summons were issued to all the three.

Then he stated that the 2nd Respondent was charged with 3 offences namely:-

- (i) Assault and robbery against the Returning Officer
- (ii) Terror against opponents
- (iii) Vote buying

Which charges were denied by him through his counsel Dr. John M. Khaminwa.

After hearing all sides, the Committee found him guilty of charges laid against him and fined him Shs.50,000/= which sum he has not paid.

He also produced certified copies of proceedings of the said Committee and its ruling (GKM 2).

In response to the questions raised by Mr. Onalo he stated that after the multiparty system; political party can nominate only one candidate.

He was asked questions on the procedures of nomination and election and I would note that according to him the notebook had to be surrendered to the Returning Officer but could not say whether the one from Sifugwe Polling Station was so received. He was asked questions as regards activities carried out by Sifugwe and Musoma Polling Stations' Presiding Officers or whether 2nd Respondent tore some pages of the note books and he said he could not recall. But he did receive the letter of 9th December 2002 from Mr. Osogo and acted therefrom. He also stated that the summons showed wrong date of the incident as 25th October 2002 which should read 25th November 2002.

He was referred to the proceedings and stated it was summons and agreed that the situation being tense the strict procedure of trial was not observed. He did not recall whether the 2nd Respondent called any witnesses. He did not recall whether a separate summons was issued to 2nd Respondent after hearing and

said that the other two were complainants and agreed that in the summons before the court no specific charges were leveled against the 2nd Respondent.

He also confirmed that the proceedings are not signed but claimed it was certified.

Agreeing on informal handling of the procedure he stated that he did not recall whether the witnesses took oath.

After stating that the notice of allegations and evidence as well opportunity to defend was given to 2nd Respondent, he added that they did not frame a charge. He also conceded that they heard all the named cases which he later stated as relating to 16 candidates who were summoned on the same day and the committee gave rulings the next day.

In response to the specific questions raised as to the nature of inquiry he said “*we did sit as a quasi judicial body or tribunal. It was not a court of law.*”

Immediately thereafter he deponed that although they were bound by principles of natural justice, it was difficult to follow the strict procedure of trial”.

Replying the questions raised by Mr. Orengo he said they could be 16 candidates who were summoned and that 2nd Respondent has challenged the decision of the Electoral Commission of Kenya Committee.

He thought he called the Returning Officer but his name is not on record and agreed if 1st Respondent stated he did not attend that could be the fact.

He agreed that in the several cases the names of the candidates are changed at the calling of the political party and that 1st Respondent has not informed ECK that 2nd Respondent was not validly nominated.

He has also not received any complaint as regards competence of Electorate Commission of Kenya Officials at Budalangi and denied that a NARC candidate appointed them.

He conceded that neither the 1st Respondent is mentioned in the proceedings of the Committee nor his letter and the reason was serious pressure of work. He did not recall Mr. Osogo saying that he was present during the incident.

He referred only three persons in Budalangi and did not mention the 1st Respondent as an accuser. He also agreed that the ruling does not state that 2nd Respondent was guilty of an election offence as the Ruling was a result of an informal trial.

He agreed that candidates are allowed to pay to their agents as several of them came to ECK complaining the non-payment. The candidates were allowed to give refreshments to the agents and one of them can go out to refresh. They can alter themselves as inside the polling station there has to be two agents, but then he said, as per his understanding, the candidate cannot appoint more than two agents.

In re-examination he stated that the 2nd Respondent was accompanied by a lawyer and neither of them raised any objections and that it was not a criminal trial. The Ruling also refers to defence of the 2nd Respondent.

The last witness for 1st and 3rd Respondent was Jemimah Keli who is a Legal Officer of Electorate Commission of Kenya.

She confirmed the Electoral Code of Conduct hearing on 21st December 2002 and Electoral Commission of Kenya found the 2nd Respondent guilty of breach of Electoral Code of Conduct and fined him of Kshs.50,000/=. Therefrom the 2nd Respondent filed a Miscellaneous Application No. 13 of 2003

challenging the said proceedings under Judicial Review premised under Order LIII of Civil Procedure Rules.

The said proceedings were dismissed in absence of the 2nd Respondent on an application filed by Electorate Commission of Kenya.

ECK, thereafter filed a Miscellaneous Application No. 245 of 2004 seeking remedies to recover the imposed fine not paid by the 2nd Respondent. Therefrom an application was filed seeking determination of constitutional issues which operated as an automatic stay of the proceedings filed by the ECK. Her assertion in the affidavit that the said application is caught up with doctrine of Res Judicata, is in my view, not relevant to the present petition.

Mr. Onalo just showed her a letter dated 27th November 2002 from ECK and addressed to the Petitioner. I advisedly shall not take any account thereof. She also referred to Section 34A(4) of the Act which stipulates that the hearing of Election Code Committee cannot prejudice the trial of the Petition.

She agreed in response to the questions by Mr. Orengo, that the order of dismissal was made in absence of the representation from the 2nd Respondent and that she was not sure whether there was any affidavit in response to the application.

That was the close of the case of 1st and 3rd Respondents.

(c) case of the 2nd Respondent.

Most of the witnesses called by the 2nd Respondent are those named by Petitioner's witnesses as having participated with the 2nd Respondent and being his associates.

The 1st witness is Adango Munyolo David who denied in response to testimony of Inspector Ndagwa (ECK W1) that he was with the 2nd Respondent on the nomination day. He said on the day he reported from his duty as an Enforcement Officer with Port Victoria Town Council and was working on revenue collection at Mulukoba Beach Market.

That there are many Adango in Budalangi constituency and the names mentioned by Inspector Ndagwa were his names. He agreed with the Petitioner that they know each other and in 1999 he voted for him and that there is no disagreement between them.

He also agreed that he heard about the violence at Nomination centre being a matter of notoriety and also added that people were not happy with what ECK did.

2nd witness was Michael Congo Ouma who is a nominated Councillor for Busia County Council. He participated in NARC Party Nomination on 20th November 2002 and in Parliamentary nomination 2nd Respondent won the nomination defeating other candidates including the Petitioner.

On 25th November 2002 he accompanied the 2nd Respondent being his seconder in a convoy of five vehicles carrying 45 people. They arrived at the centre around 11.00 a.m. and took 15 minutes to check their document. He entered the nomination room with 2nd Respondent, James Maloba Kuoba and two or three subscribers as they were told that the room was small.

When 2nd Respondent presented his papers, the 1st Respondent declined to take them saying Petitioner had earlier presented papers as duly nominated candidate for NARC. The 1st Respondent requested the 2nd Respondent to wait outside while he consulted and investigated. While outside 2nd Respondent informed the group of subscribers who remained outside that there was a problem with his nomination as the Petitioner had presented his papers as duly nominated candidate for NARC.

The crowd which gathered outside and which included supporters of Osogo, Ojiambo as well as 2nd Respondent, seemed to have got wind after a while and made its way to the compound. Some began to shout being agitated that the 2nd Respondent had been compromised by KANU.

As the agitation grew the crowd surged forward and they were pushed and forced back inside the nomination room and commotion ensued. Neither Electoral Commission of Kenya officials nor them had any control over the commotion. There was lot of pushing, shoving and shouting and he saw 2nd Respondent leaving the room and he followed. He joined him when he told that he had decided to seek NARC's intervention. Late John Otoyoro Roho also joined them. They drove together in hope that 2nd Respondent could catch 3.30 p.m. flight to Nairobi. The route they followed was Budalangi – Ruanbwa – Nyadorera – Siaya – Luanda – Maseno – Kisumu.

Roads were rough due to rains and 2nd Respondent managed to catch the flight.

On 26th, 2nd Respondents arrived at 8.00 a.m. and he and late Roho picked him up from the airport and arrived at around 12.00 p.m. to nomination centre where his papers were accepted and he was nominated on NARC ticket.

He then related incident of 26th December 2002. He was a member of co-ordinating meeting and they were meeting polling agents at 2nd Respondent's home to check on their documentations. They had recruited 650 polling agents for the three levels of elections and each agent were paid Shs.1,000/= for their allowances and money for food and refreshments.

He denied the veracity of testimony of Regina Matyuka (PW9) that she was present at the meeting and 2nd Respondent was giving out money at his home on that day to be given to the voters.

In reply to questions by Mr. Kyalo he stated that the convoy included civic candidates and their subscribers. 2nd Respondent had his proposer, seconder and 18 subscribers with him.

They were told by security officer that as the room was small, the candidate would enter with proposer, seconded and some subscribers.

The crowd which was getting agitated also included supporters of NARC and other members of public with supporters of other parties.

It was himself, 2nd Respondent, James who were pushed. The 2nd Respondent was pushed more by the crowd shouting that he had been cheated by KANU. The crowd gathered nearer when the 2nd Respondent gave information to subscribers outside the room. There were two Police Officers inside the room. There were other officers outside. The pushing crowd wanted 2nd Respondent to present his papers. He denied he saw Inspector Ndagwa when he was inside. While he was inside he did not see 2nd Respondent or any other from the crowd tearing the documents of ECK or did not see anything being destroyed while he was inside. 2nd Respondent pushed himself out and not by Inspector Ndagwa. Till he was in the centre he did not hear any firing. He denied veracity of testimony of Inspector Ndagwa that the firing started before the departure of 2nd Respondent.

He agreed to suggestion of Mr. Onalo that the 2nd Respondent fell down but stated that he got up immediately.

He stated that NARC did not have any party office at Budalangi and 2nd Respondent was co-ordinating election and meeting.

As regards the allegation made by Regina (PW9) he said she was not there and he was incharge of payment of the Polling Agents and added that she failed to distribute shoes given to her from the Ford

Kenya office and that she had not done any work for NARC.

He denied that Christine Mbeko was present on 26th December 2002.

He denied suggestions that he was in charge of distributing bribe money.

In re-examination he reiterated that there was a crowd consisting of about 3000 persons and the three of them were pushed inside by members of the crowd.

2nd Respondent was inside for a brief period after being pushed.

RW3 was Aggrey Ouna Ojiambo. He accompanied 2nd Respondent in his convoy but did not enter the nomination room but was in compound as he was proposer for late John Roha for civil election.

According to him the 2nd Respondent entered the room with James Maloba Kioba, Michael Congo and two or three subscribers. It took time and remaining subscribers were getting concerned because of lack of progress and soon thereafter the word had gone out that his papers were not accepted as the Petitioner had presented his papers earlier as a NARC Candidate.

I do note discrepancy in this evidence in comparison to the earlier witness.

The 2nd Respondent came out after 20 minutes and went to his group of subscribers and tried to explain them the reason of non-acceptance of his papers and that 1st Respondent had asked for time to make a decision. While he was explaining, the members of public started making their way into the compound saying that their seat is not going to be grabbed by someone whom they had not nominated.

I may note this statement and observe that the members of the public had to be the supporters of 2nd Respondent.

They also were saying that 2nd Respondent was compromised by KANU and he got worried. 2nd Respondent then found himself being pushed inside the nomination room. He tried to get close to the room but gathered that things were getting out of hand and all were speaking together including 1st Respondent.

Then he saw 2nd Respondent and Congo (DW2) emerge from the room and speed towards the vehicles and drove off in a pick up driven by late John Roha.

As pandemonium broke he left the place to go home. He heard some gunshots from the distance.

I note that last portion of the last sentence of para 12 and portion of para 15 of his affidavit were deleted on the same grounds as those ones deleted from affidavits of some witnesses of the Petitioner.

As regards the position of Inspector Ndagwa, he asserted that on 25th November 2002 he saw him outside the nomination room even when 2nd Respondent got out of the nomination room after being pushed in. He added that O.C.S. of Port Victoria Mr. Maina was present along with his officials. He also averred that Inspector Ndagwa comes from and lives in the same location as Prof. Ojiambo, Petitioner, Peter Onyango and Elisha Musoma who were candidates and was a supporter of KANU and that he sometimes acted as the bodyguard of said candidates.

He was present on 26th November 2002 as the nomination of late Roha was suspended on 25th November 2002.

In short he averred that he did not see 2nd Respondent taking part in any act of violence nor did he hear him urge anybody including his supporters to participate in acts of violence.

Replying to questions from Mr. Kyalo he said that the people were murmuring about non-acceptance of 2nd Respondent's papers and that he then confirmed the same as he came out. When he was explaining to his subscribers and civic candidates the members of public moved nearer. It was not for more than 3 to 5 minutes and before he could finish, 2nd Respondent was pushed along with James, Congo and subscribers. He witnessed the incident at a distance of about 10 meters. While shouting were going on Inspector Ndagwa was controlling and directing his officers and he was out till he left the place. He agreed that 2nd Respondent was gloomy and the crowd felt that something was wrong.

In cross examination by Mr. Onalo he responded that the results of nomination process by the NARC were published and he could not say whether the same was sent to the Returning Officer. He however asserted that the Petitioner was present when the result were declared.

The next in line was Antony Buluma Okuku (RW (4) who read and confirmed the contents of this affidavit sworn on 12th June 2007. He was the polling agent of late Roha. He denied being present or having received money from the 2nd Respondent at his residence. On that day he accompanied the ballot boxes from Budalangi to Maduwa Polling Station. He did not know one Cornel Odera who is alleged to have carried Shs.6,000/= for distribution to the voter to cover Buyanga and Maduwa Polling Stations.

In cross-examination by the Petitioner he said that although he was a polling agent he did not attend the meeting on 26th December, 2002 as he was away collecting ballot boxes. Mr. Michael Congo was to follow them to train.

It is true that he did not produce his letter of appointment as an agent nor did he give its details.

From the affidavit of the next witness Edward Obwanda Osunga (PW 5), I struck out para 16. I do not have to reiterate further except to state that I adhere to my ruling of 20th March, 2002.

He was the Polling of the President Kibaki during 2002 General Election.

He attended meeting at 2nd Respondent's Residence on 26th December 2002 at the invitation of Michael Congo. It was to discuss the plans for the election day and to check on the documentations of the agents so that they be allowed in the polling station. He reiterated that each agent was given Shs.1,000/= as allowance as averred by other witnesses.

He did not see Regina (PW9) at the meeting and denied that money was distributed to induce voters and that he did not receive any. His fellow agents at Osieko Polling Station were Reuben Okello Oguok, Musa Amolo Joash and Richard Sakwa Rabar.

He stated that several polling agents were assigned to Osieko Polling Station to allow for alternation so that at any given time there were two polling agents for a candidate.

The money handed over on 26th December 2002 was for allowances of the polling agents.

In cross-examination he denied his nomination as a Councilor in 1997 was by or at behest of 2nd Respondent. It was Ford Kenya which nominated him. He also added that the Party decides the strategy and Hermann was Budalangi co-ordinator for NARC.

He denied the suggestion that Michael Congo was co-ordinator of bribery and stated that he did not see him giving any money for bribery. He said he did not know why the residence of 2nd Respondent was chosen for the meeting and stated that office of Ford Kenya was at shopping centre wherein all the Electorate Commission of Kenya officials were also given instructions. They wanted to be away from them.

As regards Regina the story of her non-distribution of shoes for Women Dancers Groups was repeated

and also added that she was chased away after the incident.

RW 6 was Paul Oyindi Masinde who read and confirmed the contents of his affidavit sworn on 20th June 2007.

He denied the veracity of the testimony of Regina that on 26th December, 2002 while at 2nd Respondent's residence he was given Shs.12,000/= to be distributed to voters as an inducement to vote for the 2nd Respondent.

He was a teacher at the material time and was not allowed to be agent of a political party candidates. He was retiring very soon and could not jeopardize his retirement benefits. He voted at Budalangi Primary School Polling Station which is very far from Bulwani Polling Station.

In cross-examination he agreed that his residence was rented since one year as constituency office and its rent is paid by the Manager as the office is a government office. He denied to be a member of Ford Kenya. He denied to be an associate of 2nd Respondent but agreed that he was just a friend. The government has facilitated M.Ps to have a Constituency office and the house is not rented by any political party, Peter Adango (RW 7) was read over in Luhya language and confirmed the contents of his affidavit property thumb printed on 20th June 2002.

He denied that he was either a representative or agent of 2nd Respondent during 2002 general elections and denied that he was at 2nd Respondent's residence on the 26th December 2002 or at any other date. His grandmother is Hendrilka Anyango Ouma and stated 2nd Respondent did not give him any money to distribute to the voters. He knows Regina (PW9) and Sammy Odiero Benedict but does not know Cornel Odera or one Anditi. He is registered voter at Iyanga.

He reiterated that Regina lied when she named him in her testimony.

Next was Hendrika Anyango Ouna (RW8) who came from Eyanga village. She does not work as she has chest problem. She being a member of Ford Kenya, she knows Regina (PW9) as a former Women leader in Ford Kenya.

She denied being either representative or agent of 2nd Respondent as she is too old to do that kind of job. Thus she denied that she was at 2nd Respondent's residence on 26th December 2002 and received Shs.6,000/= to be given to voters. She participated only as a voter. Furthermore she said that her only daughter expired on 25th December 2002 and she was busy doing funeral arrangements. She denied knowing Cornel Odera or Sammy Benedict Odiero, but knows Antony Buluma Okuku alias Aditi as a person from Bukhama village.

She responded that she cannot know that she had a right to inspect voter Register when she did not know how to read.

I do not think it is very relevant, as also conceded by the Petitioner, that she did not have either burial permit or death certificate of her only daughter but she stated that the chief was present at the funeral.

She was also asked how did she manage to come to the court if she could not walk long distance. She said she reached Usenge by boat. She walked from Osieko slowly and taking rest in between. She denied having ever traveled on Boda Boda.

RW9 is Roseline Anyango Agonga who has read over her affidavit sworn on 22nd June 2007 in Luhya and confirmed its contents.

She was a polling agent for 2nd Respondent and exhibited letter of appointment and oath of secrecy (EX. RAA 2). She also exhibited her ID card (Ex. NO. RAA – 1) and thereafter as agreed she also brought her

Elector's card No.178/018/0858346876.

She knew Regina as she used to be a woman leader for Ford Kenya. She said she did not know anyone named Roselyne Anyango Musuma holding Identity Card No. 21170399 and Elector's card No.175/018/0858358183

She was the only woman polling agent at Musoma Primary School for NARC party and gave names of all the agents assigned to the said polling station.

She denied having received Shs.4,000/= in Shs. 50 denomination to be distributed to the voters to induce them to vote for 2nd Respondent. But she was at meeting on 26th December, 2002 at invitation as a polling agent. The money given out was for distribution to the polling Agents for their allowance for food and refreshment.

She went home after the meeting and then at 7.00 p.m. she went to Musoma Primary School. The ballot boxes and other election materials arrived after she got there. One Henry Maleina Okumu agreed to stay overnight at Polling Station instead of her. On her cross-examination she stated that her electoral card was checked by Election Officials before she cast her vote.

During the cross-examination an order was made to check and produce register of voters of Musoma Primary School if it was amongst the documents presented by Election Commission of Kenya to the court.

When questioned on educational qualification of the polling Agent for the said polling station, she responded she was educated upto class IV, but also added that some of the M.Ps are also not very educated.

She denied that agents, who were illiterate and having access to bribery were appointed.

She reiterated that she did not see Regina on 26th December, 2002 at 2nd Respondent's residence. She was shown her name on No.36 in the voters register shown to her which was printed on 26th September, 2002 before the election. Once again I cannot rely on the documents shown unprocedurally during the cross-examination and to that matter during re-examination.

R.W.10 Christine Namaindi Obeko, whose affidavit sworn on 25th June, 2002 was read over to her in Luhya and she confirmed its content.

She is a registered voter at Lanyofu and is a business woman running an eating kiosk together with her husband Longinus Linus Obeko in Port Victoria. She produced a business licence in the name of her husband. She denied being present at 2nd Respondent's residence on 26th December, 2002 as she was busy at her kiosk due to heavy business during the election time.

She was aware of the meeting of polling agents on that day as being a Ford Kenya official. She denied having received Shs.15,000/= at the meeting to distribute amongst the voters. She also stated that she went to vote at Lunyofu Polling Station at 7.00 a.m. Osieko polling station is at a distance of 25 K.M. and that it was impossible for her to go to 2nd Respondent and then travel to Osieko on 26th December, 2002 and return to Lunyolu.

On cross-examination she stated that Regina left in 2001 as a women leader and one elected was Consolata in 2002.

She gave numbers of her Identity Card and Elector Card as well as her place in Register of voters. She stated that there was difference between Regina and her when she failed to distribute 36 pair of shoes to woman dancers.

She denied to the suggestion that Regina could not lie.

The next witness Hermann J.L. Ogulla was allowed to give evidence after disclosure that he was present once or twice during previous hearings session. The Petitioner did not object to him giving testimony with a rider that the weight to be placed on his evidence has to be considered in view of the facts of his presence in the court.

As per his affidavit which he read and confirmed as true he applied for the post of NARC constituency co-coordinator after an advertisement was placed. He was selected. In Budalangi constituency under his Chairmanship – a nomination panel was constituted. A meeting on 19th November, 2002 was convened by NARC Parliamentary and Civic aspirants. Then he described the procedure leading to the nomination which was held on 20th November, 2002 as scheduled but Mr. Osogo came to the meeting arguing that it was to be held the next day. The nomination exercise went ahead, as agreed and accepted by aspirants by using the method of voting by secret ballot. The exercise was held at several polling stations headed by presiding officers and after compilation of the results received, the 2nd Respondent won the nomination by securing 8024 votes. He also stated the votes secured by all the aspirants including those of the Petitioner who was second with 1330 votes. The results were announced and certificates were issued. He exhibited all the necessary documents mentioned by him to his affidavit. There was no appeal against the exercise and result by any aspirant including the Petitioner which has been provided under NARC Nomination Rules.

On cross-examination by the Petitioner he did not comment on the suggestions from him that his affidavit was worthless which shows only the process of nomination. Despite the said suggestion the Petitioner continued to question him. He agreed that the list Ex.1 was based from applications received by the aspirants. I do not think it shows a column which mentioned a date of approval by NARC. It was an umbrella of various parties forming coalition. NAK was a part of that coalition.

He said that he was not in Court when Regina was giving her testimony to the effect that she saw him on 26th December, 2002 at 2nd Respondent's residence. He said he came when she was almost finishing her testimony. He denied he was there and asserted that he did not leave his place of work at Budalangi as they were preparing for the election next day. This evidence corroborates the reply from RW 5 when he explained why meeting was held at 2nd Respondent's residence.

He stated that Mr. Osogo was given two hours on 20th December, 2002 by consent of all the applicants including the Petitioner. He did not come back. He denied the suggestions that Mr. Osogo defected to SDP as he conducted the election on that day. He agreed that Opiyo brothers are related to him by marriage but he was not aware that they were agents of the 2nd Respondent. He however stressed that they were not agents at the nomination exercise.

R.W. 11 was Romanius Okochi Wongoyo who read and confirmed the contents of his affidavit sworn on 26th June, 2007. He was a subscriber to the 2nd Respondent and participated as a voter even in nomination process on 20th November, 2002 and saw the Petitioner during that exercise.

On 25th November, 2002 he reached nomination centre at about 9.30 a.m. as agreed but the 2nd Respondent arrived at about 11.00 a.m. When he arrived at the Nomination centre he saw OCS of Port Victoria and Insp. John Ndagwa. When he saw 2nd Respondent arriving he joined the other subscribers. After that they spent 15 minutes checking on the documents of all concerned when they all neared the nomination room they were told by the police officer at its door that the classroom was small and all of them could not go in.

He was selected amongst the subscribers to go along the 2nd Respondent, James Malaba Kuloba, Michael Congo & Fredrick Odonoyo Achami. When 2nd Respondent presented his papers, the 1st Respondent declined to take them informing that the Petitioner had earlier presented his papers on NARC Nomination. 2nd Respondent tried to explain that it could not be true as he was the one nominated by

NARC. Thereupon the 1st Respondent requested the 2nd Respondent and all of them to wait outside while he consulted. The 2nd Respondent had already decided and informed them that he was going to Nairobi to seek NARC's intervention. When they were outside, the 2nd Respondent informed his group of subscribers who were outside that there was a problem due to Petitioner having presented his papers as a nominated candidate for NARC. While he was doing so, he sensed "that the public picked up that something was a miss because they moved closer to where they were" and demanded to know whether 2nd Respondent was compromised by KANU. Suddenly the crowd surged pushing everybody towards and into the nomination room. He saw 2nd Respondent falling and immediately picking himself up and was pushed inside as he and other members of public were.

Inside commotion ensued and people were pushing back and forth. He could see 2nd Respondent trying to get out ahead as he was also so struggling. When he managed to come out he heard people saying 2nd Respondent had driven away. Outside he saw Inspector Ndagwa running about and trying to command the officers. After a while he heard him instructing the police to fire in the air and at that point he left the place.

As informed he went back on 26th November, 2002 when 2nd Respondent presented his papers at around 12.00 p.m. and he was nominated.

On cross examination by Mr. Kyalo, he said he didn't not see whether O.C.S was around when Inspector Ndagwa was instructing to fire.

This witness refused to answer to any question as to estimation. He was a teacher of History and Kiswahili and he told that he could not estimate. When outside, 2nd Respondent did not take even five minutes to explain to his subscribers and crowd started drawing nearer. All five of them were pushed inside and mob was also pushing inside demanding explanation from the 1st Respondent who cleared the Petitioner. He did not see 2nd Respondent banging the table. When he was reading letter of 9th December, 2002 (Exh. ELR) addressed to the Chairman of ECK, he denied that they stormed into room. He did not see any damages to the records or stationeries while he was inside. He also denied that the Inspector Ndagwa entered the room through a window and removed 2nd Respondent. He said there were about the same number of people inside the room as were in the court (around 60).

In response to questions from the Petitioner he said that he did not see Roha Aggrey Ouma on that day as well as Aggrey Mwonalo David. This fact has to be noted. He remembered that it was 9.30 a.m. when he arrived and waited for the 2nd Respondent as agreed, but denied that he saw the petitioner at that time and said he could have come and gone but stressed that he did not know that the Petitioner had already submitted his papers. But he agreed that he saw Mr. Osogo and Professor. Ojiambo

When 2nd Respondent was addressing the subscribers, he cannot say whether it was within hearing distance of the members of public.

He also reiterated that the crowd was not happy and were even saying that the Petitioner had taken the seat unlawfully. They wanted the change and 2nd Respondent wanted the right result.

On 26th November, 2002 he did not see Mr. Osogo or Professor Ojiambo.

He agreed that the 1st respondent talked about 200 people in the room during his re-examination.

Next in line was Bwire Murabi (RW 13) who read and confirmed the contents of his affidavit sworn on 25th June, 2007. He denied averments made by Regina (P.W. 9) that on 26th December, 2002 he was with her at the Respondent's residence at Port Victoria and that he with Paul Oyindi Masinde (RW 6) received Shs.12,000/= from 2nd Respondent to induce the voters to vote for him. He said he was an agent of the 2nd respondent and attached/exhibited the letter of appointment and oath of secrecy. He also

annexed a copy of guidelines distributed to the agents when they were called for a meeting at 2nd Respondent's residence for training and discuss plans and preparations for the polling day. All agents were paid Shs.1,000/= and he also received the same. He did not see Regina or was not with her on that day. He also did not see nor was he with Paul Musinde on that day who is married to his niece.

After meeting at 2.00 p.m. he went to Bulwani village – his home. After dinner he went to Bulwani Polling Station at 9.00 p.m. and spent night there. He named his fellow agents and he and one Timothy Bwire Onjaro relieved other two agents who had accompanied the ballot boxes and spent night at the polling station.

He denied having made any list and having made one with Regina.

In response to questions raised by the Petitioner he agreed that Hermann was the Chief NARC co-ordinator and Michael Congo was in charge of briefing of agents. He denied that he was a liar. He reiterated incident of non-distribution of the shoes by Regina. (P.W.9) and that she was put off by that incident. He did not know she was a polling agent like him.

R.W. 14 is Fredrick Adeyo Achami and was interpreted in Kiswahili the contents of his affidavit sworn on 26th June, 2007. He was requested by 2nd Respondent, after he won the nomination from NARC on 20th November, 2002, to be his subscriber and he agreed to do so.

On 25th November 2002 he arrived the nomination centre at 10 a.m. and joined Rumanus (R.W.12) to await 2nd respondent. At around 11 a.m. he came in his Peugeot 504 saloon followed by other vehicles. They all checked their documents and then went towards the door at the nomination room. At the instructions of security officer, only five of them entered.

He then narrated that on presentation of the papers by 2nd Respondent the 1st Respondent asked him which party he belonged to. When the answer given was NARC, he declined to accept his papers as the Petitioner was already nominated. The 2nd Respondent tried to explain and then he was asked by the 1st respondent to wait outside as he consulted. When they got outside the 2nd Respondent explained to the subscribers and added that when they were leaving the room the 2nd Respondent was saying that he had to go to Nairobi to seek the intervention of NARC Headquarters.

The crowd came closer shouting that he was compromised. Within few minutes, there was pushing as the crowd surged forward and who were closer to the door like them were pushed inside. He repeated the incident of 2nd Respondent falling and picking himself and was forced further into the room. He was near him. During the commotion which ensued, he saw 2nd Respondent and Michael Congo leaving the room and he decided to follow them. The crowd outside was charged and there was a lot of shouting. He decided to leave and then heard Inspector Ndagwa ordering to fire in the air.

On instruction received in the evening he went back to nomination centre, the following day 2nd Respondent arrived at 12.00 p.m. and his papers for nomination were accepted.

It was stated in cross-examination that there were about 3000 people outside the nomination centre. He conceded there was security and he saw Inspector Ndagwa outside. According to him they were inside the nomination room for about 4 to 5 minutes. The 2nd Respondent was unhappy on the denial of acceptance of papers. The crowd outside consisted of supporters of all the candidates.

The 2nd Respondent was telling them as they were coming out of the room that he had to go to Nairobi. As they were coming out the crowd started coming closer. The 2nd Respondent addressed the subscribers and the crowd seemed to have got the news and he saw people shouting and coming inside. They were pushed inside when 2nd Respondent was addressing his subscribers and then stated that he found the crowd while coming out and who pushed them. 2nd Respondent fell and picked himself and did not carry

any stick and that he immediately managed to struggle out.

I do note the discrepancy of this evidence with that of other witnesses.

There were two officers inside the room but did not see Inspector Ndagwa inside.

He did not see the other candidates and he ran immediately after he managed to come out but had seen them earlier.

All those witnesses stated that they did not have personal differences with Regina.

Mr. Onalo did not examine the witnesses as he saw the witnesses sitting outside the court in annex chamber and at that time he was examining P.W.12.

I must note here that I myself saw Mr. Onalo's assistant Phydalis Owesi whispering in his ears at 12.45 p.m. and pointing his fingers at the annex – next to the door of the court No. 1, when the court was about to rise. Phydalis agreed to my observation. Mr. Onalo did not bring to the attention of the court this fact at 2.30 p.m. when the court sat after the recess or at the time when he finished the cross-examination of R.W.12 who was second but one from this witnesses.

2nd Respondent then took the oath and read and confirmed the contents of his two affidavits both sworn on 27th June, 2007. According to him, he won the nomination for NARC after nomination exercise was carried out.

On 25th November 2002 he, accompanied by his proposer, seconder and subscribers, arrived at about 11.00 p.m. to the nomination centre and found a large gathering of members of public. He had all the required documents for nominations. It took them 15 minutes to check on all documentation including those of proposer, seconder and subscribers. Police officer on the door asked him not to enter with all subscribers.

He went inside with his proposer and seconder and two subscribers. He repeated what was said by others that on entering and on presentation of his papers the 1st Respondent declined to receive his papers. According to him his nomination was a matter beyond doubt and tried to persuade the 1st Respondent that the Petitioner could not be genuine or lawful candidate. After his plea 1st Respondent asked him to be given some time and to wait outside. He left the room in a civil manner with his people and went to inform the group of subscribers who were outside, that there was a problem as the Petitioner had already presented his nomination papers earlier. While he was coming out with his people from the room he informed them that arguments with 1st Respondent would not resolve the problem. As the nomination was for two days, he had time to seek NARC's intervention and he informed his subscribers outside accordingly.

He could hear the crowd shouting that he was compromised by KANU but did not see them coming. Suddenly the crowd surged forward and he found himself being pushed and forced back into nomination room. He reiterated his fall and getting up as testified earlier and was pushed forward inside. Inside, the commotion ensued with lot of pushing and shouting. He heard people demanding to be told why his papers had not been accepted. He struggled to get outside and Michael Congo followed.

He planned to take 3.30 p.m. flight. The roads were in very bad state and managed to reach Kisumu at about 3.00 p.m. He exhibited his ticket and boarding pass. Upon arrival he went to NARC Headquarters and met with the officials including the Chairman Mr. Wanjala Welime and Secretary Mr. Alex K. Muriithu. They were able to see from the records sent to them by Hermann Ogulla that he was the legitimate candidate for the party. He was given a letter dated 25th November, 2002 signed by the two officials. He already had a NARC certificate for nomination dated 22nd November 2002 bearing No.2295. He was given a composite list of NARC Parliamentary Candidate which had been forwarded to the 3rd Respondent which was downloaded for him and he produced it in exhibit "Ex. RBSW – 4".

This list became a serious bone of contention as in one of the pages of the list served on the Petitioner and 1st and 3rd Respondents showed on page 16 that it was dated 21st March 2002 when NARC was not in existence. Other pages also show a thin black line at the right side bottom of the pages.

The 2nd Respondent only said that he was given the said list by the NARC Headquarters and he picked it up lying there. He denied that the list is a forged document prepared by him to mislead the court.

He also produced list of Parliamentary candidates published by Electorate Commission of Kenya on 29th November 2002 and also a list of female and male candidates. He also stated that the Petitioner could not have won NARC nomination as it was he who had won the same and results thereof were duly signed by agents of all the candidates. He reiterated the procedure before the nomination exercise was completed. He asserted that the Petitioner knew he was not acting honestly and in the circumstances he knew he was causing anxiety and tension with the general public when he claimed to be the candidate for NARC and proceeded to present his papers.

He denied specifically all the averments and allegations made in the petition and those by the witnesses from the Petitioner and the 1st and 3rd Respondents. I note paragraphs 24 to 34 of his first affidavit.

As regards allegations at Sifugwe Polling Station, he stated that he only talked to his agents as to the position of the station who complained that Presiding Officer was making ballot papers for illiterate voters without allowing the polling agents to witness the making of ballot papers. He recorded the complaint in the book kept by 3rd Respondent to record such complaints.

The Presiding Officer stated that he was not supposed to write on her book and tore the two pages which he had written. He was not happy about that incident but he left for other stations as the polling was about to stop. He also did not see any NARC agent bribing the voters at that station with Shs.40/= each.

Then he described his relation with Regina and mentioned the incident of non-distribution of shoes given to her and how she has been insisting of getting more financial assistance from him every time and that she also lied about the incident of 26th December 2002 where she was not present and she was not invited by him to come either directly or through other persons.

He denied averments made by her as regards distribution of money by him to induce voters to vote for him. He reiterated the purpose of the meeting at his residence on 26th December, 2002 as testified by other witnesses.

He denied being involved in any acts of violence against the 1st Respondent or his officials and did not agitate any of his supporters including proposer, seconder and subscribers. According to him, it was a spontaneous reaction of many people present at the nomination centre when they learnt he was not allowed to present his nomination papers. He was the sitting M.P. for the Constituency and was nominated once again to contest the Parliamentary seat from Budalangi.

Then he explained what transpired on 21st December, 2002 when he was summoned together with Prof. Ojiambo and James Osogo to appear before Electoral Conduct Management Committee to provide information during the hearing of complaints regarding Budalangi Constituency. The summons did not inform that he was to face personally any charge. He went with his lawyer for abundant caution and said that is a habit of politicians. He stated that no charges were leveled against him, nor was he told to bring any witnesses to defend himself. All the three candidates made statements informally in the presence of each other without being sworn. 1st Respondent was not present nor were his letter read over to him. No one asked him any questions and he did to neither of the three candidates.

He was surprised to know that next day in the purported ruling he was found to have broken law and fine of Shs.50,000/= was imposed on him. He has filed a proceedings under Constitution to challenge the

said ruling which is pending hearing.

In the supplementary affidavit he exhibited declaration to the result of election, certificate thereof showing that he won the election by securing 9132 votes.

In cross-examination he stated that on his presentation of the papers the 1st Respondent asked him on which Party Ticket and on his answer he declined to accept my papers. He pleaded with him for about 20 minutes and he felt that after such pleading, arguments will not resolve the problem. He agreed that the 1st Respondent did ask him to wait but he felt that once the nomination of the Petitioner was accepted he had to take quick decision and he could manage to resolve only if he could take 3.30 p.m. flight from Kisumu to go to Nairobi.

When he came out he briefed the supporters for about 2 to 4 minutes. The crowd outside had already sensed due to delay and his failure to cheer on coming out and they started drawing nearer when they did not see him cheering. He commented that testimony of Achemi (RW 14) that they were pushed inside when they were coming out was not factual. He denied that with the delay and not cheering as well as his addressing the subscribers, and information that he had to go to Nairobi could have angered the crowd who expected his nomination. He stressed that they were waiting for him to break the news which they did not get and that they were deprived of their right to choose.

He denied to the suggestions that his not being cheerful was not right for a leader and that he failed to take necessary steps to avert the looming incident. I must state here that he was not told by the counsel what actions he should have taken to avert violence and intimidation as is stipulated in Rule 5 of the Election Code of conduct. He added that as the crowd surged he thought they wanted to talk to him and he did not anticipate any imminent danger till he was instead pushed and he did not anticipate any imminent danger till he was so pushed. He also stated that D.O's office is in "U" shape and there was no escape. He did not have any bodyguard. He was in opposition that time he mused.

He denied the averments made by the 1st Respondent and stated that he was inside the room for about 3 minutes before he managed to get out. He denied that Inspector Ndagwa took him out and recalled that he saw him when he got out of the nomination room. He did not have any stick that day and do not carry any. He denied having incited or helping his supporters to overturn any table in the room.

He estimated the distance between Budalangi and Port Victoria about 12 km. A cycle rider can take 35 to 40 minutes. He denied that news of acceptance of nomination of other candidates was known to him. He was also not told by his subscribers about the nomination of the Petitioner when they were checking the documents. He did not even know that the Petitioner had been there. The crowd cheered on seeing him arrive at the Nomination Centre so it could not be true that they knew the nomination of the Petitioner.

He commented that if Mr. Mukele the Vice-Chairman of Electorate Commission of Kenya told the court that there was no composite lists he was misleading.

He reiterated what he did at Sifugwe Polling Station I must note that the Petitioner also candidly accepted in court that he put his comments in a notebook of the presiding officer when this witness referred to that fact.

He also reiterated what happened before Electoral Conduct Management Committee on 21st December 2002 chaired by Mr. Mukele the Vice Chairman of Electorate Commission of Kenya.

He added that during the hearing everyone was accused including Electoral Commission of Kenya as per Mr. Osogo. Even he stated that the ruling and proceedings did not capture vote buying complaints against – KANU.

He added that they were not allowed to say much as the committee was hearing many complaints on the

same day. They were before the Committee for 30 to 35 minutes and that usually politicians always take a lawyer with them and he did not anticipate any problem. His lawyer only commented after all have finished talking.

He made comments on his affidavit in support of Ex- Parte summons filed by him in the pending case. He stated that all his averments are made after the ruling was delivered and he became aware that there was a complaint against him. In brief, in the said affidavit he has mentioned that he was charged and found guilty among other averments.

As per Mr. Kyalo, case of the 1st and 3rd Respondent was that the charges were leveled against the 2nd Respondent, that he was heard and thereafter fined by the said committee, on being found guilty of Electorate Code of Conduct.

The 2nd Respondent continued by stating that he was made aware of the dismissal of his earlier case Misc. Application No.13 of 2003 when the ECK started pestering him to pay the fine and it filed the suit to compel him to pay the fine. Before that Mr. Mukele had been telephoning him to pay the fine.

In response to question by Mr. Onalo he conceded that the result of Election was subject to the challenge.

He reiterated that the hostility of crowd was due to nomination of the Petitioner as they expected him to be nominated.

He came to Nairobi as it was only the party who could confirm who was the right candidate. He was not aware whether 1st Respondent carried out any investigation before his return on 26th November, 2002. On that day he only had an additional document by way of a letter of 25th November, 2002 as he already had the certificate of nomination of 22nd November, 2002.

He agreed that the composite list was not signed by any official of NARC. He denied the allegations that it was a forgery.

He agreed that he was informed by the 1st Respondent that he had accepted Petitioner's nomination on NARC ticket.

On 26th he did not hear 1st Respondent stating that he did not nominate the petitioner as his papers were destroyed by 2nd Respondent but he heard the 1st Respondent saying that he was nominated on account of his papers. He denied that papers were destroyed by him as alleged in affidavit of 1st Respondent.

He also stated that if he would not have picked himself up after his fall he could have been trampled. He denied he with his supporters destroyed the papers. He averred that the 1st Respondent refused to show him papers presented by the Petitioner.

He did not know that the Petitioner did not have copies of his documents as put to the witness by the Petitioner.

He agreed that before nomination exercise, the candidates had to go to their respective party and after paying the fees of shs.10,000 had to go to NARC and pay additional shs.30,000/=. The papers had to show that they were members of NARC through their original party which was Ford Kenya both for him and the Petitioner.

He was taken into details of the distance and time it takes to travel from Budalangi to Kisumu. He denied as put to him that even a leisure driver could not take one and half hours to reach Kisumu.

He reiterated that the roads were repaired starting from 2003 and as agreed by even Professor Ojiambo

the roads were rough although of tarmac.

He denied averments by Inspector Ndagwa that after coming out of nomination room he told the Supporters that there would not be any election in Budalangi until the Petitioner's nomination was withdrawn.

He was not aware of the destruction of KANU Office, but the politician did shout that he was compromised by KANU.

He found 1st Respondent and his officials ready with receipts books and was not aware for necessity of a fresh one. He was shown receipt numbers of his receipt and that of the Petitioner's. Apart from the fact that they were not in sequence no further evidence was put forth. He stressed that he had not seen any torn papers till the day.

He denied he reached Musoma Primary School on the polling day and denied the averments to that effect by Musoma (PW 1) also a candidate. He agreed that application by the Petitioner to call the Presiding Officer Mr. Ogao was not allowed by the court.

He did not take any action on the conduct of Sifugwe Presiding Officer as by that evening he knew he was winning.

He reiterated that Regina was suspended after she failed to distribute the shoes given to her.

He did not appoint her as a polling agent. He insinuated that she could have forged a letter if she claimed she had one. If not, she could have annexed the same to her affidavit if she had one.

The training guidelines produced has a date of election. It is published by a Non Governmental Organization under umbrella of Ufungamano.

He conceded that letter of invitation referred by the witnesses for the meeting of 26th December, 2002 is not produced by any one. Hermann Ogula was not in the said meeting. He denied the meeting was for associates to coordinate bribery. He denied having caused any injury by him to some one when was being served. He was shown a P3 form but stated that he was not called to give any statement by any one.

He denied having lied or misled the court.

In re-examination he confirmed that the meeting of 26th December, 2002 was for polling agents. He also stated that the Petitioner has not given his evidence on acceptance of his nomination. He has told the truth and stated that his testimony on rough condition of the roads has been corroborated by Professor Ojiambo.

This is the evidence led before me. I have advisedly taken efforts to put relevant evidence elaborately. This was to avert any misconception as regards evidence which I am going to consider hereafter. I had on many occasions felt like following the foot steps of Hon. Kariuki J. to disqualify but withstood the impulse in the interest of justice as well as to perform my duty as a Court to finalize this long pending petition pending even at the fague end of the present parliament term.

From the evidence led before me it comes out clear that the case of the Petitioner mostly rests on the evidence of Regina Anyango Moyuja (PW 9), that led by 1st Respondent and 3rd Respondent and on the Ruling of Electoral Conduct Management Committee which fined the 2nd Respondent after holding that he had broken the law and provisions of Electoral Code of Conduct (Fourth Schedule) of National Assembly and Presidential Elections Act (Cap 7). (Hereinafter referred to as "*The Act*"), as provided under its paragraph 3, 6 and 8.

There are several disputed or indisputable facts arising from the evidence before the court.

- (1) The Petitioner and 2nd Respondent were originally members of Ford Kenya, a political party which allied to form a political party known as National Alliance (Party) of Kenya – popularly known as NARC.
 - (2) The 2nd Respondent was the sitting Member of Parliament from Budalangi Constituency and at the time was a member of opposition.
 - (3) On 20th November 2002, NARC conducted the nomination exercise to elect a candidate for Budalangi Constituency as per NARC Nomination Rules.
 - (4) The Petitioner was also an aspirant for the said candidature and participated in the Nomination exercise which was by ballot.
 - (5) The 2nd Respondent won the nomination securing 450 votes against 160 votes secured by the Petitioner.
 - (6) No appeal or complaint was raised against the result of Nomination which was declared and Certificate of Acceptance of Results for Preliminary Nomination signed by the Petitioner was issued by the Presiding Officer of the Nomination process.
- (The facts on item Nos. 3, 4, 5 and 6 are verily evidenced in testimony of the NARC Co-ordinator Hermann J.L. Ogula (RW 11))
- (7) On 25th November 2002 which was the Nomination Day for general election 2002, the Petitioner was the first to arrive to present his papers. (His time of arrival as 6.30 a.m. in paragraph 6 of affidavit of Inspector John Ndagwa (ECK W 2) was later changed during his testimony to be around 8.00 a.m.). Time of arrival of no other candidates was changed.
 - (8) His Nomination Papers were accepted by the Returning Officer (1st Respondent) and was declared nominated on NARC ticket.
 - (9) The 2nd Respondent arrived to the Nomination centre at around 11.00 a.m. to present his nomination papers which involved certificate of Nomination from NARC bearing No.2095 and was dated 22nd November 2002.
 - (10) The 1st Respondent declined to accept 2nd Respondent's papers informing him that he had already accepted papers of the Petitioner earlier on the NARC ticket, and after some discussions with the 2nd Respondent, asked him to wait outside while he consulted the Head Office.
 - (11) The 2nd Respondent obliged and went out.
 - (12) After sometime the crowd entered inside the Nomination room including 2nd Respondent and some of his supporters.
 - (13) The commotion ensued and the nomination exercise was suspended.
 - (14) The materials of ECK and nomination papers were torn.
 - (15) 102 rounds of ammunition were fired by the Security Officers on duty to contain the crowd.
 - (16) There were two officers inside the nomination room.
 - (17) The 2nd Respondent went to Nairobi to seek intervention of NARC Headquarters.

(18) On 26th November 2002 he returned to Nomination Centre at around 12.00 p.m. and his nomination papers were accepted.

(19) All other aspiring candidates except the Petitioner also came to the Nomination Centre on 26th November 2002 to re-present their papers along with issued receipts of Shs.5,000/= and were re-affirmed as nominated candidates for their respective political parties.

(20) The Electoral Conduct Management Committee (hereinafter referred to as 'ECMC') issued summons on 2nd Respondent, Prof. Joseph B. Ojiambo (PW 10) and Mr. James C.N. Osogo (PW 5) to attend before it on 21st December 2002 at 12.00 p.m. to provide information during the hearing of complaints in their constituency which involved Assault and Robbery of (sic) the Returning Officer on 25th October 2002 in Budalangi Constituency (The said date was corrected to read as 25th November 2002 during testimony of Gabriel K. Mukele (ECK W4) the Chairman of 'ECMC').

(21) All the three candidates appeared before ECMC who after conducting a hearing found that the 2nd Respondent broke the law and the Electoral Code of Conduct as provided under paragraphs 3,6 and 8 of the said code. It sentenced him with a fine of Shs.50,000/=.

(22) The 2nd Respondent filed a Judicial Review Application being Misc. C.A. No. 13 of 2003, which was dismissed ex-parte.

(23) Thereafter ECK filed Misc. C.A. No.245 of 2004 seeking for the speedy recovery of the fine of Shs.50,000/=. The 2nd Respondent has in turn filed a Notice of Motion raising constitutional issues whereby the Misc. C.A. No. 245 of 2004 is stayed pending hearing of Notice of Motion dated 27th May 2004.

(24) The 2nd Respondent won the general election, 2002 from Budalangi Constituency securing 9132 votes.

(25) Thereafter the Petition was filed.

In my view from the above evidence and facts before the court the following issues arise for this court's determination.

(1) What is the standard of proof in election proceedings to prove the offences under the Election Offence Act (Cap. 66)?

(2) Whether the nomination of the Petitioner by the 1st Respondent was final and whether the 1st Respondent became functus officio.

(3) If so, whether the election of the 2nd Respondent is rendered null and void or voidable.

(4) Whether the Petitioner has proved as per the applicable standard of proof that the 2nd Respondent either by himself or through his supporters committed election offences like Bribery, acts of violence and intimidation as alleged in the Petition.

(5) What is the effect of ECMC Ruling and imposition of the fine on the 2nd Respondent in respect of the present petition and the allegations of violence made therein.

(6) What is the effect of the existence of Constitutional reference before the Constitutional Bench as regards this court's powers under the Election Law.

(7) Whether the ECK failed to provide security thereby infringing the rights of the Petitioner and voters.

(8) Whether NARC should have been a party in the Petition.

If I can condense the above points I have to determine the validity of election in question, on two main grounds:-

(1) Election offences

(2) Acceptance of Nomination papers by the 1st Respondent on 25th November 2002.

Inevitably I shall have to make useful finding on standard of proof in this case so that basing on such finding I can proceed to determine other complaints of the Petitioner.

Standard of Proof:

The Petitioner and the 1st and 3rd Respondents submitted through their learned counsel that the issue of standard of proof is adequately established in the Election Petition No. 3 of 1979 between Archbishop Stephen Ondiek Oluoch and Stanley Thuo & Another.

The court therein, after considering the allegations made before it observed, namely:

“--- then the standard of proof required in our view is that prevailing in any Civil Case where an allegation of what amounts to a criminal offence, such as fraud or conspiracy, is made, and it has to be proved to a standard to be measured by considering in its entire context, the gravity of the issue before the court.”

Although it was not specifically mentioned by either of the counsel, I note that the court proceeded further and observed after considering the consequences of finding of guilt in respect of Election Offences: namely;

“To a sitting member, and hardly less for an aspiring member, that must be a matter of utmost gravity and so we regard standard of proof required by this court, without relying on undue technicalities, to be that of removing from our minds any question that the event alleged took place”. (emphasis mine)

Thereafter the court also observed that the burden of proving very serious allegations of bribery and/or treating lies on the Petitioner and his own witnesses. I shall revert to this observations later in the Judgment.

With the above authorities, Mr. Onalo the Petitioner in his submissions rubbished, the “*foreign authorities*” relied upon by the 2nd Respondent. These authorities are from Tanzania, Indian Supreme Court, South African Bench consisting of eleven Judges. Be that as it may it was further submitted that he would not even pretend to distinguish the same.

In any event, our court in Election No. 1 of 2005 between Hassan Ali Joho and Hotham Nyange has adopted the standard of proof held in Tanzanian case of Mbowe v. Eliafoo (1967) E.A 240 to the effect that the election offence has to be proved to the satisfaction of the court and that the court cannot be said to be satisfied when it is in doubt. It went further to state on page 10 of the Judgment and I quote: “*where a reasonable doubt exists then it is impossible to say that the court is satisfied.*”

The court in the said case also referred the case of Joseph Wafula Khaoya v Eliakim Ludeki & Lawrence Sifuna (Election Petition No. 12 of 1993) where it was held that a very high degree of proof is required.

In short our courts have been so far, reluctant to put in certain terms the standard of proof required in the Election Petition. However, it is certain that the standard of proof is not, in any event, the balance of probability. I therefore cannot, with due respect, agree with Mr. Onalo, the Petitioner in that respect.

Mr. Orengo, the learned counsel for the 2nd Respondent, took the court through various provisions of relevant laws as to the consequences a candidate would face if the election offence is found to have been committed.

Section 31(1) of the Act stipulates:

“At the conclusion of the trial of a petition, the Election Court shall report in writing to the Speaker whether an Election Offence has or has not been proved to have been committed by any person in connection with the election, and the names and description of the persons, if any, who have been proved at the trial to have been guilty of an election offence.”

He emphasized the words *“who have been proved at the trial to have been guilty of an election offence.”*

He also referred to section 26(1)(e) of the Act which deal with striking off a vote by a person held to be guilty of election offence. Section 35(4) of the Constitution was noted which stipulates for disqualification from being nominated for election as a member of National Assembly for a period not exceeding five years.

Section 3 of National Assembly (Powers and Privileges) Act (Cap 6) which deals with the provisions of appeal against conviction of Election Offence.

Thereafter a very innovative issue was raised by Mr. Orengo under the provisions of Section 77 of the Constitution and he urged this court to hold the election offence in pari passu with criminal offence and consequently all the rights and obligations therein are applicable to the trial under the Act.

He urged that for this court to apply a lower standard of proof from the one implied in the provision of Constitution and adopted in common law system of beyond reasonable doubt, a specific provision in the law has to be provided for. He relied on Section 77 subsection 2(a), (8) and (12)(a) of the Constitution. He emphasized that the presumption of innocence until proven guilty stipulated in Section 77 (2)(a) and the provision of Section 77 (12)(a), to the effect that unless a burden to prove is imposed on an accused person by law, the burden is on the accuser.

He advanced his submissions by stressing that this court is an Election Court, jurisdiction whereof is provided under Section 44 of the Constitution and is established under the Act. It is a special court which cannot be termed either civil or criminal and its jurisdiction falls under Section 60(c) of the Constitution. It has to exercise its peculiar and additional jurisdiction in juxta position with all principles of laws.

The Constitution donates the power to decide whether a candidate is validly elected and whether a seat has fallen vacant, as per section 44 thereof.

The jurisdiction and/or power to decide these two issues thereafter flows from the Act.

If the court has to make a report (as stipulated under Section 31) that a person is proved after the trial to be guilty of an election offence, then he urged that the standard of proof has to be the same as applied before a criminal court.

He then commented on the case of Archbishop Ondiek’s case (supra) and emphasized that the court required therein that the evidence before the court must show the chain. The witnesses, in that case stated that they handed over the ballot papers to the Respondent. Thus, in actual sense, the proof was beyond reasonable doubt.

He disagreed with Mbowe’s case (supra) and lamented that sufficiency of proof also is not an adequate standard of proof.

He pointed out that even in our Criminal Procedure Code there is no specific section which stipulates

the standard of proof. It only talks about ‘proved to be guilty’ which are the same words used in Section 31 of the Act. Thus, it follows that the standard must be beyond reasonable doubt.

The courts in general while determining election offences have adopted a very cautious approach. They have stated “*as per the gravity of the issues before the court.*”, as earlier observed.

He pointed out the case of Election Petition No. 10 of 1983 between Johnson Nzuki Ndundu and Moses Okal & Another wherein the court held –

“on the other hand, there is no dispute that the burden of proof on the Petitioner is that he must prove the offence alleged to a high standard leaving the court with the assurance that they were committed. These are grave offence because the sanction imposed by law would have a serious effect upon Mr. Munyasya. Therefore we set out realizing that we must examine the evidence carefully”. Emphasis mine.

Indian Supreme Court on the other hand, under similar provisions of laws, has come out boldly. In the case of M. Narayan Rao V G Venkata Reddy and another. 1977 (AIR) (Sc) 208, it has been held that

“the charge of Commission of corrupt practice has to be proved and established beyond doubt like a criminal charge or a quasi-criminal charge but not exactly in the manner of establishment of guilty in the manner of criminal prosecution giving the liberty to the accused to keep mum. The charge has to be proved on appraisal of the evidence adduced by both sides especially by the election Petitioner”.

The court also considered the serious consequences of setting aside of an election.

It was stressed that the cogent, credible and consistent evidence is required.

To strengthen the submissions Section 34A (5) of the Act was cited where the ECK has a discretion to appoint a prosecutor for an offence under Electoral Code of Conduct and such officer would have powers conferred upon a public prosecutor by the Criminal Procedure Code.

Mr. Orengo paused to wonder if the Electorate Commission of Kenya is enjoined to appoint a prosecutor having a prosecutorial powers under Criminal Procedure Code and given that high standard while prosecuting an offence under the Electoral Conduct Code and the Act, what about this court?

This court, according to him cannot do anything else than be very conscious of the standard required.

He relied on Election Appeal between Amolok Chanad Chhazad & Bhagwan Das Arya & Another vs A.I.R. (SC) 813 before the Supreme Court of India headed by Ex Chief Justice P.N. Bhagwati, wherein it was held on page 818:-

“The Election Petitions alleging corrupt practices are proceedings of a quasi-criminal nature and the onus is on the person who challenges the election to prove the allegations beyond reasonable doubt.”

He thus finally urged that this court should without any inhibition, come out and declare that the burden of proof in the election offences is beyond reasonable doubt, and not preponderance of evidence.

Mr. Mwenesi the learned counsel for the Petitioner did not totally ignore the foreign authority unlike Mr. Onalo the Petitioner. He tried to stress that even the Indian cases of Rao and Amolok (supra), the courts have not come out clearly that the trials of corrupt practices under the Election Act are Criminal Proceedings to bring them under the Constitutional Provisions stipulated in section 77.

He tried to reason out his submissions by going back to the purpose of election cases which according to him is the expediency, and he stressed that the same is the genesis of the election process.

Mr. Mwenesi took me to section 23 of the Act which makes provisions for the procedure of the election court.

He emphasized on the provisions of section 23(1) (a) which states that the summoning of the witness and swearing them, as far as circumstances admit, shall be as in a trial by the High Court in the exercise of original civil jurisdiction. He also pointed out that section 23(1) (d) enjoins the election court to decide all matters before it without undue regard to technicalities.

With due respect to Mr. Mwenesi none of these provisions really helps the court to determine the issue of standard of proof either in respect of election offences or in respect of issues dealing with validity of the election which are the issues before this court.

In my view by conceding that the consequences of making a report by the court under section 31 of the Act are grave and by stating that the consequences should not deter the court from making the report, he has impliedly agreed that the standard cannot be the one applicable to civil proceedings.

To deliberate on this issue I shall first deal with the Election Offence Act (Cap 66). It can not be disputed that

(1) it creates offences concerning the election process which are punishable by an imprisonment of not more than five years.

(2) Its provisions are couched in Penal language.

(3) Even Part III of this Act which is, titled 'Corrupt Practice' mentions the wording 'Every person shall be guilty of the offence ---'

It is moreover admitted that if a person is proved to be guilty of any of the offences, he shall face grave consequences. I may also add that the consequences of the election offences are felt widely as it shall also affect the right of franchise given to every elector to choose freely as well as the fundamental structure of democracy upon which our government stands. These are the serious effects over and above the personal consequences to be faced by the Petitioner as well as the candidate or ECK.

It is stated that the jurisdiction of the ECK is of a quasi-judicial nature who deals with the infringement of the Electoral Code of Conduct and the offences of non-subscription to the Code of Conduct as per section 34A (3) of the Act, by any party or candidate.

Thus in my considered view, the trial of the election offences by the election court ought to be on a higher pedestal than that of a Committee appointed by the ECK.

I shall thus endeavour with all humility to find a proper position of the election court vis-à-vis Election Offences Act. I shall state that the offences under the said Act are serious and are of criminal nature without the fringes of a purely criminal offence under the Criminal Jurisdiction like right to be silent etc. From the authorities cited by the Petitioner as well as the Respondent one factor comes out loud and clear that the courts were hesitant to take the issue of election offence with light heart. I need not reiterate these observations as I have amply put forth the same hereinbefore. I shall have no hesitation, after due consideration of laws, to hold that the election offences are quasi-criminal in nature and the election court is a special court dealing with election of National Assembly which is a symbol of freedom and democracy. Its jurisdiction cannot be assimilated with the courts dealing with civil cases involving matrimonial offences or fraud etc.

The burden of proof that a person is guilty of the election offences are on the Petitioner and his own witnesses. If the court has reasonable doubt then, it cannot and shall not find the person accused of such offence to be guilty.

After holding as aforesaid I shall now consider the evidence as regards election offences of undue influence by Violence and Intimidation as well as Bribery.

I may like to begin with allegations of Bribery. I shall at this juncture observe that none of the incidents

of election offences alleged in the petition and testified has been reported to the Police or Law Enforcement authority.

(A) **Bribery:**

The Petitioner relies on the testimonies of Elisha Jacob Musoma (PW 1), Regina Anyango Mayuka (PW 9) and that of Dorice Mwanika Muchule (ECK W2)

The allegations in respect of this offence is contained in paragraph nos. 21, 22 and 23 of the Petition.

Particulars also were given by the Petitioner on request.

I have already specified the brief version of the relevant evidence of these witnesses in the earlier parts hereof.

PW1 after re-presenting his papers on 26th November 2002, while driving to Mau Mau, he saw a crowd gathered, he got out and seeing the 2nd Respondent there he retreated in fear of trouble. Even after stating so, he went ahead and testified that he saw 2nd Respondent not only distributing money but also saw the notes in denomination of Shs 200 and Shs 50/= being distributed. There was a crowd and 2nd Respondent was amongst them. Then he further stated that someone complained that he should be given Shs.200/= instead of Shs.50/= as votes are equal. I shall have to note that this incident has not been mentioned in the particulars supplied along with that of Ruambwa. I may hasten to state that the words "*among other places*" appearing in the particulars supplied cannot cure the absence of its mention specifically, when PW1 stated that he had informed of this incident to the Petitioner before he filed this petition.

Going further he talked about the next day, and gave its date as the Polling day i.e. 27th December 2002, and stated that he saw supporters of 2nd Respondent dishing out money to the voters inside the Musoma Primary School Polling Station and inside the polling room his agents were openly campaigning for the 2nd Respondent. He reported the same to the Presiding Officer, Mr. Ogao who ejected the agents and promised to report the incident of bribery. Mr. Ogao did not give evidence and on top of this 1st Respondent who was the Returning Officer have forcefully denied of having received any complaint of bribery on the Polling day. I also note that this witness has not given names of either a voter or an Agent receiving or giving bribery.

Now I come to the evidence of (PW 9) Regina. I cannot ignore consistent evidence of an incident of non-distribution of shoes by her for dancing group. In re-examination she, of course, put the incident having taken place on 23rd December, 2002 to include the same as a part of bribery. But I cannot accept the same as a credible evidence coming at the fague end of her evidence and not from her affidavit. Her evidence of being an agent of a candidate (without giving his/her name) from NARC given during cross-examination cannot be relied on much in juxta position with consistent responses from the witnesses of the 2nd Respondent to the effect that after the incident she was suspended. I also note further that, she had specifically stated that she was never inside the Polling room and that agents of 2nd Respondent were inside. Then where was she as a polling agent? She also changed her version by stating that it was the dancers who picked the shoes from the offices of Ford Kenya and in re-examination once again she tried to improve her evidence by saying that it was 2nd Respondent who himself distributed the shoes along with clothes and scarves.

She also changed like a wind, her version on the manner in which she was invited to the residence of the 2nd Respondent on 26th December, 2002. I also note her testimony to the effect that the supporters of 2nd Respondent milled outside the residence of the 2nd Respondent, and that they were called inside by Michael Congo as per polling stations. I then pause and wonder how she could see what happened as regards the supporters in respect of other polling stations?

Mr. Onalo urged me to find in the same terms as finding of the court in Election Petition No. 26 of 1979

between Nicholas Wanyama Okada and another, and James Charles Nalchwangu Osogo wherein the court relied on the evidence of witnesses who had bad blood with the Respondent as they were simple rustic witnesses.

With due respect to Mr. Onalo, I do not accept that Regina falls under that description. Moreover the court, in Osogo's case (supra), had other evidence from the witnesses of authorities.

In short I have to take the evidence of Regina with greatest caution.

Even without prejudice to that, except of mentioning the names of known supporters of the 2nd Respondents having received bribe money, she totally failed to give even one name of the voter who was bribed, even by her during the eve of the polling day. As stated by Mr. Orenge, I do agree that her evidence as regards very grave allegations does require support from other cogent, consistent and clear evidence.

The alleged lies of the 2nd Respondent during the previous proceeding in respect of this petition and his witnesses before me, as capitulated by Mr. Onalo cannot assist him with the onus to be discharged by him. I also get support from the evidence of Hermann Ogulla, the Chief Co-ordinator of NARC, who was not asked whether he distributed money to the Polling Agent for their allowances or checked their documentations or trained them. Moreover, Regina herself had agreed that 2nd Respondent was co-ordinating election of Budalangi Constituency.

The contention emphasized strongly by the Petitioner that the evidence by 2nd Respondent and his witnesses as to the payment of allowances on 26th December 2002 was an afterthought is not valid as Regina was asked and denied that the payment of Shs.12,000/= was to give to agents as allowances to Agents.

The evidence of Mr. Osogo (PW 5), as agreed by him, was on information and without disclosing its source. He, with a bit of arrogance, also deponed that he did not find necessary to divulge the source. Thus his evidence along with the annexures to his affidavit are nothing but hearsay evidence. It is also interesting to note when PW1 testified that Mr. Osogo's allegations made against him are not true but those made against the 2nd Respondent are true.

The last witness for this offence is Dorice (ECK W2). Her evidence in respect to the 2nd Respondent's writing on her notebook, tearing those pages and her reporting this incident in a separate report to 1st Respondent have been totally negated by the evidence of the 1st Respondent. The alleged complaints written by the 2nd Respondent on her notebook were concerning her permission to the strangers to vote and not allowing the NARC agents to check the mark on illiterate voters ballot put by her. I do note that these allegations could not have made her happy. Her allegation that she was asked by one SDP agent (not named) to come out and witness an agent of NARC distributing Shs.40/= to the voters in queue cannot be relied upon because first of all she did not name him and after or before ejecting him the report was not made to the police. Her evidence that she reported the same to 1st Respondent has been once again negated. I also note that the evidence of other witnesses is to the effect that Shs.50/= notes were being distributed while she talked about the distribution of Shs.40/=. I cannot really see how she could have seen the exact change of Shs.40/= from wherever she was shown by an unknown SDP agent.

In any event, there is no other evidence that the complaints of bribery by or on behalf of 2nd Respondent were received either by security officer or Administrative authority or by the Returning Officer.

From the evidence before me, I cannot with any justification find that I am satisfied as per the standard of proof as aforesaid in respect of the election offence of bribery or treating as per section 10 of the Election Offences Act.

I thus dismiss this ground shown in paragraphs 22 and 23 of the Petition and shall not make any report to

the Speaker under section 31(1) of the Act in respect of this head of election offence.

(B) Violence and Intimidation (Undue influence)

Once again it is true that the evidence for this issue has come from the witnesses called by 1st and 3rd Respondents. More specifically it is supported by the evidence of 1st Respondent, Inspector Ndagwa (ECK W1) and ECMC Chairman Mr. Mukele (ECK W4) and somehow from the documents produced by Jemminah Keli (ECK W5).

I have strived to detail the relevant parts of their respective testimonies in earlier part hereof.

Mr. Onalo submitted on this issue basing on the grounds of fraudulent destructions of Nomination papers and undue influence. He also relied on evidence of three contenders Mr. Musoma, (PW 1), Mr. Osogo (PW 5), and Prof. Ojiambo (PW 10) to the effect that they had testified that they were informed by the 1st Respondent that their nomination papers were destroyed by 2nd Respondent and it was stressed that the fact that the 2nd Respondent personally did not tear the document is of no avail as he was “*leading the squad*”. However, 1st Respondent has not stated that he told those witnesses as alleged.

He further contended that the violence which was perpetuated the previous day was to make him withdraw from the contest. He conceded, however, that the evidence of withdrawal as well as the evidence that he was prevented from re-presenting his nomination due to undue influence are not on record, but he added that the same is not an issue. What is in issue, is the undue influence on the 1st Respondent and the target was the Petitioner as his papers were destroyed. This fact came out from the affidavit of the 1st Respondent that he nominated the 2nd Respondent because of his papers and lack of Petitioner’s papers. The whole stress was on the contents of the letter dated 7th December 2002 written by the 1st Respondent and addressed to the Chairman ECK.

It is interesting to note that the Petitioner and the counsel of 1st and 3rd Respondents tried to interpret or change or explain the meaning of the certain and clear words of 1st Respondent, i.e. “*I was not intimidated*” only during submissions. What I cannot accept is that, without anything to support from the record, both of them tried to approbate and reprobate the evidence of the 1st Respondent. Except for his clear evidence of non-intimidation, they wholly rely on his evidence to prove the present issue. It may be prudent to restate the evidence of 1st Respondent when he stated that save for incident of 25th November 2002, the election was not rigged, unfairly conducted, interfered with or influenced by 2nd Respondent.

Mr. Onalo states on page 82 of his skeleton submissions and I quote:

“The first respondent’s averment was a sweeping denial of everything in order not to say anything incriminately against the 2nd Respondent. He was mindful of the fact that he had done enough to crucify the 2nd Respondent with regard to 2nd Respondent’s participation in nomination violence to suppress the Petitioner’s nomination.”

Can I, thereafter separate or divide the evidence of 1st Respondent and then rely on some part of his evidence and discard other part thereof?

The reliance was placed on the finding made, in Election Petition No. 16 of 1974 between Raphael Samson Kithika Mbanda and Luka Daudi Galgalo and Paul Joseph Ngei, to the effect that even if there is an evidence of withdrawal the court was not deterred to go behind and find that the undue influence was proved. I may only observe that from the facts of Ngei’s case there was enough evidence of undue influence and from the evidence supported by those of independent witnesses the court found what it found.

I have two versions of the incident of 25th November, 2002 which occurred at the Nomination centre and

as a result whereof the electoral documents and nomination papers were destroyed as evidenced hereinbefore.

I must note that no police record of the incident is before this court. The Petitioner's contention to infer any irregularity or interference by any section of authorities including that from the 2nd Respondent cannot be accepted without any specific evidence pointing to that direction. It is true that 2nd Respondent was a sitting candidate but I cannot also ignore the fact that he was an opposition candidate. I cannot ignore the struggle between KANU the ruling party and NARC the allied opposition to take control of the governance of the country. In the general picture of the above facts, without anything further, I cannot infer that the 2nd Respondent exerted influence on the police authorities not to take or neglect to take any positive action to bring the offenders to the book of law.

The police officers called by the Petitioner did not exhibit any doubt as to procedure that was followed after the incident. On the contrary PW8 Senior Superintendent of Police Mr. Kipkeyo specifically agreed that the inquiry file on incident of riots are not immediately opened. He added that after the situation has been calmed down, the complainant had to make a report and statement and in this case, as no complainant had filed any statement, inquiry file could not be opened. All the officers denied that they have received any complaint of violence against the 2nd Respondent. 1st Respondent also stated that he did not make any statement before or lodged a complaint as regards violence and robbery before any of the police stations. What he did was to write a letter to the Chairman, ECK on 7th December 2002 after about 12 days from the incident and also after the closure of the nomination process.

In all the cases relied upon by the Petitioner and 1st and 3rd Respondents, the court had evidence of the complaints and respective evidence of the officers who received such complaints along with the evidence of witnesses from the Petitioner.

I must consider very seriously the evidence of Inspector Ndagwa. He agreed that he hailed from the same location as that of the Petitioner i.e. Budalangi East Location. He also during his testimony corrected arrival time of the Petitioner from 6.30 a.m. to 8.00 a.m which he averred in his affidavit. I have endeavoured to detail his evidence and my comments thereon hereinbefore. I do reiterate the same here. There is no dispute that he was outside the nomination room until the commotion ensued. He had his two officers inside the nomination room which, as per evidence on record, was small and could accommodate 20 standing persons.

He saw the 2nd Respondent coming out when he went in the nomination centre to present his nomination papers on his arrival at about 11.30 a.m. When he was outside D.O.'s office, he saw the 2nd Respondent and his supporters retreat but after about 30 minutes, they stormed back. I shall pause here and do note that he did not tell the court what he saw within those 30 minutes and how the 2nd Respondent stormed back with his supporters. If by the time he went inside the crowd was normal, then I have total paucity of evidence when the crowd became uncontrollable to the extent that 102 rounds of ammunitions had to be fired.

His evidence becomes more confusing when he said that thereafter he heard noise and shouts of thief. Because of that he became curious and at that time he was summoned by the 1st Respondent into the main hall. How did the 1st Respondent manage to summon him to the room amidst the noise and mayhem and more interesting is to note that how he heard 1st Respondent's shout amongst the noise. I also cannot accept that he, who according to him was the officer-in-charge of the security, waited to be summoned even after he heard noises and shouts of thief behind the locked doors. What was he and of course his officers outside as well as the two officers inside were doing during this time.

It is also imperative to observe that the two officers inside were the first hand eyewitnesses as to how the 2nd Respondent entered and what happened before the entry of Inspector Ndagwa. None of them except him is before the court. Moreover he was in the room for 20 minutes after his entry from a window. According to him he saw then the torn documents and nomination papers. It was only after 20 minutes

being inside the room, he forced the 2nd Respondent out of the room and then instructed his officers to fire in air and thereupon 102 rounds were fired. His alleged statement made in O.B. of D.O's office is not before the court.

Inspector Ndagwa has testified in response to the cross-examination by Mr. Onalo that when 2nd Respondent had initially come out, he waited for 30 minutes and he told his supporters that if they did not remove the name of Mr. Onalo, there would not be an election at Budalangi as he had stealthily entered. But there is a paucity of evidence that after he uttered those words, what happened as he had, immediately before this evidence only stated and I quote:

“After 30 minutes 2nd Respondent came back to the Hall”. He did not state with whom, if he was with some one. These 30 minutes are 15 to 20 minutes from the evidence of 1st Respondent.

If 2nd Respondent, stormed back as is alleged, why he did not take immediate actions as a security officer in charge. I must note here that neither 1st Respondent nor him (who was in any event outside) did mention about the crowd entering and how they broke the demarcation line. According to 1st Respondent there were 200 people and I wonder then how and why he waited for him to be summoned by the 1st Respondent. All the observations made hereinbefore raise great doubt on credibility of the evidence of Inspector Ndagwa.

He tried to explain why he did not arrest either the 2nd Respondent or anyone of his supporters at the time of incident and even the next day. But this explanation, after a report by him to O.C.P.D. was made and even after the conceded presence of O.C.S. on 26th November 2002, does not seem convincing enough so as to find against the 2nd Respondent.

Moreover the 1st Respondent during his cross examination was explicit when he said that there was so much chaos that he did not remember who did what and also could not place 2nd Respondent or any of his supporters committing any of the alleged acts of violence.

He also denied having been under intimidation. Despite the personal alleged assault and robbery, he did not make report to any police station. These were personal criminal offences against him and his report after several days only to the Chairman ECK do not make a clear, cogent and consistent evidence for committal of the offence as alleged.

From the evidence, the court cannot see a chain or pattern of events from which a conclusively clear picture is drawn of the evidence relying wherefrom this court can become assured or satisfied that the mayhem occurred due to direct or indirect participation by the 2nd Respondent or any of his agents.

The efforts by Mr. Kyalo to bring the onus on the 2nd Respondent to avert or curtail the happening of this unfortunate incident on the basis of provisions of Electoral Code of Conduct were inadequate and are not well placed. This court also failed to see how the 2nd Respondent anticipated that his failure to cheer after being rejected by the 1st Respondent and his communication to his subscribers waiting outside in verandah would spark up the violent reaction from the crowd which inevitably included his supporters.

I also tend to agree with suggestions from Mr. Orengo that the 1st Respondent, before this court, destroyed or impeached the contents of his letter of 7th December 2002, by stating there was a chaos and he could not remember who did what.

Moreover, apart from this piece of evidence, 1st Respondent has, in no uncertain ways, denied that 2nd Respondent had in any way intimidated him or interfered in the election process. He also denied that any reports of bribery or undue conduct by or on behalf of the 2nd Respondent, were made to him.

It has to be noted that the incident of assault was an offence committed against him. He was an

experienced election official and was aware that his office was a symbol of dignity and power of democracy and yet what he does to show his indignance?

He does not report to security arms of government and after lapse of 14 days only writes a letter to the Chairman of ECK. I hereby note that before his letter Mr. Osogo has already written a letter of 2nd December 2002 to the Chairman ECK complaining about this incident. But on the second day he, willingly and without any eyebrow raised, accepts the nomination papers from the same 2nd Respondent. I do agree that Mr. Kyalo's valiant attempt to interpret his denial of intimidation speaks a volume.

I am urged to totally ignore the evidence led by 2nd Respondent and his witnesses as an afterthought:

The reasons are that

1. The 2nd Respondent had been held to be lying by the Court of Appeal when the order of striking out the Petition was made by the High Court.
2. None of the witnesses had been cross-examined on possibilities of the 2nd Respondent and other five been pushed inside by the crowd.

Even if the above contentions are accepted the burden of proof lies on the Petitioner and the paucity in evidence in his case cannot be expected to be filled in by the 2nd Respondent. The gaps are left by the case of the Petitioner and, in that event, even by the case of the 1st and 3rd Respondents. I cannot be persuaded to stitch in the scattered patches of evidence with yawning gaps only because the contention of the 2nd Respondent that he was not duly served with the petition was rejected. I also note here that as per the Act, the Respondent in the election petition is not required to file their response.

The contradictions in the evidence of Mr. Achemi (RW 14) that the crowd pushed them inside when they were coming out is not so overwhelming to discredit totally the case of the 2nd Respondent.

I was persuaded also to infer that when 2nd Respondent entered the nomination room for the first time he ought to be aware of the fact that the nomination of the Petitioner was already accepted. How can I do so, when there is no evidence of any disharmony or disquiet even from Inspector Ndagwa who was outside when the 2nd Respondent arrived and entered the room with his proposer, seconder and subscribers. Even 1st Respondent did not give any indication that 2nd Respondent looked unhappy or stressed when he entered the room. On the contrary he stated that when he requested him to wait outside he willingly did so.

Furthermore, it is evident from the record that the 2nd Respondent knew that he was the one who was nominated by the NARC.

The changed timing of the arrival of the Petitioner by Inspector Ndagwa during cross-examination also points to the uncertainty of timing. It is also not in doubt that the Petitioner moved fast, despite the knowledge of Party nomination, which he did not challenge, and arrived first to present his papers. He does not come the next day and does not do anything till he files his application for Judicial Review. I say this, even at the risk of repetition as this is the issue which has not been clarified. The general remark that the Petitioner awaited till the result of election is not convincing and as per law.

I also do not agree, with due respect, that the issue of nomination is a matter of another court as the Court of Appeal in Wanyoiko's case (supra) found to the contrary. I also add that the issue of nomination by the Political party looms large in the Act and the Constitution.

Petitioner's case as well as that of the 3rd Respondent is that the 2nd Respondent should be declared guilty of an election offence under section 9 of Cap. 66.

It stipulates:

9. Every person shall be guilty of the offence of undue influence who directly or indirectly, by himself or by any other person on his behalf, makes use of or threatens any force, violence or restraint, or any temporal or spiritual injury, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of -

- (a) inducing or compelling a person to give or refrain from giving his vote, whether to a particular candidate or not, at an election; or
- (b) otherwise impeding or preventing the free exercise becoming a candidate or to withdraw if he has become a candidate; or
- (c) impeding or preventing a person from being nominated as a candidate for an election or from being registered as a voter.

It is further submitted that the Petitioner has proved all the ingredients of the said section and its sub-sections.

The Petitioner submits that he was induced or compelled to refrain from becoming a candidate and was also impeded or prevented from being nominated as a candidate for an election, as well as prevented from exercising his right to vote for himself together with his supporters (section 9 (b), (c) and (d).

Moreover, only because I have evidence of mob violence and consequence suspension of Nomination process, I cannot infer that it was perpetuated by the 2nd Respondent or on his behalf.

As per Mr. Mwenesi it matters not whether only one person is so prevented.

I do agree with this submission. But I should have the evidence that 2nd Respondent himself or on his behalf made use of or threatened any force, violence or restraint, or any temporal or spiritual injury, damage or loss, or any fraudulent device, trick or deception and that was on account or for purposes of eventualities mentioned in section 9 (a) to (d).

I have glaring evidence of 1st Respondent that he was not intimidated. I also do not have any evidence from the Petitioner that he similarly suffered.

The upshot of all the above is that, unfortunately, I cannot find with assurance or without reasonable doubt that the crowd became uncontrolled due to direct or indirect action of the 2nd Respondent or any of his supporters. I also face the same problem as regards the occurrence of alleged assault and robbery and destructions of electoral material. I do not have clear, cogent and consistent evidence that the said occurrence was as a result of an action either by the 2nd Respondent himself or on his behalf by others. These offences are definitely offences of quasi-criminal nature and standard of their respective proof cannot be lightly taken as is urged by the Petitioner and 1st and 3rd Respondents.

I also thus reject those allegations specified in paragraphs 6,13,14 and 26 of the Petition.

I may note in passing that those grounds are not sufficiently pleaded or particularized also by Answers to particulars as to the Petition. (Para 4 of particulars dated 31st March, 2003).

In face of the absolute paucity of any explanation as to absence of the Petitioner on the next day, I would find myself in great difficulty that the nomination of the 2nd Respondent was as a result of any ingredients of section 9 of Cap. 66.

C. Security

Under Section 42A (b) and (c) of the Constitution the Electoral Commission of Kenya is responsible for directing and supervising the Presidential, National Assembly and local government elections and promoting free and fair elections. Section 34 of the Act empowers ECK to make regulations for better carrying out of the purposes and provisions of the Act. Section 17A of the Act also provides overall conduct of the Elections under the Act by ECK.

Relying on the above provisions and general principle that the security is at the heart of a free and fair election, the Petitioner submitted that Electoral Commission of Kenya was obliged to manage, control and supervise the nomination process keeping in view of the aforesaid but that it was wanting on that duty on nomination day i.e. 25th November 2002.

It was contended that the destruction of the electoral documents and nomination papers could have been averted if sufficient security was provided. It was further stressed that the Electoral Commission of Kenya always had to anticipate that something could go wrong and be prepared for it. Even if 20 security officers were posted as testified by 1st Respondent (which were 10 to 12 as per Inspector Ndagwa) the number was not sufficient.

It was thus contended that Electoral Commission of Kenya was cowed down by the violence. Point was reinforced by submitting that despite the violence no arrest was made and consequently the election was not transparent, free and fair.

Mr. Kyalo opposed this contention forcefully. He pointed out that till 11.30 a.m. there was calm and nomination process was undertaken without any hindrance. It was the non-action by 2nd Respondent to rise above the occasion to contain the dissatisfaction of the crowd that resulted in the mob rising. It is difficult to know how the mob would react. It was also denied that due to improper exercise by the 1st Respondent by accepting the nomination paper of the Petitioner the crowd became unhappy and resultant chaos ensued. He supported the action of the 1st Respondent by submitting that he took the documents presented by the Petitioner on their face value and that he is not expected to act as a document examiner, to check the veracity or otherwise of such documents.

He also added that the election was nationwide and security establishment was overly stretched. Under the circumstances the deployment of about 20 officers was more than adequate. The officers took timely action by firing in the air and the crowd was disbursed.

Without going much into detail of the evidence, which in any event has been considered by me in earlier part of this judgment, I cannot, in all fairness, find that the security by Electoral Commission of Kenya on nomination was lacking or inadequate. Only because there was a mob violence, which resulted in destruction of documents and materials of election and without support of any further evidence on the non-action or negligence by the security officer coming from the Petitioner, I should not agree with the contentions raised in the Petition.

I thus find so and reject this ground based by paragraphs 7, 18 and 19 of the Petition raised by the Petitioner.

Moreover, from the circumstances of this case I do not find that due to the acts of violence which were committed on the 25th November 2002 at Nomination Centre, the election of Budalangi Constituency was not transparent, free and fair.

D. Effect of Electoral Commission of Kenya Ruling dated 22nd December 2002 Mr. Mwenesi the learned lead counsel of the Petitioner submitted on the facts behind the ECMC's Ruling dated 22nd December 2002.

After the delivery of the said ruling, a Judicial Review application was filed by the 2nd Respondent to annul and quash the ECMC's proceedings and finding. That application was dismissed. It was thereupon contended that the issue of its validity is now determined and is barred from further scrutiny by this court

on the Principle of Res Judicata.

It is conceded that a Constitutional reference complaining of the infringement of fundamental right is filed but it is contended that the same has not arisen from this petition. At the time of filing the same, the Petition had been in existence.

According to Mr. Mwenesi the reference was filed under Rule 9 of the Repealed Rules of Practice and Procedure (Legal Notice 133 of 2001).

Mr. Mwenesi invited court's attention to paragraph 11 of Electoral Code of Conduct which stipulates:

"11. In making decision regarding appropriate Penalties or sanctions the Commission or, as the case may be, the High Court shall have regard to any other legal consequences that may result from Civil or Criminal proceedings instituted by reason of the same occurrence". (emphasis mine)

I was also invited to look at Section 34A (4) of the Act.

"(4) for the avoidance of doubt, the trial of an offence under this section shall be without prejudice to any proceedings in or consequent upon a petition".

In my humble view, the word 'trial' does indicate that it can proceed despite the proceedings in an election petition or any proceedings consequent thereto. That does not result into a conclusion that this court can rely on proceedings of the trial or its ruling in this petition.

What I have before me is the trial of an election offence under Election Offences Act and the obligation under section 31 of the Act and particularly sub-section (3) and (5) thereof,

However after careful reading of the whole of section 34A of the Act, I am of a considered view that the offence which the sub-section (4) stipulates is the offence mentioned in sub-section (3): namely

"3. Every officer of a political party which, and every person nominated as a candidate who, attempts to participate or participates in any election without subscribing to the Electoral Code of Conduct shall be guilty of an offence and liable to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding three years or both." (Emphasis mine)

Thus in my considered view section 34A (4) speaks of an offence under section 34A(3) and not any proceedings under the Electoral Code of Conduct.

With this clarification I can now proceed with the provisions of Electoral Code of Conduct.

Paragraph 6 of the Electoral Code of Conduct provides that all who are bound by this code shall have duty to observe the acts which are mentioned therein paragraph 8 of the said Code stipulates the consequences of any infringement of any provisions of the Code.

The ECMC was conducting the proceedings under paragraph 8 of the Code.

Thereafter paragraph 11 enjoins the ECMC or the High Court, (if approached under Paragraph 9), as the case may be, to have regard to any other legal consequences that may result from civil or criminal proceedings instituted by reason of the same occurrence.

Mr. Mwenesi vehemently contended that 2nd Respondent after the incident was identified and tried under the Code. He conceded that the ECMC proceedings is not a criminal proceedings but is in the nature of disciplinary proceedings but urged that the election offence has arisen from the same occurrence and the court now has to assess the evidence in view of the finding of ECMC.

I have considered Mr. Mukele's evidence before this court. With utmost respect to his evidence and

bearing in mind the pending constitutional reference in concurrent jurisdiction, I can only state that this court has to be utmost cautious before giving any reliance to the Ruling.

Considering the relevant provisions cited from the Act, Regulations and the Electoral Code of Conduct, the court shall have still to find proof of guilt of the offence stipulated in a separate Act of Parliament i.e. Election Offences Act. (Cap 66).

I do not think that this court is bound by the Ruling made by ECMC in deciding the issue of occurrence of violence. I cannot also accept that Ruling made by the ECMC is Res Judicata so far as this court is concerned, as per my observations made hereinbefore and also as this court has jurisdiction under the Constitution and is enjoined to determine the validity of an election and also to perform the duties conferred upon it under section 31 of the Act.

I am not shown any civil or criminal proceedings as regards the occurrence. What I have is an application arising from the Ruling of ECMC and the constitutional reference filed under that application. I cannot decide those issues which goes to the Constitutionality of the proceedings, and as a matter of first principle shall not encroach upon the proceedings before court having concurrent jurisdiction.

The upshot of all the above, in my considered view, is that so far as determining the issue of violence as an election offence, this court is to determine the same from the evidence led before it.

I shall, of course, refrain from making any comments on the legality and/or constitutionality of the proceedings before ECMC and its finding, for obvious reasons.

Although it may not be relevant, but in my view, the constitutional reference filed by the 2nd Respondent in Misc. C.A. No.245 of 2004 is filed under Rule 10 of the Constitution of Kenya Protection of Fundamental Rights and Freedoms of the Individual Practice and Proceeding Rules, 2001 (Popularly, known as ‘Chunga Rules’) (Legal Notice No. 133 of 2001).

Moreover, I cannot avoid noticing that the ECMC proceedings which is accepted by Mr. Mukele (RW 4) as a quasi-judicial proceedings was conducted under the Electoral Code of Conduct. As per the Ruling it was held and I quote:

“The Committee finds that Mr. Wanjala broke the law and the Electoral Code of Conduct as provided under paragraphs 3,6 and 8 of the Electoral Code of Conduct”.

Paragraph 3 does not indicate any offence.

Paragraph 6 prescribes the duties of those bound by this Code. The 2nd Respondent agreed that he was so bound being an aspiring candidate. I also note that he was a sitting M.P. also.

Paragraph 8 is a penaltim provision.

In any event the 2nd Respondent was not tried for an election offence which in any event the ECMC has no jurisdiction to try.

I am thus strengthened in my findings that this court cannot make the report under section 31 of the Act to the Speaker based on the Ruling of ECMC.

While saying so I tend to agree with Mr. Orenge that after being fined by ECMC if I report the 2nd Respondent to the Speaker relying on the ECMC Ruling it may be a case of double jeopardy.

I do hold that the proceedings before ECMC are totally different than the trial for election offences as provided under the Constitution, the Act and Election Offences Act (Cap 66).

(E) Whether the Nomination of 2nd Respondent was a nullity.

It is a matter of fact that as per 1st Respondent on 25th November, 2002, he accepted the nomination papers of the Petitioner.

As per the evidence before me, after violation, the nomination process was suspended. ECK documents were destroyed and he recalled all the candidates who had appeared before him on 25th November 2002 and whose papers for Nomination were accepted by him, to re-present the photocopies of their papers with the original receipt for nomination fees of Shs.5,000/=. 1st Respondent also testified that if a candidate did not have the copies, he could resubmit by filling in the fresh forms. He did not specify which form though. I presume it may be the Nomination Form. Be that as it may, all other candidates appeared on 26th November, 2002 except the Petitioner. The 2nd Respondent came and based on his papers and lack of papers from the Petitioner the 2nd Respondent's papers were accepted to be nominated on NARC ticket.

It is the case of the Petitioner that once he was nominated, his nomination was valid as per section 34 of the Constitution, which stipulates:

“34. Subject to section 35, a person shall be qualified to be elected as a member of the National Assembly if, and shall not be qualified unless, at the date of his nomination for election —

- (a) he is a citizen of Kenya who has attained the age of twenty-one years; and
- (b) he is registered in some constituency as a voter in elections to the National Assembly; and
- (c) he is able to speak and, unless incapacitated by blindness or other physical cause, to read the Swahili and English languages well enough to take an active part in the proceedings of the National Assembly; and
- (d) he is nominated by a political party in the manner prescribed by or under an Act of Parliament.

According to Mr. Onalo the nomination procedure, so far as his nomination by the 1st Respondent was concerned, was as provided under the Presidential and Parliamentary Elections Regulations (hereinafter referred to as “The Regulations”). He emphasized that there is no evidence of, as insinuated by the 2nd Respondent, that his certificate from NARC was a forgery. He went ahead to state that the 2nd Respondent did not take the opportunity to cross-examine him when he offered himself before the close of his case. I only note that the Petitioner had not laid facts of his case under oath either by an affidavit or by putting him on the witness box.

It is also contended that he became a Candidate nominated by NARC at 9.00 a.m. on 25th November, 2002. His nomination can only be withdrawn by himself as per Regulation 19 of the Regulation and has not done so.

He relied on the holding of Ngei's case (supra) on page (24) of the Judgment it is stated:

“we have no doubt that a person becomes a candidate when his nomination is validly accepted – as that of the Petitioner was at 10.50 a.m. on the 24th August, 1974.”

Relying on the case of Suleiman Rashid Shakomb Vs John Mwalaka & 5 Others Election Petition No. 5 of 1993.

The Election Court held that:

“There is no provision for a political party to withdraw the candidature of a Candidate after its party

nomination has been completed with the party's nomination of a candidate."

It was also held in the said case that only one candidate can be sponsored by a political party for an election in a Parliamentary Constituency and that when a candidate presents the papers first and the papers were in order no more nomination papers could be validly presented.

The Petitioner also relied on the observation made by the court on page 9 of the Judgment and I do quote:

"In our view the legal position here is that Mrs. Mwea having presented her nomination papers to the Returning Officer and these papers having found to be in order then Mrs. Mwea was validly nominated as a parliamentary candidate for Likoni Constituency. Although Mr. Skombo presented his nomination papers we are of the view that since there was nothing wrong with Mrs. Mwea's candidature, then there was no way DP could be allowed to present a second candidate for the same Constituency."

Mr. Onalo canvassed that a prudent officer could have held back the Petitioner papers in anticipation of other nomination. Furthermore, there was no investigation under Regulation 18(2A) of the Regulation by the 1st Respondent as according to him his papers were destroyed by the 2nd Respondent. He held the 1st Respondent responsible in participating in the process of further nomination which he called as 'a farce'. The 1st Respondent became functus officio after accepting his nomination papers.

Mr. Mwenesi further reinforced these submissions by stating that process was disrupted after violence and the process came under Regulation 19B of the Regulations. This process then was to be continued the next day. As per his contention the whole process, instead of being continued the next day, started afresh and that was a serious breach of law.

According to him the 1st Respondent should have proceeded with the presentation of the 2nd Respondent's papers as per Regulation 19(e). That means he should have considered the nomination paper as another one and then proceeded to investigate the validity or otherwise of both papers, and declare one as valid and another as invalid (Regulation 18(2A)).

1st Respondent had failed to investigate and then decide as there is no evidence to that effect. According to Mr. Mwenesi the candid acceptance by the 1st Respondent and the submissions by the 1st and 3rd Respondents asking this court to annul the election of the 2nd Respondent, support the case of the Petitioner.

I was asked to assert that had 1st Respondent followed the proceedings, the name of the Petitioner would have been on the ballot box.

Mr. Mwenesi also stressed that the Party Nomination process (which he chose to name as selection process) was an internal affair. It was conducted as per Gazette Notice No.7128 of 1st November 2002 wherein it was notified that each party wishing to participate in the election must finalize the nomination of its candidate on or before 24th November, 2002. After the said process, the Nomination by ECK was conducted and the Petitioner filed his papers, which were accepted by the 1st Respondent.

In cross-examination the fact of this acceptance was not destroyed. From the case of the 2nd Respondent also the Petitioner's case is strengthened. On 25th November 2002, the 2nd Respondent goes for intervention by the Party and brings back a letter of 25th November, 2002 which tended to supersede all the earlier communications. Those words have to be taken seriously to presume that the Petitioner had a valid certificate of nomination from the NARC.

Mr. Kyalo submitted that in deciding the validity or otherwise of the nomination papers under Regulation 18(2A) a Returning Officer is not obliged to hear any objection or counter objection before determining which paper is valid. This process does not include a hearing in the legal sense as contended by the Respondent.

1st Respondent, according to him is an old and experienced returning officer and he did not reject the nomination papers of the 2nd Respondent on 25th November 2002. What he did is to ask for time but before he could do so, “all hell broke loose.” If violence would not have occurred, he would then have used his discretion after investigating and would have chosen one against another. The result whereof would then have to await the election process. In short the case of the 1st and 3rd Respondents on this issue once again did not come out to point towards one direction.

Before I deal with response by Mr. Orengo I shall note that in the case of Shakombo (supra) the court had both the nomination certificates in respect of the Petitioner and the Respondent. After considering the contents of both certificates the court came to the conclusion that the first nomination presented was the valid one and the party cannot withdraw the nomination of any candidate it must be the candidate himself as per Regulation 19 of the Regulations.

I cannot but accept the observations made by the court in the said case which was based on the facts before it.

Mr. Orengo began his submissions by stressing the centrality and role of a political party in multiparty democratic state and under Constitution and relevant laws.

He contended that no one can contest a parliamentary election without being nominated by a political party, which fact cannot be disputed as per provisions of the Constitution and the Act.

He referred to section 33 wherein even nominated members to be appointed by the President have to be nominated by the Parliamentary parties (see section 33(3)).

He, of course squarely stressed the wordings of section 34(d) of the Constitution and emphasized the words “nominated by a political party in the manner prescribed under an Act of parliament”.

The preamble of the Act emphasizes conduct of the ECK and political parties participating in elections in Kenya.

He relied on the book by Lord Helilsham entitled “On the Constitution”. It is stated on page 33 of the said book amongst others that the Party lies at the root of cabinet government in all parliamentary democracies. I have noted the above because the same is adopted in the recent case of Republic vs Registrar of Societies and Others Ex-parte Hon. Uhuru Kenyatta and Others (Misc. C.A. No.747 of 2006 on page 113 of the Judgment. It is observed that:

“The party is therefore key to democratic government. It is the case of the Constitution of Kenya. Section 1A of the Constitution declares that “Kenya shall be a multiparty democratic state- - ----- Its face loom large”.

He referred the court to the definition of “political party” in section 123 of the Constitution. It stipulates

“political party’ means a political party which is duly registered under any law which requires political parties to be registered, and which has complied with the requirements of any law as to the Constitution or rules of political parties nominating candidates for the National Assembly” (emphasis mine).

He emphasized that for nomination, one has to refer to section 17 of the Act and not on the Regulations which are relied by the Petitioner. Section 17(1) reiterates the requirement of section 34(d) of the Constitution. He also observed that, a person who shall be deemed to have been nominated is the person who is nominated by the Political Party.

Mr. Hermann Ogula (RW 11) testified and showed by documentary evidence that 2nd Respondent was the nominated candidate. It cannot be in dispute that the Petitioner participated in the nomination process and lost. One can only be nominated when the party certifies after going through the process. Only way one

can participate in parliamentary election is by way of nomination from the Party.

He referred to cases cited by the Petitioner. The Election Petition No. 26 of 1979 between Nicholas Wanyama Okada and Moffat Mburu Mugure and James Charles Osogo and Election Petitioner No. 3 of 1979 between Archbishop Stephen Ondiek Oluoch and Stanley Thuo and Joseph Mathews Ogutu were for preliminary elections from one party system. Same was the issue in Election Petition No. 17 of 1979 between Titus Kitili Benjamin Mbathi and Joseph Thungu and David Musyoka.

As per Mr. Orengo the issue of Nomination is left to the Political Party due its centrality in Constitution as well as the Act.

In the case of C.A. No. 213 of 1995 between Wanyoike and ECK the Court of Appeal held nominations are, conducted under section 17 of the Act and observed that:

“the only court recognized to deal accordingly is the Election Court”.

Section 13 of the Act empowers ECK to manage the election and to ensure that the Constitution and laws are followed.

Section 13 of the Act provides that the Speaker shall issue writ under his hand in the prescribed form addressed to the returning officer of each Constituency in which an elected member of Parliament is to be returned. It also stipulates that the writ shall specify the day on which each political party shall nominate candidates to contest the parliamentary election in accordance with its Constitution or rules. All the processes of election are regulated through the law and ECK has to manage and supervise the Election as per the Constitution and law.

He emphasized provisions of section 14(4) which stipulates that the Political Party shall notify the ECK the authorized persons selected by it and whose signatures shall be deposited with the ECK.

Mr. Orengo lamented that the Petitioner as well as 1st and 3rd Respondents want this court to look at the incident of 25th November 2002 without the antecedent events leading to nomination of the 2nd Respondent and to isolate the incident without any consideration to the facts and laws regarding nomination.

The Petitioner participated and lost the nomination of NARC. Was he then justified to appear before 1st Respondent and participate on the Nomination Day of 25th November 2002?

The Answer ‘NO’ is glaring on the face of the Court. The first person to account and face the wrath of the court for what happened on 25th November 2002 is the Petitioner and not the 2nd Respondent who was validly nominated as per the evidence produced.

The Petitioner conveniently has not included NARC as a party in this petition. It was urged that these facts have to be subject to serious scrutiny by the court. The issue of nomination is a very serious and relevant issue in the election process. He noted that the nomination of the Presidential candidate is also by the Political Party.

He relied on the case of Hon. Musikari Kombo and 2 Others vs Registrar of Societies (Misc. C.A. No. 725 of 2006). On page 7 of its Ruling, the court observed that any change in a major political party shall have serious constitutional implications and cannot be allowed to pass easily in a democratic society.

He lastly relied on the case between Kipkalya Kiprono Kones and Republic and ECK C.C.A. No. 94 of 2005) wherein on page 6 of their Judgment the Court of Appeal observed: namely.

“We again assume that each and any parliamentary political party has a process of selecting its members or member for nomination to the Assembly ---- and that is the genesis of the dispute before the court.”

It was further reiterated that it is the duty of the Returning Officer to follow the law and accordingly he had to satisfy himself as per law the validity of the nomination papers and not to satisfy himself. He is duty bound to ensure that section 17 is satisfied, as it is the positive law.

He invited the court to emulate the Constitutional court in Uhuru's case when it passed strictures on the Registrar of Societies for non-compliance of section 57 of the Societies Act which is not even in positive terms. A public body does not and cannot enjoy unfettered discretion.

In the case of R v Somerset County Council Ex-parte Feelings and Others (1995) 2 All E.R. 513 at page 524 it was held that:

“It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility: a responsibility which defines its purpose and justifies its existence. Under our law, this is true of every public body.”

The 1st Respondent was totally wanting in performance of his public duty and should be strictly admonished.

He further submitted that the Petitioner tried Judicial Review against ECK but when he came to this court, the party who decided the issue of nomination is not brought before the court.

The Petitioner's assertion that he did not have any complaint against NARC is nothing but mischievous. If he did not have complaint against nomination process then how he could complain against 2nd Respondent who was the nominated candidate.

It is upon the Petitioner to put forth his case with all details as the Respondent is not permitted to file his response, and if the Petitioner was a nominated candidate as per law, as he contends, then he should have obtained intervention from the NARC.

Mr. Mwenesi as regards the contention that the NARC being a relevant party ought to have been made a party, responded that the Petitioner does not have any complaint against NARC. He invited my attention to the definition of 'Respondent' in the National Assembly Elections (Election Petition) Rules. It states:

“Respondent” in relation to an election petition, means the person whose election is complained of, or if the petition complains of the conduct of returning officer or any person under him; that officer and includes any other person whose conduct is complained of in relation to the election”

It is the Petitioner's case that he had a valid certificate of clearance/nomination from the NARC and it was not a party against whom he had any complaint.

Now the court does not have NARC before it. The court then has to decide the issue on balance of probability which tilts in favour of the Petitioner.

While considering the issue of nomination I must confess that I have spent considerable time to deliberate on this issue which is not only a novel point yet to be determined by any Election Court but is also of serious complexity as per the evidence.

The reliance placed by the Petitioner on the Kombe's case (CC.A. No. 52 of 2006) is misplaced as what the Court of Appeal was considering was simply an issue of cost. The original petition in respect of the parties also was dealing with issue of symbol of the different party pasted on the candidates ballot papers.

Omamo's case relied by the Petitioner on the issue of *functus officio* was before the Act and regulations were amended in the year 2002, when Regulations 18 and 19 were amended by Legal Notice No.172/02.

However I would take the principle of *functus officio* on page 11 of the said case, namely

“For that purpose it is only necessary that the act should be complete, so far as the arbitrator is concerned; that he should have done some act whereby he becomes functus officio, and had declared his final mind”.

Was this the case in present petition, when the 1st Respondent accepted the nomination papers of the Petitioner? It was not, in view of the further provisions made in Regulations 18 and 19.

Under Regulation 18(2) (e) the Returning Officer can hold a nomination paper invalid if the nomination paper is presented after another one had been presented by the candidate sponsored by the same party.

The 1st Respondent while not accepting the nomination of 2nd Respondent on 25th November 2002 till further consultation did act under the said regulation.

But further paragraph 2A has been added to Regulation 18 which stipulates:

“Notwithstanding paragraph 2(e) if the nomination papers are presented in which the same political party appears to have nominated different candidates, the returning officer may investigate the matter and determine which nomination paper to hold invalid, provided that where the political party in question has submitted a composite list of Parliamentary candidates duly signed by two national officials of the party accredited for that purpose, the returning officer shall confirm the validly nominated candidate by referring to such a list.”

I shall refer to Regulation 19B which was similarly added vide the aforesaid Legal Notice which provides for the procedure to be adopted if the nomination process was interrupted or obstructed by riots, open violence, floods or other natural catastrophe.

Thus I shall with due respect, cannot accept the contention from the Petitioner that on acceptance of his nomination papers, the 1st Respondent became functus officio and I shall reject that contention.

After the incident of 25th November 2002, the 1st Respondent suspended or abandoned the nomination exercise as per Regulation 19B of the Regulations. It is testified by the 1st Respondent, and not denied by Mr. Musoma, Mr. Osogo and Prof. Ojiambo, that he sent words to all the candidates to re-present copies of their papers with original receipt for payment of Nomination fees. Except for the Petitioner all came and did so and were once again nominated.

The Petitioner have not given any explanation for his non-appearance. His suggestions that his papers were destroyed and he did not have any copies cannot be accepted without his testimony, because none of the witnesses before the court can testify or comment on that suggestion. It is not denied that he had a receipt and 1st Respondent specifically stated that a candidate who appeared on 25th November 2002 would have filed fresh nomination form I presume under Regulation 16(5).

If the Petitioner was relying on his legal stand that his nomination by the 1st Respondent cannot be reviewed, I have, with sufficient reasons, not agreed. The Petitioner could not just disappear from the scene.

Both the Petitioner and 2nd Respondent complain that the 1st Respondent did not perform his duties under the Act. The Petitioner relies on Regulation 18(e) and 18 (2A). The 2nd Respondent relies on section 17 of the Act.

Section 17(1) of the Act stipulates

“(A) A person shall be deemed to be nominated by a political party for election as a member of the National Assembly for the purposes of paragraph (d) of section 34 of the Constitution if he is selected in the manner provided for in the Constitution or rules of the political party concerned relating to members of that party who wish to contest parliamentary elections and subject to subsection (4) the party certifies the selection to the Election Commission”.

Mr. Orenge emphasized on the words “deemed to be nominated”. He also submitted that the evidence of Mr. Hermann Ogulla (RW 11) is spotless and it is not refuted that NARC Party conducted the selection process if you will, for nomination of candidate for Budalangi Constituency and the 2nd Respondent was the winner after securing highest number of votes. The 2nd Respondent also produced certificate from NARC. It was dated 22nd November 2002. This fact is not contested by the Petitioner. He was aware that he lost the Nomination by selection process. This process was as per the Nomination Rules of NARC as per Mr. Ogulla which fact is also not denied or questioned. It cannot be heard from the Petitioner’s mouth that he was not aware of the result of nomination process by NARC. Yet he proceeded on 25th November 2002 to present his papers contending he was nominated by NARC Party by being first to do so. His membership card as produced does not bear the names NARC Party.

I may commence my considerations on the submissions aforesaid by observing that it can not be disputed that the Petitioner participated in the party nomination exercise. He lost the nomination. He did not object to the validity of nomination exercise either before the Party (which according to Mr. Hermann is provided for in party rules and which evidence is not challenged) or before the court. It can also not be disputed that being aware very well of the result of nomination he presented the nomination paper from NARC party. He wants the court simply to believe the testimony of 1st Respondent that he presented the certificate of Nomination from NARC signed by the Chairman and Secretary. As per section 17(9) of the Act, the specimen signature of those officers are deposited with ECK. I do not have the evidence even from the 1st Respondent that he scrutinized those signatures prior to accepting the Petitioner’s papers. It is also true that the 1st Respondent ought to have known the date of NARC Party nomination as per section 13(3) (b) of the Act.

The Petitioner did not join NARC as a party to the Petition. Yet he wants to state that he was validly nominated candidate on NARC ticket. In the circumstances of the above, I am of a considered view that the onus to prove that he was the one validly nominated candidate from NARC as per the certificate of nomination presented to 1st Respondent, is on the Petitioner and it cannot be shifted either to 1st Respondent and 3rd Respondent or the 2nd Respondent. This is also as per our principles on Laws of Evidence even in Civil Proceedings.

Having found so, I proceed to observe that the Petitioner solely relies on the evidence of the 1st Respondent to the effect that he accepted the Petitioner’s nomination papers including clearance certificate from the NARC. I do not have that certificate before me. The Petitioner tries to absolve him by saying that it was destroyed.

Is that explanation sufficient to discharge the onus in the circumstances of this case? My answer is No. The averments made by the Petitioner that his nomination was valid have to be proved by some substantial evidence in the absence of any documentary evidence. One wonders that the important documents like certificate of Nomination from a Political Party was not copied for the posterity.

His total silence on his absence on the next day for re-presentation and absence of any other cogent evidence coming from his side to prove that he had a valid nomination certificate from NARC do not advance or support his contention. This court can be compelled to make adverse and assumptions from these facts.

Only because his papers were accepted by 1st Respondent on their presentation on 25th November 2002 it cannot be a proof of their validity. Similar papers were presented by the 2nd Respondent on the same day. They both have to be investigated upon by the 1st Respondent and as per Regulation 18(2A) he has to accept one as valid and another as invalid.

With these, I shall now come to the role played by the 1st Respondent during nomination as he has been criticized by both Petitioner as well as 2nd Respondent.

Obviously as per his evidence, on 25th November 2002, he saw the papers presented by the Petitioner

and took the same on their face value, as contended by Mr. Kyalo. He has also not testified that before accepting the certificate from NARC presented by the Petitioner, he scrutinized the signatures appearing thereon, with the specimen signatures sent as per section 17(4) of the Act. The 2nd Respondent then comes with other set of papers including the certificate of 22nd November 2002 which is before the court.

Before he could consult, the mob intervened and the nomination process was suspended. The next day he did not have the first set of papers, obviously destroyed according to him. He did not have any facts to investigate upon in the absence of the Petitioner or his papers. The Petitioner likes to blame the 3rd Respondent and 2nd Respondent for such destruction. I have no evidence as to who committed the offence and no one is shown to have been prosecuted so far for destroying those documents. I also do not have sufficient evidence to assess and put blame on any person.

Under the circumstances, which the 1st Respondent was facing, I do not think he failed in complying with either section 17 of the Act or Regulation 18 of the Regulations.

In peculiar circumstances of this petition, the 1st Respondent could not have done anything more or anything less. Mr. Mwenesi's submissions that if there was an investigation, the Petitioner would have been declared as validly nominated is neither here nor there. This court will not enter itself in the arena of inferences without any grounds set forth to do so.

Mr. Mwenesi at the fague end of submissions brought to my attention The Gazette Notice under Regulation 14. Despite that I did consider submissions made thereon. If the Petitioner was right that on the 26th November 2002, the 2nd Respondent had only the letter of 25th November 2002 to show the nomination by NARC, then I would have tended to accept that the NARC had intervened in nomination process beyond 24th November 2002. But I have the certificate of Nomination No.2095 dated 22nd November 2002 and unqualified evidence of Mr. Hermann Ogulu.

It is his evidence that the selection process was agreed to be by ballot and the 2nd Respondent had won the selection process.

With constraint faced by the evidence before me, I also reject the contention that the nomination of the 2nd Respondent was invalid on this ground.

I thus reject that there was any fundamental irregularity in the nomination process conducted by the 1st Respondent on 25th November 2002 or on 26th November 2002 so as to render the election of National Assembly for Budalangi Constituency as an invalid election or a null and void election.

I thus reject this issue supported by paragraphs 9,10,12,16,17,19 and 20 of the petition.

There was much clamour from the Petitioner and 2nd Respondent accusing each other of having committed wrongs and then to come before the court taking advantage of their own respective wrongs. The maxim – NOLLUS COMODUM CAPERE PROTEST DE INJURIA SUA PROPIA was relied upon. I may not comment much on this maxim as my findings are self revealing.

Lastly I should comment on the composite list which was annexed to the affidavit of the 2nd Respondent.

As earlier observed some pages thereof showed its date as 21st March, 2002 when NARC had not come into existence. It is also agreed that the same was not signed by the two officials of NARC to get support of provisions of Regulation 18(2A) of the Regulations.

The Petitioner and 1st and 3rd Respondent made capital out of it and urged the court to declare the same as forgery and to report the 2nd Respondent to have committed perjury.

I was urged to follow the case of Election Petition No. 26 of 1979 between Nicholas Wanyama Okada & Moffat Kamau Mburu Mugwe. In the said case the Respondent relied on a ticket which was proved never to have been issued by MPs and which was proved to be a stolen ticket. It was relied by the Respondent to prove his absence from the alleged scene. I totally agree with the finding made by the court in the said case.

But in this case, it is adequately before me that the said composite list was not uttered by the 2nd Respondent to the 1st Respondent. Thus his nomination had nothing to do with the said composite list. Yes, he did utter the same before the court. After rigorous cross-examination from both counsel, he could adequately explain the source of the said list. Once again due to paucity of evidence before me, it would be difficult and unfair on the part of the court to send the 2nd Respondent to gallows.

Conclusion:

The upshot of all the above is that I am not satisfied that the Petitioner has proved any of the allegations made in the Petition and thus I shall dismiss the Petition dated 9th January 2003 filed on the same day.

I shall so certify to the Speaker that no election offence has been proved to have been committed by any of the Respondents herein including the 2nd Respondent in connection with general election of 2002 in respect of Budalangi Constituency.

Orders as to costs:

Considering the entire context of the Petition and also considering that various interim rulings have been made herein, I order that the Petitioner pay 10 per cent of the costs of the Respondents.

Finally I must thank Mr. Onalo and all the counsel for their assistance and co-operation to the court during this long and strenuous trial. I (must confess) have not referred all the authorities cited before me but that is not because I have not considered them.

Delivered, Dated and Signed this 2nd day of August 2007.

K.H. RAWAL

JUDGE

CERTIFICATE

Section 30(1) of the National Assembly and Presidential Elections Act (Cap 7).

I, as the duly gazetted Election Court, have determined the questions raised in the Petition of Peter Leo Onalo, certify that Bitta Sauti Raphael Wanjala, whose election and return were complained of, was validly elected and returned as a Member of the National Assembly for Budalangi Constituency.

Given under my hands and seal of this court on 2nd day of August, 2007.

LADY JUSTICE K.H. RAWAL

JUDGE