



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

**CIVIL APPEAL NO. 138 OF 2013**

*(Appeal arising from the Judgment of [RACHEL NGETICH, AG. CM] dated 10.9.2013 in the Chief Magistrate's Court Bungoma in Election Petition No.1 of 2013)*

NATHAN OBWANA ..... APPELLANT

V E R S U S

ROBERT BISAKAYA WANYERA ..... 1<sup>ST</sup> RESPONDENT

CALEB GEKONDE ..... 2<sup>ND</sup> RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION ..... 3<sup>RD</sup> RESPONDENT

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

**Introduction**

The people of Lwandanyi Ward participated in the elections conducted by the IEBC on the 4.3.2013 just like all other Kenyans. Lwandanyi Ward is within Sirisia Constituency in Bungoma County. The appellant herein was declared the winner having garnered 2,527 votes while the 1<sup>st</sup> respondent came in second with 2,454 votes. The 1<sup>st</sup> respondent filed Election Petition No. 1 of 2013 before the Bungoma Chief Magistrate's Court. The election court held in his favour and ordered a fresh election. The appellant herein was dissatisfied with that decision and preferred the current appeal. The 3<sup>rd</sup> respondent was also dissatisfied with the decision of the election court and filed Civil Appeal No. 50 of 2013 but the same was later on withdrawn with the consent of all the parties herein.

**The Grounds of Appeal**

The Memorandum of Appeal dated 11.9.2013 contains 34 grounds of appeal. During the hearing of the appeal counsel for the appellant condensed the grounds and combined some of them together. As per the written submissions by the appellant, the grounds of appeal are:-

1. The election court erred in law and fact by finding that there were irregularities in the election occasioned by non-compliance with written law (Grounds 1 – 4, 21 & 22, 24, 16 & 26).
2. The election court erred in law by holding that the election was not conducted within the principles set out by the Constitution and written law (Ground 5).
3. The election court erred by nullifying the results of the election yet the results obtained during scrutiny and recount were substantially the same as the declared results in Forms 35 (Ground 6).

4. The election court erred by determining the petition on grounds that were not pleaded or canvassed by the parties (Grounds 7, 23 & 25)
5. The election court erred in law by allowing the petitioner to fish for new evidence during the recount and scrutiny of votes thereby leading to abuse of the process (Grounds 10, 11, 12, 13, 14 & 15).
6. The learned magistrate erred in law by making a determination on only 12 out of the 98 disputed votes (Ground 18).
7. The election court erred in law by failing to establish and uphold the will of the people of Lwandanyi Ward (Ground 19).
8. The election court misinterpreted the law and regulations on elections (Grounds 17 & 20).

### **Appellant's Submissions**

In support of the appeal, Mr. Mooka, counsel for the appellant submitted that the trial court nullified the election on the ground that there were irregularities which led to the non-compliance of the written law. A few mistakes were admitted by the IEBC officials but those irregularities did not affect the results. The trial court held that the Forms 35 that were produced in court were not authentic yet the authenticity of the forms was not a complaint in the petition. There was no evidence that the forms 35 that were produced were fake and the court resorted to making physical comparisons on the forms as opposed to the results contained in those forms. Most of the Forms 35 were duly stamped and signed by both party agents as well as IEBC officials. There was no evidence that the forms had not been produced from the originals. The failure to sign the Form 36 cannot be a ground to nullify the elections.

Counsel for the appellant contends that the alterations on the Forms 35 were just normal alterations and were not intended to benefit any party. The trial court concluded that a verified Form 36 was not produced yet there was no evidence that the verified form contained results which were different from those filed in court. The court could have even come up with its own Form 36 after analyzing the Forms 35. The trial magistrate held that the absence of counter foils in the ballot box for Kaburweti Primary School polling station number 64 was a fatal irregularity. The votes in that box were counted and the results tallied with those results in the Forms 35. There was also an issue on the serial numbers and seals of some ballot boxes and comparisons were made by the trial court. These were not issues raised by the petitioner. It was also established that there was no evidence that the ballot boxes were opened and votes stuffed. The trial court gave undue weight on issues of seals and ballot boxes yet there was no dispute on the results from some of the polling stations.

It is submitted by the appellant that the irregularities did not affect the results. The court was able to know who had won the election after the votes were scrutinized and recounted. The elections were conducted in line with the provisions of **Article 81** of the **Constitution**. It was accurate and transparent and any irregularities that were noted could not have been grounds to nullify the results. The results obtained after scrutiny and recount substantially agreed with the results contained in the Forms 35. The appellant still emerged as the winner. There was negligible difference after scrutiny and this was occasioned by a dispute on 98 votes. These votes did not make any difference as the appellant was still the winner.

Mr. Mooka, further submitted that the 1<sup>st</sup> respondent diverted from his pleadings and the court determined the petition on grounds that were not part of the agreed issues. Such issues include validity or authenticity of Forms 35, failure by IEBC officials to fill Forms 35 and countersign the forms, failure to stamp Forms 35, lack of counterfoils, lack of a verified Form 36, polling day diaries and issues relating to seals on the ballot boxes. All the allegations raised in the petition and which formed the basis of the agreed issues were disproved by the petitioner. These included violence, intimidation, bribery, bias and lack of impartiality by IEBC officials, stuffing of votes, failure to assist illiterate voters and rigging. The petitioner's main contention was that he was awarded one vote instead of 271 votes for Lwandanyi Primary School polling station. That contention was not proved as it was established that the petitioner had been allocated his proper 271 votes. The petitioner only intended to fish for new evidence in the exercise of scrutiny and recount.

Counsel contends that although there were 98 disputed votes the trial magistrates only dealt with 12 votes and failed to determine the status of other votes. The court misinterpreted the election laws and regulations as the minor irregularities did not affect the results. The will of the people of Lwandanyi Ward was not upheld.

Counsel for the appellant cited several authorities on all the grounds. Counsel reiterate the fact that the petitioner was bound by his pleadings but the trial court dealt with issues outside the pleadings. The case of **NAIROBI CITY COUNCIL V THABITI ENTERPRISES LIMITED [1995 – 1998] 2 EA 231** and that of **KENYA MEAT COMMISSION V RADEN [1990] KLR** were cited to support the contention that parties should be guided by their pleadings. Counsel also cited the case of **HENRY NADIMO V IEBC & 3 OTHERS [2013] eKLR** where Justice Tuiyot dealt with the issue of Forms 35 and 36 in a Busia Election Petition.

### **Submissions by 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**

Mr. Akenga for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents supports the appeal and adopted the submissions by counsel for the appellant. Counsel submitted that the appellant was rightfully declared the winner and the nullification of the results was not based on the law. The trial court found differences in Forms 35 which differences did not go to the material will of the people of Lwandanyi Ward. The trial court compared the Forms 35 found in the ballot boxes viz a vis those filed in court and concentrated on the physical differences and no mention of the specific votes was made. This mainly involved polling stations numbers 60 and 61. There was no detriment to the 1<sup>st</sup> respondent that could have been held to have affected the results. The court dealt with procedural aspects as opposed to substantive aspect of the forms. The Form 36 that was produced in court was the one that was used to announce the results. That form complied with the statutory requirements. The form that was prepared after verification was done was not produced. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were honest enough and produced in court the form that had been used to announce the results. Counsel relies on the case of **BENJAMIN OGUNYO V BENJAMIN ANDOLO ANDAYI** where the court held that any subsequent Form 36 after the results had been announced is illegal and not admissible in court. The reconciled Form 36 did not affect the results that had been announced. Even after verification the appellant was still the winner.

Counsel contends that the issue of different serial numbers for two polling stations arose during submissions. Nobody disowned the votes contained in the ballot boxes. The ballot boxes for the two polling stations were scrutinized and the results tallied with those filed in court. The materials used to conduct the elections were the same materials that were put before the court. The 1<sup>st</sup> respondent did not raise any issue to the effect that the votes of a particular polling station exceeded the number of registered voters or that the serial numbers of the ballot papers were not the ones used in the Ward. The votes are counted at the polling stations and there was no discrepancy. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents complied with the law and there was no proof of noncompliance. Counsel relies on the case of **JOHN OYOKO & ANOTHER V IEBC & OTHERS [2013] eKLR**.

Mr. Akenga further submits that the burden of proof was shifted to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents yet it was the duty of the 1<sup>st</sup> respondent to prove his case. The trial court concluded that there was noncompliance with the law without relating the noncompliance to its effect on the validity of the election. The alleged errors did not qualify to have the election nullified. The trial court found that all the grounds that had been pleaded by the petitioner had failed but made its own issues and from those issues declared the election to have been improper.

### **Submissions by 1<sup>st</sup> Respondent**

The 1<sup>st</sup> respondent contends that the appeal was filed and signed by the Firm of KamauLagatAdvocates without due authority filed by the appellant as required by **Rule 34(1) and 10(3)** of the Election Petition Rules 2013. The rules require that the memorandum of appeal ought to have been signed by the appellant. Under **Rule 23(3)(b)** a petition can only be withdrawn after it has been signed by the petitioner and his advocate. Counsel relies on the cases of **MUTUKU & 3 OTHERS V UNITED**

**INSURANCE COMPANY LIMITED Civil Case No. 1994 of 2002** where it was held that an unsigned pleading cannot be valid in law and that it is the signature of an appropriate person which authenticates a pleading. Counsel also cited the case of **JAFFERSON KALOMA MLEWA V REPUBLIC Mombasa Court of Appeal Criminal Appeal No. 528 of 2010** where the Court of appeal set aside a judgment of a Two Judge Bench of the High Court because it had not been signed by one of the judges.

With regard to grounds 1-5 of the grounds of appeal, counsel for the 1<sup>st</sup> respondent contends that the trial court correctly directed its mind to the provisions of Section 83 of the Election Act. The court concluded that the Forms 35 used to declare the results were not authenticated and there was no certainty that the copies that were produced in court was a reflection of the originals. The errors on the forms were also admitted. The errors could not have been cured by the provision of section 83 of the Elections Act. The 1<sup>st</sup> respondent did prove that there were irregularities in the manner in which the elections were conducted. Articles 81 and 86 of the Constitution provides for the manner in which elections are to be conducted and this include fairness, transparency, accountability, accuracy and safety of election materials. There were no counterfoils in the ballot boxes and this raises doubt on the source of the ballot papers in the ballot boxes. The seals for some of the ballot boxes were missing, there were two different Form 36 and only one was produced while the other one was concealed from the court and this did prove that there was no transparency and accountability. The Forms 35 that were produced contained erasures that were not countersigned by the presiding officers and some had no signatures of the presiding officers and party agents. Some forms had no IEBC stamps. The polling day diary for polling station number 64 had no signature of the presiding officer. Over 10 ballot boxes did not have seals and some had broken seals. All these irregularities affected the results. The entire election process could not be held to be free and fair. Counsel relies on the case of **JAMES OMINGO MAGARA V MANSON NYAMWEYA & 2 OTHERS. Kisumu Civil Appeal No. 8 of 2010 (CA)** where the court emphasized on the issue of irregularities which affect the results. Counsel for the 1<sup>st</sup> respondent further submitted that the scrutiny and recount process established that there were no counterfoils inside some ballot boxes. The difference between the appellant and the 1<sup>st</sup> respondent is only 144 votes and this can be caused by tampering with only one ballot box.

On ground 6, 7 and 23 the 1<sup>st</sup> respondent maintains that the results after the scrutiny and recount exercise do not tally with the announced results. The irregularities that were discovered by the scrutiny and recount lead to only one conclusion that those results were not proper. The trial court dealt with the issues that were within the pleadings. An election petition is an inquiry and the court is not just bound by the pleadings but is expected to consider the entire evidence. This is supported by the decision in the case of **JUSTUS MUNGUMBI OMITI V WALTER ENOCK NYAMBATI OSEBE & 2 OTHERS. Kisii Election Petition No. 1 of 2008**. The trial court evaluated the pleadings and the evidence adduced before it arrived at its decision.

With regard to grounds 8 and 9 it is the submission of the 1<sup>st</sup> respondent that his petition before the trial court was not based on the results of Lwandanyi Primary School polling station only. The petition raised several complaints including denial of the petitioner's agents access to polling stations, erasures on Forms 35, interference of the ballot boxes among others. The petition also raised the issue of irreparable irregularities and alteration of the votes in some polling stations. On grounds 10, 11, 12, 13, 14 and 15 counsel for the 1<sup>st</sup> respondent submitted that the results of an election are manifested in the contents of the ballot boxes. An audit was done and several issues remained unanswered. That cannot be equated to fishing for new evidence. The winner in an election is not entirely determined on the basis of arithmetic. The entire election process has to be evaluated. The results of an election are arrived at after the entire process is properly conducted. Where the contents of the ballot boxes are in doubt then the election cannot be held to be free and fair.

On grounds 16, 17, 18, 19, 20 and 26 counsel contends that the trial court correctly doubted the honesty of the returning officer who prepared another verified Form 36 but failed to produce it in court. The returning officer produced Forms 35 that had been altered without being countersigned. Some of the Forms 35 were not signed by the presiding officers and were also not stamped with IEBC stamp. Seven ballot boxes lacked Forms 35. Counsel submits that the court correctly ordered for scrutiny and recount

so as to find out the truth. Most of the issues raised by the appellant are issues of fact as opposed to law. The trial court correctly applied the law.

Concerning the rest of the grounds of appeal, Mrs. Mumalasi submitted that 30 Forms 35 were found in the ballot boxes and seven boxes had no Forms 35. This called upon consideration of the anomaly by the trial court. The petitioner before the trial court had doubted the authenticity of the results and his petition was related to the entire exercise as opposed to the results of one polling station. The Form 36 that was produced was not signed. The court is entitled to look at all the evidence produced in court before making its decision as opposed to concentrating on the pleadings only. Counsel relies on the case of **THOMAS MALINDA MUSAU & 2 OTHERS V IEBC & 2 OTHERS. Machakos Election Petition No. 2 of 2013** where the court held that having the highest vote during recount does not automatically make you the winner. The provisions of Section 83 of the Election Act cannot be a blanket to cover all manner of irresponsible handling of election.

### **Petitioner's case before the Trial Court**

Six witnesses testified for the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent himself was PW1. He testified that he was a candidate for Lwandanyi Ward representative in the Bungoma County Assembly. He vied for the position on FORD KENYA PARTY TICKET. He was at the tallying centre at Sirisia Secondary School and the returning officer announced that he had garnered 1 vote at Lwandanyi polling station. He had voted at that station and he knew he had garnered 271 votes. He immediately complained to the returning officer. At station number 58 he got 8 votes but the Form 36 gave him 0 votes. At station 85 it is indicated in the Form 36 that he got 1 vote yet he had obtained 11 votes. Some Forms 35 were not signed by the agents and some had no place for the agents to sign. Some Forms 35 had alterations. He further testified that his agents were not allowed to accompany the ballot boxes. He had agents throughout the 37 polling stations.

The presiding officer announced that he had garnered 2,454 votes but his calculation had given him 2,557 votes. He was not in agreement with the votes given to him since 270 votes were not included. Because of the irregularities he lost some votes that were not accounted for. His agents signed some of the Forms 35. His petition was not based on the votes of Lwandanyi Primary School polling station only but on the manner in which the elections were conducted. There were incidents of violence and a boy by the name DAVID was assaulted at one polling station. He was number two while the appellant was declared the winner.

**PW2, MARY KHAINJA BIKETI**, is an old lady who went to vote at Lwandanyi Primary School polling station. Her evidence is that she intended to vote for the 1<sup>st</sup> respondent and was guided by the presiding officer as opposed to the party agent. She was not sure whether her vote was correctly made for the 1<sup>st</sup> respondent. She is a grandmother to the 1<sup>st</sup> respondent. **PW3, PETER WOTUBE MASIKA** is the chairman of Ford Kenya Party in Lwandanyi Ward. On the 3.4.2013 he was going through the polling stations and he met MILDRED BARASA at Lwandanyi Primary School giving out money to voters. He also found one MUUTULI (PW5) having been beaten at around 1.00 p.m. near Korsindet polling station. He reported the matter to the police station. He was the coordinator of the party in Lwandanyi Ward. He also noted that one of his party agents had not been allowed into a polling station and he intervened. Mildred Barasa was giving out the money on behalf of **HILARRY MASINDE BARASA**, a United Democratic Front (UDF) candidate in the Ward. Some voters left Korsindet polling station without voting due to violence.

**PW4**, was **MAURICE WANYONYI**. He was the chairman of AMANI (UWIANO) initiative. He was an observer of the elections. On the 5.3.2013 he went to the Sirisia tallying centre when the votes for Lwandanyi polling station were announced. The returning officer announced that the 1<sup>st</sup> respondent herein had garnered only 1 vote yet he had garnered 271 votes. The 1<sup>st</sup> respondent protested the announcement but the returning officer told him that his work was over and he could go to court. He visited Kapkala polling station and witnessed violence. There was tension caused by party affiliation. **PW5, DAVID MUUTULI MUKHAMANI** testified that he went to vote at Korsindet polling station

when he was beaten by a woman by the name Mildred. He reported to the area chief and went on to vote. He was treated at Lwandanyi dispensary.

**JOSEPH BIKETI MAFULA**, was **PW6**. He was the agent of the 1<sup>st</sup> respondent at Lwandanyi Primary School polling station number 069. He went to the polling station in the morning but he was denied entry while the agents for other parties were allowed. He called the 1<sup>st</sup> respondent who intervened and he was later allowed. It was his evidence that he signed the Form 35 for that polling station where the 1<sup>st</sup> respondent garnered 271 votes. He was satisfied with the results. The 1<sup>st</sup> respondent garnered the highest number of votes at that polling station. He was not allowed to accompany the ballot boxes to the tallying centre.

### **Appellant's Evidence before the Trial Court**

The appellant testified for himself as 1<sup>st</sup> respondent and called three witnesses. His evidence was that he was a candidate on ORANGE DEMOCRATIC PARTY TICKET (ODM) in Lwandanyi Ward. There were 13 candidates. He cast his vote at Kapkara polling station and went home. He was declared the winner having garnered 2,527 votes against his closest rival, the 1<sup>st</sup> respondent, who garnered 2,454 votes. At Lwandanyi Primary School polling station he garnered 28 votes while the petitioner got 271 votes. According to him the election was free and fair and he did not influence the IEBC officials. His agent at Lwandanyi Ward was JACKSON SABATI. The petitioner raised objection when the results were announced. It is his further evidence that the ballot boxes for Lwandanyi Primary School polling station were taken to the tallying centre last. No irregularity was reported and he won the election fairly. He was not aware that he was entitled to be given a copy of the Form 36. The 1<sup>st</sup> respondent stood up and protested when the votes from Lwandanyi Primary School were announced.

**MASINDE BARASA** was the 2<sup>nd</sup> witness for the appellant. He was one of the 13 candidates for the County Representative in Lwandanyi Ward on UDF party. His evidence was that Mildred Apiyo Barasa is his mother. She was a member of Ford Kenya Party and not the UDF party. He collected the number of votes he had garnered from his agents and noted that he had lost. He got 886 votes and decided not to go to the tallying centre. He was contented with the results and according to him the election was free and fair.

**PAUL PAPA ODEKE**, testified as the 3<sup>rd</sup> witness for the appellant. He was an agent for the appellant at Korsindet polling station. The appellant got 180 votes at the station and he signed the Form 35 after the voting exercise. He never witnessed any violence at the station. Illiterate voters were assisted by the presiding officer at the station. The votes were counted at the station and the counting ended at about 8.00 p.m.

### **Evidence for the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents before the Trial Court**

**LONAH NANJALA KHAEMBA** was the 4<sup>th</sup> defence witness. She is a teacher at Chwele Girls High School and was the presiding officer at Lwandanyi Primary School polling station. Her evidence was that the 1<sup>st</sup> respondent got 271 votes at the station. There were two agents for the FORD KENYA party at the station. She assisted illiterate voters in the presence of party agents. The votes were counted and Forms 35 filled. She later transported the ballot boxes to Sirisia tallying centre. Counting was conducted properly and the election was free and fair. **Zablon Masinde** and **Wycliffe Musungu** were FORD KENYA party agents who were inside the polling station before **Joseph Mafula** entered the polling station. There was an anomaly with the total number of valid votes cast as indicated on the Forms 35. She cancelled and countersigned. There was no report of bribery or violence.

**CALEB SIRIBA KIGONDE** was the 5<sup>th</sup> defence witness who testified on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. He was the returning officer for Sirisia Constituency. He announced the results from Lwandanyi Primary School polling station and the 1<sup>st</sup> respondent got 271 votes. It is the same votes indicated in the Form 35 and Form 36. Had he not announced 271 votes for the respondent then the total

votes for 1<sup>st</sup> respondent was to be 2,184. There were two candidates at Lwandanyi Primary polling centre who got 1 vote each. No incident of violence was reported to him. After the results were announced he was later asked by IEBC officials to do a verification of the results. He verified the results and filled in another Form 36. Some errors were detected after the results had been announced but they did not affect the final results. At polling station number 58 the 1<sup>st</sup> respondent was given 0 votes instead of 8 votes. At station number 85 Khabukoya the 1<sup>st</sup> respondent was given 0 votes instead of 11. The 1<sup>st</sup> respondent lost 19 votes due to the errors. The appellant lost 77 votes also due to the errors. Other candidates were also affected but that did not affect the final results. The verified results gave the appellant herein 2,614 votes while the 1<sup>st</sup> respondent got 2,473 votes giving a difference of 141 votes.

The returning officer went on to testify that he discovered the anomaly after the results had been announced. He did not receive any complaint that he had announced the wrong number of votes for Lwandanyi Primary School polling. He was at the tallying centre from 3<sup>rd</sup> to 5<sup>th</sup> of March 2013 and the staff including himself were fatigued. The Form 36 was filled in by the input clerks. The Form 36 he produced in court had his name without his signature. Some of the Forms 35 had alterations that were not countersigned. He used the Form 36 that was produced in court to announce the results. When the petition was filed he forwarded the election materials to the court. Some of the ballot boxes had broken seals while some had Forms 35 missing. He attributed the anomaly to the process of transporting the boxes. When he was announcing the results there was a projector showing the results. The results were being announced as they were taken to the tallying centre. The Forms 35 are filled separately as opposed to being filled using carbon paper. There were 37 polling stations in the Ward.

### **Scrutiny & Recount**

After the defence closed its case, an order was issued for scrutiny and recount. Seven ballot boxes were marked as unknown. The returning officer was later recalled and identified those boxes through the use of their serial numbers. It is his evidence that the serial numbers were given by the manufactures. The 7 boxes also did not have Forms 35 affixed outside or inside. He identified the 7 boxes as follows:-

<b>SERIAL NO.</b>	<b>POLLING STATION</b>
194984	KAMUGORE PRIMARY SCHOOL (082)
195258	KABURET PRIMARY SCHOOL (064)
194939	NYAMWESI MARKET (079)
195100	LURARE PRIMARY SCHOOL (075)
195019	NYAMWESI PRIMARY SCHOOL (055)
195321	MAYEKWE PRIMARY SCHOOL (072)
195099	MALAKISI HEALTH CENTRE (077)

### **Issues raised by the Petitioner before the trial court**

From the record of appeal the main issues that were raised by the petition were:-

1. The petitioner's agents were barred from polling stations especially Lwandanyi Primary School polling station.
2. There was violence, intimidation and bribery.
3. The contents of the ballot boxes were interfered with.

4. The IEBC failed to conduct the election as per the law.
5. The declared results were not the primary results.
6. There were two different versions of the Forms 36.
7. Failure to assist illiterate voters.
8. Party agents did not accompany vehicles carrying the ballot boxes to the tallying centre.

The trial magistrate evaluated the evidence and came to the conclusion that there was no violence, intimidation or bribery. The court also found that there was no stuffing of ballots in the ballot boxes and that the petitioner's agents were not barred from the polling stations. From the evidence before the trial court I do agree with the finding of the trial magistrate on the above issues. With regard to the allegation that the petitioner's agents were barred from the polling stations, the evidence before the court showed that the only place the petitioner's agent was barred was Lwandanyi Primary School polling station. The agent in question was Joseph Mafula (PW6). PW6's evidence was that he was not allowed to enter the polling station as he was told the list was full. The evidence revealed that two other agents of the Ford Kenya Party were already inside the polling station namely Zablon Masinde and Wycliffe Musungu. It is the evidence of the presiding officer Lornah Nanjala Khaemba that when Joseph Mafula wanted to enter the polling station the other two agents were already inside. They consulted and Joseph Mafula was allowed in and another agent was released. It is clear that there was no barring of the petitioner's agent. Joseph Mafula himself testified that after he was allowed in, he participated in the process until the votes were counted. His candidate got 271 votes and he signed the Form 35.

On the issue of violence, intimidation and bribery, the petitioner contended that one Mildred Barasa was seen dishing out money at a polling station. There was also violence at Korsindet polling station. PW3 Peter Wotube Masika also informed the court that he saw Mildred Barasa dishing out money to voters at Lwandanyi Primary School. He also saw PW5 David Muutuli having been assaulted. PW5 himself testified that he was assaulted by Mildred Barasa at Korsindet polling station. The evidence on record shows that Mildred Barasa was not an agent of the appellant. Her own son Hillary Masinde Barasa was a candidate in the elections and he informed the court that his mother was a Ford Kenya party supporter. PW3 testified that Mildred was giving out money on behalf of Hillary Masinde Barasa. Mildred Apiyo Barasa swore an affidavit on the 10.4.2013 and she denied giving out money to voters or assaulting David Muutuli Mukhamani. (page 73 and 74 of the record).

I do agree with the findings of the trial court that there was no violence and bribery of voters. There was also no intimidation of the voters. On the issue of stuffing of votes, the trial magistrate found that although some seals were missing, there was no evidence that there was stuffing of ballots in the ballot boxes. It is the evidence of PW2 Mary Biketi that she was assisted by the presiding officer and she voted. The presiding officer of that polling station informed the court that she assisted illiterate voters in the presence of the party agents. I do agree with the trial magistrate that that allegation was not proved.

### **Reasons for nullification of the election by the trial court**

The trial magistrate ordered for scrutiny and recount of the votes. Several issues emerged after the process. The trial magistrate held that the Forms 35 produced in court were not authentic, the verified Form 36 was not produced in court, several ballot boxes lacked seals, 7 ballot boxes did not have original Forms 35 either inside or fixed outside the boxes, some counterfoils in some boxes were missing, comparison between Forms 35 filed in court and the originals produced during the recount for polling station number 60 and 61 showed some variances, some Forms 35 had alterations that not were countersigned, some Forms 35 in some ballot boxes were different from those found during the scrutiny and recount exercise and that some forms lacked IEBC stamp. The trial magistrate concluded that the above irregularities affected the results. The scrutiny and recount process did not clear the doubts. The court held that the Forms 35 used to declare the results were not authenticated and there was no certainty whether they were genuine. The court found as follows:-

***“Irregularities on Forms 35 and 36 arose both in the hearing and during scrutiny and recount of votes. The 3<sup>rd</sup> respondent annexed copies of the Forms 35 and 36 to the affidavit sworn by the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent testified in court and made no mention of the original Form 35 and***

36. It came out clearly in evidence as earlier mentioned that there were alterations in Forms 35 which were not countersigned. Forms 35 are primary documents which are used to feed Form 36. The entries in Form 35 are expected to be a true reflection of results of voting in every polling station. Uncertainty in the entries made in Forms 35 casts doubt on the result of election from the particular polling station in emanates. This irregularity was meant to be corrected by scrutiny and recount which was ordered by the court at the close of evidence from all parties herein.

From the scrutiny and recount report 7 ballot boxes had no Form 35 but were later identified by use of polling day diaries. I have had occasion to peruse the original Form 35 found in the ballot boxes and after comparing with the copies filed in court I noted that entries made are different in polling station No. 061 Kibindoni Primary School. The original has no IEBC stamp, no name for presiding and deputy presiding officer, no names or signatures for agents. Copy filed in court has names and signatures of presiding and deputy presiding officers and is signed by agents. Polling station number 060 Machakha Primary School the original has no names or signatures of agents while the copy does not have page 2. Both page 1 and 2 have similar content. The question that arises is from which Form 35 was it photocopied. The 2<sup>nd</sup> respondent never explained to court why he failed to avail the original Form 36 he alleged to have used to announce results in court. Even if the court was to ascertain the contents of Form 35 from the scrutiny and recount of votes, it emerged from the polling day diaries that 2 stations earlier on mentioned had different serial numbers for ballot box seals from those found during scrutiny. After the exercise a doubt still remain as to whether accurate entries were made and announced.

I have also considered presence of seals in 15 ballot boxes listed by the petitioner's advocate. I have compared the list with the handwritten proceedings, of scrutiny and recount and find that in ballot box serial number 195019 code 055 Namwesi Market they are the same serial number recorded in the polling day diary at start of polling. There is therefore no prove that the ballot boxes were opened, seals put inside and sealed again. Presence of seals in the ballot boxes do not point at any irregularity. From the foregoing I find that there is doubt as concern the authenticity and veracity of Forms produced in court by the 2<sup>nd</sup> respondent. I now wish to consider the second issue.

2. Whether the irregularity in Form 35 and 36 substantially affected the results of election.

This court ordered scrutiny and recount of votes due to doubts arising from failure to fill parts of Forms 35, stamp or countersign alterations made on entries. At the end of scrutiny the issue remained unanswered. The whole electoral process is expected to be free, fair and transparent. In the case of Joy KabatiKafulaVsAnijaKawuoya it was held that an election is a process encompassing several activities from nomination of candidates through to the final declaration of the duly elected candidate. If any one of the activities is flawed through failure to comply with the law, it affects the quality of the electoral process. In this process the Forms 35 used to declare results are not authenticated. There is no absolute certainty that the copies produced are genuine reproduction or reflection of the original Forms handed over to IEBC by presiding officers from different stations. As concern Form 36 the one produced is not signed and the fact that it has errors is admitted by the 2<sup>nd</sup> respondent. He said that he prepared a verified Form 36 which he never produced. One wonders why he decided to keep it from the court. Even if the photocopy filed in court was used to announce results as he alleged, as a show of honesty he should have produced both comparison. Failure to do so added to absence of counterfoils in one polling station and alteration not cured by scrutiny cast doubt on the results declared. It also portrays lack of transparency on the part of the 2<sup>nd</sup> respondent. The above irregularities are fatal and I do find that they fundamentally affected the electoral process and results of election.”

The above findings by the trial court formed the basis for the nullification of the election. This led to the filing of this appeal.

### The Appeal

The main issues raised in this appeal are that the irregularities did not affect the results, the verified

Form 36 was not supposed to be produced as the Form 36 used to announce the results was produced in court, the absence of counterfoils in the ballot box for polling station number 64 could not necessitate the nullification of the election, the alterations on the Forms 35 did not affect the results, the petitioner's allegations collapsed and the court considered extraneous issues and that the trial magistrate misinterpreted the law.

**Section 75** of the Election Act provides for appeals from the Magistrate's Court to the High Court. **Section 75(4)** requires this court to deal with issues of law. One of the petitioner's prayers before the trial court was for an order of scrutiny and recount. That prayer was granted. It is clear to me that all the issues that arose as a result of the scrutiny and recount process ought to have been considered by the trial magistrate. Indeed the trial court nullified the election as a result of the findings after the votes were scrutinized and recounted. The main issues for determination by this court is whether the trial magistrate correctly evaluated the information that came out after the scrutiny and recount exercise. Were the forms that were produced by the 3<sup>rd</sup> respondent before the trial court the same documents that were used during the election? Did the 3<sup>rd</sup> respondent effectively explain the absence of the original Forms 35 in 7 ballot boxes, were those 7 ballot boxes correctly identified? Were those boxes the same ballot boxes used for the election at Lwandanyi Ward? Was there need to have the verified Form 36 produced in court, or did its none production prejudice any of the parties, did the irregularities make the election not to be free and fair and therefore affected the results. I find all the above issues to be matters of law and not issues of facts.

### **Court's Analysis of the Appeal**

The record shows that counsel for the 1<sup>st</sup> respondent wrote to the IEBC on the 15.3.2013 seeking copies of Forms 34, 35 36 and 38. The letters were sent to the IEBC offices in Bungoma and one was dispatched by registered post to the Nairobi office. From the record it is clear that the documents were not supplied and the petition was filed on the 22.3.2013. The petitioner annexed a copy of Form 35 for Lwandanyi Primary School polling station number 069 which had been given to his agent. When the 3<sup>rd</sup> respondent filed its response to the petition the returning officer annexed the Forms 35 and Form 36 that were used in the election. The forms are photocopies and according to the 2<sup>nd</sup> respondent in the petition they were the ones used in the election. Should the court conclude that the Forms 35 produced in court were the ones used during the election? I have gone through all the copies of the Forms 35 that were annexed to the affidavit of the 2<sup>nd</sup> respondent in the affidavit sworn on the 30.4.2013. All of them have an IEBC stamp. All the forms except two for polling station no. 60, Machakha Primary School and 61, Kibindoni Primary School polling station were signed by the party agents. I have also gone through the report of scrutiny and recount and do find that the results of that process are quite similar to the results recorded in Form 36 produced by the 2<sup>nd</sup> respondent as well as the results in the Forms 35. The difference is occasioned by the disputed votes during the scrutiny and recount process.

I have also examined the 30 original Forms 35 that were found in the 30 ballot boxes and compared them with the Forms 35 produced in court. There were 7 boxes that lacked the original Forms 35. It is important to note that the Forms 35 are not filled in copies but they are filled in counterparts. This means that it is possible to see two Forms 35 with different serial numbers. It is possible also to see one Form 35 signed by party agents while another one has not been signed. This can occur when there is need to produce another Form 35 when the party agents have already left the polling station. It is common knowledge that the Forms 35 are filled after the votes are counted at the polling station. The most important issue in the form is the results for each of the candidates.

It is a requirement that presiding officer give party agents or the candidates Forms 35 after the votes have been counted (Regulation 79). The petition itself did not specifically state that the Forms 35 that were filled in at the polling stations were changed. There was no further affidavit filed in court after the petitioner was served with the Forms 35 contending that the results contained in those forms had been altered. It is also the petitioner's consistent position that his votes for Lwandanyi polling station were 271 yet only 1 vote was announced at the tallying Centre. He maintains that had the 271 votes been added to his votes then he would have scored 2,725 votes and become the winner. I have had the advantage of

handling three other election petitions involving two Parliamentary positions and one Gubernatorial position and all the forms that were produced by the IEBC were photocopies. There was no objection to those forms. There is also no evidence that the IEBC officials were favouring a specific candidate in the elections for Lwandanyi Ward County Representative. There is also no evidence that the forms that were produced had nothing to do with the elections at Lwandanyi Ward. I am therefore satisfied that the forms that were produced were the same forms that were used during the elections in Lwandanyi Ward.

Having held that the forms that were produced in court are the same ones that were used for the election, the next issue for determination is whether the forms and the evidence do manifest an election process that can be held to be free and fair and to be within the provisions of the law. Article 81 of the Constitution provides for general principles for the electoral system. Article 81(e) provides for free and fair elections which should include an election by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body, transparent, impartial, neutral, efficient, accurate and in an accountable manner. The petitioner before the trial court contended that the election was not free and fair, it was not transparent and conducted in an accountable manner. The reason for that is that the scrutiny and recount process revealed that the election was not transparent and the recount process left many questions unanswered.

The Forms 35 and 36 are statutory documents and therefore forms part of the law. Since an election involves both the voting process and analysis of the figures, I will evaluate the election process as well as the figures contained in the forms. As I have indicated herein above, I am in agreement with the findings of the trial court that there was no violence, intimidation and bribery of voters. The election was conducted by way of secret ballot and there is no evidence that some of the voters were barred from voting. According to PW3 violence took place at Korsindet polling station and some voters left without voting. The record shows that Korsindet Primary School polling station was number 68. It had 492 registered voters. There were 415 valid votes and only 1 rejected vote. This shows that the turnout was about 84% and there is no proof that voters failed to turn out in large numbers.

The trial court established several irregularities as highlighted herein above. One of the irregularities involves cancellation and alterations of Forms 35 without the concerned officer countersigning. The Ward had 37 polling stations. I have gone through all the Forms 35 and noted the following alterations and cancellations. At polling station number 53 Londo ACK Primary School there are two alterations on the part dealing with the aggregate of votes. The total number of votes cast is given as 201. The concerned officer had written 203 and corrected it to read 201. There were 3 rejected votes. The total number of valid votes was 198. There are no alterations in the votes for each candidate. The party agents signed the form. The alterations were merely meant to balance the figures and did not affect the candidates. The same alterations occurred at polling station number 54, Sitabicha Primary School where the total number of votes cast was initially indicated as 390 but later rectified to read 391. There were 5 rejected votes giving total number of valid votes as 386. The party agents signed the form. The trend continued in polling station number 55, Namwesi Primary School where the figure 261 was rectified. There were two spoilt votes at the station and the officer had added those votes to the total number of votes cast. The mistake was noted and rectified. The alterations were countersigned.

At polling station number 57 Malakisi CPK Primary School there are some alterations which are countersigned. The same are minor and they involve the balancing of the votes. The agents signed the form. At polling station number 60 Machakha Primary School the total number of valid votes cast at the top is given as 571 in figures and in words. There is the word "only" that was cancelled. The votes for each candidate were not disturbed. The agents signed the form. There is also an alteration on polling station number 61 Kibindoi Primary School whereby the figure 243 for total number of votes cast is rectified. The figure 3 was the one rectified and it was countersigned. The votes for each candidate were not disturbed. Similarly at polling station number 62 there is rectification on the number of rejected votes. The number is 5 but it seems the concerned officer had written 4 and it was rectified. The agents signed the form. The vote spread for each candidate was not touched.

At Chebukuyi Primary School (065) there is alteration on the total number of votes cast which was 206 and the total number of valid votes that was 204. There were 2 rejected votes. The cancellations

were countersigned. The agents signed the form. At Lwandanyi Youth Polytechnic polling station number 073 there is an alteration on the total number of rejected votes. The number was 10 and it was initially given as 9. The alteration is countersigned and there is no alteration of the votes spread to the candidates. The agents signed the form. The same alteration appears at polling station number 075 Lurare Primary School where the total number of valid votes cast is given as 100 in figures. The officer wrote in words "A hundred and". The officer realized the mistake and cancelled the extra word and countersigned. The votes spread for each candidate was not affected. The agents signed the form. At Makhuyu ECD Centre (076) there is an alteration on the total number of votes cast. The figure is 121 and the alteration is countersigned. The agents signed the form. The same applies to Malakisi Health Centre polling station number 077 where the figure for total number of votes cast of 194 was rectified and countersigned. There is also an alteration for the total number of valid votes cast in words and figures and the alteration is countersigned. The agents signed the form. The votes spread for each candidate is not affected. At Namundi Primary School (083) the total number of valid votes cast was 200. There were 3 rejected votes. The officer wrote in words One Hundred and ninety eight as the number of valid votes cast and she cancelled it and replaced it with 200 in figures and countersigned. The votes spread for each candidate was disturbed. The agents signed the form.

From the above analysis of the Forms 35 it is established that the alterations were done on the upper part of the forms. This part simply involves the arithmetic balancing of the total number of registered voters, spoilt ballot papers, total number of votes cast, rejected votes, disputed votes and total number of valid votes casts. There is no alteration on the lower part of the Forms 35 which gives the votes for each candidate. Thus the alterations did not deny any of the candidates the votes he had garnered in each of the 37 polling stations.

Other irregularities noted involved lack of counterfoils in polling station number 64 Kaburweti Primary School in the ballot box. The court also found that the same polling station and polling station number 75 had different seal numbers on the ballot boxes. My view is that even if a seal is replaced with another one the most important thing is whether the contents of the ballot box was interfered with. When the elections were conducted there were other elective positions being conducted at the same time. It is possible that the counterfoil could have been put in another ballot box for either Women Representative, Member of Parliament, Governor or Senator. What is important is to compare the results after scrutiny against the Form 35 produced in court. I do not find that anomaly to be fatal.

There was an issue involving 7 ballot boxes missing original Forms 35. The returning officer identified those boxes. The trial court noted two anomalies involving polling stations number 60 and 61. The court found that at polling station number 61 the original Form 35 had no IEBC stamp, no name for presiding and deputy presiding officer and no names or signatures of party agents. The copy filed in court has the names and signatures of the presiding and deputy presiding officers and is signed by the party agents. With regard to polling station number 60 Machakha Primary School the original form has no names or signatures of the agents while the copy produced in court does not have page 2. The court posed the question **"from which Form 35 was it photocopied"?**

The original Form 35 that was found in the ballot box for polling station number 60 for Machakha Primary School is stamped by the IEBC stamp. It gives the number of registered voters to be 738. 586 votes were cast and there were 15 rejected votes. The total number of valid votes was 571. The votes spread for each candidate was not altered. The original form was signed by Joyce Nasimiyu deputy presiding officer at the back and one Philisters who was the presiding officer. There is no name or signature of the party agents. The presiding officer commented that the elections were free and fair. The serial number of the original form is 35 CA 1084 00121644. The photocopy produced in court is serial number 35CA 1084 00121645. The photocopy form gives total number of registered voters as 738. 586 votes cast. 15 rejected votes and 571 valid votes. The votes spread for each candidate is not altered. There is no page 2 of the form. The results in both forms give the appellant herein 180 votes and the petitioner 135 votes. The results of the scrutiny and recount process gave the appellant 180 votes and the petitioner 136 votes. The difference of 1 vote was explained in the proceedings to be arising from the disputed votes. That being the case I do find that there is no difference in the results from the two forms. It is also established that the photocopy produced in court was not made from the original that was found

in the ballot box. As I have indicated herein above, the Forms 35 are not necessarily filled in duplicate, triplicate or quadruplicate. The forms are filled in counterparts. The copy that was produced in court was signed by Philisters Khamala as the presiding officer. The ID number given in both forms is the same 23494281.

With regard to polling station number 61 Kibindoi Primary School, the copy produced in court was signed by the presiding officer Samuel Wanyonyi and deputy presiding officer Moses Wafula Simiyu. It was also signed by 16 party agents. The comments by the presiding officer were that **“polling was carried out well and counting was done without and (sic) dispute”**. The serial number for that form is 35 CA 1084 00121646. The original Form 35 found in the ballot boxes is serial number 35 CA 1084 00121648. The two forms give the same number of registered voters as 273, the same number of total votes cast as 242 and same number of rejected votes as 2. The form produced in court has alteration on the figure on total number of votes cast which is given as 243 and it was countersigned. The total number of valid votes in both forms is given as 241. The original form has no signature of the presiding officer or the deputy. The party agents did not sign the original form but the copy produced in court is signed. Both forms give the votes for the appellant as 147 and the petitioner as 39. The scrutiny and recount results gave the results for the appellant as 145 and for the petitioner as 37. Both candidates were deducted 2 votes each as a result of the recount process. Given the above analysis I do find that the anomalies in those two polling stations were not so material as to raise any doubt in the mind of the trial court. It is clear that the two forms produced in court were not photocopied from the same originals. It is common knowledge that it is quite difficult to produce about 10 copies of a document by way of carbon copy. The law requires the presiding officer to give each party agent a copy. One copy is fixed to the premises where the election was conducted. A copy is put inside the ballot box while another copy is fixed outside the ballot box. Another copy is sent to the returning officer to announce the results. What is important is the Will of the people which is reflected in the votes distributed to the candidates.

The 7 polling stations where the original Forms 35 were not traced were as follows:

SERIAL NO.	POLLING STATION NO.	POLLING STATION
194984	82	KAMUGOREPRIMARY SCHOOL (082)
195258	64	KABURET PRIMARY SCHOOL (064)
194939	79	NYAMWESI MARKET (079)
195100	75	LURARE PRIMARY SCHOOL (075)
195019	55	NYAMWESI PRIMARY SCHOOL (055)
195321	72	MAYEKWE PRIMARY SCHOOL (072)
195099	77	MALAKISI HEALTH CENTRE (077)

An analysis of the results contained in the forms produced in court and the results of scrutiny and recount for the seven polling stations is as follows:-

POLLING STATION NO.	STATION	NATHAN OBWANA		ROBERT WANYERA	
		FORM 35	RECOUNT	FORM 35	RECOUNT

055	Namwesi Primary School	68	66	23	26
064	Kaburweti Primary School	85	80	27	27
072	Mayekwe Primary School	5	5	192	191
075	Lurare Primary School	16	16	6	6
077	Malakisi Health Centre	78	76	14	14
079	Namwesi Market	69	69	42	42
082	Kamungole Primary School	40	40	21	21
	<b>TOTAL</b>	<b>361</b>	<b>352</b>	<b>325</b>	<b>327</b>

The above results show that the votes for the two candidates in three polling stations namely Lurare Primary School (075), Namwesi Market (079) and Kamungole Primary School (082) are the same. Each of the two candidates had his votes affected in the other four polling stations as a result of dispute raised during the recount. The Form 35 produced in court for polling station number 55 gave the appellant 68 votes and the petitioner 23 votes. For polling station number 64 the appellant got 85 votes and the petitioner 27 votes. For polling station number 72 the appellant got 5 votes and it is the same votes he got after the recount. The petitioner got 192 votes and the recount reduced it to 191. At polling station number 77 the Form 35 gave the appellant 78 votes but it was reduced by the recount to 76 votes. The petitioner got 14 votes in the Form 35 as well as the recount. Given the picture presented by the 7 polling stations, it is my finding that there is no reason to doubt the authenticity of the Forms 35. The result of the recount shows that the same number of votes indicated in the Forms 35 were found in the ballot boxes. The ballot boxes were positively identified and there was no evidence that the votes in the ballot boxes had been tampered.

I have examined the Forms 35 for the 7 polling stations produced in court and noted the following. For polling station number 55 the form was signed by both the presiding and deputy presiding officers. Six party agents signed. The form bears the IEBC stamp. For polling station number 64 the form was signed by the presiding officer Mr. Watata Wanyama and the deputy Wafula Simiyu Mathias. Twelve party agents signed and the form bears the IEBC stamp. Polling station number 72 the form was signed by the presiding officer Nahashon Masai and the deputy Aggrey Wechuli Wamalwa. The form has the IEBC stamp at the front and was signed by thirteen party agents. At Lurare Primary School polling station number 75 the form produced in court was signed by the presiding officer Moses Masika and his deputy Simiyu Enock Wangila. Three party agents signed the form. Polling station number 77 Malakisi Health Centre the presiding officer Edwin Bilasho Wanyonyi signed and his deputy Stephen Wechuna. Ten party agents signed and the same bears the IEBC stamp. Polling station number 79 the form was signed by the presiding officer Davidson Akhonya and his deputy Mary Musundi Malia. Ten party agents signed and it bears the IEBC stamp. At Kamungole Primary School polling station number 82 the form was signed by the presiding officer Cornelius and his deputy Enos Bunyasi Wamacho. Nine party agents signed and the form bears the IEBC stamp.

The main issue for determination from the above 7 polling stations is whether there was any alterations made in favour of any one candidate or whether it is difficult to establish the votes for the candidates. Although the original Forms 35 were not found in the ballot boxes, the results of the scrutiny and recount are in tandem with the results contained in the Forms 35 produced in court. Indeed this was not an issue

specifically raised in the petition but arose as a result of the order of scrutiny and recount. The trial court was entitled to consider the scrutiny and recount outcome and make its own conclusion. I do hold that the results represent the Will of the people of Lwandanyi and there was no difference in the results in the 7 ballot boxes with the results in the Forms 35 produced in court. In essence therefore the identification of the 7 ballot boxes was proper and conclusive. The boxes were opened and the votes found inside were for Lwandanyi Ward. The results found inside were for the 13 candidates. The paper trail was therefore capable of establishing the fact that the votes were for Lwandanyi Ward as opposed to another area.

Before scrutiny and recount was done 30 original Forms 35 were found in 30 ballot boxes. As indicated herein above 7 ballot boxes missed original forms 35. I have gone through all the 30 original Forms 35 and compared them with the Forms 35 filed in court and came out with following summary.

<b>NO. OF P/S</b>	<b>FILED FORMS 35 S/N</b>	<b>VOTES FOR APPELLANT</b>	<b>VOTES FOR PETITIONER</b>	<b>ORIGINAL FORMS 35 S/N</b>	<b>VOTES FOR APPELLANT</b>	<b>VOTES FOR PETITIONER</b>
50	00121591	33	36	00212593	33	36
51	00216859	20	194	00216863	20	194
52	00121604	11	66	00121605	11	66
53	00121606	9	22	00121610	9	22
54	00121611	39	87	00121613	39	87
56	00121624	150	30	00121623	150	30
57	00121629	38	15	00121628	38	15
58	00121634	79	8	00121633	79	8
59	00121639	66	25	00121638	66	25
60	00121645	180	135	00121644	180	135
61	00121646	147	39	00121648	147	39
62	00121653	19	50	00121655	19	50
63	00121660	160	42	00121658	160	42
65	00121669	57	58	00121668	57	58
66	00121674	80	98	00121675	80	98
67	00121676	105	36	00121678	105	36
68	00121682	189	100	00121685	189	100
69	00121691	28	271	00121692	28	271

70	00121698	38	109	00121699	38	109
71	00121705	281	87	00121701	281	87
73	00121711	34	219	00121713	34	219
74	00121717	226	64	00121716	226	64
76	00121729	36	8	00121730	36	8
78	00121736	10	12	00121737	10	12
80	00121750	24	88	00121746	24	88
81	00121753	72	61	00121754	72	61
83	00121765	29	81	00121761	29	81
84	00121766	4	88	00121769	4	88
85	00121772	0	11	00121775	0	11
86	00121777	89	8	00121780	89	8
TOTAL		2253	2148		2253	2148

The above scenario shows that the distribution of the votes to the two candidates is the same in the two categories of the Forms 35. A court of law is a court of equity which deals with the substance mainly rather than the form.

The 7 ballot boxes whose original Forms 35 were not traced give the following picture:

STATION	NATHAN OBWANA		ROBERT WANYERA	
	FORM 35	RECOUNT	FORM 35	RECOUNT
055 – Namwesi Primary School	68	66	23	26
064 – Kaburweti Primary School	85	80	27	27
072 – Mayekwe Primary School	5	5	192	191
075 – Lurare Primary School	16	16	6	6
077 – Malakisi Health Centre	78	76	14	14
079 – Namwesi Market	69	69	42	42
082 – Kamungole Primary School	40	40	21	21
<b>TOTAL</b>	<b><u>361</u></b>	<b><u>352</u></b>	<b><u>325</u></b>	<b><u>327</u></b>

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The scrutiny and recount was done in pursuant of the court ruling. Counsel for the appellant reproduced the results for the two candidates as follows:-

STATION	NATHAN OBWANA		ROBERT WANYERA	
	FORM 35	RECOUNT	FORM 35	RECOUNT
050 – Nasala Primary School	33	33	36	36
051 – Tulienge Primary School	20	19	194	192
052 – Mufungu Primary School	11	11	66	66
053 – Londo ACK Primary School	9	9	22	22
054 – Sitabicha Primary School	39	38	87	85
055 – Namwesi Primary School	68	66	23	26
056 – Malakisi Muslim Pr. School	150	149	30	30
057 – Malakisi CPK Primary School	38	38	15	15
058 – Tamlega Primary School	79	77	8	8
059 – Nambuya Primary School	66	67	25	25
060 – Machakha Primary School	180	180	135	136
061 – Kibindoi Primary School	147	145	39	37
062 – Namubila SA Primary School	19	18	50	47
063 – Tororo Primary School	160	159	42	42
064 – Kaburweti Primary School	85	80	27	27
065 – Chebukuyi Primary School	57	57	58	57
066 – Lwakhaka Primary School	80	77	98	92
067 – Kaprot Primary School	105	104	36	36
068 – Korosiandet Primary School	189	189	100	99
069 – Lwandanyi Primary School	28	28	271	266

070 – Wamono Primary School	38	38	109	108
071 – Kabkara Primary School	281	289	87	91
072 – Mayekwe Primary School	5	5	192	191
073 - Lwandanyi Youth Polytechnic	34	34	219	214
074 – Katomei Primary School	226	222	64	64
075 – Lurare Primary School	16	16	6	6
076 – Mukhuyu ECD Centre	36	34	8	8
077 – Malakisi Health Centre	78	76	14	14
078 – Lurende Market	10	10	12	12
079 – Namwesi Market	69	69	42	42
080 – Kakala Primary School	24	24	88	87
081 – Kabendo Primary School	72	71	61	61
082 – Kamungole Primary School	40	40	21	21
083 – Namundi Primary School	29	29	81	81
084 – Namawanga KAG Pri. School	4	4	88	87
085 – Khabukoya Primary School	0	0	11	11
086 – Komirari Primary School	89	88	8	6
<b>TOTAL</b>	<b><u>2,614</u></b>	<b><u>2,593</u></b>	<b><u>2,473</u></b>	<b><u>2,449</u></b>

The main issue which arises from the tabulation of the results in the above different tables is whether there were irregularities in the electoral process and whether the irregularities affected the results. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents who conducted the elections do concede that there were irregularities. They contend that the irregularities did not affect the results. On the other hand counsel for the 1<sup>st</sup> respondent maintains that the irregularities were so serious that they raised doubt on the correctness of the results. I have reproduced herein above the specific findings of the trial court which led to the cancellation of the election. The court was of the view that the Forms 35 produced in court could not be relied upon as they did not resemble the originals that were produced. The court also observed that the returning officer failed to produce the verified Form 36 in court. Further, the scrutiny and recount process noted that seals from two ballot boxes were different from the seals that had been placed after the election was concluded. There were different seal numbers on some ballot boxes. However, the court held that there was no proof that the ballot boxes were opened and the votes interfered with. The court concluded that there was doubt on the authenticity and veracity of the forms that were produced in court. That doubt was not cured by the scrutiny and recount process. The irregularities affected the results.

The IEBC produced photocopies of the Forms 35. **Rule 33** of the Election Petition Rules dealing

with scrutiny of votes indicate at **33(4) (c)** that scrutiny shall be confined to **copies** of the results of each polling station in which the results of the election are in dispute. It can be implied that the IEBC can provide copies of the results to the court. In this petition the copies were provided and there was no objection on the results of any specific polling station other than Lwandanyi Primary School. The view taken by the trial court that the Forms 35 could not be taken as authentic was improper. No witness testified to the effect that the Forms 35 produced in court were not genuine or provided results different from those announced at the polling stations. All the Forms 35 produced in court for all the polling stations except polling station number 60 and 81 were signed by party agents. For polling station number 60 both the form produced in court as well as the original found in the ballot box were not signed. The original was signed by the presiding officer and his deputy. It appears that page 2 of the copy produced in court was not photocopied. The two Forms 35 were signed in counterpart and are not a copy of each other.

With regard to polling station number 80 the form produced in court was signed by the presiding officer and his deputy while the original was signed by the two officers as well as 5 party agents. Both stations give exactly the same results for all the candidates. This is in line with the findings of the scrutiny and recount process. Nobody testified that the results in these two polling stations were not correct. Other than these two polling stations all the other copies of Forms 35 produced in court were signed by party agents. I do find that the results produced in court by the IEBC represented the outcome of the election and were authentic. The trial court ought to have evaluated those results and come out with a finding as opposed to doubting the documents.

Other complaints on the results include alterations made on Forms 35. I have gone through all the forms and noted that all the alterations are countersigned by the concerned officers except polling station number 62 which has already been explained herein above. Further, the alterations only involve the balancing of the votes as opposed to cancellation and alterations of the votes for specific candidates. The documents produced in court can clearly guide the court as to the number of votes garnered by each of the 13 candidates at each polling station. The question which ought to be asked is whether the irregularities affected the results.

The only irregularity which can be noted is the absence of the 7 original Forms 35 for the 7 ballot boxes that were properly identified. The alterations on the Forms 35 are normal human errors which can be committed by any person. Can it be said that all the Forms 35 for the other elective positions did not have a single alteration that was not countersigned? The non-signing of some of the Forms 35 by the party agents cannot be serious errors to warrant cancellation of the results. **Regulation 79** of the Elections (General) Regulations, 2012 state in **79(6)** as follows:-

**“The refusal or failure of a candidate or an agent to sign a declaration form under sub-regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation (2)(a) “**

Similarly **Regulation 97(1) & (2)** of the same regulations states as follows:-

**“1. Where in these regulations expression is used requiring, authorizing, or implying that, any act is to be done in the presence of the candidates or agents, that expression shall be regarded as reference to the presence of such candidates or agents as may be required or authorized to attend.**

**2. The mere non-attendance of any candidate or agents at the time and place as contemplated under sub-regulation (1) shall not, if any act is otherwise lawfully done, invalidate that act.”**

From the above regulations it is clear that the non-signing of the two Forms 35 (polling stations 60 and 61) by the party agents cannot invalidate the results. There was no contention on the authenticity of the results of the two polling stations. With regard to the Form 36, the fact that the returning officer made some computations after the results were announced cannot be a reason to doubt the results. The results

were announced at the tallying centre and the winner was known. The subsequent auditing of the results were merely meant to satisfy the Electoral body as to the correctness of the results. Had the audit revealed that the winner had indeed lost the election then that could have been a different issue. However the outcome of the audit did not alter the fact that the declared winner was still the winner after the audit. The returning officer testified that the verified results gave the appellant 2,614 votes and the 1<sup>st</sup> respondent 2,473 votes. The scrutiny and recount process also came up with the same results.

Section 83 of the Elections Act states as follows:-

**“No election shall be declared to be void by reasons of non-compliance with any written law to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the results of the election.”**

Article 86 of the Constitution requires the IEBC to ensure that the voting method is simple, accurate, verifiable, secure, accountable and transparent. The Article also calls for the counting, tabulation and announcement of the results. **Regulation 76** of the Elections (General) Regulations, 2012 provide for the detailed voting process. Unlike in the past where votes were cast and ballot boxes sealed and thereafter transported to the counting station, the new Electoral Laws require that the votes be counted at each polling station. The party agents are normally present and Regulation 76 requires that the ballot box be opened and each vote counted and thereafter the results announced. Under this process any complaints that an agent was not allowed to travel in the vehicle that was used to transport the ballot boxes cannot be a sound complaint as all what the agent can do is to give the results of his candidate and the other candidates to his candidate or political party. He can simply do that by getting a copy of the Form 35 or even note the results on a paper. There is no evidence that the results that were announced at the tallying centre were different from those announced at the polling station.

Counsel for the appellant contends that the trial court shifted the burden of proof. In the Nigerian case of **KUNDU SWEM V DZUNGWE (1966) CLR 2(a) (SC)** the petitioner raised several allegations bordering on non-compliance with the law. The trial court held as follows:-

**“Once a petitioner establishes non-compliance and the court or other tribunal cannot say whether or not the results of the election could have been affected by such non-compliance, the election will be voided. It follows therefore that at that stage, the onus shifts to the respondent to show that the non-compliance on which the petitioner relies did not affect the results of the election.”**

Since the 1<sup>st</sup> respondent alleged that the irregularities affected the results, it was up to the respondents to disprove that fact by showing that the results were not affected. There was no shifting of the burden of proof.

In **RE KENSINGTON NORTH PARLIAMENTARY ELECTIONS [1960] 2 ALL ER 150** there were several irregularities contended by the petitioner including opening and counting of the votes in the absence of party agents, transporting the ballot boxes in the absence of party agents and failing to place marks against the names of the voters on the voters register. Justice STREATFEILD stated as follows:

**“It seems to me that the election was conducted substantially in accordance with the law, and that the act or omission did not affect the true result. The question of the burden of proof does not, on the strict wording of s 16, really arise. If it did arise, it seems that, under the wording of the corresponding section of the Ballot Act, 1872, the burden rested on the respondent....it is for the court to make its mind on the evidence as a whole whether there was a substantial compliance with the law as to elections or whether the act or omission affected the result.”**

The issue of irregularities not affecting the results has been dealt with in several court cases. The first holding in the case of **MORGAN V SIMPSON [1974] All ER 722** is that “an election court was

required to declare an election invalid (a) if irregularities in the conduct of the election had been such that it could not be said that the election had been so conducted as to be substantially in accordance with the law as to elections, or (b) if the irregularities had affected the result. Accordingly, where breaches of the election rules, although trivial, had affected the result, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the election law it was vitiate irrespective of whether or not the result of the election had been affected.”

Similarly in the case of **MASHALL V GIBSON [1995]** cited in **FITCH V STEPHENSON & OTHERS [2008] ALL ER 13 or 2008 EWHC, 501 (QB)** Justice Colman noted the following:-

“.....if the consequence of a breach of the rules is that one or more of the candidates would have polled more or less votes than were recorded at the count, but the same candidate or candidates would still have been elected, the results will not have been affected and the election can only be declared invalid if it appears to the court that the election was not so conducted as to be substantially in accordance with the law as to elections”.

The rule on irregularities which either affect or do not affect the results was also expounded in the case of **MBOGORI V KANGETHE & ANOTHER [2008] 1KLR (EP) 168** and the Ugandan case of **PAUL MWIRU V IGEME NATHAN SAMSON NABEETA & 2 OTHERS (JINJA ELECTION PETITION NO. 3 OF 2011)**. In the latter case the court noted as follows:-

“After a careful review of all the evidence on record, I do find that the election in Jinja Municipality East was substantially in compliance with prevailing electoral laws. It was only laced with some mistakes by presiding officers which led to the miscomputation of the results. These mistakes however did not affect the numerical results of the election to substantially impact on the free choice of the majority of voter.....” emphasis added)

Whenever the returning officers do subsequent verification of the results, that process is done in the absence of the parties. The returning officers can choose either to reveal or hide the results of those audits. What is important is whether the audits would reveal a different winner other than the one declared. The court should not impute bad faith on the part of returning officers who conduct subsequent audits. It is common knowledge that the elections are conducted under strict timelines and the officers conducting the elections spend several hours without sufficient rest. The citizens expect the results to be announced as promptly as possible. Therefore, if a returning officer subsequently sit down and go through his work after having declared the results that should not be taken as an act of bad faith on the part of the officer. That is also part of being transparent. The fact that the verified Form 36 was not produced in court was not anything to cause the nullification of the results. In the **Fitch v Stephenson and Others** case the electoral officers failed to count 4,930 votes out of 9,099 votes that were cast. The winner was known and even if the 4,930 votes which constituted 45.8% of the votes were counted the winner was still the same. The court upheld the election. Even if subsequent audits reveal that some votes were not taken into account and posted on the Form 36 but that anomaly does not affect the results then the election should be allowed to stand. In our current case the subsequent audits revealed that the appellant lost 77 votes while the petitioner lost 19 votes as a result of the anomaly. This did not affect the results.

An election represents the Will of the people. Courts are only called upon to intervene when the electoral process has been flawed to the extent that the winner cannot clearly be established given the irregularities in the electoral process. Other circumstances include corruption, violence and intimidation of voters. Where the paper trail can enable the court to understand the intention of the voters then the courts should not interfere. In the famous case of **WOODWARD V SARSONS [1875] LR 10 733** Justice Coleridge CJ held that courts should only nullify elections if:-

**“it has been so conducted that the tribunal which is asked to avoid it is satisfied, a matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws, - that is that the constituency have not in fact had a fair and free opportunity of electing the candidate which the majority might prefer, or that there is reasonable ground to believe that a majority of the electors may, by reason of the irregularities in the mode of conducting the election, have been prevented from electing the candidate they preferred”.**

Lastly there is the issue raised by counsel for the 1<sup>st</sup> respondent seeking to have the appeal struck out as the same was filed by Kamau Lagat Advocate without due authority by the appellant. Counsel for the 1<sup>st</sup> respondent contends that Rules 34(1) and 10(3) of the Election Petition Rules 2013 requires that the appeal ought to be signed in the same manner as a petition. Counsel maintains that the issue of signature on the pleading is crucial and under Rule 23(3) an application for leave to withdraw an election petition must be signed by the petitioner and his advocate. Counsel cited the cases of **MUTUKU & 3 OTHERS V UNITED INSURANCE COMPANY** and that of **JEFFERSON KALOMA MULEWA V REPUBLIC** (herein above cited). In both cases the court emphasized on the need for signing of pleadings and judgment by judicial officers. Counsel contends that this is not an issue of technicality but is an issue dealing with the law.

**Rule 34(1)** state that a memorandum of appeal shall be signed in the same manner as a petition. **Rule 10(3)(a)** states that an election petition shall be signed by the petitioner **OR** by a person duly authorized by the petitioner. I dealt with this issue before the appeal was heard and my position remains the same. The memorandum of appeal herein was signed by the Firm of Kamau Lagat and Company Advocates. The memorandum indicates that the said advocates signed in their capacity as the duly authorized advocates for the appellant. I do hold that that was sufficient to validate the memorandum of appeal and the non-signing by the appellant does not invalidate the appeal. The petition was drawn by counsel for the 1<sup>st</sup> respondent and signed by the petitioner himself without the signature of his counsel. In my view both scenarios are correct and what is important is substantive justice to the parties as opposed to technical and mechanical application of the law. If the appellant had not authorized the Firm of Kamau Lagat & Company Advocates to file the appeal nothing would have stopped him from withdrawing it. The term **“OR”** in Rule 10(3) means either the litigant or his advocate can sign the pleadings. This cannot be a good ground to terminate the appeal.

### **Final Conclusion**

From the record of the trial court and the pleadings before this court it is established that the appellant was declared the winner having garnered 2,527 votes while the 1<sup>st</sup> respondent came second with 2,454 votes. The returning officer Caleb Siriba Kigonde testified that he made subsequent verification of the results and prepared another Form 36 that was not produced in court. The anomalies noted were that the appellant had lost 77 votes while the 1<sup>st</sup> respondent had lost 19 votes. The anomaly occurred because the figures shifted when they were posted on the Form 36. All the 13 candidates were affected. It is his evidence that the rectification of that anomaly gave the appellant 2,614 votes while the 1<sup>st</sup> respondent got 2,473 votes. These are two scenarios given after the elections were declared and the subsequent verifications. The court ordered scrutiny and recount of the votes. The totals in the Forms 35 as per the report on scrutiny and recount gives the appellant 2,614 votes and the 1<sup>st</sup> respondent 2,473 votes. This is in line with the evidence of the returning officer that the subsequent audits came up with those figures. The report on scrutiny and recount does not give any of the other 13 candidates more votes than the appellant. Some votes were objected to and according to the submissions of the parties the total number of these votes was 98. The report on scrutiny and recount gave the appellant 2,593 votes while the 1<sup>st</sup> respondent got 2,449 votes. Due to the objected votes the appellant lost 21 votes while the 1<sup>st</sup> respondent lost 24 votes.

It is true that an election is a process and it is not merely decided on the figures. The term **“results”** encompasses more than the figures. It includes the entire process before the figures are established. The trial court held that there was no intimidation of voters, no bribery or stuffing of votes. I do find that the

electoral process was free from blemish .what caused the cancellation of the election was the evaluation of the Forms 35, Form 36 and the status of the ballot boxes. I have evaluated these documents and I am satisfied that there was no adulteration of the Forms 35 or Form 36. The ballot boxes contained the same votes that were cast in the election for Lwandanyi Ward. The minor errors which mainly dealt with balancing of the votes on the upper part of the Forms 35 cannot be held to be irregularities which affected the results.

The evidence on record does not show that at any given polling station the votes of any of the candidates were either reduced, altered and replaced with another figure or removed altogether. The election documents remained the same and are capable of showing the manner in which the voters made their choices. I do find that the trial magistrate misinterpreted the electoral documents and came to the wrong conclusion. There is no single Form 35 which can be a replica of the other. The trial magistrate expected to find replicas of the Forms 35. Seals placed on ballot boxes are made of plastic and are easy to break. Since the contents of the ballot boxes remained the same I do find that there was no irregularity involving the safety of the ballot boxes. There is no evidence that when the election was conducted the IEBC officials marked separate votes in favour of the appellant and produced those subsequently marked votes as the results of the election. Indeed none of the witnesses for the 1<sup>st</sup> respondent identified a single polling station where the votes for the petitioner had been interfered with. The only allegation was that the petitioner's votes for Lwandanyi polling station were 271 while only one vote had been declared at the tallying centre. That was the epicenter of the petition. The respondents readily agreed that the petitioner had obtained 271 votes at that particular polling station and the Form 36 produced in court confirmed that. This is also confirmed by the Form 35 as well as the results of scrutiny and recount. The petition was filed without having the advantage of seeing the Forms 35 and 36. Had counsel for the petitioner seen the Form 36 before filing the petition, the issue of 271 votes for Lwandanyi polling station could not have arisen.

Given the evidence on record, I do find that there was no reason to nullify the election for Lwandanyi Ward the results of the scrutiny and recount was apparent. All the scenarios make the appellant the winner. The appeal is merited and is hereby allowed. The judgment of the trial magistrate is hereby set aside. The petition before the trial magistrate lacked merit and is hereby dismissed. The appellant was validly elected as the County Representative of Lwandanyi Ward and I do hereby declare him as the lawfully elected County Representative of Lwandanyi Ward in Sirisia Constituency, Bungoma County. A certificate shall issue to the Speaker of Bungoma County Assembly to that effect.

### **Costs**

The petitioner was exercising his right to challenge the results of the election. There was no wrong doing on the part of the appellant as well as the 2<sup>nd</sup>, 3<sup>rd</sup> respondents to warrant imposing costs on them. I do find that it will be a heavy burden to impose costs on the petitioner. I do order that each party shall bear his/hers/its own costs.

I wish to acknowledge the industry and input of counsels for the parties herein. It is the research and submissions which assisted the court in coming up with the above findings.

**Delivered, dated and signed at Kakamega this 5<sup>th</sup> day of March 2014.**

**SAID J. CHITEMBWE**

**J U D G E**