



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
ELECTION PETITION NUMBER 7 OF 2013
(Heard Before the High Court of Kenya at Nairobi)

**IN THE MATTER OF ELECTIONS FOR THE NATIONAL ASSEMBLY SEAT FOR
MANDERA NORTH CONSTITUENCY**

AND

IN THE MATTER OF ELECTIONS PETITION

BETWEEN

BASHIR HAJI ABDULAH. PETITIONER

VERSUS

ADAN MOHAMED NOORU. 1ST RESPONDENT

BILLOW ADAN KERROW2ND RESPONDENT

EKONIT KOMOL JOHN (*Returning*

***Officer Mander North Constituency*). 3RD RESPONDENT**

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION. 4TH RESPONDENT

J U D G M E N T

This election petition was filed by the Petitioner, Bashir Haji Abdulahi at Garissa High Court on the 8th April, 2013. There are four Respondents in this petition. The 1st Respondent is the winner of the March 4th elections and is therefore the current member of the National Assembly for Mander North Constituency. The 2nd Respondent is the current Senator for Mander County. The 3rd Respondent was the Returning Officer for Mander North Constituency elections on 4th March, 2013 and the 4th Respondent is the Commission that conducted the 4th March, 2013 elections allover Kenya, including the

Mandera North Constituency. The 3rd Respondent at all material times acted as an agent and servant of the 4th Respondent.

The petition was based on the following grounds: -

1. **The Election was conducted in absence of TNA Party agents.**
2. **The Election was conducted and/or overseen by strangers.**
3. **Votes in two (2) polling stations were cast by persons not duly registered because the centres in which they originally registered and later voted on 4th March, 2013, were not duly gazetted.**
4. **Elections were characterized by instances of undue influence and/or use of force or violence.**
5. **There was serious disparity of the votes cast and garnered by the President and those cast and garnered by the member of the National Assembly, suggesting malpractices and/or irregularities.**
6. **The elections were conducted outside the times stipulated by law.**
7. **The elections were characterized by instances of election offences, malpractices and/or irregularities, including personation, treating and bribery.**
8. **The elections were characterized by unusually high voter turn-out.**
9. **The 3rd and 4th Respondents failed to employ the use of electronic voter identification machines and failed to transmit election results by electronic means.**
10. **The 4th Respondent adversely affected the integrity of the election process and results as a result of the following: -**
 - a. **Failure to transport election material to various polling stations in time and allowing the 1st Respondent to transport election material to polling centres instead of using motor vehicles hired by IEBC.**
 - b. **Allowing the announcement of election results which had discrepancies between voters who cast their votes and voters appearing in the Principal Register.**

The Petitioner called eight (8) witnesses recorded as PW I to PW 7. The 1st and 2nd Respondents called four (4) witnesses referred to herein as R₁R₂W₁ to R₁R₂W₄ to R₁R₂W₄. The 3rd and 4th Respondents called seven (7) witnesses, herein referred to as R₃R₄W₁ to R₃R₄W₇.

The court, at the end of the recording of the evidence from all the above witnesses, ordered for scrutiny and counting of votes in six polling stations. These stations were Wargadud Dam, Quramathow, Sukela Tifna Primary School, Arda Agarsu Centre, Shantoley Primary and Kubi Hills. The scrutiny was done as directed by the court taking into account certain issues raised by the Petitioner and in full consultation and consent of the Respondents. The Scrutiny Report compiled by the Deputy Registrar, Mr. M. W. Wanjala was delivered to court as directed on 29th August, 2013 and its findings will be considered by this court in this Judgment since it became part of the record of this petition trial.

The Petitioner's case through the evidence of his witnesses, is as follows, following the grounds of his petition: -

The first ground was that the Petitioner's and TNA Party election agents were evicted from certain polling stations by the agents of the 1st Respondent with the acquiescence of the 3rd and 4th Respondents. The Petitioner relied on the evidence from several of his witnesses. PW 2 Hassan Hussein was the TNA party agent at Wargadud Dam Stream (2) where Abdi Salan was the Presiding Officer. He said that he arrived at the polling centre at 10 a.m. and was allowed to start his work. He testified that he saw no clerks at the polling station but saw the Presiding Officer and his Deputy, collect national identity cards and supply ballot papers to those who surrendered the Identity Cards, without marking the voters' register, which in any case, he did not see there. As a result, he said, he protested to the Presiding Officer, more so because those who voted, were not forced to dip their last finger in indelible ink as required by law. It was because of his protest, he claimed, that he was ejected from the voting area of the polling station.

He however, did not report the malpractice to the Returning Officer nor did he include this fact in his evidence affidavit in which he stated that he was present at the Polling Station from the beginning of voting and not from 10 a.m. as he stated in his court testimony.

Asked whether he indeed was an appointed TNA agent at Wargadud Dam where two other agents for TNA were present and signed Form 35, he said that he was not aware of the other agents. He admitted that he could not and did not produce his appointment letter in court and was not certain whether the voting stream he was in charge of, was stream 2. He said he left the polling station at 1 p.m. and later changed the time to 2 p.m. He said he did not report what he saw or what happened to him to the Police as no police officers were at the polling station.

PW 3, Yussuf Abdille Abdi also gave evidence to the effect that he was ejected from his polling station at Wargadud Dam, Stream I. He also reached the station at 10 a.m. on the voting day. His Presiding Officer was Mohammed Haro. He said he arrived at the Polling and saw a voter's register but noticed that voters were not being strictly identified before voting and that their names were not being cancelled after voting. At 2.30 p.m. he said he was forced to leave the polling station because disruption of voting occurred. He was threatened and told to leave the polling station by a group of local people.

He conceded that he did not report the eviction or the malpractices he saw to the police or Returning officer or any relevant authority, except to his Senior Party Officer. At 5 the same day, the witness said, he went back to the polling station in company of PW 2, Hassan Hussein. They were again chased away by voters.

The witness however, conceded in his oral evidence that he did not include the allegation of threats and his eviction in his evidence affidavit which he adopted and relied upon in court. He again said he did not report the matter to the police and was not sure that his presence at the polling station was noticed by the Presiding Officer.

PW 4, Abdi Omar, also testified on the issue of eviction of TNA Party agents. He said he visited the six polling stations earlier mentioned, but did not find the TNA agents there as they had allegedly been evicted.

PW 7, the Petitioner herein testified similarly that he visited Wargadud Dam and Kubi Hills at 3 p.m. but saw no TNA agents since they had been evicted. He also argued that since in the mentioned polling stations TNA agents for one reason or another, were absent at the start and at the close of voting, the integrity of voting and tallying, cannot be assured since it was not supervised and ascertained by the TNA agents.

The Petitioner's witnesses also gave evidence in support of the second ground of the Petition: that elections were conducted and/or overseen by strangers. The Petitioner's evidence pointed to two polling Stations i.e. Quramathow and Santoley.

Concerning Quramathow, the Petitioner's evidence was that the Presiding Officer, Mr. Mohammed Kassim Jelle who was properly and lawfully appointed to conduct the elections there on the 4th March,

2013 was unlawfully swapped with another, called Abdi Adan Ahmed. That when Mohammed Kassim Jelle reported at Quramathow during the late hours of 3rd March, 2013, he was threatened and chased away by local people who appeared to be supporters of the 1st Respondent and who were allegedly instigated by Abdi Adan Ahmed, to evict him. That as a result, Abdi Adan Ahmed, who had not been officially posted at Guramathow, ended up conducting the elections there unlawfully, which accordingly made him a stranger. Mohammed Kassim Jelle in his testimony agreed that the issue for swapping had indeed arisen at Rhamu before the Returning Officer but that he Jelle, had turned it down, allowing him to collect the relevant election materials and travel to Quramathow at that eve of elections.

The second portion of evidence by the Petitioner in this issue of strangers conducting election was related to Santoley Primary School Polling Station. The Petitioner's evidence was to the effect that the Deputy Presiding Officer there, M/S Sahara Mohammed was at 6.30 p.m. on the polling day, removed by the Presiding Officer when she protested against some malpractices being committed at the polling station. Petitioner's case was that in her absence the election Stream she had controlled, must have been supervised by a person who had no authority to do so and who accordingly was a stranger.

Petitioner's third ground was that Wargadud Dam and Kubi Hills Polling Stations were registration stations and later Polling Stations which, however, were not duly gazetted. Accordingly, the Petitioner contended, all the voters who registered and voted there, should not be taken into account in the final tallies since they were illegal voters.

The Petitioner's fourth ground was that the 1st and 2nd Respondents used intimidation, violence and undue influence to compel voters who would otherwise have voted for the Petitioner, to vote for the 1st Respondent. He also argued that the 1st and 2nd Respondent's conduct led to the displacement of people in Petitioner's favourable areas some of who accordingly, crossed over to Ethiopia and failed to turn up to vote for the Petitioner. The Petitioner on the same account alleged in evidence that the 4th Respondent who received a complaint over the matter, failed to take action to prevent the alleged displacement of Petitioner's voters.

The Petitioner in his fifth petition ground, faulted the fact that there was some disparity of the total votes garnered by the President in Mander North Constituency with the votes garnered by the 1st Respondent as a member of the National Assembly. The President was said to have got 32605 votes while the Member of the National Assembly got 33216 although there was a dispute as to the exact figure of disparity there indeed was. The Petitioner said the margin between the two was 3176 while the Respondents gave the figure as 571. The Petitioner's case was that the only reason there was such a disparity in favour of the 1st Respondent was because the extra margin votes must have been obtained by the 1st Respondent through illegal or irregular way.

The Petitioner's evidence to support his sixth ground of the petition raised the undenied fact that in several polling stations, particularly those six disputed above, voting was allowed beyond the stipulated times even where extension was lawfully granted. In some polling stations, the Petitioner asserted, it went on until midnight or thereabout. The Petitioner argued that apart from the breach of the relevant regulation per se, the extra time must have been used to stuff the ballot boxes or allow unregistered persons to vote or even allow multiple voting by individuals. That indeed no statutory comments by the Presiding Officer were made on Form 35's to explain the reasons for the long extensions of voting time as required by the law.

The seventh ground taken up by the Petitioner is the claim that the 1st Respondent with the express authorization of the 3rd and 4th Respondents, organized personation, treating and bribery of voters. He through testified and deponed evidence asserted that at Quramathow, Wargadud Dam and Kubi Hills Polling Stations, voters were treated and bribed with cash and that voters were allowed to personate others in large scale with the sole purpose of depriving the petitioner of votes which would otherwise have been his for the taking. The Petitioner's evidence and argument was that a group of individuals set up by the 1st Respondent, moved from one to the other of the six polling stations bribing voters, treating

voters and encouraging voters to impersonate others and that the group of individuals managed to persuade voters to vote for the 1st Respondent. This it was suggested, accounted for the High Voter turn-out in the six polling stations of constituency. The Petitioner finally on the point, argued that given the election offences of personation, treating and bribery perpetrated by the 1st, 2nd, 3rd and 4th Respondents in Quramathow, Wargadud Dam and Kubi Hills polling Stations, the election results declared there, cannot be described as having been fair, just and/or transparent.

The next ground argued by the Petitioner as the Eighth ground, is that the unusually high voter turn-out across the Mandera Constituency connotes the fact that voters must have been assisted or persuaded to go to vote. On the other hand to show that most registered voters had gone to vote, impersonation, or stuffing of votes were organized by 1st Respondent with the help of the 3rd and 4th Respondents. That such process was illegal and left the election results arrived at, without integrity and therefore not fit to be left standing. That such a large turnout of voter could not be realistically expected in a nomadic or pastoral life background such as is found in Mandera North.

The Petitioner also based his petition on the ground that the 3rd and 4th Respondents failed to employ the use of electronic voter identification machines during voting and in transmitting election results to the Headquarters in Nairobi. Such use would have eliminated personation and double-voting and would have transmitted the correct results, he argued.

The final ground upon which the Petitioner based his case is a multiple one which includes: -

- a. Lack of sufficient polling stations as contemplated in the Elections Act: The Petitioner averred that majority stations were haphazard and unstructured and were without booths. he also averred that elections in Wargadud Dam, Kubi Hills and Quramathow Polling Stations were conducted in open-air or under a tree without permanent voting booths, and that the situation compromised the privacy required to vote at one's choice and finally that the situation compromised the integrity of the election process.
- b. Issuance of ballot papers in a manner contrary to law. The Petitioner averred that polling clerks or presiding officers issued ballot papers in two's instead of all six at one go – contrary to Regulation 69(2) of the Elections Regulations. He argued that it was a gross violation of election law.
- c. Situation of two polling stations, Kubi Hills and Wargadud Dam were outside Mandera North Constituency and voters who registered and voted there were not voters from Mandera North. Their votes accordingly wrongly and adversely influenced the election results and should be nullified.
- d. Failure to fill Form 32 for assisted voters. The Petitioner's case was that assisted voters who were the majority in Mandera North Constituency were not indicated or marked in the voting register and others did not fill the relevant forms for inspection purposes. That this led to breach of procedure and law and made the voting process unreliable and without integrity at all streams in the six contested polling station.
- e. Issues arising from the Scrutiny Report filed by Deputy Registrar: these included the following as averred by the Petitioner: -
 - i. Use of multiple but similar registers in different streams leading to multiple voting.
 - ii. Failure to use proper or any registers.
 - iii. Failure to include in the ballot boxes and to account for election materials including Forms 35's ballot papers, counter foils and polling station Diary/Field Day Books.

The Petitioner argued that the mere presence of ballot papers in the ballot boxes without the matching

counterfoils, did undermine the credibility of the source of ballot papers and their origin. He argued that without reconciliation of the ballot papers to the counterfoils, then the integrity of the whole election process is put in doubt. For these reasons, the Petitioner sought the nullification of all 10507 casted votes obtained by all the candidates in the six Polling Station's, where scrutiny was carried out.

The Petitioner concluded his arguments by stating that since the 1st Respondents winning margin votes was 4899 votes only the nullification of the votes garnered by all candidates in the six contested polling stations of Wargadud Dam, Quramathow, Sukele Tifna Primary School, Arda Argarsu Centre, Kubi Hills and Shantoley Primary School where the 1st Respondent garnered 10203 votes, would deny him his victory and require a fresh election.

For the above multiple reasons, therefore, as supported by the evidence of the Petitioner and his witnesses and the evidence arising from the scrutiny ordered by the court, the Petitioner sought the nullification of the election results of Mandera North Constituency, National Assembly seat.

The Respondents filed their responses to the evidence and arguments raised by the Petitioner as already tabulated hereinabove. Since their joint position is the opposition to nullification sought by the Petitioner, this court will summarise and consider the 1st and 2nd and the 3rd and 4th Respondents cases jointly.

First and foremost, the Respondents notified the court that the Petitioner's evidence and submissions, were riddled with instances of issues, grounds and a material not specifically pleaded in the petition. The Respondents also pointed out that the Petitioner has also submitted and based his arguments on affidavits of evidence that were neither properly filed or served or whose deponents failed to attend court and testify. The Respondents argued that the court should exclude such grounds, evidence and submissions in coming to its conclusions.

To the ground that election exercise was done in the absence of TNA Party agents who were allegedly forcefully evicted by the agents of the 1st Respondent with express and/or implied approval of the 3rd and 4th Respondents, the Respondents answered as follows:-

That the Petitioner failed to lead any evidence to establish the identity of the persons appointed as agents and posted to Quramathow, Sukela Tifna Primary School, Arda Argarsu Centre, Santoley Primary School and Kubi Hills Polling Centre. That the names of the agents allegedly evicted in the said stations were not adduced in the Petitioner's or his witnesses evidence in court. That such witnesses did not swear evidence affidavits nor attend court to show that they were indeed, appointed agents and were indeed evicted. That absence of such agents from polling stations, except Wargadud Dam Polling Station, could not necessarily be based only on eviction and not other explainable reasons like sickness, lateness or even failure to post an agent at all. The Respondents accordingly submitted that the Petitioner's failure to submit the list of relevant agents and failure to call them to testify if that was the best way of proving the fact, should lead the court to make an adverse inference thereon that the Petitioner's witnesses evidence, if called could have tended to be adverse to him.

As to Wargadud Dam, the Respondents averred that the agent, PW 2, Hassan Hussein, claimed to have arrived at 10 a.m. and found voting going on; this notwithstanding swearing in his affidavit that he was at the polling station from the time the election took off early the voting day morning. The Respondents also asserted that PW 2 had not been appointed a TNA agent and the appointment letter annexed to his evidence affidavit was a contrived document. That the evidence on record from PW 2 and PW 3, Yussuf Abdille Abdi, who claimed he was also a TNA agent at another stream at Wargadud Dam, was so conflicting and contradictory, that the court should arrive at the conclusion that they were not appointed agents and did not report at that station as agents

Referring to the evidence of PW 4, Abdi Omar, who was the TNA's Chief Agent and supervisor of other agents, the Respondents submitted that his evidence as to the absence of agents from polling stations, was either hearsay or did not prove sufficiently that TNA agents were at any stage evicted from their stations. The Respondents also asked the court to note that PW 2 and PW 3 did not report their alleged eviction to

the police or to the Returning Officer. That the court should further note that the Presiding Officer R₃R₄W₇, controverted PW₂ and PW₃'s oral evidence. The Respondents also drew the attention of the court to this subject of absence of TNA agents from polling stations. They averred that PW₆, Dr. Ali Mohammed, had before the actual elections, by his undated letter of complaint, received by IEBC on 3rd March, 2013, hinted that TNA agents will be barred from gazetted polling stations because of clan hatred which threatened their well-being. They asked how Dr. Ali Mohamed would have known of the eviction several days before the alleged event took place.

The Respondents concluded their answer to this issue by asserting that evidence to prove eviction of TNA agents as alleged was unreliable and incapable of proving the issue to the satisfaction of the court.

To the issue that elections in Mandera North were conducted or overseen by strangers, the Respondents had this to say: That it was Mohammed Kassim Jelle, PW₁ and not Abdi Adan Ahmed R₃R₄W₃ who originally sought swapping as a Presiding Officer, from Quramathow Stream 3 to Mado Wells, and not the other way round. That the Returning Officer R₃R₄W₇ John Ekonit Komol, only acted upon the swapping agreement of the two presiding officers to effectuate the swapping.

The Respondents then stated that the said Returning Officer released Abdi Adan Ahmed with electoral materials to Quramathow. He accordingly asserted in his evidence that the properly appointed Presiding Officer at Quramathow was not Mohammed Kassim Jelle but Abdi Adan Ahmed. The Respondents at that point left the decision to the court arguing that the Petitioner by relying on the evidence of Mohammed Kassim Jelle solely, had failed to prove the point as required by law for lack of corroborative evidence.

On the issue of eviction of M/s Sahara Mohammed as the Deputy Presiding Officer of Shantoley, and what followed, the Respondents averred that the evidence on record shows that M/s Sahara had been given a short health break and that she later returned and resumed her duties. That M/s Sahara herself failed to appear before the court and demonstrate to it as to what had really happened, thus making it difficult for the court to believe what other witnesses said about her when she herself could rightly testify.

The Respondents further said that there was no evidence to prove that in her absence and in any case during the presence of the Presiding Officer and another Deputy Presiding Officer in the polling station, any other stranger took over and/or carried out M/s Sahara's functions. M/s Sahara was shown as having signed the Form 35 at the end of the election exercise thus proving that she resumed her duties. The Respondents accordingly, sought the rejection of this ground by the court.

The Respondents also answered to the allegation that Wargadud Dam and Kubi Hills polling stations were not gazetted and that the registration of voters and their casting votes in the two polling stations was irregular or unlawful.

The Respondents argued that the Petitioner had not attempted in any meaningful way to prove this ground. That there was no evidence to show that the two stations were not in Mandera North Constituency and that the Constituency Boundaries and Wards map produced in court at the request of the court, showed and confirmed that the polling stations were indeed inside Mandera North Constituency. The Respondents finally averred that the two polling stations were, for the purpose of registration of voters during such registration and later for the casting votes on 4th March, 2013, gazetted through a Corrigenda gazette Notices No. 17047 dated 22nd November, 2012. The Respondent concluded that on this last basis alone, this petition ground should be rejected by the court.

The Respondents also answered to the argument that 1st and 2nd Respondents had used or had been allowed by the 3rd and 4th Respondents to use violence, intimidation and undue influence to compel the Petitioner's supporters to vote for the 1st Respondent. The Respondents averred that these are mere and bare allegations which are not supported by credible or cogent evidence. The Respondents further stated that credible evidence of violence on record showed that the same was not restricted to the Petitioner's strongholds in Mandera North, but appeared to be spread all over the Constituency. That even the

newspaper cuttings put into evidence confirmed that clan violence or hatred spread across the constituency and the County.

The 4th Respondent further argued that the issue of intimidation and or violence, was an issue for country security forces and was therefore, an issue beyond its control. It was a State issue which cannot rightly be placed at the door of the Respondents. That it was an issue to be handled and controlled by the National Police and/or the Army services as provided under the Constitution (Art. 239) and the relevant statutes. And further more that that during the 4th of March, 2013, there was no uncontained reported violence in polling stations in Mandera North Constituency. That, asserted the Respondents, may be the reason why the Petitioner, did not include in his petition any ground concerning violence during the 4th March, 2013. The Respondents further more argued that the allegation that Petitioner's supporters, displaced themselves to Ethiopia and did not turn up to vote out of fear, was not supported by any credible and/or cogent evidence to make it credible. That the fact that over 80% of the registered voters turned up to vote eliminated the allegation of displacement.

Finally, the Respondents (1st and 2nd) averred that they had early during the pendency of this Petition on 14th March, 2013, filed and served the Petitioner with a Request for Further and Better particulars concerning the alleged eviction of agents, displacement of Petitioners supporters, names of voters bribed and impersonating, identification of streams that lacked booths to secure voters secrecy at the polling stations, and other particulars therein specified. The Respondents also said they had sought the names of supporters of the Petitioner who were compelled or driven away through violence and other intimidatory methods. However, the Respondents averred that the Petitioner ignored the request for the above particulars and that in the circumstances, he should not be allowed to surprise and embarrass the court and the Respondents with the same issues, because he would be ambushing them.

The fifth ground to which the Respondent had to respond to concerns the disparity of cast votes between the National Assembly Elections and the Presidential Elections. The Petitioner had asserted the difference to be 3176 votes and had alleged collusion between the 1st Respondent and the 3rd and 4th Respondents to stuff ballot papers into National Assembly seat ballot box to create the alleged disparity figure.

The 3rd and 4th Respondents averred that the actual difference was not 3176 but 571 votes. They further answered that they had no control over the way the voters actually voted or for whom, after issuing them with ballot papers. That although it was mandatory for such voters to cast each of the six ballot papers for each of the seat being contested it was not easy to know when a one had not cast a given ballot paper. That accordingly, they stated, this ground had no merit and should be rejected.

The 3rd and 4th Respondents were next under legal obligation to give adequate and acceptable explanation as to why several polling stations particularly the target six aforesaid, were allowed to open beyond the officially prescribed time. They admitted that the relevant polling stations closed later than the time prescribed. They however, averred that it was necessary to extend time where the voting process started late for reasons which were beyond the control of the polling officials. They also argued that in each relevant case before the court, once there was an authorized extension of time in accordance with Regulation 64 of the Elections Regulations, the various Presiding Officers had to allow all the voters in the individual polling stations who had come in time, to vote, even where the exercise extended to late hours. They further averred that the exercise of voting, especially after sunset, was slow due to lack of electricity in almost all the polling stations in Mandera North.

The 3rd and 4th Respondents also averred that under such conditions, they had to make sure the voting exercise was not allowed to go out of control which further slowed down the electoral process. They argued that a large proportion of voters coming back home late from their daily pastoral engagements, trooped to the polling stations late in the day thus further slowing and delaying to voting. They denied unlawful or complicit conduct in favour of the 1st Respondent in the complex circumstances stated above.

The seventh ground of the Petition was that there was massive personation by, treating and bribery of voters, particularly in the three targeted polling stations of Quramathow, Wargadud Dam, and Kubi Hills.

The Respondents replied that the Petitioner has failed to adduce credible and cogent evidence to prove this serious allegation of the alleged acts which also, are criminal acts which required proof beyond reasonable doubt. They also argued that their Request for particulars filed in court and served upon the Petitioner, was ignored by the Petitioner. That such a conduct by the Petitioner, disallowed him the right to fairly and lawfully pursue this ground of the petition. The Respondents concluded on this ground that no single witness in their evidence affidavits or in oral evidence in court, demonstrated any degree of particularity on the alleged involvement by the 1st Respondent in the issues of personation, treating or bribery of voters and that this ground should similarly be rejected.

The Respondents, to the eight ground of this petition, that there was an unusually high voter turn-out, in Mandera North Constituency, stated as follows: That the high voter turn-out was a phenomenon observed across the country and not only in Mandera North. That a similar high voter turn-out was also observed in similar pastoralist and nomadic constituencies of North, North-West and North-East of the country and the Respondents did not cause it or have control over it. They also argued that the turn-out did not affect the conduct and result of the election.

The Petitioner's ninth ground of the petition was that the 3rd and 4th Respondents failed to use the Electronic Voter identification machine for identification of voters and transmission of the election results to the Returning Officer and Nairobi IEBC Centre. The 3rd and 4th Respondents admitted this failure. They however, argued that the failure was not only countrywide but also if at all, affected all candidates equally. The Respondents also averred that upon the failure of the machines, all election officials reverted to the manual functioning of voting and transmission of results which they asserted, was done effectively. They argued that the Petitioner failed to demonstrate how the failure of the said machines in any way, compromised the election result to his detriment.

The Respondents also replied to the several miscellaneous grounds raised and relied upon by the Petitioner to seek the nullification of the Mandera North Constituency National Assembly Seat election results.

- i. To the allegation that some polling stations were haphazardly structured, the 3rd and 4th Respondents admitted the same. They, however, argued that in some areas in Kenya, not limited to Mandera North Constituency, circumstances were such that all that was required was a structure to allow a voter to secretly vote without being interfered with. That strong wind removed carton paper booths which had been constructed earlier and were reconstructed from time to time to allow other voters to vote. That improvisation was the normalcy but that voters had opportunity to vote for the candidate of their choice. That any adverse effect, which was denied, affected every candidate equally.
- ii. The Petitioner had alleged that the 1st Respondent had been involved in transporting election material to his stronghold polling stations. The Respondent denied this and submitted that the Petitioner failed to adduce evidence to support this allegation. No vehicle registration numbers of the vehicles allegedly used by the 1st Respondent to transport election materials was adduced in evidence.
- iii. The Petitioner had alleged that the 3rd and 4th Respondents were, during the voting period, issuing ballot papers in an irregular manner. The Respondents argued that this issue was not pleaded in the grounds of the petition and the same should be rejected.
- iv. Grounds arising from scrutiny. The Respondents said that scrutiny did not arrive at substantial improved margin of votes to adversely affect the 1st Respondent's victory. This is because the 1st Respondent lost 26 votes while gaining 18 votes out of the recount. The Petitioner on the other hand had 7 votes added to his number of garnered votes. The Respondents' answer to this issue is that a loss of 8 votes from the winning figure made little difference and should be ignored, in view of the fact that the 1st Respondent's winning margin was over 4800 votes.

As to the issue of Form 35's missing or not signed, the Respondents argued that Form 35s only carried the figures of votes carried by every competing candidate in the said election. In view of the fact that a recount of votes was carried out and actual votes garnered by each candidate was established, then Form

35's function was actually eliminated. That it would only have been significant if the winning margins would have drastically been altered in favour of the petitioner and adversely to the 1st Respondent that Form 35's figures would have become fundamental to the issue of the integrity of the votes casting and counting. However, the reduction of the 1st Respondents margin by only 8 votes and increase of Petitioner's votes by only 7 confirmed and proved the correctness of the figures in Form 35's submitted to court.

There were some counterfoils of ballot papers cast during the contested election, missing Petitioner had submitted. It was not accordingly possible to pair a number of ballot papers to confirm that they were properly issued and cast during the election. In reply the 3rd and 4th Respondents said that the counterfoils could have been dropped into any of the ballot boxes for other seats other than the National Assembly or Presidential ballot boxes which were not actually physically inspected.

The Petitioner had in his evidence stated that there were no voters registers in the targeted six polling stations. The Respondents replied that polling clerks could not be inspecting and marking the registers with Petitioner had asserted did not exist during polling. That during the scrutiny, registers were actually found. The Respondents accordingly argued that if there were no registers at the six polling stations and were not therefore, marked, during voting, where would the alleged double registers at the polling station come from? The Respondents further argued that the issue raised in the Petition was lack of voters registers **NOT** whether the voters' registers were or were not marked more than once. The Respondents accordingly, urged the court to exclude evidence tending to give and allow the Petitioner rely on an unpleaded ground.

Arising from scrutiny also was failure to identify ballot boxes for Wargadud Dam Stream 2, Stantoley Primary School Stream 2, and Kubi Hills Stream I. The Respondents answered by saying that there were in all 14 ballot boxes which ended up in court without a trace of identification on them and that the three missing ones should be among them. The Respondent also argued, that the issue of missing ballot boxes was not one of the grounds of the petition and the court need not pay attention.

Taking into account and, using the replies above, the Respondents jointly argued that all the petition grounds had not been proven by the evidence tendered by the Petitioner and the petition should therefore be dismissed with costs.

This court has carefully perused the pleadings, the evidence adduced in affidavits and orally in court. It has also perused the submissions from both the Petitioner on the one side and the Respondents on the other. It has also carefully studied the Scrutiny Report filed by the Deputy Registrar Mr. M W Wanjala dated the 29th August, 2013. Before the court analyses the evidence on record and makes various findings of fact, it finds it necessary to lay down the principles of law which will apply to the facts arrived at. The Petitioner in this case seeks the nullification of the election results of the National Assembly seat of the Mandera North Constituency on the particular facts pleaded by him in his petition alleging breach or non-compliance of electoral law, regulations or procedures by the Respondent. He has adduced evidence in sworn affidavits and through oral testimonies in court in support of his case. Will he necessarily get the nullification of the election if he merely proves the facts he has alleged in his petition?

In the view of the court the answer is found in the guiding provision of the law applicable which is Section 83 of the Elections Act of Kenya. It provides thus: -

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

In the view of the court, the principle above was simply expressed in the English case of **Fitch Vs Stephenson & 3 Others [2008] EWHC 501 QB** as follows: -

“The cases clearly establish that the courts will strive to uphold an election as being

substantially in accordance with the law, even where there has been serious breaches of the Rules or of the duties of the election official, providing that the results of the election was unaffected by those breaches.”

It is clear to this court accordingly, that an election court starts from the point where it presumes the election result being challenged in the petition, to have been properly, regularly and lawfully arrived at and that a Petitioner seeking to nullify such a result, is under obligation to satisfy the court to the contrary. The task on the Petitioner in that respect is not light and various courts have given reasons why Parliament and thereafter, courts, had to take a hard position against over-turning election results.

The Supreme Court of India in **Rahim Khursid Vs Khurshid Ahmed & Others [1975] AIR 290, 1975 SCR (1) 643** expressed itself as follows in respect to the above point: -

“However, we have to remember another factor; an election once held, is not to be treated in a light-hearted manner, and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing serious elements of uncertainty on the verdict already tendered by the electorate. An election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held, unless clear and cogent testimony compelling the court to uphold the longest practice alleged against the returned candidate is adduced.”

The court clearly used a strong language to express abhorrence towards any easy nullification of an election result by any court. It clearly, however, left the door open for nullification of any election result where the Petitioner adduces clear and cogent testimony of evidence establishing irregularities or electoral malpractices which are of the magnitude that substantially and/or materially affect the outcome of that electoral process. **Maraga, J** (as he then was) put the same view as follows in **Joho Vs Nyange & another [2008] 3KLR 500** at page 507: -

“Election Petitions are not ordinary suits. Though they are disputes in rem, fought between certain parties, election petitions are nonetheless disputes of great importance: - Kibaki Vs Moi, Civil Appeal No. 172 of 1999. This is because when elections are successfully challenged, by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents’ social and economic activities. It is for these reasons that I concur with the Election Court’s decision in Wanguhu Nganga & another Vs George Owiti & Another, Election Petition No. 41 of 1993, that election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are not the kind of evidence required to prove election petitions. As I said, they should be proved by cogent, credible and consistent evidence.”

This court expresses concurrence to the opinions expressed by the various courts as to why the court should not easily overturn an election result. As earlier stated however, this court will not hesitate to nullify this election if the Petitioner proves to the satisfaction of the court that the alleged irregularities and/or malpractices or non-compliance with the electoral law, was such that it substantially and/or materially adversely affected the election result being challenged herein.

As in any matter of a civil nature where the party who alleges existence of certain facts has the burden of proving the alleged facts, in electoral petitions the burden of proof lies on the Petitioner. This court concurs with **Kimaru, J** in **John Kiarie Waweru Vs Beth Wambui Mugo & 2 others [2008] eKLR** at page 4 where he stated: -

“The burden of establishing all these allegations regarding the conduct of the said election and results announced thereafter is on the Petitioner.”

It would however, appear that such burden may shift to the Respondents whose burden will then be to show that the facts which are alleged by the Petitioner and supported by his evidence did not actually

occur or if they occurred, they did not actually breach the law alleged by the Petitioner to have been breached. If the Respondents in their pleadings, affidavits and oral testimony succeed to show that the facts pleaded by the Petitioner have not been sufficiently proved or if so proved, did not breach the relevant law, then the burden would in this court's view revert back to the Petitioner to prove the case to the satisfaction of the court.

To what extent then should the Petitioner prove his case, which is otherwise called the standard of proof? In cases of a civil nature, the plaintiff will likely succeed if he proves the facts upon which his claim is based on the balance of probabilities. The standard of proof in election petitions is now established to be higher than the standard in civil cases. The point was expressed as follows in the case of **John Kiarie Waweru Vs Beth Wambui Mugo** earlier cited page 5: -

“As regards the standard of proof which ought to be discharged by the Petitioner in establishing allegations of electoral malpractices, there is a consensus by electoral courts that generally the standard of proof in electoral petition cases is higher than that applicable in ordinary civil cases i.e. that proof on the balance of probabilities. The standard is higher than proof on the balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases.”

It clarified, however, that the standard of proving electoral malpractices which at the same time amount to criminal conduct, such as bribery, treating, double-voting etc is that beyond a reasonable doubt. That has been so expressed in many election petitions including by the **Supreme Court of Kenya Election Petition No. 5 of 2013** where the court stated: -

“The threshold of proof should, in principle, be above the balance of probability though not as high as beyond-reasonable-doubt-save that this would not affect the normal standards where criminal charges linked to an election, are in question.”

This court shares in the views expressed above. It would however appear that the standard of proof which is stated above the proof on the balance of probabilities but below proof beyond a reasonable doubt is two-pronged: That is to say, the evidence factually proving the alleged irregularities, malpractices or non-compliance of the relevant rules or law should contemporaneously prove on the same higher standard of proof, that the irregularities, malpractices or non-compliance, actually materially and/or substantially affected the electoral process and/or result.

The clause ***“proved to the satisfaction of Court”*** requires definition. The definition given to it by the Uganda Supreme Court is found in the case of **Col. (RTD) Dr. Kiiza Bisegye Vs Yoweri Kaguta Museveni in Presidential Petition No. 1 of 2001** where the court (Mulenga JSG as the then was) stated thus: -

“I do share the view that the expression-provided to the satisfaction of the court-connotes absence of reasonable doubt... the amount of proof that produces the court's satisfaction must be that which leaves the court without reasonable doubt.”

The trial court, as this court understands it, must have no reasonable doubt that the irregularities, malpractices or non-compliance actually occurred. It must also have no reasonable doubts that the same materially and/or substantially adversely affected the electoral process to the extent that it actually changed the end result in favour of the winner and adversely to the Petitioner.

Before I move to another issue, expressions ***“affected the results”*** or ***“substantially and/or materially affected the result”*** or ***“affected the result in a substantial manner”*** or other clauses holding the same meaning have been used in many election petitions and may be used in this judgment. In **RTD. COL. KIZZA BESIGYE** case, supra, it was explained to mean that the votes candidates obtained would have been different in a substantial manner if it were not for the alleged non-compliance. **Mulenga, JSC** explained it thus: -

“That means that to succeed, the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that the winning majority would have been reduced. Such reduction however, would have to be such as would have put the victory in doubt.”

The East African Court of Appeal put it this way in Mbowe Vs Eliufoo [1967] EA 240 at page 242: -

“In my view in the phrase ‘affected the result’ the word result means not only the result in the sense that a certain candidate won and another lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.”

Perusal of Section 83 of the Elections Act earlier cited clearly confirms that the above discussed clause, ***“affect the result of the election”*** is used as a measure upon which non-compliance of the written electoral law or irregularities and malpractices are to be determined. It is the view of this court accordingly that the provision is constructed in a manner that absorbs and applies the principles already enunciated by election petitions in States that apply English legal principles that govern elections that are democratic, free and fair. Such election laws presume that those citizens who qualify to vote should be given freedom to choose their leaders freely, fairly and transparently while taking into account the reality of our social, economic and political situations.

The court now turns to the evidence before it to analyse it and make conclusions of fact. Thereafter, it will apply the principles of law discussed hereinabove.

The first issue to tackle is whether or not the contested election in Mandera North Constituency was conducted in the absence of TNA Party election agents. Evidence adduced relates only to the six contested polling stations of Wargadud Dam, Quramathow, Sukela Tifua Primary School, Arda Agarsu Centre, Shantoley Primary School and Kubi Hills. The court has examined the evidence of Hassan Hussein, PW 2, Yussuf Abdille, PW 3, Abdi Omar, PW 4 Bashir Haji, PW 8 and Guhad Boray Madow who did not testify and whose affidavit the court found no obligation to take into account. Clearly, the names of the allegedly appointed TNA agents to four polling stations, Quramathow, Arda Agarsu Centre, Shantoley Primary School and Kubi Hills, were not given in evidence. The agents were also not called to testify, to establish whether they attended duty and if they were indeed evicted, and by whom. Only two agents posted to Wargadud Dam were called and the court will revert to their evidence in a moment.

As to the four polling stations listed above, Abdi Omar, PW 4 testified that as TNA Chief Election Agent he had made a list of all TNA agents. He did not produce the list of the agents in evidence, nor could he give the names of the agents evicted in the five polling stations as alleged, despite the fact that he allegedly supplied the list to the Petitioner as well.

In relation to Quramathow, the TNA agent allegedly sent there was not called to testify. Evidence of actual eviction was not brought on record. Only the evidence of R3R4W7 Abdisalan Bashir Muhumud, the Presiding Officer, tended to show that party agents were present throughout the voting period but the signatures on Form 35 could not show when the signing agents had arrived or whether they were present throughout the polling hours.

In relation to Sukela Tifna it was PW 4 who testified of the eviction of the TNA agents. Their names however, were not given and they were not called to testify. On the other hand the Presiding Officer of this polling station R3R4W5 Hassan Mohamed Abdi stated in his testimony that no party agents at his polling station were evicted.

In relation to Arda Agarsu, the Petitioner did not call the agent who was allegedly evicted. It was the same for Shantoley Polling Station in respect of which the witness who swore an affidavit was not called to testify.

The court notes the following points as well. There was no explanation from the Petitioner or his witnesses that the actual agents who were allegedly evicted, were not available or could not, with all necessary effort, be called to testify. In circumstances like these, the court is entitled to presume that the agents were deliberately not called to testify. In the case of **Bukenya Vs Uganda [1972] EA 549**, the Appeal Court stated as follows: -

“Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

The court’s view in this respect is that the witnesses if called, would have assisted the court greatly to arrive at a proper and fair conclusion whichever it could be. Furthermore, failure to call them and without an explanation for it, leaves the court with no alternative but to make a conclusion that the agents, if called, would have tendered adverse evidence to the allegation of eviction. The conclusion the court reaches, therefore, is that in so far as the Polling Stations of Quramathow, Sukela Tifna Primary School, Arda Agarsu Centre, Shantoley Primary School and Kubi Hills, are concerned, there is no sufficient convincing evidence to prove that TNA party agents were evicted from those stations during the voting period.

Turning to Wargadud Dam Polling Station, the Petitioner called the agents who were posted there to testify. Hassan Hussein PW 2 said in court that he had arrived at the Polling Station at 10 a.m. and found the voting process in progress. In his sworn affidavit however, he had sworn that he had arrived early and was present when the election kicked off. He testified that he was a duly appointed agent although his letter of appointment which was, although disputed, had been surrendered to the Presiding Officer when he had reported.

The court has carefully considered the evidence Hassan Hussein. It notes that he contradicted himself as to the time he allegedly arrived at the Polling Station. He said that he was first evicted at 11 a.m. and for a second time at 2.00 p.m. However, PW 3 stated that the second eviction was at 2.30 p.m. and that PW 3 and PW 2 once more returned to the Polling Station at 5.00 p.m. On the other hand the Petitioner himself said that he visited Wargadud Dam at 2.00 p.m. and he saw the two agents PW 2 and PW 3 entering the station and resume their duty before he left the station.

The conclusion the court reaches is that PW 2 Hassan Hussein contradicted his evidence and so rendered it unreliable. The Petitioner’s evidence of visiting the polling station, did not improve the testimony on eviction. Yussuf Abdille, PW 3’s evidence, especially on the time of eviction the second time contradicted that of PW 2. In these circumstances and on the higher standard of proof required in electoral petitions the court does not believe that the witness was at his polling station or that he was wrongly evicted.

On the other hand, PW 3 Yussuf Abdille did not in his evidence affidavit, swear that he was evicted from Wargadud Polling Station Stream I where he testified he was posted. His testimony to that effect only came up in court in his oral evidence. It contradicted the evidence of PW 2 as to the time of the second eviction. The court makes a similar conclusion that there was no sufficient evidence to support the allegation of eviction.

In addition, there was a legal obligation upon the Petitioner to remove reasonable doubt from the mind of the court over the above issue. He failed to do so. The conclusion the court makes accordingly, is that there was no eviction of TNA agents from Wargadud Dam polling station as alleged.

The next major issue to address is the Petitioner’s assertion that elections in Quramathow Polling Station Stream 2 was conducted by a stranger or by a person not properly appointed as a Presiding Officer. The main evidence in respect of this ground came from Moahammed Kassim Jelle. He said that he was posted to Quramathow as a Presiding Officer but one Abdi Adan Ahmed, originally appointed to Mado Wells

Polling Station, ended up conducting the elections at Quramathow. The court has considered the evidence from both sides as to how the swopping came about. It has concluded as a matter of fact that the swopping was done at the request of the two Presiding Officers, Mohammed Kassim Jelle and Abdi Aden Ahmed.

There was a dispute as to who of the two originally sought the swop. Either officer asserted that the swopping was sought by the other. I considered the fact that Mohammed Kassim Jelle, was from the evidence on record, afraid of serving at Quramathow where clan tension against his own clan, was high. He himself gave evidence of such clan hatred. He said how he got chased away from Quramathow when he arrived there. Although he tended to blame Abdi Adan Ahmed for inciting a hostile reaction from the local people on the night he arrived there, he nonetheless conceded that clan tension existed and he was afraid to serve at Quramathow during the elections.

Notwithstanding how the swopping started, however, the court concluded that the swopping took place by the authority of the Returning officer who testified to that end. The Returning Officer John Ekonit Kimol testified that Abdi Adan Ahmed collected election materials for Quramathow with his authority and Abdi left for Quramathow where the next day he performed his functions as a Presiding Officer. Abdi Adan Ahmed was therefore officially sent to Quramathow Polling Station. He was not a stranger nor a person acting without lawful authority. In the court's view the Returning Officer who was in charge of all issues touching on the conduct of elections in the Constituency, had power and authority to do swopping of Presiding Officers for any lawful or reasonable ground, even without a request from the appointed Presiding Officers themselves, provided he notified the concerned officers. In this case there is sufficient evidence that consultation and notification of swopping took place before it was effected.

A second part of this ground was that the Presiding Officer at Santoley Primary School Polling Station ousted one of his Deputies called Sahara Mohammed at about 6.30 p.m. on the voting day. Petitioner's case was that during the absence of Sahara Mohammed from the polling station, a stranger must have carried out her functions. The Petitioner gave no evidence as to who really acted in the absence of Sahara. He guessed that someone without authority did.

The court noted the explanation given by the Returning Officer to the effect that when he sought an explanation as to why Sahara Mohammed left the polling station, the Presiding Officers told him that she was given a health-break sought by Sahara herself. The Petitioner did not find it necessary to call Sahara Mohammed as a witness.

The court came to the conclusion that there was no credible or any evidence whatsoever to support the view that anyone not authorized by law acted in Sahara's position when she was briefly absent. The Presiding Officer and the Second Deputy Presiding officer must have remained at the polling station since voting was still going on. The evidence on record showed that Sahara Mohammed came back to the station when the Returning Officer visited the station. This allegation, accordingly, has not been supported by any credible evidence.

The third ground to consider is that votes garnered at Wargadud Dam and Kubi Hills Polling Centres were cast by voters registered there while the said registration centres were not official and were not at any time gazetted. The Petitioner stated that all other voter registration stations across the country and particularly in Mandera North Constituency excluding the two above, were gazetted in the Official Gazette on 16th November, 2012. It was Petitioner's case that any registration of voters and later, any voting, at Wargadud Dam and Kubi Hills, could not therefore, have been anything, but unlawful.

There was evidence on record from the Respondents, however, that the two polling centres were on 27th November, 2012 gazetted as registration and polling centres. Copy of the Gazette Notice which was a corrigenda to the earlier Gazette No. 16727 of 2012 was tendered in evidence and was conceded by the Petitioner who expressed surprise at the second gazettement which was a corrigenda to the 1st gazettement of 16th November, 2012. The court's finding on this issue, therefore is that the Petitioner's allegation that the two polling stations were not lawful for no-gazettement, is incorrect and invalid.

The court will consider the fourth ground of the Petition; that elections were characterized by instances of undue influence and/or use of force or violence impacting negatively on the integrity of the elections. The Petitioner's case is that there were well-co-ordinated armed attacks aimed at his supporters in areas occupied by his supporters or clansmen. The attacks were aimed at intimidating voters in areas perceived to be supporting him. That these armed attacks drove voters away across the border to Ethiopia or to IDP camps in areas guarded by the police force. That Rhamu Ward was one of the areas which was targeted. That a political rally presided over by Billow Adan Kerrow, the 2nd Respondent on 27th February, 2013 was the origin of the violence. That a prominent businessman and major supporter of the Petitioner, named Haji Jelle, was run over by the 2nd Respondent's motor vehicle. That the incident provoked violence in which houses were burnt down in Rhamu ward and that the violence did not stop until the elections on 4th March, 2013 which elections the violence adversely affected whether directly or indirectly.

The Petitioner's second approach was the theory that because of the high scale violence in Rhamu Ward which carried about 17000 registered voters making 45% of the total voters, many voters did not turn-up to vote because of the fear of violence. That the result was that most of the voters, who voted to return a 75-80% voter turn-out, could not have been the genuine voters. That it must have been impersonators or multiple voters who raised the voter percentage. The Petitioner upon that theory, sought nullification of all votes garnered by all candidates in the six polling stations herein targeted. Petitioner in this respect, cited the finding in **William Odhiambo Oduol Vs IEBC & 2 others [2013] eKLR** in which Muchelule, J made a finding that what happens during campaigning period is legitimate business of a court hearing a petition concerning that election. He also cited a finding in the case of **Kiiza Besigye Vs Museveni** (supra) in which the Supreme Court of Uganda pronounced that in order to assess the effect of events that occur during campaign period including violence and other violations, the court has to evaluate the whole process of election to determine how it affected the result, and then assess the degree of the effect. The court had further stated that the number of votes garnered during election could be affected by conditions existing during the campaign period leading to the elections.

The Petitioner accordingly argued that the alleged violence and intimidation in Rhamu Ward of Mandera North directly adversely affected the result of elections there and left it without integrity associated with free, fair and transparent elections. That this leaves this court with no alternative but to nullify the Mandera North National Assembly seat elections.

The court has considered the evidence in support of this ground. The 1st and 2nd Respondents conceded that the intense hatred and political difference between two major ethnic groups – the Gare and Degodia, has existed from time immemorial. They conceded that fresh tension may have been started by the death of Haji Jelle on 27th February, 2013, a week before elections. However, they asserted that security control is and was not in their hands but in the hands of the Central Government.

The 1st and 2nd Respondents, however, denied that they held a political rally at Rhamu on 27th February, 2013 as alleged. The 2nd Respondent conceded that his campaign group drove through Rhamu on the said date but held no political rally as they had not scheduled one. The 1st and 2nd Respondents denied being responsible for the clan tension which they admitted existed before, during and after elections.

The court's view is that the ethnic tension between the Degodia and Gare clans existed all along and is historical. Even after elections, it still exists. Whether or not the 1st and 2nd Respondents supported it towards election is not clear as there is no specific evidence in this case to prove the same. There is no sufficient evidence to satisfy this court either, that the two were directly responsible and caused the violence that may have led to the burning of houses on the 27th February, 2013.

Furthermore, there is on record no direct or reliable evidence that many voters from Rhamu Ward were displaced or that over 5000 crossed over to Ethiopia and failed to turn-up to vote on the 4th of March, 2013. Neither the Petitioner nor his witnesses were able to point to the probable number of voters who had crossed to Ethiopia or who did not leave Ethiopia to come and vote. Nor was there reliable evidence

showing the displaced voters who camped at the District Headquarters or whether they did not go to vote.

On the contrary, there was evidence of a high voter-turnout in polling stations in Rhamu Ward, suggesting accordingly, that the majority of voters, went to vote. This also means that even if it was true that many voters in Rhamu Ward were exposed to or even if they were affected by the ethnic tensions which flared from time to time, they nonetheless, turned up to vote, and the high voter turnout was evidence of the same.

Furthermore, there is no evidence on record of actual violence flaring between the Gare and Degodia clans during the elections on the 4th March, 2013. This means, voting in all 55 voting stations except for a brief disruption for one hour or so in one polling station, went on smoothly and votes were at the end of voting, counted, tallied and freely announced as required by law.

It is further relevant to observe that the Petitioner did not lead evidence to prove that any violence and its effect on the ground as alleged, would only affect him to the exclusion of other candidates who included the 1st Respondent. This is more so because the Respondents like the Petitioner, also claimed that the majority voters in Rhamu Ward were of the clan from which the 1st and 2nd Respondents hail and it would, therefore, seem highly unlikely that the 1st and 2nd Respondents would stage the alleged violence when it would likely hurt all people and would also adversely affect their own political support.

In conclusion on this issue, this court cannot ignore the influence that is generally borne by the clan dynamics in the North-Eastern part of this country. Often, but not always, the candidate who comes from the larger clan has greater chances of winning. There is little that the court can do since the purpose of elections is to give the people freedom to democratically choose their leaders in a process that is free, fair and transparent. In these circumstances, the court cannot avoid taking judicial notice of the influence of clan dynamics in politics of certain areas of the Republic.

The fifth ground of the petition was that there was disparity of votes cast for the National Assembly seat as compared to the votes garnered by the President in the same Constituency of Mandera North. The Petitioner's case was that every voter who cast his vote on the 4th March, 2013 obtained six different ballot papers which would enable the voter to vote in respect of each of the six open seats. If accordingly, every voter voted for the President and also for the member of the National Assembly, then the votes cast and garnered in either case should have been equal.

There was concession from the Respondents, particularly, the 3rd and 4th Respondents, that the alleged disparity was indeed observed. However, although the Petitioner said it was 3176 the 3rd and 4th Respondents said the disparity was only 571 votes in favour of the Member of the National Assembly. The main issue to resolve is whether the disparity was proof that there was collusion between the 3rd and 1st Respondents to stuff extra ballot papers into the National Assembly seat with the purpose of assisting the 1st Respondent to win.

The court has examined the evidence in the file, including the copies of Form 35's and Form 36. There is evidence from the 3rd and 4th Respondents, which evidence the court accepts as correct, that the votes cast in Mandera North for the President were 32665 and those for the Member of National Assembly were 33216. The disparity of the votes between the two seats accordingly if correctly reflected in the said Forms, was not 3176 as asserted by the Petitioner, but (33216 – 32665) 551. The Petitioner tried to rely on a newspaper cutting of Presidential election results published on the Nation Newspaper. The court did not find the same more reliable than the relevant Form 35's and Form 36 in respect of Mandera North Constituency.

The Petitioner did not explain why he selected a comparison of the votes cast for the President and the Member of the National Assembly only without taking into account other competitive seats for which the same voters contemporaneously cast their votes, such as the Governor's seat, Women Representative seat e.t.c. A full or complete comparison of all the seats would possibly have demonstrated the issue either

way.

Left as is however, the disparity phenomenon is not easy to explain out. However, this court in an earlier ruling in this petition, expressed itself as follows: -

“In my view, there may be legitimate reasons for the difference. First, a voter may for lack of knowledge deliberately or without intending to do so, drop more than one ballot paper in any one ballot box. He may on the other hand decide to vote for the President and not for the Member of the National Assembly or vice versa, as each voter had freedom to vote as he/she wished. Secondly, the court observed that this phenomenon was not limited to Mandera North. Indeed, it was widespread across the country.”

There could be other reasons why the said disparity could occur but for the purpose of this case, the court adopts its above earlier view. In addition, the Petitioner did not adduce any or sufficient evidence to demonstrate that polling officials in collusion with the 1st Respondent or his agents, stuffed extra or unaccounted ballot papers into the National Assembly ballot box. The disparity in votes between different seats voted for contemporaneously, per se, cannot form the basis for vitiating the election results which in normal circumstances, are an expression of the will of the voters. The Petitioner did not, therefore, prove this ground.

The court will now move to consider the sixth ground of this petition which is that the Elections in Mandera North Constituency were conducted beyond the lawfully stipulated time periods. The Petitioner asserted that voting beyond lawful periods occurred in Wargadud Dam, Quramathow, Sukela Tifna Primary School, Arda Argarsu Centre and Kubi Hills. He said that in several of them voting went on up to the next day of 5th March, 2013.

The 3rd and 4th Respondent admitted the Petitioner's claim. They explained that the delay to start voting at the stipulated time of 6 a.m. was caused by failure by the polling officials to operate the Electronic Voter identification Devices (EVDS). That the Polling officials in accordance with the training they had received, turned to manual processing of identification and manual marking of registers. They said that they took into account the delay in time that had occurred, which they accommodated by extending closing time. They also testified that they allowed voters who were in the polling stations at the extended closing time to vote, which itself, as well, extended the voting time. Finally they also testified that due to the lack of adequate sources of light, the voting process was slowed down and several polling stations were forced by those circumstances to continue until or even after midnight of the 4th of March, 2013.

The 3rd and 4th Respondent's defence, therefore, was that they acted or conducted the elections lawfully, having been forced to act so, by circumstances that prevailed in each of the named polling stations.

The Petitioner's case in this respect is that the extensions of time to vote, in each case, were unlawful and unexplained in Forms 35's and accordingly, it was done for devious reasons, including allowing double voting, stuffing of votes, and committing other related malpractices to assist the 1st Respondent to gain victory.

The court has carefully considered the evidence and arguments from both sides. Since the 3rd and 4th Respondents admit the fact that they allowed extension of voting to late hours as alleged, the question to be considered is whether or not the purpose of extension of time was to commit the malpractices alleged above with a view to assisting the 1st Respondent win the election.

The court observes that under Regulation 64(3) of the **Elections (General) Regulations, 2012** a Presiding Officer has full powers in consultation with the Returning Officer, to extend the hours of polling at the polling stations where polling as in this case, has been interrupted for a valid cause or where polling in that polling station, started late in order to regain the time lost. It is however, also clear that such extension and the reasons for the same, shall be detailed in a report justifying the extension. The reasons might appear as statutory comment in Form 35 or in the Field book or Field Diary. The 3rd and

4th Respondent have not denied the allegation from the Petitioner that the Presiding Officers did not indicate the reasons for extensions of time in each of the alleged stations. That failure in the face of Regulation 64(4) aforesaid, is clearly an irregularity by the Presiding Officers. The court will later in this judgment revert to the consequence of this irregularity.

The seventh ground of the petition is that the election was characterized by instances of election offences amounting to personation, treating and bribery. These were alleged to have taken place in a massive scale in Quramathow, Wargadud Dam and Kubi Hills, having been conducted by the 1st Respondent with express authorization of the 3rd and 4th Respondents. Its aim is said to have been to improperly and illegally deprive the Petitioner of the National Assembly seat victory. It was alleged that certain individuals moved between the three polling stations quoted above, bribing voters and voting more than once. It was further alleged by the Petitioner or his witnesses that the same group's multiple voting, is what made the voter turn-out to appear to be high, when in reality, it was not. Petitioner also argued that the alleged group, covered up for the displaced persons who had not turned up to vote.

The court notes that although the Respondents had formerly sought for relevant particulars of the names of the alleged persons who committed personation, treating and bribery, no such particulars were formerly supplied. Nor did the Petitioner's oral evidence from him or his witnesses in court, reveal the names of the persons who formed the alleged group.

The conclusion the court reaches is that there is effectively no evidence to support the allegation of personation, bribery or treating, even on the ordinary standard of proof applicable in civil cases. There is either no demonstration by evidence on the numbers involved or their effect on the election result. The applicable law, however, is that such malpractices being or amounting also to criminal conduct, required proof beyond a reasonable doubt. Besides the number of people involved must also be specified. The number of votes procured by the personation, treating or bribery, must be quantified. The effect of the malpractices on the election process must be demonstrated. In the case of **Kalembe Ndile, Machakos High Court Election Petition No. 7 of 2013**, my brother **Majanja, J** expressed himself as follows at page 17, paragraph 49: -

“Evidence of bribery needs to be reasonably precise and capable of being quantified if it is to be considered to affect the results. For instance, how many votes were procured as a result of bribery; were they two, ten or a whole polling station or what number? If it were even to be assumed that such amorphous crowd was bribed to either vote in a particular way or abstain from voting, aside from the criminal aspect of it, what number is the court to attribute to such illegal conduct in order to say that such conduct affected results of the election?”

In this case also, no such numbers of affected voters was demonstrated. The numbers are important especially since in this case numbers of votes garnered by the Petitioner and the 1st Respondent, form one of the major issues.

The Eighth ground of the Petition is that there was unusually high voter turn-out of 84% in Mandera North Constituency . The Petitioner asserted that the Constituency is inhabited by pastoral nomadic tribes who move from place to another and care little about elections but care more about the welfare of their animals. That this kind of people would not get time to go and vote. The High vote turn-out percentage therefore, asserted the Petitioner, must have arisen because the few voters who turned up to vote, were allowed by the 3rd and 4th Respondents or their servants to vote over and over again. The Petitioner also alleged stuffing in favour of the 1st Respondent by the polling officers or with their consent.

The court has considered this argument. The Respondents denied stuffing and multiple voting. They stated that the voter-turn-outs were indeed high, particularly towards the end of the day. There is also evidence from several witnesses who testified in favour of the Respondents, that the reason for high turn-out towards evening, was because the pastoralists who had gone out to graze and water their animals came to vote after returning home and securing their animals. Whatever is the correct explanation for the high voter turn-out, there was evidence on record that the trend transcended the county. It also became

clear and obvious that clan dynamics equally affected the voter turn-out.

The conclusion the court reaches however is that the Petitioner failed to prove to the satisfaction of the court that the high turn-out of voters was in any way induced by the Respondents or that it was in any way illegal. Nor did the Petitioner demonstrate that the high voter turn-out did not reflect in other parts of Mandera North Constituency other than Rhamu Ward where the six contested polling stations are situated.

The ninth ground of the petition is that the 3rd and 4th Respondents failed to employ the use of the electronic voter identification machines and the transmission of results by electronic means. The Petitioner stated that the use of the electronic machines was abandoned within the first hour of their use. The Petitioner's case was that the failure to continue using the machines in identification of voters and transmission of election results from the polling stations to the Constituency Tallying Centre and to the National Centre, greatly compromised the accuracy and transparency of the said result, rendering the elections unfair and unjust as against the Petitioner. The Petitioner attempted to justify the above generalized and sweeping allegation by stating that the failure allowed unregistered voters to vote and registered voters to vote more than once. He also alleged that failure to use the machines to electronically transmit results allowed opportunity for the physical manipulation of results before the same reached the tallying centres.

The court has considered this ground. The court finds no evidence to support the above allegations. It was incumbent upon the Petitioner to adduce evidence to support the allegation to the satisfaction of this court. In the absence of such evidence the allegations remain at the level of mere conjecture and are hereby rejected. The court is also persuaded into taking judicial notice of the fact the operation of the electronic machines for lack of expertise by the polling officials and for other reasons, failed across the country and resumption of operations through manual means were ordered and successfully applied. There is no evidence of physical manipulation of the election results on the way before results reached the Tallying Centre. There is no evidence that failure of the machines allowed unregistered voters to vote or that it allowed double voting to occur.

The court in addition; agrees with and adopts the following view of the Supreme Court of Kenya in relation to the above issue: -

***“[235] But as regards the integrity of the election itself, what lawful course could IEBC have taken after the transmission technology failed? There was no option, in our opinion but to revert to the manual electoral system, as was done.*”**

[237]It is not surprising that the applicable law entrusted a discretion to IEBC, on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for conduct of the electoral process. This negates the Petitioner's contention that, in the instant case, injustice or illegality in the conduct of the election would result, if IEBC did not consistently employ electronic technology. It follows that the Petitioner's case, in so far as it attributes nullity to the Presidential election on the grounds of failed technological devices, is not sustainable.”

The final ground of this petition is multifaceted. The court will deal separately with each sub-ground.

i. Lack of properly constructed Polling Stations

The Petitioner alleged that Wargadud Dam, Quramathow and Kubi Hills were not physically existent. That they were open-air polling stations without voting booths. That, therefore, voters were rarely in queues or in any order. That indelible ink could not possibly be applied and this disorderliness led to multi-voting and personation. The 3rd and 4th Respondents denied this allegation. They called witnesses including Ibrahim Adan Isaac and Bashir Haji Abdulahi who voted each at least in one of the polling stations. They tended to state that voting there was orderly and that indelible ink was being applied.

The court has considered this ground. It was not denied by the 3rd and 4th Respondents that the said polling stations were indeed open air and probably under some trees shade. The court is however, persuaded that in Mandera North where life is nomadic and pastoralistic and people move from one area to another in search of grass and water, voting stations especially mobile ones, as these were, can be situated in spots where voters can easily reach to vote. Such Polling Stations are likely to be temporary and probably in open air spaces. A polling Station is defined in Section 2 of the Act as “... **any room, place, vehicle or vessel set apart and equipped for the casting of votes at an election.**” A polling station, therefore, can be in open air space, can be on a motor vehicle or ship. What matters is that voters can freely and secretly cast a vote for the person the voter prefers. No evidence was brought through any voter that he did not cast his vote in the said open air polling stations, or as secretly as one wished so that the petitioner can then urge that the voting process or election result’s integrity, from the stations, was compromised.

ii. **Issuance of Ballot Papers in a authorized Manner:**

There was evidence that in one or two polling stations, polling officials were issuing 2 ballot papers to the voter, instead of six which a voter required to vote for each one of the six seats being contested. The 3rd and 4th Respondents witness Abdisalan Bashir Muhumed admitted this practice. He explained that in a case where a voter appeared totally illiterate or ignorant, and to avoid overwhelming the witness, they released the six ballot papers in batches of two to enable the voter cast them and come back for the others, until he fully voted for all six seats.

The court has considered this issue. While it appears strange, it nevertheless appears a rational method of allowing ignorant or illiterate voters to vote. There was no evidence that this method was widespread or that it in any way, compromised a fair and free voting. It was clearly intended to assist such voters and for a good reason as explained. The Petitioner did not demonstrate to the court how it negatively affected his chances of success.

iii. **Situation of Wargadud Dam and Kubi Hills**

Petitioner asserted that the above two polling stations were in Mandera South Constituency. He suggested that votes cast in the same should be nullified. The Respondents on the other produced a map **Exhibit 1 & 2**, showing the polling stations to be situated in Mandera North Constituency. The court has considered this sub-ground. The court finds no evidence to support it, although, on the other hand, this is a new ground not pleaded in the petition and not supported by any evidence affidavit.

iv. **Assisted Voters**

The Petitioner’s case was that the majority of Mandera North Constituency voters, being assisted voters because they were illiterate, required to be so marked as assisted voters in the Register. It was his case that during the scrutiny ordered by the court, it was noted that most of the voters were not marked in the voting registers as assisted voters, except in Stream 2 of Quramathow and Stream 2 of Arda Agarsu. He submitted failure to so mark every assisted voter compromised the integrity of the election.

The Respondent denied this allegation and drew the attention of the court to the ruling and directions of this court earlier made over the issue to the Deputy Registrar who conducted the scrutiny.

The court has referred to its earlier directions and orders on this issue. The court found that the issue of indicating the assisted voters in the voting register was only relevant and necessary where the voter was assisted by a person accompanying him/her for that purpose, to the polling station. That is contrasted with assistance by the Presiding Officer himself in the course of his administrative and supervisory duties at the polling station. The court further made it clear in a ruling dated 15th August, 2013 that whatever finding that is made by the Deputy Register over the issue of assisted voters, it would not be used by the Petitioner to push for any purpose of the petition.

Contrary to the above directions the Petitioner has seized the issue and used it to seek nullification even though the numbers of voters assisted were never ascertained or published and although the extent of the failure to mark the assisted voters is unknown. All the court can say is that the ground and the stance taken by the Petitioner does not assist him in any way to persuade the court that the 3rd Respondent acted in any unlawful way in respect to this issue.

The final issues which the court will consider are those based on the Scrutiny and Recount Report. After recount, the Report shows that the 1st Respondent Adan Mohammed Nooru lost 26 votes while he gained 18 votes. The Petitioner on the other hand gained 7 votes. The effect of the recount accordingly is that the winner's victory margin was reduced by 8 votes from 4899 to 4891.

The grounds raised by the Petitioner which are based on the scrutiny and Recount Report are: -

- a. **Use of multiple registers leading to double or triple voting.**
- b. **Failure to use proper register or any registers at all.**
- c. **Failure to account for crucial election material such as ballot boxes, Form 35's Counter-foils and Polling Station Diaries or Field Day Books.**

The Petitioner asserted that scrutiny revealed that in five (5) Polling Stations scrutinized, there were identical registers in the custody of Presiding Officers and that some were used in the voting process. As a result, the Petitioner concluded, there were extra votes cast and counted due to double or triple voting. The Petitioner argued that two or more Streams of polling stations may have kept identical registers which may have allowed double or triple voting depending on the number of streams that existed.

As to ballot paper counterfoils, the Petitioner asserted that the scrutiny revealed absence of counterfoils from some ballot boxes. He accordingly argued that without reconciliation of the missing counter foils with the ballot papers, from which they were plucked, the integrity of the whole voting exercise was rendered dubious and the court should declare all the votes garnered in the five polling stations of Wargadud Dam, Arda Agarsu, Santoley, Sukela Tifna and Kubi Hills as irregularly obtained and accordingly void.

Another issue raised and argued by the Petitioner is that a number of ballot boxes from some of the six polling stations, could not be identified because labels had come off and Form 35's could not be found inside some of them. This issue affected about 14 ballot boxes whose ballot papers and other electoral material could not be identified. The Scrutiny Report accordingly states that it was impossible to verify the names crossed off some of the registers with the figures contained in Form 35's.

It was the Petitioner's case also that the fact that there is evidence of double or triple voting, confirms the fact that there was no indelible ink being applied by polling clerks or that they deliberately breached the law. The Petitioner also asserted that where the Presiding Officers allowed the use of print out registers instead of the original registers as contained in electronic voting identification machines, they acted irregularly and their action amounted to a malpractice which should render the electoral exercise null and void.

The Respondents replied to the issues above arising from the Scrutiny Report. They argued that first and foremost, all these are new issues not pleaded in the petition and which are being raised too late in the day for either side to demonstrate the correct position of the same. The Respondents therefore urged the court to expunge all such issues without going into their merit.

Secondly, the Respondents argued that the matters raised, coming when opportunity to adduce evidence has been closed, besides the same having not been proved to the satisfaction of the court as required by the law.

Thirdly, they argued that even if there could be some evidence generally touching on the issues raised,

particularly from the Scrutiny Report, the same was not tested in cross-examination and was also not sufficient to show that the irregularities now lately alleged, were of such magnitude as could or did affect the final outcome of the election result of Mandera North Constituency.

The court has carefully perused and considered the arguments as are based on the Scrutiny Report. From **Appendix 7** of the Report, there is evidence that there are names which were cancelled out twice or three times. Those cancelled twice were numbering 620. Those cancelled three times were 29 but since two of the triple votes were illegally cast, the effect was to double the 29 votes to make the same 58. It would, therefore, appear to the court that the irregularly increased votes arising from double or triple voting, in all the six polling stations in contention, were $(620+58) = 678$.

If the court were to consider the issue above as a valid issue to take into account despite the same having not been pleaded, the court would proceed to reduce the 1st Respondent's vote victory margin by 687 from the earlier balance margin of 4891 under powers granted under Section 82(2) (e) of the Act. The victory margin between the candidates would still remain 4204 $(4891 - 687)$. The irregularity if proved and accepted by the court, would in terms of numbers, be not of such a magnitude as would affect the outcome of this election.

The court has however, observed that all the grounds raised above arising from the Scrutiny Report, were indeed not pleaded in the petition. The 3rd and 4th Respondents could not and did not indeed prepare a response to the petition, or adduce evidence in reply, to these grounds. The Petitioner did not either lead specific evidence to prove or demonstrate the issues. This means that much of those grounds is merely in the written submissions or arguments by the Petitioner, as based on the Scrutiny report.

The law touching on the issue on pleading is found under **Rule 10 of the Elections (Parliamentary and County Elections) Petition Rules, 2013**. It provides as follows: -

“10(i) An election petition filed under Rule 8 shall state: -

- a.
- b.
- c.
- d.
- e. **the grounds on which the petition is presented.**
- f.”

Similar provisions as the one above have been considered by text books and courts. It is now commonly accepted by the courts that only those grounds pleaded in the petition shall be taken into account and considered by the petition court in dealing with a petition for nullification of an election result. As put in Halsburys Laws of England: -

“The functions of pleadings are to give fair notice of the case which had to be met. It is also to define with precision the matters on which the parties differ and the points on which they agree; and thus to identify with clarity the issues on which the parties will ask the court to adjudicate to depone the matters in dispute between the parties. To attain this objective, the pleadings are conducted in accordance with the rules and practice which it is the purpose of this title to expound. The main purpose of these rules is to compel each party to clearly and intelligibly show the material facts on which he relied, omitting everything immaterial; and then to require his opponent either to admit or explicitly to deny every material alleged against him....”

In establishing his case accordingly, the Petitioner herein was bound by matters which he set out in his petition and which this court has hereinabove analysed in detail. This court further agrees with and adopts the statement made by the court in the case of **Mohamud Muhumed Sirat Vs Ali Hassan Abdirahman and 2 others – Nairobi Petition No. 15 of 2008(2010) eKLR**, which states thus: -

“From the outset, this court wishes to state that the Petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the Petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court, will therefore not render any opinion in respect of aspects of the Petitioner’s case which were not based on the pleadings that he had filed in court and in particular, the Petition.”

What the court understands from the principle discussed in these cases is that it will not even countenance issues or new grounds introduced by the Petitioner after the pleadings have been closed, whether they arise during adduction of evidence or during submissions. The same principle was expressed by the Court of Appeal in **Civil Appeal Number 255 of 2008 – Ndolo Vs Waithaka & Others, [2010]eKLR page 280**, as follows: -

“Leading evidence on an issue that is not pleaded circumvents the petition and the particulars supplied, is irrelevant and inadmissible and is unacceptable for introducing an element of surprise and uncertainty... Since an election petition is not capable of being amended, all issues in the petition crystallize after service of particulars and therefore any attempt to introduce evidence outside the petition as particularized, would violate the principle of relevance.”

Applying the above principle, the court hereby finds that the arguments raised by the Petitioner as earlier herein above tabulated, arising from scrutiny which were not pleaded in the petition, will not be given any further consideration and will not bring out any effect on the earlier findings of the grounds of the petition except where they closely and directly relate to those grounds. The irrelevant grounds in question, include the alleged double or triple voting, use of copied printed registers and the allegedly unaccounted ballot boxes, Form 35’s, counterfoils and Diary and Field Day Books.

Having come to the immediately above findings, the court will now make the following concluding remarks.

The conclusion this court has reached in respect of every ground of the petition is based on evidence adduced before the court to prove the petition. It is possible that some irregularities or malpractices or non-compliance of rules and procedures alleged, may have been committed by presiding officers and polling clerks in the course of their duty to conduct the election for Mandera North Constituency. It is even possible that some of those irregularities were done innocently although nevertheless negligently. It was however, upon the Petitioner to prove the grounds of his petition on a standard beyond the balance of probabilities although not beyond a reasonable doubt except in respect of those malpractices which also amounted to criminal conduct, which required to be proved beyond a reasonable doubt.

The court has however, come to the conclusion that none of the grounds of the Petition hereinabove shown and analyzed seriatim, was proved to the standard of proof as laid down by law. The majority of the irregularities and malpractices alleged and probably committed were minor, human and excusable. They did not go to the root of the electoral principles so as to affect adversely, the result of the election contested. Such irregularities include failure by the presiding Officers to indicate the reasons and nature of extension of voting hours; the reasons why agents in given polling stations did not sign Form 35’s; arithmetical mistakes of figures of votes garnered by candidates as entered in Form 35’s; misplacement in ballot boxes of forms and other electoral materials. In some of these irregularities it was the failure to explain an act or conduct rather than the doing of it that led to the irregularity.

This court in conclusion accordingly, agrees with the pronouncement in the case of **Bernard Shinali Vs Boni Khalwale and 2 others (2011) eKLR** where the court expressed itself thus:-

“Further, I agree with the proposition grounded on the decision in Mbowe Vs Eliufoo (1967) EA, 240 that any allegations made in an election petition have to be proved to the ‘satisfaction of the court.’ Like Rawal, J in Onalo, I am certain that the standard of proof, save in matters

where electoral offences are alleged, cannot be generally beyond reasonable doubt, but because of the quasi-criminal nature of some election, Petitions, it is almost certainly on a higher degree than merely on a balance of probabilities, the latter being the standard in Civil cases.”

The court has considered virtually all the grounds of this Petition after analyzing the evidence adduced by both sides of the Petition. On matters of fact, it has arrived at conclusions in respect of each such ground.

The court has also applied those facts to the electoral principles of the law including the standards of proof relevant and applicable. The final conclusions cannot be made however, without once more citing the provisions of **Section 83 of the Elections Act** aforesaid. The Petitioners sought for the nullification of the Mandera North National Assembly seat on the ten or so grounds enumerated at the beginning of this judgment. Those grounds, for the reasons indicated after analysis of each, were as a matter of fact and/or law, not proved to the satisfaction of this court. If and where there was some acceptable evidence, proof was not beyond the balance of probabilities as required by the law. Even where at all the court might have felt persuaded of the facts alleged, if at all, the Petition failed to demonstrate that the facts or grounds so proved were such that they materially or substantially affected the election result being challenged. In these circumstances and in the spirit of Section 83(1) of the Act this court has no hesitation in declaring that the Petitioner’s Petition has failed and should be rejected.

Accordingly the court makes the following final orders:-

ORDERS

- 1. The election petition filed by the Petitioner on 8th April, 2013, is hereby dismissed.**
- 2. The costs of defending the Petition by the 1st, 2nd, 3rd and 4th Respondent shall be borne by the Petitioner.**
- 3. For the purpose of those costs the 3rd and 4th Respondents shall be considered as one party.**
- 4. Costs for the 1st Respondent shall not be more than Kshs. Three (3) million while those of the 2nd Respondent shall not be more than Kshs. One (1) million.**
- 5. Costs for the 3rd and 4th Respondents shall jointly be not more than Kshs. Two (2) million.**
- 6. A certificate of this court as to the validity of the election of Mandera North National Assembly seat, shall forthwith issue and be served upon the Independent Electoral and Boundaries Commission for the purpose of notifying the Speaker of the National Assembly in accordance with Section 86(1) of the Elections Act.**

DATED and DELIVERED at Nairobi this 2nd day of October, 2013.

.....

D. A. ONYANCHA

JUDGE

In the presence of

Adline court clerk

Mr. Muchiri for the Petitioner

Kilukumi & Ismail for the 1st Respondent

Mrs. Karanu for the 2nd Respondent

Mrs. Karanu for the 3rd and 4th Respondent.