



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
KAKAMEGA LAW COURTS
ELECTION PETITION NO: 6 OF 2013

JUSTUS GESITO MUGALI M'MBAYA.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

DANIEL LENARUM, RETURNING OFFICER,

SHINYALU CONSTITUENCY.....2ND RESPONDENT

ANAMI SILVERSE LISAMULA.....3RD RESPONDENT

JUDGEMENT

Background

1. The Petitioner, Justus Gesito Mugali M'mbaya and the 3rd Respondent Anami Silverse Lisamula were contestants for the seat of Member of National Assembly, Shinyalu Constituency, in the General Elections held on 4th March 2013. Notably, the Petitioner and the 3rd Respondent have competed before for the same seat in a by-election held in 2009 where the Petitioner did in fact beat the 3rd Respondent making him the immediate former Member of Parliament for Shinyalu Constituency. The Petitioner was at the time a member of the Orange Democratic Movement (ODM) Party and during the political party nominations sometime in June 2012, the 3rd Respondent beat the Petitioner to the ODM party Chairmanship in the Constituency Sub-Branch. In the fullness of time, and a few months to the general elections of 2013, the Petitioner defected to the United Democratic Forum (UDF) Party, on whose ticket he contested for the Shinyalu Parliamentary seat.
2. The race for the Member of National Assembly in this Constituency attracted seven contestants where the 3rd Respondent emerged winner with 15,102 votes, and the Petitioner came in second position with 14, 061 votes. The Petitioner being dissatisfied with the results, filed a petition dated 9th April 2013. The Petition was supported by an affidavit sworn by the Petitioner on the same date. In compliance with Rule 12 of the Election (Parliamentary and County Elections) Petition Rules, 2013(*hereinafter referred to as the Election Rules*), the Petitioner filed and served affidavits by witnesses. The Petitioner was represented by Dr. John Khaminwa and Mr. Wachira.

3. The Petitioner prayed for the following declaratory orders in the Petition:
 - a. The 1st and 2nd Respondents are in breach of their Constitutional Obligations under Article 10, 81, (e), 86 and 88 of the Constitution in relation to the 4th March 2013 elections for the Member of the National Assembly for Shinyalu Constituency.
 - b. The declaration that the 3rd Respondent had won the election for Member of the National Assembly for Shinyalu Constituency is invalid.
 - c. The 1st Respondent was in breach of its obligations under Sections 59, 60, 61, 62, 74, 79, and 82 of the Elections (General) Regulations, 2012.
 - d. The 1st and 2nd Respondent failed to properly tally and verify the count of votes in breach of Article 101 of the Constitution during and in relation to the Member of the National Assembly for Shinyalu Constituency elections held on 4th March 2013.
 - e. The 2nd Respondent is in breach of the his Constitutional Obligation under Article 75 of the Constitution in relation to the 4th March election for the Member of the National Assembly for Shinyalu Constituency.
 - f. The 1st and 2nd Respondents are guilty of offences under the Elections Act, 2011.
 - g. A declaration that the 3rd Respondent was not validly elected as the Member of the National Assembly for Shinyalu Constituency at the concluded elections held on 4th March 2013.
 - h. An order that the 3rd Respondent is disqualified due to contravention of provisions of the Election Act and more, in particular, in contravention of Section 65 of the Act.
 - i. A declaration that the Petitioner duly won and was elected as Member of the National Assembly for Shinyalu Constituency at the concluded elections held on 4th March 2013.
 - j. In the alternative, an order that there be a fresh election for the Member of the National Assembly for Shinyalu Constituency in strict compliance with the Constitution.
 - k. Costs of the Petition be borne by the Respondents.
 - l. Such other or further relief that the Court may consider proper in the circumstances.
4. In response to the Petition, the 1st and 2nd Respondents both represented by Mr. Edwin Mukele filed a joint response to the Petition dated 30th April 2013. Counsel also filed affidavits by witnesses in compliance with Rule 12 of the Election Rules. The 1st and 2nd Respondents prayed that the Court does find that the 3rd Respondent was duly elected and that the elections were valid, free and fair. The 3rd Respondent represented by Mr. Lubulellah, Mr. Mutubwa and Ms. Ngeresa also filed a response to the Petition dated 2nd May 2013 together with affidavits by witnesses in compliance with Rule 12 of the Election Rules. The 3rd Respondent prayed that the Petition be dismissed with costs.

Pre-trial Applications

5. Both parties to the petition filed applications seeking various orders. The Petitioner filed an application dated 17th May 2013, seeking an order for a re-count and/or scrutiny of the votes in respect of this election. This application was argued and the Court reserved its ruling to a time when all or some witnesses would have given their evidence. This application was revisited on 2nd August 2013 when all the witnesses had given their evidence. The application was canvassed by way of written submissions which were highlighted in Court on 6th of August 2013. The Court delivered its considered ruling on 26th August 2013 and for reasons contained in the said ruling, rejected the application in its entirety.
6. The 3rd Respondent filed applications dated 10th and 29th May 2013 seeking various orders including striking out affidavits of the Petitioner's witnesses and sections of the Petition. These applications were also canvassed by way of written submissions and the Court delivered the rulings in respect of both applications on 21st June 2013. Arising out of the applications and the rulings of the Court, the following was struck off from the Court record:

- i. Annexures “JGMM2” and “JGMM3” and paragraph 8(s) of the Petitioner’s Affidavit in support of the Petition sworn on 9th April 2013.
 - ii. Paragraphs 23 and 24 of the 3rd Respondent’s Witness Affidavit sworn on 2nd May 2013
7. To set the Petition in motion, the Court conducted a pre-trial conference on 21st June 2013 where Parties agreed on issues, number of witnesses, time allocation and approximate duration of the Petition.
 8. The hearing of the Petition commenced on 16th July 2013 with counsel giving opening statements. Dr. Khwamiwa, counsel for the Petitioner submitted that the Petition hinged broadly on two issues, namely; Whether the tallying exercise was properly and validly done or whether it disclosed malpractices and serious flaws in the process. Counsel stated that the difference in votes between the Petitioner and 3rd Respondent was 1,041 and therefore very small. This being so, Dr. Khaminwa submitted that any irregularity or malpractice if proved, on the part of the 1st and 2nd Respondents, should convince the court to nullify the elections in view of that small victory margin. Secondly, counsel submitted that there was violence meted out on the Petitioner on the night prior to the day of the election. It was his submission that once violence is disclosed in an election, the new constitutional premises sets high standards on integrity, fairness and justice which demand that such elections be nullified as the violence becomes *Res ipsa loquitor*.
 9. Mr. Mukele, counsel for the 1st and 2nd Respondents submitted that the question before Court was whether the 1st and 2nd Respondents conducted the elections in accordance with the law. In respect of irregularities and malpractices, counsel submitted that if there were any, then the question would be to what extent the said malpractices and irregularities affected the outcome of the elections.
 10. Mr. Lubulellah, counsel for the 3rd Respondent submitted that the petition was extensively hinged on the provision of the Constitution on integrity, fairness and justice. Counsel stated that these principles are for the benefit of all whether Petitioner or Respondent. Therefore the Court must apply constitutional principles impartially taking into account the conditions under which the election took place. In respect to violence, Mr. Lubulellah stated that an assertion that where there is any evidence of then the election must be quashed is not correct. The court must establish who is responsible for the violence and under what circumstances the violence occurred. The court must also address whether that violence affected the results of the elections. The Counsel submitted that the Principle of *Res ipsa loquitor* has no application to election petitions.

Reference made to Constitutional Provisions and International Instruments

11. The Petition was profoundly drafted on constitutional provisions with the Petitioner alleging that the Respondents breached provisions of the Constitution relating to political rights thereby infringing on his rights, and to a larger extent, failing the electorates of Shinyalu Constituency. Among the Articles of the Constitution cited in the petition was Article 38 which gives every citizen the right to make political choices, and the right to free, fair and regular elections. Article 81 was also cited which outlines the general principles for the electoral system. Sub- article (e) provides that free and fair elections should bear the following characteristics: - secret ballot; free from violence, intimidation, proper influence or corruption; conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.
12. The Petition was also anchored on the provisions of various International Instruments such as the African Charter on Democracy, Elections and Governance, 2007, which provides one of its objectives as:

“Promote the holding of regular, free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments.”

13. Another International Instrument cited in the Petition was the Declaration on Criteria for Free and Fair Elections (Unanimously adopted by the Inter-Parliamentary Council as its 154th session Paris, 26th March 1994) which provides inter-alia, for free and fair elections as well as voting and election rights.
14. The 3rd Respondent also cited the Universal Declaration of Human Rights which at Article 21(i) provides that everyone has a right to take part in the government of his country, directly or through chosen representatives.

Issues emerging from the Evidence

Violence

15. In the Petition, the Petitioner pleaded that he vehemently opposed the declaration of the 3rd Respondent as the winner of the Member of the National Assembly for Shinyalu Constituency and sought to challenge its validity for reasons that there was violence meted out against him and his supporters. The Petitioner averred that the violence was instigated by the Petitioner's opponents and particularly the 3rd Respondent and his supporters. The Petitioner stated that on the night of 3rd – 4th March 2013, between 1:00 – 2:00am, he and others were distributing agent accreditation letters and other election materials, including subsistence allowance to the UDF Party Agents in their homes, in order to facilitate their entry into the polling station on the voting day which was the following morning. The Petitioner stated that he was in a convoy of two Motor Vehicles: Range - Rover KBH 893U and Land Cruiser KAQ 346B, himself being in the Range-Rover ahead of the Land Cruiser. He stated that there were 5 people including himself in the Range-Rover and 2 people in the Land Cruiser accompanying them.
16. In evidence the Petitioner testified that when they reached Shamakhanga village in Lugango area, they were blocked by two vehicles, a KAQ 704D belonging to the 3rd Respondent and a pick-up truck. The occupants of those vehicles who were about 15 started stoning the Petitioner and his entourage, while shouting "*Mwizi, Mwizi wa Kura*" which words the Petitioner perceived to refer to him. He stated that the people in the Range-Rover ran away leaving him with the driver, Mr. Kizito Muhembele (PW4). One person hit his side of the car with a big stone and at that point, Mr. Fred Shijenje (PW1) came to pull him out of the car. The Petitioner testified that he was able to see the vehicles that blocked their path because his vehicle had stronger and more powerful lights than those in the opposite direction. It was his evidence that he saw the registration number of the vehicles that blocked them before the occupants started throwing stones. He testified further that when Fred Shijenje PW1 came to get him out of the vehicle, he saw the 3rd Respondent at the scene of the incident. The Petitioner stated that he quickly ran to the Land Cruiser which was reversing, and together with some of his entourage, drove into the home of Wellington Mukanda (PW5) for safety.
17. Fred Shinjenje (PW1) testified that he is a Reverend for the past 15 years in Friends (Quakers) Church in Lirhanda, and also the Deputy Organizing Secretary for UDF Party Shinyalu Sub-branch in Kakamega. It was his evidence that on the night of the attack, he was in the company of the Petitioner in the Range-Rover and that a white Land cruiser belonging to the Petitioner was trailing them. It was his evidence that he saw an oncoming vehicle Prado KAQ 704D which stopped in the middle of the road as if to block them. He stated that he did not see the inside of the vehicle but that there were about 15-20 people out there who shouting "*Mwizi wa Kura amekuja*" which words he believe referred to the Petitioner. He testified that the people started throwing stones at them and he jumped out of the car and started to run toward the Land Cruiser. He testified that he then remembered he had left the Petitioner in the Range-Rover and so he rushed back and pulled him out and they both ran into the Land cruiser which reversed and drove to the home of Wellington Mukanda (PW5). PW1 stated that he identified the 3rd Respondent at the scene of the incident because he saw him and heard his voice. Asked by the Court whether he shared with the Petitioner or with any other person that he saw the 3rd Respondent at the scene, the

witness was emphatic that he did not share this information with anybody at all.

18. Kizito Muhembele (PW4), the driver of the Petitioner's Range-Rover vehicle testified that he was the one driving on the night of the attack. He testified that he stopped the vehicle to give way to the oncoming vehicles, but instead one of the vehicles blocked the road. People came out of the vehicles and started to throw stones at them, chanting "*wezi wa kura*" which words he understood to mean "*Kizito ni mwizi wa kura*". He testified that his efforts to tell the people that they were not thieves and that Hon. Kizito was the one in the vehicle fell on deaf ears. He testified that he was beaten and so he fled into hiding 1 ½ KM away from the scene of the incident. PW4 did not identify anybody at the scene of the attack neither did he see the Petitioner's motor vehicle being burnt.
19. PW1, PW4 and PW10 all testified that they did not witness the vehicle being burnt. PW4 testified that from where he hid, he saw smoke and fire and that he heard a loud bang and so he knew that the vehicle was burnt. PW1 and PW10 testified that they ran into the Land Cruiser and left the scene before the vehicle was burnt. They all testified that the Police took them back to the scene and that's when they saw the burnt vehicle. PW1 and PW10 testified that when they got to PW5's home, PW5 took them to his brother's home one Eliud Gitava. On cross-examination PW1, PW4, and PW10 all denied that they carried any crude weapons in the Range-Rover vehicle. The Petitioner also denied that he was in a campaign and stated that the money he was carrying was meant for Party Agents being their subsistence allowance.
20. Wellington Mukanda (PW5) confirmed that the Petitioner (PW10) with others in the Land Cruiser drove into his home and that he decided to take them to his brother's home about 800m from his home. It was his evidence that the Petitioner had, 5 minutes before the incident, driven past his home and had given him accreditation letters for UDF Party Agents and subsistence allowance amounting to Kshs. 48,000/- to be distributed to the agents early morning at 5:30am before the opening of the polling stations. It was PW5's his evidence that at around 12:45am that morning the 3rd Respondent had called him on his cell-phone wanting to know why he (PW5) was with the Petitioner. PW5 testified that he gave his wife the phone and that the 3rd Respondent asked that the phone be handed back to PW5. PW5 stated that the 3rd Respondent asked why he had given his wife the phone and his response was that he was with his wife at home and not with the Petitioner, and that at that point the 3rd Respondent hang up the call. PW5 also testified that the 3rd Respondent's home was 600meters away from the scene of the attack.
21. Anami Silverse Lisamula, the 3rd Respondent (RW6) in response to the allegations that he was responsible for the violence meted out against the Petitioner stated that the same were false and a deliberate and calculated scheme by the Petitioner to harass, intimidate and ultimately fabricate a case against him. The 3rd Respondent also stated that he was not aware of any rumour that the Petitioner had died in the incident and the rumour could therefore not be attributable to him. In respect of the allegation that the electorate in the Constituency failed to vote due to the alleged rumours, the 3rd Respondent stated that it was speculative with no empirical basis. The 3rd Respondent pondered how it would be determined that the said electorate would have voted for the Petitioner in view of the provisions of Section 44 of the Elections Act, 2011 which prohibits such disclosure.
22. In cross-examination, the 3rd Respondent admitted that he knew the Petitioner's vehicle was burnt but stated that he did not know who burnt the vehicle and for what reason. He stated that he saw the burnt vehicle the following day at 6:00pm when he visited the scene. The 3rd Respondent admitted that he was charged alongside two others namely; Goefrey Muhongo Mitalo and Clifton Mutsotso Anami, the latter being his elder brother, with the offence of malicious damage to property, and that he made a statement to the police. He also stated that his children Brian Runalo Anami, Newton Nicholas Mwambi and Anami Rodney Khamatishi had been charged with the same offence but that the said charges were dropped. The 3rd Respondent contended that the charge against him was a fabrication and a scheme meant to tarnish his name and to deny Shinyalu

people proper reputation in Parliament.

23. It was the 3rd Respondent's evidence that during that period, his family was mourning the death of his brother-in-law (his sister's husband). He stated that the deceased had died in a road accident in Kericho and so relatives and friends went to both his house and that of his sister in Sigalagala to offer their condolences and pray with them. The 3rd Respondent stated that he did not keep a record of who visited because people came in and left for two consecutive days. The 3rd Respondent also stated that the incident occurred over 1 KM away from his home and not 600m or less as alleged by the Petitioner and his witnesses.
24. Asked about the vehicle KAQ 704 D, the 3rd Respondent replied that he did not know the owner but a search conducted at the Kenya Revenue Authorities revealed that the car was registered in the name of Timestar Trading Company Limited. The 3rd Respondent, however, admitted that his sons used that vehicle on the night of the incident. He stated that he made a report to the Police on the morning of the election because on the same night the Petitioner's vehicle was burnt, his sons were attacked by unknown assailants and so they were also victims of aggression. The 3rd Respondent also stated that he had received threatening text messages on his mobile phone and had also received information concerning his safety which necessitated him to contact the police to give him security during the election period.
25. The 3rd Respondent admitted that he telephoned Wellington Lumosi Mukanda (PW5). He explained that he called him 2 days prior to the night PW5 alleged he was called. The 3rd Respondent explained that he knew PW5 to be his supporter but that he had been shown a picture of PW5 wearing a UDF T-shirt and so he wanted to find out if PW5 had jumped ship to the Petitioner's camp.
26. In re-examination, the 3rd Respondent stated that his home is perched on a hill and where the incident occurred is on a depression and so he was able to see the vehicle burning. He stated that at that time he did not know whose vehicle had been set ablaze but that he found out in the morning that it belonged to the Petitioner. The 3rd Respondent also refuted the claims made by Fred Shijenje (PW1) that he saw him at the scene during the alleged violent attack.
27. The Court made an order, *suo motto*, to visit the scene of the incident. On 1/8/2013, the Court accompanied by court officers, counsel together with their clients visited Lugango area where the incident occurred. At the scene, PW1 recanted his earlier evidence that the vehicle that had blocked them was 70 meters away. He had wrongly estimated the distance because it was at night. He explained and demonstrated to the Court how the oncoming vehicle had stopped on the road and stated the distance was 40 meters away from the Range-Rover. He restated his evidence that people started throwing stones at them from all directions while running towards them. He stated that a big stone hit the windscreen on the side of the Petitioner who started shouting "*Tumefanya nini?*" x 2. He stated that he ran away but came back for the Petitioner. On cross-examination, PW1 admitted that the road is 6-8 meters wide and therefore two vehicles can by-pass each other. He also admitted that there is a homestead 20 meters across from where the incident took place. PW1 however stated that at night he did not see that homestead.
28. Asked by the Court about the incident, PW1 stated that he saw only one vehicle that appeared to have blocked them on the road 40metersaway. He also stated that he saw the 3rd Respondent at the scene who was standing 7 meters away and that the 3rd Respondent had won a Kaunda suit. He also heard the 3rd Respondent shouting "*Mwizi, Mwizi*"
29. Upon visiting the scene, the Court noted that the 3rd Respondent's home is within Shamakhanga market. However, the said home is over 1 KM away from where the incident took place. The incident occurred a few meters from Lugango Primary School and right outside a homestead. In fact the owner of the homestead was kind enough to bring the Court a table and chair from his house. This gentleman was not a witness in these proceedings and therefore the Court could not

get any information from him about the incident.

30. On behalf of the Petitioner, Dr. Khaminwa submitted on the 3rd Respondent's statement recorded with the police where the 3rd Respondent claimed that the same was in respect to an attack meted out against his sons and not in respect to the attack on the Petitioner. He submitted that the alleged attack on the 3rd Respondent's sons was a fabrication by the 3rd Respondent. In respect to the 3rd Respondent's evidence that his home could be accessed using two routes, the counsel submitted that it would be inconceivable for the 3rd Respondent's sons to use the longer route home. Counsel also referred the Court to the affidavit of Alexander Khamasi Mulimi whose evidence would implicate the 3rd Respondent.

31. In response, Mr. Mukele for the 1st and 2nd Respondent submitted that proof of an offence of violence as stated in Section 65 of the Elections Act is beyond reasonable doubt and that the court cannot interfere with an election based on this allegation unless this standard is met. Counsel submitted that the Petitioner has failed to satisfy the requirement of law in this regard. Additionally, counsel stated that no evidence had been adduced to demonstrate that either the 1st Respondent's officials or the 2nd Respondent either instigated or were active participants in the said incident.

32. In respect to the burden of proof in election petitions, Mr. Mukele submitted that it is settled law that election petitions cannot be based on generalities and speculation and that the Petitioner is required to adduce specific evidence in support of the petition to be able to discharge both the burden and standard of proof bestowed upon him by law. Counsel cited Justice Maraga in the case of **Joho Vs Nyange and Another (2008) 3 KLR (EP) 500** where the court states as follows in relation to the principles for determination of election petitions;

“A collary to that principle is that Election Petitions are disputes in rem of great public importance and therefore not ordinary suits. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election Petitions should be proved by cogent and consistent evidence.”

33. On behalf of the 3rd Respondent, Mr. Lubullelah submitted that the violence as a ground to nullify elections must be propagated in an electoral context, premeditated and designed to achieve a particular electoral result. It was his submission that the violence set out in the Petition pointed out to criminal actions of persons unknown and unidentified to both the Petitioner and the 3rd Respondent. He submitted further that there were no investigation reports brought before Court to establish the *mens rea* and *actus reus* of the alleged perpetrators. Counsel submitted that the Petitioner's visit to the general area had not been announced and therefore, there is no way that attack on the Petitioner's entourage could have been pre-planned. Counsel contended that there was no evidence establishing a motive for the attack on the Petitioner or an established premeditation or a political connection to the said attack. Counsel further submitted that there was no evidence even to suggest that the 3rd Respondent issued instructions, directed, ordered or otherwise prevailed upon another to set the Petitioner's vehicle ablaze. In respect to the burden and standard of proof in election petitions, Mr. Lubullelah submitted that burden of proof lies with the Petitioner since he is the person who would fail if no evidence is adduced to prove the grounds of the Petition. Counsel cited various cases in support of this principle including a 1975 case of **Josiah & 4 Others –Vs- Ogutu [2008] IKLR (EP) 73** where the Court held, *“the burden was on the Petitioners to prove the complaints raised in the petition”*. In the case of **Joho Vs Nyange & Another (No. 4) (2008) 3 KLR 500** the learned Maraga J. held that, *“the burden of proof in election petitions lies with the petitioner as he is the person who seeks to nullify an election”*.

34. Counsel submitted that the standard of proof is said to be higher than on the balance of probabilities applicable to Civil cases but not as high as proof beyond reasonable doubt, which is applicable to criminal cases. Counsel submitted that this position was adapted and restated by the

Supreme Court in the case of **Raila Amollo Odinga & Others Vs Ahmed Issack Hassan & Others Supreme Court Election Petition No. 5 OF 2013** where the Court held;

“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. In the case of data specific electoral requirements the party bearing the legal burden of proof must discharge it beyond any reasonable doubt”.

Counsel for the 3rd Respondent further submitted that it must be remembered always that Election Petitions are not ordinary civil or criminal suits. They are actions in *rem* and of general public importance affecting citizen’s political rights.

Affidavit sworn by Alexander Khamasi Mulimi

35. This witness swore an Affidavit on 9th March 2013 in support of the Petitioner’s case. However, he was not among the Petitioner’s witnesses called to give evidence, and Dr. Khaminwa cited non-cooperation as being the reason. However, his affidavit has been heavily relied upon by the Petitioner, and for the benefit of the record, I will summarize the contents of this witness’s affidavit.

36. Alexander Mulimi stated that he is a youth leader of UDF Party in Kakamega County. At 2:27am on 4th March 2013 (the morning before the election) he called his friend who is also the 3rd Respondent’s Personal Assistant, one Geoffrey Mitalo Muongo, to inquire about the attack on the Petitioner. He stated that Geoffrey Mitalo Muhongo responded by saying that they had attacked the Petitioner, and had burnt his vehicle and were looking for him to finish him. Alexander stated that he recorded the information on his telephone and immediately called the OCPD and DCIO Kakamega to report the matter. He stated further that he later went to record a statement in that respect. The telephone recording stored in a Compact Disk (CD) was annexed to his affidavit and marked “AKM1”. As stated, this witness did not testify and therefore the audio recording was not re-played to Court. Also, his alleged statement with the Police was not availed to the Court. The Court did not have an opportunity to hear the conversation and also to read the statement. Since he did not testify, the veracity of his evidence was not tested through cross-examination by Counsels for the Respondent. It is noteworthy that the 3rd Respondent confirmed that he knew the said Geoffrey Mitalo Muhongo as a resident of Shinyalu and also as his supporter. The 3rd Respondent however denied that the said Geoffrey Mitalo was his Personal Assistant. The 3rd Respondent averred that he and Geoffrey Mitalo’s father were age-mates and had undergone the initiation rites together, thus, ordinarily his interaction with Geoffrey Mitalo would be very limited.

37. In view of the foregoing, how then does the Court deal with Alexander Mulimi’s evidence? In a ruling delivered on 31st July 2013 in respect of this issue, the Court ruled that such affidavits were properly on record and therefore could not be struck out merely because the witness did not testify. However, the Court would exercise its discretion on the evidential value to place on affidavits such as this. In my considered view, the evidence of Alexander Mulimi appears to be very important to the Petitioner as it attempts to provide a link between the 3rd Respondent and the aforesaid attack through Mr. Geoffrey Mitalo Muongo. The 3rd Respondent has dismissed the said attempt to link him not only to the attack but also to the said Mr. Geoffrey Mitalo Muongo. The testimony is uncontested. Dr. Khaminwa said that this witness was uncooperative. However, he did apply for a witness compelling order in that regard. If indeed the Petitioner considered the testimony of this witness so crucial to the Petition, nothing stopped the Petitioner from getting witness summons to compel the witness to attend court and give evidence. In my view the weight this court shall place on the evidence of this witness is corroborative. On its own it is highly speculative and prejudicial to the 3rd Respondent.

38. From the foregoing I have to make a determination on the alleged violence. The evidence availed

before the Court clearly establishes that violence took place on the night of 3rd – 4th March 2013 against the Petitioner and during which the Petitioner's vehicle was burnt causing him to also lose money and other property. However, of critical value to the Court is who carried out the said violence? The Petitioner has attempted to lay the blame squarely at the feet of the 3rd Respondent. The 3rd Respondent has also with equal vigour distanced himself from the said violence. The 3rd Respondent and some of his relatives, as we have seen, were charged in a Criminal Court Case No. 681/2013 with the offence of malicious damage to property. That case was not prosecuted and it now appears that the Director of Public Prosecutions has entered a *Nolle Prosequi* on the matter hereby ending the said criminal proceedings.

39. At the final submissions, Dr. Khaminwa for the Petitioner submitted that the *Nolle Prosequi* entered is defective and incompetent as the Attorney General can only exercise those powers after obtaining leave of Court pursuant to Article 157 of the Constitution. It was his submission that no such leave was obtained. Counsel contends that the entry of the *Nolle Prosequi* is to defeat the ends of justice and amounts to dishonesty.

40. In response, Mr. Lubulellah, counsel for the 3rd Respondent submitted that the matter before the court is an election petition and that the Court had not been moved to quash the decision of the Director of Public Prosecution (DPP) in the Criminal Case No. 681/2013. It was counsel's submission that the Court cannot quash that *Nolle Prosequi* without hearing the DPP. Counsel maintained that this Court was not the right forum to determine the issue of the *Nolle Prosequi* and that in any event the learned DPP had independently reached a decision after establishing that there was not enough evidence to prosecute the 3rd Respondent.

41. I have been asked by the Petitioner to declare that the said entry of *Nolle Prosequi* is null and void and illegal, as it was entered against the provisions of the Constitution. Article 157(8) of the Constitution provides:

“The Director of Public Prosecutions may not discontinue a prosecution without the permission of the Court.”

The Petitioner alleges that the DPP entered the *Nolle Prosequi* without the permission of the Court. This, in my view, may be correct. However, I have no evidence in this election court to show that a *Nolle Prosequi* was entered without the authority of the Court. But even if this is the position, three issues still arise: firstly, the constitutional provision is not couched in mandatory terms. It uses the term “may” rather than “shall” and the correct interpretation of the term used cannot be determined in this Court. Secondly, even if this Court were to expressly find the act illegal, this court has no mandate to quash the same without giving the DPP an opportunity to respond to the allegation. In other words, this Court does not currently possess the required jurisdiction to question and to make a determination on the validity or otherwise of the entry of the *Nolle Prosequi*. Thirdly, and perhaps even more profound issue, is that even if the entry of the said *Nolle Prosequi* were to be held illegal by this court, that declaration would only reinstate the said criminal case. It is to be noted that the said criminal case is yet to be prosecuted and determined. Without a determination, this court has no way of making a proclamation on the guilt or otherwise of the 3rd Respondent and his co-accused persons. The principle that the accused remains innocent until proven guilty still stands. Perhaps the Petitioner's only option is to firstly challenge the entry of the *Nolle Prosequi* and then, if successful, await the prosecution of the case. In the event that the 3rd Respondent is found guilty he will most probably be jailed and automatically lose his seat because an electoral offence would have been proved.

42. The above notwithstanding, this Court's hands are not tied to the criminal case. If there is ample evidence before this Court that the 3rd Respondent was the author of the alleged violence, that would be enough for this court to nullify the election of the 3rd Respondent on account of an election offence. So it is now my duty to establish if there is evidence to that effect against the 3rd Respondent. As I have stated earlier, there is evidence that the Petitioner was attacked on the night

of the 3rd – 4th March 2013. The Petitioner has blamed the 3rd Respondent, while the 3rd Respondent has denied liability.

43. For the 3rd Respondent to be held liable for the attack, it must be proved beyond reasonable doubt that the 3rd Respondent personally staged the said attack or that his agents did that upon his authority. Out of about 5 to 6 people who accompanied the Petitioner on that fateful night, only the Petitioner (PW10) and Fred Shijenje (PW1) affirm to having seen and identified the 3rd Respondent at the scene of the attack. The Petitioner even remembered that the 3rd Respondent was in a Kaunda Suit whose colour he could not remember. Kizito Muhembele (PW4), the Petitioner's driver did not identify anybody at the scene. The 3rd Respondent denied the allegation that he was at the scene. He, however, stated that he visited the scene the following day at 6:00am. He also admitted to owning a beige Kaunda Suit but which he stated that he had not worn it for many months. The 3rd Respondent stated that the Petitioner's allegation that he was at the scene was falsehood aimed at tarnishing his name and help the Petitioner regain the Parliamentary seat he had lost. The Petitioner said that he saw the 3rd Respondent at the scene of the attack although he did not speak to him.
44. Fred Shijenje (PW1) claimed to have seen the 3rd Respondent at the scene. What was however remarkable about this witness is that upon being cross-examined by the Court he stated that he did not share this valuable information with any person not even the Petitioner. I must say that I was not impressed by the evidence of this witness especially concerning him seeing the 3rd Respondent at the scene. In my view, this was valuable information which he could not have failed to immediately share with all concerned. If one sees one's attacker at the scene of the attack, would that not be the immediate story to be told to anybody who would care to listen? Would that not be the first information to be shared with the Petitioner and others in the group? My impression of this witness' evidence is that it was an afterthought, and in the absence of other corroborative evidence, I cannot rely on it.
45. The other evidence is that of the Petitioner. The Petitioner simply stated that he saw the 3rd Respondent at the scene. He never talked to him, shout at him or in any way engage him as to why he would want to kill him. However, the Petitioner's reaction is understandable as he stated that he was in shock even though he was able to identify the 3rd Respondent. Without any other corroborating evidence, the Petitioner's evidence on this issue stands alone. From the reasons I have stated, the evidence of PW1 according to me is not trustworthy and cannot be the required corroboration. I do not know why only 2 out of the people in the Petitioner's vehicle could identify the 3rd Respondent at the scene. Further, it is not clear to me why, even after seeing the 3rd Respondent at the scene, they kept quiet amongst themselves on this issue. This information was very material for the entire group, and it had to be easily found in their lips. The allegations by the Petitioner and PW1 that they saw the 3rd Respondent at the scene of the attack appears to me to be an afterthought. Even if it is not an afterthought, the allegation was simply not proved and I reject it.
46. The foregoing paragraphs notwithstanding, this is Court is persuaded by the 3rd Respondent's evidence that he was not at the scene of the attack on the material night. I believe the 3rd Respondent's testimony that during that time he was bereaved and mourning the death of his brother-in-law. There were many visitors in their home who had come to condole with them. It is inconceivable that a person in mourning could himself find time to engage in plans to cause bodily harm or even death to another person. It requires a person with the mind of a beast to do that and I have not perceived the 3rd Respondent to possess such a mind.
47. Lastly – and this is a speculative question. What would the 3rd Respondent gain by killing or causing serious bodily harm to a competitor on the eve of the elections? I cannot answer this question, simply because I do not know. However, in my estimation, a rationally thinking man

would know that there is nothing to gain but everything to lose, if such a thing were to be planned and executed. The 3rd Respondent comes across as a person with a rational mind. In the absence of cogent evidence to prove the allegation, I find no reason to link the 3rd Respondent with the attack meted upon the Petitioner on the night of 3rd – 4th March 2013. While this Court cannot speculate on who attacked the Petitioner and burnt his motor vehicle, there is also the possibility that the attack was staged by ordinary unknown thugs who were excited over the electoral period, this being the eve of the elections. It is noteworthy that the 3rd Respondent also claims his children were attacked near the said place and this caused him to make a report with the police. It is beyond the scope of this court now to establish who the attackers were and I therefore leave this matter to the said criminal process, should it continue.

Effect of the violence

48. The Petitioner averred that he lost his vehicle worth Kshs. 16 Million and valuable items that were in the vehicle including his Identification documents, 2 briefcases containing money, mobile phones, laptop, cameras, clothes and letters of accreditation for the UDF Party agents. The Petitioner stated that as a result of the violent attack, word went round the Constituency that the Petitioner had been killed in the attack which resulted to a lot of fear and confusion through the Constituency and his supporters. The Petitioner averred that he was not able to vote because his identification documents were burnt in the vehicle.
49. In support of this assertion, the Petitioner called Samuel Cherolyi (PW6) and Emanuel Manyonyi (PW7) to testify. PW6 testified that he was a voter at Maluma Primary School Polling Station. It was his evidence that residents of that area received with shock the news that the Petitioner had been attacked and that he had perished and because of this news, people failed to turn up to vote. PW6 stated that he viewed voters' register of that station and that there were 253 registered voters out of which 226 voted. In his view a voter turn-out of 89.33% for that polling station was not good enough. PW7 on his part testified that he was a polling clerk of IEBC in Shilolavakhali Youth Polytechnic Polling Station. The news that the Petitioner had perished confused voters especially the illiterate voters. On cross-examination, PW7 admitted that the registered voters were about 260 out of which 216 voted. He also admitted that the Petitioner won the elections in that polling station while the 3rd Respondent came 2nd with 65 votes.
50. It was the Petitioner's contention that the rumours that he had perished in the violent attack affected the voter turn-out in Shinyalu Constituency. He averred that those that would vote for him did not and many more failed to turn up to vote because they had been disheartened with the news. The Petitioner pegged his argument on the results announced by the 2nd Respondent that the registered voters in the Constituency was about 56,000/- versus the actual votes cast of 45, 636. In his view a turn-out of 81% was not good enough and that it clearly depicted that people did not come out to vote because of the violent attack.
51. To rebut the Petitioner's claim that the voter turn-out was low due to the violence, the 3rd Respondent referred to Forms 35 of various Polling Stations that are near to the scene of attack and testified as follows:
- i. He voted at Shihuli polling station which is more than 2 km from the place of alleged attack with 533 registered voters in Stream 1. The 3rd Respondent garnered 382 votes while the Petitioner got 74 votes. This was a very high voter turn-out despite the alleged attack. In Stream 2, 370 votes were cast out of 541 registered voters. 10 Party Agents signed Form 35 in Stream 1 whereas 9 Party Agents signed Form 35 of Stream 2. In both streams the Presiding Officers' comments were that the polls were peaceful free and fair.
 - ii. The nearest polling station to the place of attack is Lugango Primary school which had 459 registered voters while 380 voted. 10 Party Agents signed Form 35 and the Presiding Officer's comments are that there was peaceful election.
 - iii. The other nearby polling station is Lugose Primary school with 628 registered voters while 522

voted. Form 35 was signed by the 4 Party Agents in the station. There are no reports of violence.
iv. The other close polling station is Shitochi Primary school where elections were also peaceful.

52. Abednela Atsamla Shitichi (RW3) echoed the 3rd Respondent's evidence. RW3 testified that he is a Retired Senior Chief having served as Senior Chief of Lunyu Sub-location, Vihiga Location. He stated that he was the Chief Tallying Agent of ODM Shinyalu Constituency. It was his evidence that he heard about the attack and the burning of the Petitioner's motor vehicle on radio at 11:00am on the day of the poll when he was already on duty. He testified that the news of the attack did not unduly bother him. He visited Lukango Polling Station, which is a few meters from the scene of the attack at 4:00pm where he found the party agents as well as observers. RW3 testified that the comments made by the Presiding Officer of Lukango Polling Station in Form 35 were, "*Peaceful Elections*".

53. The Petitioner testified further that the party agents were immensely affected because most of them did not get letters of accreditation on time and therefore they were unable to access their respective polling stations to carry out agent duties. This aspect was corroborated by the evidence of Ezekiel Imbwaga (PW8) whose evidence was that he was unable to enter Lunyu Primary School Polling Station (No. 069) until 2:00pm when the Chief Agent Levi Ahindikha (PW2) brought him the said letter.

54. Patrick Lumati (RW2) in his Witness Affidavit sworn on 25th June 2013 stated that he was the Presiding Officer of Lunyu Polling Station. In evidence RW2 stated Ezekiel Mbiya Imbagwa (PW8) initially had no letter of appointment by his party and that is why he denied him entry into the polling station. Later at 2:00 pm PW8 showed RW2 a letter of appointment by the party and so RW2 allowed PW8 in. RW2 also testified that at 6.00am there was a UDF party agent called Hillary Shijaji, who signed the Poll Day Diary at the open of the polling station. On cross-examination, RW2 stated that he knew the Petitioner but that he did not see him in his polling station on the polling day. It was his evidence that he heard about the Petitioner's attack on 5th March 2013 after he had handed over the results to the Returning Officer. RW2 stated that he never read about it in the Newspaper or see it on Television or heard it on radio. He also did not call the Petitioner about it as he did not have the Petitioner's telephone number.

55. In the final submissions, Dr. Khaminwa submitted that the 1st Respondent failed to crack the whip on the violence that occurred prior to the election. It was his submission that RW1 and RW2 were being untruthful when they testified that they did not hear or receive any information that the Petitioner had been attacked and his vehicle burnt. Counsel stated that this was unbelievable because there was extensive coverage of the incident and therefore RW2 in claiming that he did not hear the news until 6th March 2013 was being dishonest. Counsel submitted that the 1st and 2nd Respondents failed to take any steps to ensure that there was no violence and also failed to invoke their statutory powers to deal with the situation as mandated by the Elections Act and the regulations thereunder.

56. In response, Mr. Mukele for the 1st and 2nd Respondents submitted that the Petitioner failed to prove that the alleged incident affected the elections and the outcome thereof. Counsel stated that other than the Petitioner and his driver (PW4), his other witnesses voted despite the incident. Further, counsel submitted, the voting exercise, in the polling stations that are within the area where the incident occurred, proceeded peacefully and the voter turn-out of the entire constituency at 81% was impressive. It was therefore his submission that the attack did not affect in any way the electoral process in Shinyalu Constituency.

57. On behalf of the 3rd Respondent, Mr. Lubulellah submitted that the alleged violence was a single isolated incident prior to the elections, and that it did not stop anybody from voting and exercising his or her rights, neither did it lead to any substantial number of votes being obtained by the 3rd Respondent. He submitted that the voter turn-out in the Constituency was over 81% indicating that the incident did not affect the elections. It was his submission that the violence did not go to the

root of the elections. Counsel submitted that there was no evidence that there was an organized campaign by the 3rd Respondent to use violence. Counsel invited the Court to look at polling stations within two kilometers of the scene of the incident, namely; Shihuli, Lukango, Lihorero, Wanzala and Shibuye Mixed Polling Stations. He submitted that the voter turn-out in these polling stations was not reflective of voter apathy. Counsel concluded that if the alleged violence had no proven effect on the election results in the nearest polling stations, it cannot be said with any conviction or cogency that the furthest polling station would have been affected.

58. I agree with the submissions that the violence was isolated and had no effect on the election process. Indeed in all the surrounding polling stations, there was a high voter turn-out, and the verdict by all the Presiding Officers was that the elections were peaceful. I will in a short while return to this issue.

Violence ascribed to the Petitioner

59. Two of the 3rd Respondent's witnesses namely; Alexander Alukwe (RW4) and Hillary Shimenga (RW5) testified that they were assaulted on the instructions of the Petitioner by his security detail. RW4 stated that he was cut on the head by one Benard Shiverenje who was part of the Petitioner's entourage on 1st March 2013 at around 4:00pm in the home of Nuhu Amwayi in Mugomari, where the Petitioner was dishing out money to supporters. RW4 testified that he reported the matter to the police and went to the hospital where he was issued with a P3 form. RW5 testified that on 20th February 2013 at about 8:30pm while he was walking home from Navangala Shopping Centre, he came across the Petitioner's entourage which had stopped and people were queuing to get money from the Petitioner. RW5 said that he also queued in the hope of getting the money, but that the supporters in the Petitioner's caravan said that he was a supporter of Adrian Mambili Meja and so he was pushed out of the queue. RW5 testified that the Petitioner instructed one Musungu to cut him into pieces and that Musungu cut him on the head. RW5 stated that he reported the matter to the police.

60. Mr. Lubulellah on behalf of the 3rd Respondent submitted that the Court heard the testimony of **Alexander Alukwe** and **Hillary Muhanga Shimenga**; and was shown the injuries, sustained by them; medical treatment documents; and P3 forms. The witnesses also provided details of Occurrence Book Numbers in respect of their complaints to Kakamega Police Station. Counsel submitted that the persons mentioned by RW4 and RW5 as being their attackers, that is, Bernard Shiverenje and Musungu were part of the Petitioner's entourage during the night of the alleged attack on the Petitioner. It was counsel's submission that this was clear evidence showing that the Petitioner ran a violent campaign.

61. I have carefully considered this aspect of violence allegedly committed by the Petitioner. I am satisfied by the evidence of Alexander Alukwe (RW4) and Hillary Shimenga (RW5) that they were assaulted, in accordance with their testimonies, in the presence of the Petitioner, and that this assault amounted to an electoral offence under the Elections Act. While I am reluctant to find the Petitioner personally liable on account of the conduct of his agents at his express instructions and directions, I am nonetheless shocked that the Petitioner – a leader – could allow the assault and beating of such young people to take place in his very presence. These boys were like his own children and the Petitioner ought not have sat pretty when his agents unleashed savage attacks on the boys. I saw the injuries. They are bad. I am satisfied they were inflicted in accordance with the testimony of those witnesses.

62. As I have already said I am reluctant to cite the Petitioner for an election offence but I hereby do issue a warning to the Petitioner that such behavior should not occur in the future, and that this election court will not condone any act of violence in pursuance of an elective political position. This judgment remains on record to guide against any such conduct in the future. As the witnesses have already taken independent legal action on the issue, the matter should take its own life and proceed to determination in those other independent forums.

Failure of the Electronic Gadgets and its effect on the elections

63. Other than the violent attack, the Petitioner pleaded that the Biometric Voter Registration (BVR) Machines either failed or were deliberately tampered with, resulting to manual voting which made it easier to manipulate results. In evidence it came out clearly that what the Petitioner meant when referring to the BVR Machine was actually the Electronic Voter Identification Device (EVID) since the BVR Machines worked properly to capture voters' details and that is where the voters' registers were derived. In response to this allegation, the 2nd Respondent, Daniel Lenarum (RW1) confirmed that the EVID did fail in most of the Polling Stations in Shinyalu Constituency, but the same were not tampered with. It was his evidence that where the EVID failed, the polling station resorted to the manual registers which worked well albeit causing the process to slow down.
64. The Court had the opportunity of cross-examining Patrick Lumati (RW2) on the effect of the failure of the EVID device. RW2 stated to the Court that in his Polling Station nobody complained that the votes recorded in Form 35 were incorrect. RW2 stated that electronic voting was meant to complement the manual process, but that of importance, electorates were voting with their pens and not their thumbs, and in that regard, this election was for all intents and purposes a manual process.
65. Mr. Mukele for the 1st and 2nd Respondent submitted that the Electronic Voter Identification Device (EVID) and Electronic Results Transmission System (ERTS) faced challenges which compelled the 1st Respondent to exercise its discretion and revert to the manual system.
66. Mr. Lubullelah for the 3rd Respondent submitted that the 1st Respondent has the Constitutional discretion under Article 80 (d) of the Constitution, Section 44 of the Elections Act 2011, and Section 4(m) of the Independent Electoral and Boundaries Commission Act 2011 to use such technology as it considers appropriate. It was Counsel's submission that the choice of the appropriate technology adapted or used by the 1st Respondent is influenced by, and subject to, Kenya's status as a developing Country with strained budgetary economic circumstances. Counsel invited the Court to take judicial notice of the country's infrastructure in considering the failure of the electronic devices. Counsel submitted further that the failure of the Electronic Voter Identification device (EVID) and the system for electronic transmission of results (ERTS) was not unique to Shinyalu Constituency as it failed to work throughout Kenya during the General Elections. Counsel maintained that the EVID and Electronic result transmission devices were however only complementary to the manual electoral processes which are entrenched in the Law.
67. I have carefully considered counsel submission on this issue and its possible consequences. I must state from the outset that the alleged failure of the Electronic Voter Identification Device (EVID) and the Electronic Results Transmission System (ERTS) were not unique to Shinyalu Constituency. This was a countrywide problem, and all the election courts in the country had to deal with the issue in one way or the other. I am aware that electronic voting and transmission of the results were meant to compliment the manual process. This was the evidence of RW2 Mr. Patrick Lumati. I accept this evidence as truth. The voters were voting with their pens and their thumbs. When IEBC officials noted the failure in these two processes they duly and dutifully resorted to the manual systems which worked except that the manual process was slower. It must be had in mind that the failure of these electronic processes did not favour one party or disadvantage the other. This was a neutral occurrence, unfortunate as it was.
68. The Petitioner has not proved to this court that such failure unduly favoured other parties especially the 3rd Respondent, or that the failure disenfranchised the Petitioner in any material particulars. I therefore find that the failure of both EVID and ERTS systems was not envisaged or caused by the 1st and 2nd Respondents. When the same took place, the 1st and 2nd Respondents immediately took remedial measures to resort to the manual voter register and manual transmission of results. It is a process which favoured neither party nor gave any of the parties undue disadvantage. In that regard, I do not find the allegation a viable ground upon which to

nullify the elections. I can only urge the IEBC to improve on the provision of electronic identification and electronic transmission of the results in its future undertaking.

Voter Assistance

69. It is common that there were voters who required assistance to vote. On this aspect, the Petitioner averred that he is popularly known as “Kizito” and Presiding Officers whilst assisting the illiterate voters deliberately used his last name M’mbaya thereby deliberately keeping his identity from the said voters causing voter apathy. Emanuel Manyoni (PW7), a polling clerk of IEBC in Shilolavakhali Youth Polytechnic Polling Station gave evidence in regard to this claim. It was his evidence that the Presiding Officer and his deputy were deliberately reading out the unpopular names of the Petitioner such as “Justus M’mbaya” and that they failed to tell them they were referring to Hon. Gesito or Kizito as he is popularly known. He stated that he realized this when the illiterate voters complained that the Petitioner’s name was not on the ballot paper. It was his evidence that he raised this issue with the Presiding Officer who then started reading the full names of the candidates but by this time, many voters had left with the belief that the Petitioner was not in the contest.
70. In cross-examination PW7 admitted that on the ballot paper, the Petitioner’s name appeared as “Justus Gesito Mugali M’mbaya. PW7 also admitted that there were 11 agents, and all of them signed the Form 35 and that the Presiding Officer communicated that the process was done well. PW7 could not also give a name of a voter who left confused or who was misled in respect to the Petitioner’s names.
71. In the final submissions, Mr. Lubullela submitted that the evidence of Emanuel Manyoni (PW7) was of no value to the Petition for he did not give any name of a misled voter. Counsel also submitted that the Petitioner failed to call or get a Witness Affidavit from any of the voters who were allegedly misled, and in that regard, he had failed to discharge the burden of proving this allegation. In respect of the Petitioner’s names, Counsel submitted that ‘Justus Gesito Mugali M’mbaya’ all referred only to the Petitioner and it was his duty to inform the voters the name by which he was to be identified on the ballot paper. Counsel submitted further that ballot papers used during the elections had not only the full names of the candidates, but also the candidates photos by which any visually able voter could identify his preferred candidate as well as the candidate’s party symbol.
72. In my view, the allegation that the illiterate voters were misled not to vote for the Petitioner were not proved. A candidate could either be identified by his name, his photograph or party symbol. In addition, evidence was led to show the process through which assisted voters taken. It was a participatory process involving all the parties’ agents. It is notable that none of the Petitioner’s witnesses proved this allegation. In fact, PW7 agreed with the Respondents that he was not aware of any voter who left confused or was misled in respect of the Petitioner’s names. I can only agree with Mr. Lubullellah that the evidence of Emmanuel Manyoni (PW7) was of little or no value to the Petitioner. This Court finds the allegations relating to voter assistance baseless and therefore dismissed.

Tallying Exercise

73. The Petitioner also pleaded that the tallying exercise was not properly conducted by the officials of the 1st Respondent and the 2nd Respondent as the Returning Officer. The Petitioner stated that there were massive discrepancies in the results contained in Forms 35 and Form 36, and as such, the only logical conclusion would be that the entire tallying process was manipulated and rigged by the Respondents. It is noteworthy that all the issues pertaining tallying exercises, Forms 35 and Form 36 were amply dealt with in the ruling of this Court in respect of scrutiny delivered on 23rd August 2013. The Petitioner filed an application dated 17th May 2013 seeking an order of re-count and/or scrutiny of votes in respect to the elective post, the subject matter of the Petition. The Respondents filed their responses and all the parties filed written submissions in support of, and opposition to, the re-count and/or scrutiny exercise. After listening to all the witnesses of both the Petitioner and the Respondents, the Court retired to write a ruling and in its considered view,

found that the Petitioner had not made out a case for the Court to grant either re-count or scrutiny of the votes cast. In the process of determining whether the Petitioner had laid sufficient basis, the Court determined other issues that were ancillary to the tallying process.

74. For purposes of the record, I will mention, in brief, the aspects as were discussed in the said ruling, as follows:

- i. The UDF Chief Agent Levi Ahindikha (PW2) evidence was two-fold. First, the UDF Party Agents were denied access to their respective Polling Stations and secondly, the total votes cast in favour of each candidate in Form 36 differed with the aggregate results that were announced by the Returning Officer. 2nd Respondent (RW1) conceded to the latter fact.
- ii. Syphrose Mulama (PW3) was a UDF Party Agent in Shidodo Polling Station stream 1 where the Petitioner garnered 149 votes and correctly recorded in the Form 35. However, a figure of 24 votes was recorded in Form 36 for the Petitioner instead of 149. The 2nd Respondent (RW1) conceded to this fact.
- iii. The results contained in Form 36 and the circumstances giving rise to Documents marked “A” and “B”
- iv. The Petitioner alleged that names of Party Agents in some of the Forms 35 appeared to have been written in the same handwriting.
- v. The Petitioner had raised an issue with Forms 35 that Party Agents did not append their signatures. The Petitioner cited an example of Mukumu Girls Boarding Primary School Polling Station in which no Party Agent had signed the Form 35. The Presiding Officer of this Polling Station, Truphena Abwaku (RW7) conceded to this fact.
- vi. The Petitioner in paragraph 13 of his Further Affidavit sworn on 17th May 2013 listed polling stations that had discrepancies in the figures that appeared in the respective Forms 35 and those posted on Form 36. RW1 conceded that there were errors that arose from transferring figures from Forms 35 to Form 36

75. The evidence in support of the aforementioned claims was analyzed in relation to the responses the Respondents and their witnesses gave. Having dealt with the issues substantially in the ruling dated 23rd August 2013, going over the same in this Judgment would be repetitive and serve no purpose at all. Respectfully, the Court still holds the finding it made on the said application, which was dismissed. I therefore find that any allegations on tallying irregularities have been considered and reconciled to the satisfaction of the Court in both documents “A” and “B”. After the said reconciliation, there is still clear margin of 710 votes between the Petitioner and the 3rd Respondent.

Evidence emergent submissions stage

76. In the final submissions filed by Dr. Khaminwa, he referred the Court to the Witness Affidavit sworn by Rosemary Kembu who averred that she was the Presiding Officer of Shidodo Polling Station Stream 1 (No. 050) and annexed a copy of the station’s Form 35. However, the Form 35 annexed in the said witness’ affidavit indicates that the Presiding Officer of the said station was one Felicitas Busieka Ingaso and who has signed the said Form 35. Dr. Khaminwa submitted that this was sufficient evidence that there was manipulation of results on the part of the 1st and 2nd Respondents.

77. In response thereto, Mr. Mukele for the 1st and 2nd Respondents submitted that the court should note that the said Kembu Rosemary did not testify as a witness of the 1st and 2nd Respondents in this matter although she swore an affidavit in response to the Petition. Counsel also submitted that the court should note that this is first time that the Petitioner is raising any issue regarding either the said witness or her affidavit as it was not raised in the course of the hearing of the Petition. It was Counsel’s submission that this issue should properly have been raised during the hearing of the Petition and evidence would have been led by all parties both in examination in chief and in cross-examination, and as such, the witness would have been accorded an opportunity to testify on

the contents of her affidavit.

78. Mr. Mukele submitted that a party is precluded from raising new issues by way of submissions. Counsel contended that new evidence cannot be introduced after the conclusion of the hearing of the Petition by way of final written submissions. Counsel submitted, even if the court were to consider this evidence, it would note from the 1st and 2nd Respondents Joint Further Affidavit sworn on the 17th May 2013 that the Presiding Officer of Shidodo Primary School (No.50) (Stream 1) was Felicitas Busieko Ingaso and that of Stream 2 was Kembo Rosemary. Counsel further submitted that there has been no challenge on the declaration contained in Forms 35 in this station, and indeed the declaration in the said Forms 35 have been executed by agents of the respective parties and the statutory comments are positive. Counsel submitted that the 2nd Respondent conceded that there was an error in the posting of the votes garnered by the Petitioner in Stream 1 in the Form 36 and therefore the error was in transferring the figures from Form 35 to 36 and not in respect to the vote counting in the Polling Station.

79. As stated above, all the issues raised by the Petitioner in respect to discrepancies in the tallying exercise were all addressed by the Court in its ruling of 23rd August 2013. The Court noted that there was an error in the transfer of the Petitioner's votes in respect to Shidodo Polling Station Stream 1 from Forms 35 to Form 36, which error was conceded to by the 2nd Respondent. The transposing of figures cost the Petitioner 125 votes. In its ruling, the Court viewed this discrepancy as an error on the part of the 1st and 2nd Respondent and not a manipulation of results in a scheme to disenfranchise the Petitioner.

80. The Petitioner at this stage brings to the attention of the Court the contents of the Affidavit of Rosemary Kembu (a witness of the 1st and 2nd Respondents) and avers that she has annexed a Form 35 of Stream 1 which is signed by Felicitas Busieko Ingaso as the Presiding Officer, yet she claims to be the Presiding Officer of the said Station. That, Dr. Khaminwa asserts, is sufficient evidence of manipulation of results. This evidence was indeed on record but the Petitioner did not raise any issue with it until final submission stage. Consequently, the witness cannot be availed to set the record straight or even be cross-examined to test the veracity. This places the 1st and 2nd Respondents at a disadvantage for they cannot at this stage defend themselves. The Court will therefore be going against the rules of natural justice if it was to consider the Petitioner's conviction on this issue yet it has not afforded the 1st and 2nd Respondent a chance to explain the circumstance.

81. The above notwithstanding, the Court has looked at the Forms 35 of Shidodo Polling Station Streams 1 and 2 and taken note that both Felicitas Busieko Ingaso and Rosemary Kembu were Presiding Officers of the said stations respectively. It is a fact that the Petitioner has not questioned the contents of the Forms 35 of either polling stations and that the only issue is the transfer of the Petitioner's figures from Form 35 of Stream 1 to Form 36. The only logical conclusion that the Court can draw from this is that it is an error on the preparation of the Witness Affidavit. Therefore the conviction by the Petitioner that it is sufficient evidence demonstrating manipulation of results is, in my view, erroneous. In any event, I believe that had the said witness Rosemary Kembu been called to testify, she could have clarified the error. Finally, the error does not go to the root of the issues at hand, and I will leave the matter to rest there.

High Voter Turn-out

82. In the final submissions, Dr. Khaminwa submitted that the voter turn-out in Shihuli Polling Station Stream 1 was exceptionally high with 541 registered voters and 533 votes cast. Counsel submitted that it was instructive that this is where the 3rd Respondent cast his vote. Counsel compared Stream 1 with Stream 2 where out of 541 registered voters only 370 turned up to vote. Counsel submitted that this evidenced perversion of polling, probably ballot stuffing, organized impersonation of absent voters, vote buying and or bribery. Counsel referred the Court to Article 21 of the Universal Declaration of Human Rights that states:

“The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by the universal and equal suffrage held by secret vote or by equivalent free voting procedures.”

Dr. Khaminwa took the Court back to 2007 elections where, in his view, due to the alleged vote rigging and manipulation, the country ended up in a civil war. Dr. Khaminwa urged the Court to uphold Article 21 of the Universal Declaration of Human Rights, above quoted, to avert a similar tragedy in the future.

83. In response, Mr. Mukele submitted that the Petitioner had not adduced any evidence at all showing that the results from Shihuli polling stations are not the ones attained by each candidate. Mr. Lubullellah on his part submitted that the assertion by the Petitioner that high voter turnout in Shihuli Polling Station is indicative of ballot theft was incorrect. It was his submission that the aim of the 1st Respondent through the voter education exercise conducted throughout the country was actually to get out as many people to go out and vote and therefore it would be wrong to criminalize high voter turnout.

84. On my part, I hereby find no evidence laid before this Court to enable me reach a conclusion that a high voter turnout is as a result of ballot stuffing or any other known electoral malpractice. Indeed, a high voter turnout is the pride of every electoral commission. The Petitioner's submission criminalizing high voter turnout without any evidence of malpractice is not acceptable, and I refuse to be persuaded by such criminalization.

85. I have critically and carefully considered the grounds upon which this Petition was premised. I have equally very carefully considered all the evidence in support of the Petition and against it. The Petitioner's case finally hinged on two limbs. First, the violence meted out against him on the eve of the elections, which the Petitioner considered an electoral offence by the 3rd Respondent itself enough to nullify the elections. I have analyzed this issue in all its perspectives. My finding is that there was indeed violence as alleged. However, that violence was not traceable to anybody, let alone the 3rd Respondent. I have also found that the violence was isolated and had no effect on the voting. Indeed, in all the surrounding polling stations, near the scene of the attack, there were high voter turnout and the verdict by all the Presiding Officers was that the elections were peaceful. This isolated and unfortunate incident, which is not traceable to the 3rd Respondent, cannot be a ground upon which to base a decision to nullify an otherwise credible electoral result. If a single act of violence, which is not widespread and which does not affect the voting process, either in one or several polling stations, were to be a basis of nullifying elections, then what would stop a rogue candidate, upon sensing defeat, from self-inflicting violence with the hope that the ensuing results would be nullified? The Court cannot allow this to happen.

86. The second limb of the Petition is hinged on electoral irregularities. I have in this judgment considered those alleged irregularities. Those irregularities were minor. The irregularities were conceded to by the 2nd Respondent and reconciled after which the 3rd Respondent still had a lead of 710 vote margin. The Petitioner tried to persuade this Court to consider these irregularities grave enough to allow the nullification of the elections. This persuasion has weighed heavily on my mind.

87. It is true that the 2013 general elections were the most complex in the country's history. Voters were voting for 6 different elective posts: President, Governor, Senator, Member of National Assembly, Women Representative and County Representative. The tasks to be performed, including over 600 Forms 35 to be filled, Polling Day Diaries, Field Note Books etc were enormous. Anomalies and errors would certainly not be avoided under such circumstances. It is the duty of this Court to determine the nature and extent of such anomalies and errors. It is also the duty of the court to consider whether such anomalies and errors affected candidates across the board, or if just one or a few candidates were prejudiced. In this Petition, it has been established that such anomalies existed at the tallying process. However, these were random errors which

never targeted any party. Arising from the reconciliation ordered by the Court which culminated to documents “A” and “B”, the tallying errors were conceded to by the 1st and 2nd Respondents, reconciled and adopted by this Court with the results that the margin of votes between the Petitioner and the 3rd Respondent reduced to 710 votes with the 3rd Respondent still in the lead.

88. However, errors have been admitted, and it is still within my jurisdiction to find that those errors are enough to nullify the election. As I said earlier, this issue is weighing heavily in my mind. Because of this, the guiding principle that I adopt in this matter is this: If I nullify this election, is there a guarantee that the noted errors and anomalies will not be found in the ensuing by election? In other words, are we likely to have a perfect election, which will exclude all the minor errors and anomalies? Is it possible that even if this election is nullified, we are still likely to encounter tallying errors, agents not signing Forms 35 etc.

89. After careful consideration on the above issues, I am persuaded that as long as elections are carried out by human beings, and as long as our technology advancements in elections stagnate, errors, especially minor errors will continue to be part of the electoral process, and it will be the duty of an election court to determine the nature and impact of such errors. It is true, however, that if I nullify this election, the ensuing by-election will be less tedious as we shall be dealing with only the Member of National Assembly candidates. Even so, there is no guarantee that other minor electoral errors will be avoided. I find it an exercise in futility to nullify this election due to minor errors and anomalies which will still accompany the by-election which would ensue. I am not persuaded that a prudent Court, sitting as I do, in the light of the evidence adduced before the Court, can order the nullification of the Shinyalu Constituency Parliamentary Election results.

90. I have also carefully considered in this judgment all other grounds and allegations put forth by the Petitioner in support of his Petition.

91. In the upshot, I make the following orders:

- a. This Court returns the verdict that the 3rd Respondent Hon. Anami Silverse Lisamula was validly elected and declared as Member for National Assembly for Shinyalu Constituency during the Parliamentary elections held on 4th March 2013, which was conducted in a free, fair and credible manner, and in compliance with the provisions of the Constitution, Elections Act, the Rules and Regulations thereunder and all other enabling provisions of the law.
- b. The Petition herein is dismissed in its entirety with costs to the Respondents.
- c. The costs of the Petition shall not exceed Kshs. 2 Million out of which the 3rd Respondent's costs shall not exceed Kshs. 1 Million and those of the 1st and 2nd Respondents shall not exceed Kshs. 1 Million.
- d. It is hereby directed that a Certificate of determination be issued to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly as provided under Section 86 (1) of the Elections Act.

92. I must at this point express my sincere gratitude to the counsel in this petition, for they quoted and availed to the Court numerous authorities from within and without this jurisdiction, all with the aim of assisting the Court to return with a better judgment. If I have not cited them, it is not because they are not relevant but because others are distinguishable from the circumstances prevailing in this Petition. In addition, the counsel exhibited a great deal of maturity and professional restraint and decorum towards each other and the Court and it is my duty to commend the counsel for that.

93. That is the Judgment of the Court.

Dated, Signed and Delivered at **Kakamega** this **4th** day of **October** 2013

E.K.O. OGOLA

JUDGE

In the Presence of:-

Dr. Khaminwa..... – For Petitioner

Ms Valary Odera h/b for Mr. Mukele..... – For 1st and 2nd Respondents

Mr. Lubulellah..... - For 3rd Respondents

Mr. Paul Kahi..... - Court Clerk