



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITALE

ELECTION PETITION NO. 9 OF 2013

JONAS MISTO VINCENT KUKO PETITIONER

VERSUS

DAVID WAFULA WEKESA 1ST RESPONDENT

FARAH ABDI IBRAHIM 2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION3RD RESPONDENT

[CONSOLIDATED WITH ELECTION PETITION NO. 7 OF 2013]

OMARI WAFULA ASMAN..... PETITIONER

VERSUS

DAVID WAFULA WEKESA1ST RESPONDENT

IBRAHIM FARAH.....2ND RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION3RD RESPONDENT

JUDGMENT

INTRODUCTION

1. Following the election on 4th March, 2013 for the National Assembly for Saboti Constituency two petitions were filed before this court. The election was contested by nine (9) candidates and the votes garnered by each candidate were announced by the Returning officer as follows;

Jonas Misto Vincent Kuko	9,153
Asman Omari Wafula	8,088
David Wafula Wekesa	9,586

Benjamin J.S.S.S. Imbogo	1,088
Caleb Amisi Luyai	2,292
Chesari Lawrence Mokosu	5,918
Leonard N.K. Moss	624
Robert Wanjala	7,388
Samson W. Wanyonyi	698

2. The Returning Officer, Farah Abdi Ibrahim (2nd Respondent) returned David Wafula Wekesa (1st Respondent) as the duly elected member of the National Assembly for Saboti Constituency.
3. Aggrieved by the election process and results returned, two candidates, Jonas Misto Vincent Kuko and Asman Omari Wafula filed two petitions challenging the elections.
4. For purposes of this judgment the Petitioner in Petition 9 of 2013, **Jonas Misto Vincent Kuko** shall be referred to as Petitioner 9 and the Petitioner in Petition No. 7 of 2013, **Asman Omari Wafula** shall be referred to as Petitioner 7.

Petition 9 of 2013

5. Petitioner 9's case is set out in the Petition dated 8/4/2013. He seeks the followings orders:

- a) That it be ordered that there be a recount and re-tallying of the ballot papers cast at the election of 4/3/2013 in Saboti Constituency and in case your Petitioner is then found to have received the highest number of votes, then this Honorable Court do declare the Petitioner as the duly elected member of parliament for Saboti Constituency;
- b) That it be ordered that there be a scrutiny of the votes recorded as having been cast as well as scrutiny of the rejected, void and spoilt ballot papers;
- c) That the election of the 1st Respondent as the member of Parliament for Saboti Constituency be declared null and void;
- d) That the Respondent be condemned to pay the costs of this petition.

6. The petition is supported by the Petitioner's affidavit sworn on 8/4/2013 and the affidavit of Daniel Kapkara Sonyonyi sworn on the same day.

Petitioner 9's case

7. Petitioner 9's complaint is against the conduct of the counting and tallying of the votes cast. He avers that the 2nd and 3rd Respondent did not act within the provisions of the Elections Laws and the Regulations. The 2nd Respondent refused to order a re-examination of form 35's and that the entries entered there-from to form 36 are inaccurate.
8. In particular, the Petitioner questioned the validity of the results in Trans Nzoia Primary School streams B, 5, 3, and 1, Town Hall streams 2 and 5, Matisi Polling Station streams A, 3, 4 and 5. In summary, he avers that the results contained in form 36 are not accurate and that the 1st Respondent did not secure a majority of the lawfully cast votes.

Petition 7 of 2013

9. Petitioner 7's case is as set out in the petition dated 8th April 2013. He seeks the following prayers *inter alia*;

- a. An examination of the voter Registers used in all polling stations in Saboti Constituency to determine the exact number of voters who cast their votes;
- b. A scrutiny of the ballot boxes with their seal and votes cast in the elections for Member of the National Assembly for Saboti Constituency as well as a recount of the said votes;
- c. That the election of Member of the National Assembly for Saboti Constituency was void;
- d. An order nullifying the election of the 1st Respondent as the Member of the National Assembly for Saboti constituency;
- e. A finding that the 1st Respondent committed election offences in the election of 4/3/2013;
- f. A finding that the 2nd and 3rd Respondent conducted the election in Saboti Constituency in a manner that was irregular, improper, reckless and contrary to the relevant electoral law and regulations;
- g. An order that a fresh election for the seat of Member of the National Assembly for Saboti constituency;
- h. The Respondents be condemned to pay the Petitioners' costs of the Petition;

Petitioner 7's case

10. Petitioner 7's case is pegged on the conduct before and during the election process. The Petitioner asserts that the 1st Respondent deployed his agents and supporters to polling stations to bribe voters. He in particular referred to incidents at Mt. Elgon Primary School and Saboti Primary School where two people were arrested and charged with the offence of treating.
11. He further alleges that the Petitioner's agents were excluded from the polling stations during the opening of the ballot boxes to confirm the state of the ballot boxes.
12. That there were irregularities and malpractices by the 2nd and 3rd Respondent during the voting, counting and tallying of votes. He avers the 2nd Respondent declared results which were not verified by the Petitioner's agents; that in some instances the party agents were coerced into signing blank form 35's and were prevented from witnessing the voting of voters who required assistance.
13. The Petitioner further avers that despite his timely request on the names which he was popularly known by to appear on the ballot paper, the 2nd and 3rd Respondent failed and or neglected to effect his request. He contends the omission of the name caused confusion to the voters and affected his performance in the election.

1st Respondent's Case

14. In response, the 1st Respondent avers that the discrepancies alluded were human errors, immaterial and did not affect the election result; that the counting process proceeded as by law provided and in the presence of all the party agents; that the alterations and cancellations in form 35's was duly done before all the parties and by party agents signing the said forms, they verified the correctness of the said alterations.
15. Further, he denied deploying his agents and supporters to bribe voters. He denied knowing the two people arrested at Mt. Elgon Primary School and Saboti Primary School for the offence of treating.

1st and 2nd Respondents' Case

16. In response, the 2nd and 3rd Respondents stated that the election, polling and counting of the votes was free, fair, accurate, transparent and credible and the tallying was accurate and verifiable; that the results declared reflected the will of the people of Saboti Constituency.
17. That upon declaration of the results, the 2nd Respondent did an audit which revealed a few transposition errors. The 2nd Respondent duly corrected the errors detected and generated a second form 36. They aver the errors may have arisen due to fatigue and the re-tallied results did not materially affect the final outcome.
18. They denied committing any electoral offences or malpractices and assert that the agents were duly granted access to all polling stations.
19. They further averred that Petitioner 7 was registered using the names as they appeared on his

national identity card. That the Petitioner did not present to them a Deed Poll for change of name and they therefore could not print names according to a candidate's personal preference.

Preliminary Issues:

20. The 2nd and 3rd Respondents upon being served with Petition 9, filed a Notice of Motion dated 8th May, 2013 seeking the Petition be dismissed for failure to deposit with court the entire security for payment of costs. The 1st Respondent also filed a similar application dated 13th May, 2013.
21. Petitioner 9, filed an application dated 10th May 2013, seeking an extension of time to deposit the shortfall of the required deposit. The three applications were consolidated as they essentially raised similar issues.
22. The court by its ruling, on 13th June 2013, extended time allowing the Petitioner time to deposit the shortfall of the security for payment of costs.
23. Upon complying with the Court's Order, Petitioner 9 filed a Notice of Motion dated 22nd June, 2013 in which he sought a recount and re-tally of the ballot papers cast in all the polling stations in the Constituency. Before hearing the application, Petitioner 9 intimated to court that he wished to abandon all other prayers in his petition but for recount of the votes cast.
24. The two petitions were consolidated on the 9th July, 2013 as they both questioned the validity of the 1st Respondent as the validly elected Member of National Assembly, Saboti Constituency. Petitioner 7 opted to participate in the application for scrutiny and re-tally.
25. The application was heard and by a ruling delivered on 16/7/2013 and the application was found to be premature and was deferred to allow further evidence to be adduced.

Pretrial Conference

26. At the pretrial conference herein the two petitions were consolidated for hearing and determination and the following issues were agreed upon by the parties and endorsed by court:

- a) Whether the election for Member of National Assembly, Saboti Constituency was marred with irregularities which subsequently affected the outcome of the election;
- b) Whether omission of the candidate's name which he was popularly known by affected the outcome of the election;
- c) Whether the 1st Respondent committed the election offences alleged;
- d) Whether the 1st Respondent was validly elected as the Member of Parliament for Saboti Constituency;
- e) What Orders should be made on costs.

Hearing

27. Before the hearing hereof the Petitioners testified and called five witnesses in support of their respective petitions; Daniel Kapkara Sonyonyi, Benefentry Mutiera, Joseph Mbito Masai, Faridah Shanzu and Eunice Nekesa Mwalobi.
28. The 1st Respondent also testified and called four other witnesses; Vincent Otieno Okeyo, Martin Juma Wamalwa, George Wafula Machasio and Jackson Khisa Kaptumwa. The 2nd Respondent also took to the stand.
29. All the witnesses relied on their sworn affidavits and were cross examined by respective counsel. Reference will be made to their evidence during analysis of the issues raised in the petitions.

On deferred ruling

30. Having considered the evidence that was adduced by the witnesses and respective counsel's submission's, a ruling was delivered on the deferred application on 13/8/2013. A partial recount

was ordered in the following 11 polling stations;

<u>Polling station</u>		<u>Streams</u>
I) Trans Nzoia Primary School	-	All streams
ii) Matisi Primary School	-	A, 3, 4, 5
iii) Town Hall	-	All streams
iv) Lukhome Primary School	-	A, 2
v) Tuwani Primary School	-	C
vi) Gituamba Primary School	-	1, 2
vii) Nakami Secondary School	-	1
viii) Rafiki Primary School	-	A
ix) St. Joseph Boys Secondary School - B		
x) Kitale Youth Polytechnic	-	B
xi) Grassland Primary School	-	1

Scrutiny and Recount

31. The exercise was undertaken over a period of four (4) days between the 15th to the 18th August, 2013 and was supervised by the Deputy Registrar, Kitale, Hon. J.M. Nang'ea.
32. Documents scrutinised included copies of the results of each of the 11 polling stations, packets of spoilt papers and packets of rejected papers.
33. The copy of the register used during the elections was not found in any of the parliamentary ballot boxes opened and it therefore was not scrutinized.
34. The results in the recount were recorded and form part of the proceedings. The final results of each candidate after the partial recount were as follows:-

• Benjamin J.S.S.S Imbogo	-	954
• Caleb Amisi Luyai	-	2067
• Chesari Lawrence Mokusu	-	6198
• David Wafula Wekesa	-	9580
• Jonas Misto Vincent Kuko	-	9310
• Leonard Namutoko Kipbrob Moss	-	440
• Omari Wafula Asman	-	8428
• Robert Wanjala	-	7570
• Samson Waliaula Wanyonyi	-	501
• The total number of votes cast	-	45,853
• The total number of valid votes cast	-	45,026
• The total number of rejected votes	-	827

35. At the close of the hearing, parties filed written submissions which the respective learned counsel on record highlighted on 9/10/2013.

Submissions

36. **Mr. Kiarie**, learned counsel for Petitioner 9 relied on the grounds in the petition. He submitted

- that the recount of the 11 polling stations confirmed the complaints of the Petitioner that the results declared by the 2nd and 3rd Respondents were inaccurate. According to counsel the irregularities were due to inefficiency of the 2nd and 3rd Respondents contrary to **Article 81 (e)** of the **Constitution**. He further relied on the decision in **Richard Kalembe Ndile vs Dr. Patrick Musimba Mweu & 2 Others, Machakos Election Petition No. 1 of 2013** in urging the court that an election is not about simple arithmetic and that the appropriate relief in these circumstances is to return the matter back to the constituents to elect a person of their choice to represent them in the National Assembly. That the 2nd and 3rd Respondents be condemned to pay the costs.
37. **Mr. Kraido**, submitted for and on behalf of Petitioner 7. It was his submission that the election deviated from the principles of the Constitution. The results as declared by the 2nd Respondent were incapable of been verified as the recount confirmed that the votes captured in form 36 were not supported by results entered in form 35s.
38. Petitioner 7 also contended that the 2nd and 3rd Respondents failed to allow the Petitioner's agents access to the polling stations in the morning to witness opening of the sealed ballot boxes.
39. On allegations of treating, counsel submitted that there was compelling evidence. He stated that two people were arrested and charged with the offence of treating. He further stated that the 1st Respondent had subsequently interfered with witnesses and caused **Benfentry Mutiera (PW2)** to swear an affidavit refuting facts of the arrest of the two persons on trial for the offence of treating. It was also his submission that PW2 and another person were paid monies so as not to testify for the Petitioner 7 in his Petition.
40. On the omission of the name "Mutacho" in the ballot paper, the learned counsel submitted the omission left many voters unsure of their preferred candidate as they could not identify the Petitioner by his other names. According to counsel, there was no distinction between the Petitioner and 1st Respondent who share the name "Wafula" and thus this confusion affected the results of the election.
41. That the allegations had been proved as against the 1st Respondent, the 2nd and 3rd Respondent and the election had been impugned due to the irregularities and there was therefore need for a fresh election to ascertain the people's choice and the Respondents be liable for costs.
42. In response to Petition 9, **Mr. Wandabwa**, learned counsel for the 1st Respondent submitted that the recount of the 11 polling stations did not disclose any material discrepancies; That the issues which had been raised by Petitioner 9 before the recount had been addressed by the 2nd Respondent's re-tallying of the results. He further submitted that there was no pattern of the votes scrutinized to indicate the results were skewed in favour of the 1st Respondent; or that the errors affected the final results. He relied on **Ali Mursal vs. Adi Mohamed & Others, Election Petition No. 1 of 2013** to submit that some irregularities are innocent and it was upon the petitioner to prove that the irregularities were deliberate with a purpose of denying him victory. According to counsel, the Petitioners have failed to demonstrate fraud or manipulation of the results. He urged court to find the irregularities were due to human error and fatigue.
43. On allegations of bribery and treating, it was counsel's submission that the evidence was not plausible; that there was material contradiction between PW2 and PW3 testimonies and that there was no evidence linking the bribers to the 1st Respondent. Counsel denied any interference with PW2, he stated that the offer for the upkeep was after PW2 swore an affidavit. It was his submission that facilitating PW2 with upkeep was therefore not an inducement or interference because it happened after the event.
44. The 1st Respondent urged the court to find that the scrutiny revealed the outcome and that the anomalies complained of had been taken into account by the 2nd and 3rd Respondent. The 1st Respondent prayed that the Petitions be dismissed and both Petitioners bear the costs.
45. **Mr. Yego**, learned counsel for the 2nd and 3rd Respondents submitted that the elections results are verifiable and accurate; that any errors detected were immediately rectified by the 2nd Respondents *suo moto* an act that demonstrates transparency and diligence on his part. Counsel submitted that the re-tally of the results was lawful as the initial results announced were provisional. He relied on **Section 39** of the **Elections Act**. It was thus his submission that the re-tallied results conform to the provisions of **Article 81** of the **Constitution**.
46. Counsel further submitted that non-attendance of candidates during the re-tally and their absence at the signing of a declaration form or the announcement of the results does not invalidate results.
47. On recount, it was submission of counsel that the report by the Deputy Registrar did not reveal

- any discrepancies in the tallying process apart from what the 2nd Respondent had admitted and addressed in his tally. It was his submission that the recount confirmed the disparities were minor and did not affect a specific candidate; that there was no fraud or manipulation of votes but minor transpositional errors which are human flaws.
48. In respect to omission of Petitioner 7's name, "Mutacho" in the ballot. It was the submission of **Mr. Yego**, that the name "Mutacho" did not appear in the Petitioner's identification documents and in particular his National Identity Card and Birth Certificate. He further submitted that the Petitioner did not submit a Deed Poll as proof of change of name.
49. Despite the name "Mutacho" not appearing in the ballot, the learned counsel submitted that it did not confuse any voters because the petitioner's photograph, party name and party symbol did appear on the ballot. These were other ways in which voters could identify and distinguish him from the 1st Respondent and the other candidates.
50. Mr. Yego, refuted the allegations that Petitioner 7's agents were denied access to the polling stations in the morning of the election day to witness the opening and sealing of the ballot boxes. He submitted that the agents were present and they duly signed the polling day diary. He further stated that the Petitioner did not allege any irregularities occurred in the particular polling station where agents were denied access.
51. The court was urged to find that the 2nd Respondent had not committed any irregularity that affected the results or the outcome of the election and urged the court to dismiss the Petitions with costs pegged at Kshs.5 million.

ISSUES FOR DETERMINATION

52. Upon hearing the final submissions of the respective parties counsel, this court finds the following issues for determination;

- (a) Whether the election for Member of National Assembly, Saboti Constituency was marred with irregularities in contravention of the principles of the Constitution of Kenya.
- b) Whether omission of the candidate's name which he was popularly known by affected the outcome of the election;
- c) Whether the Petitioner 7 has proved that the 1st Respondent committed the election offences alleged;
- d) Whether the 1st Respondent was validly elected as the Member of Parliament for Saboti Constituency;
- (e) Who should be condemned to pay the costs of the Petitions.

ANALYSIS

53. The analysis will be categorized under the following sub-headings;

- i. Forms 35
- ii. Forms 36
- iii. Omission of Petitioner 7's preferred name on the ballot papers
- iv. Voter Bribery
- v. Costs

FORMS 35

54. The Petitioners contend that many of the Forms 35 had alterations, cancellations, over-writing and over-emphasis. These irregularities were of such magnitude that it affected the outcome of the

- election. In one instance there existed two (2) sets of Forms 35. One being a Form 35 for a Senate election and another for Member of Parliament, both are alleged to have been used to make entries for Lukhome Primary School Polling Station No. 050.
55. The 2nd and 3rd Respondents submitted that the alterations, over-writing, over-emphasis and cancellations on the Forms 35 was not fraudulent, deliberate nor manipulated in favour of any candidate, in particular the 1st Respondent. These irregularities were minimal and were brought about by human errors and the candidates agents being aware countersigned on the reverse side of the Forms.
56. In their submissions the 2nd and 3rd Respondent relied on the case of **Rishad Hamid Ahmed Amana vs IEBC and 2 others where Kimaru J.** The learned Judge held that the Petitioner is not only required to establish that there were irregularities but must also establish that the irregularities were of such a magnitude that the outcome of the result was affected.
57. This court states that the burden of establishing the allegations is upon the person making the allegations and the standard of proof required in election petitions is set down in the case of **John Kiarie Waweru vs Beth Wambui Mugo & 2 others EP No.13 (2008)**

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

58. This position was enhanced by the Supreme Court in the case of **Raila Odinga and others vs IEBC and 3 others Nairobi Petition No.5 of 2013 eKLR.**

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

59. This court is guided and persuaded by the above cited authorities.
60. It is upon the Petitioners to produce the necessary evidence in the first place and thereafter the Respondents to rebut. Going through the evidence of both Petitioners this court notes that no single agent who was called to testify stated that the cancellations, alterations, overwriting and or over emphasis on the Forms 35 in;

Matisi Primary School- Stream A,3,4 and 5

Lukhome Primary School - Stream A and 5

Gituamba Primary School - Stream 1 and

Grassland Primary School was effected by the 2nd and 3rd Respondents without their knowledge and or consent.

61. It is also noted by this court that the agents duly signed on the reverse side of the Forms 35. There was no evidence adduced that these agents were coerced and as to when they appended their signatures. Was it before or after the alterations, cancellations, overwriting or overemphasis? The acts are therefore presumed to have been done rightly and regularly.
62. In the instance of Lukhome Polling Station where the Form 35 for Senate was utilized, it was noted after the recount that the correct results were posted and Petitioner 7 had 125 votes on this particular Form 35 whereas the Form 35 annexed to the 2nd and 3rd Respondent's Petition had an over-writing on the total valid votes cast and the votes for Petitioner 7 were indicated as 25.
63. Again this court reiterates that no agent of Petitioner 7 from this particular polling station tendered evidence in court on the Senate Form 35 and the other Form 35 to raise issues on the

- shortfall, the beneficiary of the unaccounted 100 votes, and the origin of the Senate Form 35, so as to solidify these doubts and establish them in the courts mind and impute bad motive on the part of the 2nd and 3rd Respondents to the satisfaction of this court.
64. This court ordered that there be a partial recount of votes in eleven polling stations and this recount indeed vindicated the 2nd and 3rd Respondent as submitted by their Counsel. It is indeed noted that the results of seven (7) polling stations out of the eleven (11) were found to have the accurate results posted on the Forms 35, that is notwithstanding the alterations, over-emphasis and over-writings on Forms 35.
65. This court makes reference to the case of **Hassan Ali Joho vs Hotham Nyange and Anor (2008) 3 KLR** where Maraga J (as he then was) observed;

“... because elections are conducted by human beings, there are bound to be errors which can be explained. There is no election which can be perfectly conducted. However, it is only when such errors, which constitute non-compliance with the law, materially affects the outcome of the results that the court will have no option other than to nullify the said results....”

66. It was therefore upon the Petitioners 9 and 7 to tender evidence that the irregularities were not mere arithmetical errors and that they fundamentally altered the outcome and that the election was conducted in a flawed manner and in a manner that was not transparent or credible and that the irregularities were of such a magnitude to affect the outcome of the election. Only then can this court interfere and declare the election a nullity.
67. This court finds it has not been proven that the irregularities were deliberate nor of a magnitude to warrant this court to invalidate the outcome of the election.

FORMS 36

68. The evidence adduced by the 2nd Respondent was that he announced the winner of the election using the first Form 36. Petitioner 9 in his testimony stated that the collation of results onto Forms 35 from many polling stations was fraught with irregularities such as alterations and over-writing. This then meant that the results transposed from Form 35 onto Form 36 were inaccurate and erroneous. Petitioner 9 noticed also that the Form 36 had duplication of results and omissions. He therefore requested the 2nd Respondent for a re-tally and re-examination which request was promptly turned down.
69. The 2nd Respondent proceeded to announce the winner using the first set of Form 36. Within 30 minutes from the time of the announcement of the results the 2nd Respondent decided on his own volition **“suo moto”** to singularly conduct a re-tally.
70. The Petitioner 7 stated in evidence that he was not aware of the re-tally conducted by the 2nd Respondent nor were his agents informed. The Petitioner 9 was also not made aware of the re-tallying exercise. The 1st Respondent and his agents were busy celebrating and were also not aware of this re-tallying process. It is not disputed that these crucial and important parties were all absent when the re-tally was done.
71. After the re-tally there was in existence two (2) sets of Form 36. The first one generated had been used to announce the results and is the only one that had a legal foundation.
72. This court notes that the second Form 36 that was generated by the 2nd Respondent was not even signed by the 2nd Respondent himself nor was it signed by any of the Petitioners or their agents. Neither was it signed by the 1st Respondent or his agents. Such an incomplete document such as is in this instance cannot be said to have any legal validity.
73. It is not disputed that the 2nd Respondent made adjustments on this second Form 36 and the evidence shows that it was a document generated after the fact (post announcement) and it is noted that this Form 36 was only utilized by the 2nd Respondent in the response to the Petition.
74. This court opines that this second Form 36 was generated for the 2nd Respondent's own personal satisfaction to appease his conscience and this document is found to have no legal validity. The 2nd Respondent's conduct will be re-visited under the sub-heading of costs.

75. It is noted that the first Form 36 generated was used for the purposes of declaring the winner. The second Form 36 brought into the fore the irregularities of duplication and omissions that formed grounds of the Petitioner 9's Petition seeking for a recount and re-tally.
76. Again this court reiterates that it is incumbent upon the Petitioners to show that the irregularities were of such a magnitude so as to be described as perverse and that the same affected the outcome of the results and to also prove that the irregularities were deliberate and skewed in favour of the 1st Respondent.
77. The court states that the evidence adduced by the Petitioners and their witnesses initiated some doubt, prompting the court to order for a recount to enquire into the issues of transparency, conduct of the election and the accuracy of the results and as to whether the errors, duplications and omissions were deliberately made by the 2nd and 3rd Respondents.
78. This court ordered a partial recount of eleven (11) polling stations to test the accuracy of the results collated and transposed and to inquire into the irregularities, to confirm the magnitude of the errors and the effect on the results.
79. A Report on the recount was prepared by the Deputy Registrar Kitale, which report forms part of these proceedings.
80. At this point this court makes reference to the case of **Kalembe Ndile** where Majanja J made the following observation;

“...An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error. Indeed the evidence is clear that the counting was done at night and in less than ideal conditions hence errors which are admitted were bound to occur particularly in the tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs.”

81. This court states that the counting of the votes for the 4th March, 2013 election for Saboti Constituency which had 54 polling stations was done over a period of less than two (2) days and done not in ideal conditions and this exercise was inclusive of the counting of the other votes for the elections for Presidency, Governor, Senator, Women's Rep and County Rep.
82. The recount for only eleven (11) polling stations had been ordered to take place for a period of three (3) days and the time was found to be insufficient and an additional day was added for the exercise to be complete. What was noted from this exercise was that the time in the form of days allocated for vote counting was an important factor for accuracy of the process.
83. The court further reiterates that out of the eleven polling stations seven were found to have posted accurate results on the Forms 35, despite the alterations and over-writings, thereon.
84. This court reiterates the fact that the 2nd and 3rd Respondents were indeed vindicated by the recount exercise. It was found that the time for counting of votes was a constraint and the voluminous number of votes was overwhelming. The recount exercise found that the errors affected all the candidates and were not deliberately skewed in favour of the 1st Respondent and that the errors were human errors arising from the factors stated above.
85. Indeed it is incumbent for the Petitioners to show that the entire election process was not conducted in a transparent or credible manner, that the results transposed on Form 36 from Form 35 were not verifiable and that the inaccuracies were deliberate and skewed in favour of the 1st Respondent so as to affect the outcome
86. The duplication, omissions and other figures posted onto Form 36 after the recount exercise were found to be verifiable and minimal and further found not to have affected the outcome. As can be seen in the Table hereunder the 1st Respondent even garnered six (6) more votes and the margin between Petitioner 9 and the 1st Respondent was enlarged to 270 and the 1st Respondent still emerged as the winner.

TABLE

CANDIDATE'S NAME

FINAL RESULTS RESULTS AFTER RECOUNT

JONAS MISTO VINCENT KUKO	9,153	9310
ASMAN OMARI WAFULA	8,088	8428
DAVID WAFULA WEKESA	9,586	9580
BENAJMIN J.S.S.S. IMBOGO	1,088	954
CALEB AMISI LUYAI	2,292	2067
CHESARI LAWRENCE MOKOSU	5,918	6198
LEONARD N. K. MOSS	624	440
ROBERT WANJALA	7,388	7570
SAMSON W. WANYONYI	698	501

87. This court reiterates that the Petitioners have failed to prove that irregularities on Form 35 were not mere human errors, that they were deliberate and that they were of such magnitude to warrant invalidation of the election and likewise the irregularities on Form 36 transposed from Forms 35 cannot warrant the interference by this court.

Omission of Petitioner 7's preferred name on the ballot paper

88. The Petitioner 7 submitted that he was popularly known as 'MUTACHO' and that this name 'MUTACHO' was omitted from the ballot paper. The Petitioner 7 stated in his testimony that he had approached the 2nd Respondent to have this name included on the Ballot paper. He further supported this request with a letter addressed to the 3rd Respondent.

89. The Petitioner stated that the 2nd and 3rd Respondents did not heed this request and that this omission cost him the seat as the voters were confused as to whom they should vote for considering the fact that two of the candidates (Petitioner 7 and the 1st Respondent) bore similar names namely 'WAFULA'

90. Firstly this court notes that the 3rd Respondent is bound by the provisions of Section 24(a) of the Elections Act which requires that a nominee for Member of Parliament must be a registered voter.

91. The requirements for registration as a voter are that a person must be in possession of a National Identity Card or a Passport or an acknowledgement of registration certificate issued by a registration officer under the Registration of Persons Act.

92. The 3rd Respondent is duty bound by law to register a voter by the names that appear on the aforementioned documents unless documentation in support of name change is provided.

93. Upon perusal of Petitioner 7's National Identity Card that was annexed to the Petition this court finds that the document does not bear the name "Mutacho". A Birth Certificate was also annexed and it also makes no reference to the name "Mutacho"

94. This Court finds no evidence on record and it was the testimony of both the Petitioner 7 and the 2nd Respondent that no Deed Poll was submitted to the 2nd or the 3rd Respondent to support the inclusion of this preferred name "Mutacho".

95. The question posed is **"was the omission of the preferred popular name MUTACHO on the ballot paper an irregularity by the 2nd and 3rd Respondents?"**

96. The Constitution 2010 gives the 3rd Respondent the express mandate of registration of candidates and provides at Article 88 (4) as follows;

“88 (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and in particular, for-

(a) The continuous registration of citizens as voters;

(b)

(c)

(d)

(e)

(f) the registration of candidates for an election.”

97.Pursuant to Regulation 38(a) of The Elections (General) Regulations 2012 the Petitioner 7’s political party was required to submit his nomination paper to the 3rd Respondent containing his name as it appears in the register of voters.

98.Therefore the candidates name appearing in the nomination certificate should be the same name appearing on his/her National Identity Card or Passport.

99.The Petitioner registered as a voter using his National Identification Card which this court reiterates bore only the names **“Omari Wafula Asman”** and in the absence of a Deed Poll as proof of change of name could only be registered as a candidate by the 3rd Respondent by the same names hereinabove mentioned.

100.On the issue of voter confusion due to the omission of the preferred name on the ballot papers this court makes reference to Regulation 68(4) of the Elections (General) Regulations which provides as follows;

“...(4) Every ballot paper for the use at an election shall-

Contain the name and party symbol of the person validly nominated;

Contain a photograph of the candidate where applicable;”

101.From the reading of the above provision it would then follow that a candidate may be identified and distinguished from other candidates on a ballot paper either by his name, party symbol and or photograph.

102.This court is persuaded by the decision of Karanja J in **Kitale Election Petition No.11 of 2013** where the learned Judge observed;

“...the name of a candidate was not the only means of identification in a ballot paper. There were other means which included the candidate’s political party’s name, symbol and colour.....

“..... it cannot be true that voters at certain polling stations refrained from voting or voted for the wrong candidate.....

“..... it cannot also be true that both Petitioners did not vote for themselves due to the mix-up in their names....”

103.The evidence tendered by **Eunice Nekesa Mwalobi (PW5)** was that despite the name **“Mutacho”** not appearing on the ballot paper, she was able to recognize the photograph and the names of Petitioner 7 and was not confused.

104.The court also notes that despite the omission of that one particular name **“Mutacho”** in the ballot paper, the Petitioner garnered a large number of votes, notably over 8,000 votes and

- emerged third in the contest.
105. Apart from the one witness PW5 who stated that she was not confused, Petitioner 7 tendered no evidence to support his allegation that the omission of the name “**Mutacho**” confused any voter.
106. This witness’s (**PW5**) evidence is supportive of the fact that the ballot paper has sufficient information that enables a voter to choose a candidate of his/her choice without confusion.
107. Petitioner 7 did not also tender any evidence to prove how he lost votes to the 1st Respondent due to the fact that they shared a similar name, namely “**Wafula**”
108. From the evidence adduced this court finds that Petitioner 7 failed to prove how the omission of that one preferred name on the ballot paper by the 3rd Respondent caused confusion so that it denied Petitioner 7 victory.

BRIBERY

109. Bribery is a form of manipulation that can affect the outcome of an election. It is considered to be criminal in nature and the burden of proof of such an election offence is upon the one who alleges. The evidence adduced or provided must be clear, concise and conclusive. The standard of proof is that of beyond reasonable doubt. This court refers again to the case of **Raila Odinga (supra)** which sets the standard of proof as follows;

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

110. There is no room for the court to make presumptions. If this election offence is proved along the lines stated, then it is incumbent upon this court to declare that the election was not free and fair. This court makes reference to the case of **Mahmud Muhumed Sirat vs Ali Hassasn Abdirahman and 2 others Nrb EP No. 15 of 2008** where it was held;

“due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the election....”

111. The offence of bribery is stipulated in Section 64 of the Elections Act and reads as follows;

“Sec 64(1) A candidate who:

a) directly or indirectly in person or by any other person on his behalf gives, lends or agrees to give or lend, or offers, promises or promises to procure or to endeavour to procure any money of valuable consideration to or for any voter, or to or for any person on behalf of any voter or to or for any other person in order to induce any voter:

i) to vote or refrain from voting for a particular candidate;

ii)

iii)

commits the offence of bribery.”

112. The above section details what constitutes an act of bribery by a candidate or his agent.

113. The evidence of **Benfentry Mutiera (PW2)** which is supported by his affidavit made on the 8th April, 2013 was that he received a phone call informing him of bribery incidents at Mt Elgon Primary School Polling Station. He dashed to the scene using a motor-bike and was accompanied by **Joseph Mbito Masai (PW3)**. The witness states that **PW3** then approached one **David Wanyonyi Wabwire (Wabwire)** who was the person alleged to be bribing people and **PW3** presented himself as a voter. **PW2** says he was standing approximately 30 metres away and

witnessed the bribe and heard **Wabwire** tell **PW3** to vote for;

“Governor- Khaemba, Senator –Wambalambala and David Wafula”

114. In cross examination **PW3** stated as follows;

“Wabwire told me to vote for Lazaro (1st Respondent) and Governor- Khaemba and Senator- Wambalambala and he gave me Kshs.100/-. There were people around him. I was the only person who was bribed. I pretended that I was confused. I did not know him before (Wabwire). I was told that Wabwire was Lazaro’s agent by someone.”

115. **PW2** and **PW3** then arrested **Wabwire** and took him to Saboti Police Station.

116. There was a second incident of bribery that took place on the same day at Saboti Primary School where **Jackson Khisa Kaptumwa (Kaptumwa)** is alleged to have bribed one **Serut Kazi Dennis** to vote for the 1st Respondent.

117. Under cross examination **PW3** states that he witnessed this second act of bribery that took place at Saboti Primary School and that he and **PW2** also arrested **Kaptumwa**.

118. This court has had occasion to peruse the Charge Sheet related to the alleged offence committed by **Wabwire** and notes that at the Section marked **PARTICULARS OF OFFENCE** it indicates that the person who was bribed by **Wabwire** was one **Brian Cheseto**. The date of arrest is indicated as having been effected on the 6/03/2013 and **PW3** is listed as a witness, therein.

119. These details on the Charge Sheet are materially inconsistent with the evidence of **PW2** and **PW3** which then raises doubt and questions in the court’s mind as to who was bribed by **Wabwire**, on which date was the said **Wabwire** arrested and whether **PW2** actually fully witnessed the act or incident of bribery and the person being bribed.

120. The Charge Sheet indicates that a **Brian Cheseto** was the one bribed whereas **PW3** confesses to have been the one who was bribed by **Wabwire** yet he is listed as the witness. **PW2** states that from a distance of 30 meters he was able to see **PW3** being bribed and to hear the details of the ensuing conversation. Both **PW2** and **PW3** state the date of arrest to be 4/03/2013 yet the Charge Sheet indicates the date as 6/03/2013. This person **Brian Cheseto** was not called as a witness by Petitioner 7 to shed more light so as to clarify the aforementioned inconsistencies and to give evidence on the status of the criminal case, whether it had been concluded, the outcome or whether it was still ongoing.

121. In the light of these inconsistencies it is not for the court to be presumptuous and it is incumbent upon the Petitioner 7 to present evidence that is concise and certain to enable this court to reach a conclusion with certainty.

122. This court further notes a material discrepancy in the Charges preferred against **Wabwire** and **Kaptumwa**. The two are charged under the provisions of **Section 62(2)** of the **Elections Act**. The offence envisaged under this section is in respect of a voter who accepts any monies amongst other things.

123. From the evidence adduced by **PW2** and **PW3** the two persons that is **Wabwire** and **Kaptumwa** are said to have offered bribes and were not the recipients of the bribes as contemplated by Section 62(2) of the Elections Act. **Kaptumwa** stated in evidence that the criminal case was ongoing. Again this court reiterates that it is not for the court to be presumptuous and from the evidence adduced by Petitioner 7 in support of the offences the evidence can best be described as inconclusive.

124. This court further states that for the offence of bribery to be proved, evidence must be adduced to show that the bribe was offered and received to influence a voter to vote for a particular candidate. The evidence must establish a **“nexus”** between the persons giving the money and the 1st Respondent. Refer to the case of **John Kiarie Waweru vs Beth Mugo Wambui and 2 others (supra)**.

125. The evidence adduced by **PW3** was that someone told him that **Wabwire** was the 1st Respondent’s agent. The evidence of **PW3** can at best be described as hearsay and there is also doubt as to which candidate amongst the Member of Parliament, Senator or Governor authorized or had knowledge of the bribery.

126. The association between the bribers and the 1st Respondent during campaign time is not conclusive evidence that the 1st Respondent approved, had knowledge or consented to the bribing of voters.
127. This court reiterates that it is not the duty of the court to make presumptions and Petitioner 7 had an obligation to prove beyond reasonable doubt that the election offence of bribery did take place and to also prove “*nexus* .”
128. The evidence placed before this court by Petitioner 7 and his witnesses is found to be insufficient, unclear, uncertain, and no unequivocal proof of bribery has been established as against the 1st Respondent that he committed the alleged election offences of bribery.

COSTS

129. Lastly, what remains is for this court to award costs and decide which party should be condemned to pay these costs.
130. In Petition No.9 of 2013 this court finds that the 2nd Respondent, despite being requested, did not carry out a re-tally before announcing the final election results but did it singularly, post announcement. From the evidence adduced by Petitioner 9 this court finds that were it not for the high-handedness, dismissive nature and head-master attitude of the 2nd Respondent, herein this Petition would not have been filed by Petitioner 9. Such conduct caused unwarranted expenses in the form of time and expenditure and someone must foot this bill.
131. For the reason set out above and the 2nd Respondent being an employee of the 3rd Respondent both parties are hereby condemned to pay the costs of the recount.
132. With regard to Petition No.7 of 2013 this court takes cognizance of the fact that the 1st Respondent made attempts to intermeddle and interfere with Petitioner 7’s witness. The evidence adduced by Benfentry Mitiera (PW 2) was admitted by the 1st Respondent, himself, in his oral evidence. The 1st Respondent admitted to calling PW2 and directing him to go to his Advocates offices in Nairobi. Whilst there, PW2 states in evidence that he swore an Affidavit to refute the averments of bribery made in his affidavit in support of Petition No.7 of 2013. PW2 was also to refrain from testifying against **Wabwire** and **Kaptumwa** in the criminal cases before the Magistrates court. The 1st Respondent confirmed that he instructed his advocate to facilitate **PW2’s** travel expenses and upkeep whilst in Nairobi.
133. Such actions cannot be condoned and the 1st Respondent’s actions must be sanctioned which will be done by way of condemning the 1st Respondent to pay the costs of the Petition No.7 of 2013.

FINDINGS

134. This court finds that the Petitioners 7 and 9 have failed to prove that the irregularities by the 2nd and 3rd Respondents, were deliberate and calculated to manipulate the election in favour of the 1st Respondent and this court further finds that the irregularities were not substantial in nature so as to compromise the results and the outcome of the election. The election is found to have been conducted substantially in accordance with the principles set down in the Constitution.
135. This court finds that the 2nd and 3rd Respondents acted within the law by declining to include the name “**MUTACHO**” on the ballot paper and find that this action did not amount to an irregularity. And this court finds further that the omission of this preferred name did not cause voter confusion nor did it affect the results or the outcome of the election.
136. This court finds that the allegations of bribery against the 1st Respondent are inconclusive and are therefore not proven. This court is satisfied that the election conducted on the 4th March, 2013 was free and fair and reflected the will of the people of Saboti Constituency.

CONCLUSION

137. This court hereby dismisses both Petition No.7 of 2013 and Petition No.9 of 2013.
138. This court finds that **DAVID WEKESA WAFULA** was validly elected as Member of

- Parliament for Saboti Constituency.
- 139.A Certificate under the provisions of Section 86(1) of the Elections Act shall be issued to the Speaker of the National Assembly.
- 140.Each party shall bear their own costs in Petition No.9 of 2013 but the costs of the recount shall be paid by the 2nd and 3rd Respondent. Rule 36 of the Elections Petition Rules 2013 gives this court powers to apportion and cap the costs. The costs are capped at Kshs.1,500,000/= payable to and to be apportioned on a pro rata basis between the Petitioner 9 and the court.
- 141.Costs of Petition No.7 of 2013 shall be paid by the 1st Respondent. The costs are capped at Kshs.2,000,000/=. Kshs.1,000,000/= apportioned to Petitioner 7 and Kshs.1,000,000/= to the 2nd and 3rd Respondents.
- 142.The costs in to be taxed and certified by the Deputy Registrar.
- 143.The security deposited by the Petitioners to be refunded to the Petitioners in their respective Petitions.

It is so Ordered.

DATED, SIGNED and DELIVERED at KITALE this 3rd day of October, 2013

A. MSHILA

JUDGE