



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**AS HEARD IN THE HIGH COURT OF KENYA AT NAIROBI**

**PETITION NO. 4 OF 2013**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ELECTIONS ACT, 2011**

**AND**

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY & COUNTY ELECTIONS)  
PETITION RULES 2013**

**AND**

**IN THE MATTER OF THE INDEPENDENT & ELECTORAL BOUNDARIES COMMISSION**

**ACT, 2011**

**BETWEEN**

**RICHARD NCHAPI LEIYAGU..... PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**ISHMAEL HASHIM.....2<sup>ND</sup> RESPONDENT**

**MATHEW KIDEME LEMPURKEL.....3<sup>RD</sup> RESPONDENT**

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

1. Article 38 of the Constitution of Kenya grants every Kenyan the freedom to make political choices. These include the right to participate in free, fair and regular elections based on universal suffrage and the free expression of the will of the electors. In exercise of this right, the electorate of Laikipia North Constituency flocked to various polling stations in that constituency on 4<sup>th</sup> March, 2013 to elect their member of the National Assembly.

2. After counting and tallying, the 2<sup>nd</sup> Respondent returned the following results:-

- a. Emuria Lorere – 3,549 votes
- b. John Etie Eleman – 261 votes
- c. John Pamita Letai – 3,480 votes
- d. Mathew Lekidime Lempurkei – 7,267 votes
- e. Peter Katoine Kilesi – 4,313 votes
- f. Richard Nchapi Leiyagu – 4,438 votes

**Total – 23,873 votes**

Pursuant to this, the 1<sup>st</sup> Respondent declared the 3<sup>rd</sup> Respondent as the duly elected member of the National Assembly for the said constituency.

3. Aggrieved by the said declaration, the Petitioner filed this Petition on 10<sup>th</sup> April, 2013 challenging the said election. In the Petition, the Petitioner made various complaints of irregularities against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and their polling officials as well as against the 3<sup>rd</sup> Respondent for malpractices. He contended that the conduct of the said election was not free and fair and was in breach of Articles 81(e), 83(2) and 83(3) of the Constitution, Sections 62, 64 and 110 of the Elections Act, 2011 and the Elections (General Regulations) Rules 2012. The Petitioner complained of the recruitment of polling officials who were partisan and lacking in qualification; collusion between polling officials and the 3<sup>rd</sup> Respondent to manipulate the electoral process; failure to enforce the electoral code of conduct; exclusion of party agents belonging to TNA and other parties save for those of the 3<sup>rd</sup> Respondent from various polling stations; skewed voter assistance; failure to open various polling stations within the prescribed time thereby disenfranchising vulnerable voters; opening various polling stations beyond the prescribed time and allowing persons not registered as voters to vote.
4. The Petitioner's other complaints were that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent failed to avail to the Petitioner or his agents Forms 35 from all polling stations thereby denying him an opportunity to question or verify the results; failure to seal or keep under seal ballot boxes in accordance with the law thereby creating an opportunity for ballot stuffing or interference with electoral material and failure to faithfully transmit results from polling stations to the constituency and National Tallying Centres and/or permitting their alterations contrary to law.
5. As against the 3<sup>rd</sup> Respondent, the Petitioner complained that during and after the official campaign period, as well as on the election day, the 3<sup>rd</sup> Respondent by himself or through his agents and or with his privity, committed various electoral malpractices. These were that, on 1<sup>st</sup> March, 2013, the 3<sup>rd</sup> Respondent held a meeting with at least 15 Presiding Officers at Nanyuki wherein strategies of manipulating the electoral process were laid and that the 3<sup>rd</sup> Respondent bribed the subject Presiding Officers; that the 3<sup>rd</sup> Respondent repaired the water dam for the Pois Robo community within Segera ward, that the 3<sup>rd</sup> Respondent purchased 50 plastic chairs for Ngenia Witeithie Women Group during the campaign period and purchased 2 rolls of fencing wire for Ngenia Dispensary. He also accused the 3<sup>rd</sup> Respondent of bribery of voters by his agents with his tacit approval.
6. The Petitioner therefore concluded that because of the irregularities and electoral malpractices complained of, the elections for the National Assembly for the said Constituency were neither free nor fair. He therefore prayed for the nullification of the said results, the preservation and production of all the Forms 35 relating to that election, the preservation, production and scrutiny of all voter registers for the constituency and for the costs of the Petition.
7. In their response filed on 26<sup>th</sup> April, 2013, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent denied the Petitioner's allegations contending that the elections were conducted in accordance with the law, that they were free and fair, peaceful, credible and that the results reflected the free will of the people of Laikipia North. That there was no complaint received about the results except one that was received on 10<sup>th</sup> March, 2013; after the 2<sup>nd</sup> Respondent had presented the results at the Bomas of

Kenya on 6<sup>th</sup> March, 2013; that the polling officials were qualified and there was no partisanship in their recruitment or deployment; that the polling officers did provide the Forms 35 to the Agents; that all polling materials were properly sealed save for the Ballot Box for Ngenia Secondary School Stream 2 which was opened by the Returning Officer with the concurrence of all the candidates to verify the results that were not adding up. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent denied any meeting taking place between its polling officials and the 3<sup>rd</sup> Respondent, they admitted that the BVR kit failed as was the case country wide. They contended that the TNA Party Agents for National Assembly lacked the required documentation to be allowed to polling stations and that they were only allowed into the polling station at 1 p.m. when they procured the requisite documentation. They accused the Petitioner of having planned a militia and bandit attack in areas where he did not have support.

8. In his response filed on 6<sup>th</sup> May, 2013, the 3<sup>rd</sup> Respondent denied all the allegations made by the Petitioner and in particular any collusion with polling officials. He averred that the Petitioner's Agents who were denied entry into polling stations were those who lacked proper documentation; that all ballot papers were sealed in the presence of party Agents. While denying the electoral malpractices levelled against him, the 3<sup>rd</sup> Respondent contended that the Pois Robo Community Dam was repaired in September, 2012 by the Ndugu Zangu Christian Community Charitable Trust and not by him as alleged. He further contended that it was the Petitioner who was guilty of violence and intimidation and therefore prayed that the Petition be dismissed and the Petitioner be found to have committed election offences under Section 87 of the Elections Act. He also prayed for the costs of the Petition.

#### **ISSUES FOR DETERMINATION**

9. At the pre-trial stage the parties agreed to the following as the issues falling for determination:-
  1. ***Whether the 3<sup>rd</sup> Respondent was validly elected as a member of National Assembly for Laikipia North.***
  2. ***Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents managed the electoral process for Laikipia North in a free and fair manner.***
  3. ***Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to monitor and enforce election code of conduct for the Laikipia North.***
  4. ***Whether there was undue influence of voters by the 3<sup>rd</sup> Respondent during the campaign period.***
  5. ***Whether the Petitioner is entitled to the orders sought.***
  6. ***Who is entitled to the costs.***
10. A total of twenty nine (29) witnesses testified for the parties. I have considered their testimonies and I will refer to the same as I deal with each issue and complaint that falls for determination. I propose to deal with each complaint separately. However, before doing so, I propose to address the basis and/or principles on which those issues and therefore the complaints in the Petition as a whole will be decided.
11. Under Articles 81(e) and 86 of the Constitution, the elections carried out by the 1<sup>st</sup> Respondent must be free and fair, that is to say, by secret ballot, free from violence, intimidation, improper influence or corruption, transparent, impartial, neutral, efficient, accurate and accountable. The 1<sup>st</sup> Respondent must be seen to have carried out those elections in an independent manner. Further, whatever method used by the 1<sup>st</sup> Respondent, the same should be simple, accurate, verifiable, secure, accountable and transparent and above all the results of voting should be openly tabulated and promptly announced at the polling station.
12. In an election Petition, it is upon the Petitioner to prove that the above principles have been breached by establishing that the allegations of irregularities and malpractices were clearly committed. In **Raila Vs IEBC & 3 others (2013) eKLR**, the Supreme court held that:-

***“Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove***

***that there has been non-compliance with the laws but that such failure of compliance did affect the validity of the elections. It is on that basis that the Respondents bear the burden of proving the contrary. This emerged from a long standing common law approach in respect of alleged irregularity in the acts of public bodies, Omnia praesumuntur rite etsolemnitereseacta, all acts are presumed to be done rights and regularly. So the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the laws.”***  
***(Emphasis mine)***

Accordingly, the evidence must not only be firm but also credible.

13. In this regard, the burden and standard of proof in an election Petition is not akin to that pertains in an ordinary civil suit. In **Joho Vs Nyange & Anor (2008) 3KLR (EP) 500** at page 507, Maraga J held:-

***“Election petitions are no ordinary suits. Though they are disputes in rem fought between certain parties, election petitions are nonetheless disputes of great public importance Kibaki v Moi, Civil Appeal No.172 of 1999. This is because when elections are successfully challenged by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents’ social and economic activities. It is for these reasons that I concur with the election court’s decision on Wanguhu Ng’anga and Another Vs George Owiti and Another, Election Petition No.41 of 1993 that election petitions should not be taken lightly.”***

14. For this reason, an election court will not lightly overturn the results of an election. The Petitioner has to prove his allegations with credible evidence to a level slightly above a balance of probability but slightly below that of beyond reasonable doubt. However, on those malpractices that are of a criminal nature or which amount to electoral offences under the Elections Act, the same must be proved beyond reasonable doubt. Accordingly, the burden lies with the Petitioner to establish to the required standard of proof that the irregularities complained of were so substantial that they affected the results. Therefore, the election court has to consider if the results do properly reflect the will of the electorate. This was succinctly put in the case of **Morgan & others Vs Simpson & Anor (1974) 3 All ER 722 at 728** wherein it was stated that:-

***“(1) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not....***

***(2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. ...***

***(3) But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated.”***

These then are the principles under which this court is going to consider this Petition.

15. In this regard, after assessing the pleadings and evidence, I propose to combine issues agreed by the parties into three broad issues namely:-

- a. Whether the elections for the Laikipia Constituency for the National Assembly were conducted in accordance with the law.
  - b. Whether the 3<sup>rd</sup> Respondent is guilty of the malpractices complained of; and
  - c. Whether the Petitioner is entitled to the orders sought.
- a. **Was the election for the Laikipia Constituency for the National Assembly conducted in accordance with the law?**

16. This issue concerns the conduct of the 1<sup>st</sup> Respondent and all its officials in the conduct of the entire election. It addresses the issue of whether the conduct of the said personnel was in accordance with the provisions of the Constitution and the electoral law and if not to what extent the conduct complained of affected the results of the election. In this regard, I propose to address each complaint raised by the Petitioner separately.

**Recruitment of partisan and unqualified polling officials**

17. The Petitioner complained that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent recruited polling officials who were partisan and unqualified. That this fact rendered those officials incapable of presiding over free, fair and transparent elections. That although the Petitioner complained of this fact, no action was undertaken to remedy the situation. PW15, the Petitioner testified that relatives of the 3<sup>rd</sup> Respondent, namely Namusungu Lenawasai and Samuel Leorso were engaged in recruitment of ODM members during the registration of voters exercise, that he protested the deployment of Langas Lalaikipian, Abraham Lemanyichoi, Frelimo Lolkitekiu, Stephen Lolkitekiu and Phillip Lodungokiyok as polling officials as they had been involved in irregularities during the TNA primaries but they were nevertheless deployed. He told the court that whilst the qualifications of the polling officials were well spelt out and known, the 1<sup>st</sup> Respondent hired persons who were not qualified at all. He gave examples of such officials from the list of Presiding and Deputy Presiding Officers produced by the 1<sup>st</sup> Respondent. On cross examination, PW15 admitted that save for Abraham Lemanyichoi, he did not know where the other officials whom he had complained against were deployed. He also conceded that in the station in which Mr. Lemanyichoi was the Presiding Officer, he got two (2) votes whilst the 3<sup>rd</sup> Respondent got Zero (0) votes.
18. On his part, PW4, Emuria Lorere who was the K.N.C candidate for the National Assembly elections, testified that after recruitment, he realized that most of the polling officials were from one community and did not have the requisite qualifications. He complained to the 1<sup>st</sup> Respondent about this state of affairs. It was submitted for the Petitioner that in recruiting staff that were clan members of the 3<sup>rd</sup> Respondent, the 1<sup>st</sup> Respondent acted contrary to Articles 81 and 86 of the Constitution regarding impartiality.
19. On behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, the 2<sup>nd</sup> Respondent denied that the polling officials that he recruited were partisan or that they were unqualified. He told the court that he acted upon the complaint of the Petitioner about the five (5) officials by only retaining two and dropping the other three. That he deployed one of the retained officials to a remote polling station that had only 8 voters. He admitted that due to a deliberate policy on the part of the 1<sup>st</sup> Respondent to recruit local people, there were polling officials whom he recruited that did not meet the qualification criteria set by the 1<sup>st</sup> Respondent. Mr. Juma, learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent submitted that Regulations 3(6) and 6 of the **Election (General) Regulations, 2012** (hereinafter “**the Regulations**”) gave the 1<sup>st</sup> Respondent discretion on the appointment of poll officials, that the law does not set the education standards of such poll officials. That for this reason, the 1<sup>st</sup> Respondent had discretion to recruit such officials based on the education levels in a particular area or locality. The Ugandan case of **Shaban Sadiq Nkutu Vs Asuman Kyafi & Abnor HC-03-CV-EP-0008. 2006 (UR)** was relied on in support of the contention that the fact that poll officials are related to a contestant, does not invalidate an election.
20. On his part, the 3<sup>rd</sup> Respondent denied that the alleged polling officials were his relatives. Mr. Kanchory appearing with Mr. Ole Kamwaro submitted that the Petitioner had not shown that any of the polling officials had exhibited impartiality in the conduct of the election.
21. From the evidence on record, it is clear that the recruitment of polling officials was conducted by the 1<sup>st</sup> Respondent in a competitive manner. There is no evidence to suggest that any of the candidates or their agents or relatives was involved in such recruitment. The evidence shows that the recruitment was carried out in a cluster of constituencies and not handpicked. Although the Petitioner claimed that the recruitment of the polling officials was skewed in favour of the 3<sup>rd</sup> Respondent, he only identified one Abraham Lemanyichoi and Namusungu Lenawasae as a cousin and clan member, respectively of the 3<sup>rd</sup> Respondent. Although an election conducted by relatives of a candidate may be prima facie held to be biased, such bias must be proved. It must be shown

- that such officials acted in an impartial manner that was skewed in favour of the relative candidate. I am persuaded by the Ugandan authority of **Shaban Sadiq Maitu Vs Asuman Kyafu (supra)** wherein the court found that the fact that there being no law barring such employment a Petitioner must show that the conduct of such an official compromised the election. Such evidence lacking, a citizen cannot be denied an employment opportunity on the basis that his/her relative is vying for a position in the elections. In the present case, no specific act or conduct of the two poll officials or any other, that was shown to have been contrary to that required of them or that was skewed in favour of the 3<sup>rd</sup> Respondent. To the contrary the evidence shows that, where Mr. Lemanyichoi was a Presiding Officer, the 3<sup>rd</sup> Respondent got zero (0) votes whilst the Petitioner got 2 votes out of 4 votes cast. I am not satisfied that there was sufficient evidence to show that the 1<sup>st</sup> Respondent's officials were impartial in the conduct of the elections.
22. On qualification, it is clear that when the 1<sup>st</sup> Respondent advertised for the positions of Presiding Officers, Deputy Presiding Officers and polling clerks, the qualification for such positions was given. The Presiding and Deputy Presiding Officers were required to have degrees and/or diplomas. It emerged from the evidence that some of those recruited by the 1<sup>st</sup> Respondent for those positions did not hold the requisite qualifications. R2W1, Ishmael Hashim who was the Returning Officer testified that whilst the said qualifications was what was required, there were not enough people within the constituency who had such qualification. That because of the 1<sup>st</sup> Respondent's policy of recruiting polling officials from within the locality, the 1<sup>st</sup> Respondent had to do with the available human resource including the unqualified personnel.
23. I note from the electoral law and regulations that there is no set education standards for poll officials. Such standards are by the 1<sup>st</sup> Respondent and for best practice and to efficiently carry out elections. Whilst conduct of elections by a bunch of unqualified personnel is prone to simple mistakes and irregularities that can compromise an election, each case must be treated on its own peculiar circumstances. Under Article 10 of the Constitution, equity is one of the principles that is required in public conduct. I think it would be inequitable to insist that persons with degrees and diplomas be imported (I say so advisedly) into an area for purposes of conducting an election for reason of lack of local personnel with such qualification, yet there is no such legal requirement. If the issue of qualification was a legal requirement, it would be a different thing altogether. However, it is not. To my mind therefore, it has not been shown that the hiring of poll officials who had less qualification than that advertised by the 1<sup>st</sup> Respondent affected the conduct of the elections. I have perused the Form 35 supplied by the 1<sup>st</sup> Respondent and they seem to have been properly filled. There is no prima facie evidence of incompetence in the filling of the same.

### ***Collusion of poll officials with 3<sup>rd</sup> Respondent***

24. The Petitioner complained that the 1<sup>st</sup> Respondent permitted the presiding Officers to collude with the 3<sup>rd</sup> Respondent in ensuring that the electoral process was manipulated. In his evidence, PW15 told the court that on 1<sup>st</sup> March, 2013, 15 Presiding Officers attended a meeting called by the 3<sup>rd</sup> Respondent at Hotel Sixty Two Paradise, Nanyuki, wherein it was agreed how the elections would be manipulated. He further claimed that the Presiding Officers present were bribed and promised jobs by the 3<sup>rd</sup> Respondent. On cross examination, he stated that the polling officials conspired against him in favour of the 3<sup>rd</sup> Respondent. He admitted, however that it was not all officials who were against him, otherwise he would not have obtained the 4,000 votes that he secured. On his part, the 3<sup>rd</sup> Respondent denied any collusion between him and the poll officials. In their submissions, none of the parties addressed this issue.
25. This allegation in my view is one of the prohibited acts under Section 64 of the Elections Act. Due to its criminal nature, the same should be proved beyond reasonable doubt. I have considered the evidence of the parties. Although the Petitioner disclosed the date and place where the alleged collusion and bribery took place, he did not disclose the names of the concerned 15 poll officials. Further, he did not dispute the alibi put forward by the 3<sup>rd</sup> Respondent that on 1<sup>st</sup> March, 2013 he, the 3<sup>rd</sup> Respondent was in Nairobi. This allegation, in my view therefore was not established.

***Exclusion of party Agents from polling stations.***

26. The Petitioner complained that his party agents and those of other political parties were excluded from various polling stations whilst those belonging to the 3<sup>rd</sup> Respondent were untouched. He stated that his agents told him that they had been excluded from polling stations which prompted him to ask his Chief Agent, PW 14, Danilo Legei to intervene. He set out the affected polling stations as Kirimom LMD offices, Musul Nur School, Olmunishoi Nursery School, Narok Primary, Chumvi Primary, Lekiji Primary and Mugie primary. That this problem was widespread in Mukogodo East and West wards as well as Sosion Ward.
27. PW4, Emuria Lorere the KNC candidate told the court that he received several complaints from his agents that they had been turned away from their respective polling stations. He however admitted that none of his said Agents had filed any Affidavit. Other witnesses who testified on this complaint were PW6, PW7, PW10 and PW14. PW6 John Saitoti Leiyagu told the court that he was the Petitioner's agent at Mugie Primary School Polling station. That the Presiding Officer chased him out of the polling station the moment the latter arrived at that station. PW7, Francis Ltaipoma Nginduri told the court that he was the supervisor of TNA agents for Mukogodo ward. That two of his agents in Musul Nur Polling Station were chased away from the polling station. PW10, Namarias Lemuna told the court that she was a TNA agent for Narok Primary Polling station. That when she presented her documents to the Presiding Officer at 6.00 a.m., she was chased away from the station and remained outside the polling station the whole day. On cross examination, she told the court that she had given the Presiding Officer the appointment letter, that there was another TNA agent in the same station. Finally, PW14, Danilo Masiane Legei, told the court that he was the TNA Chief Agent and the overall overseer of the Agents in the entire constituency. That he was called by the party agents who told him that they had been denied entry into the polling stations. He gave the reason for such exclusion as lack of appointment letters. That in the stations that he regularized the position of his agents, they were allowed back by the poll officials.
28. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent called R1W1, R1W2, R1W3, R1W4 and R2W1 to testify on this issue. R1W1 Michael Leuran Loctole told the court that as the Presiding Officer for Olmunishoi Polling Station, he turned away those agents who did not have the relevant documents. R1W2, R1W3 and R1W4 who were also Presiding Officers for Mugie, Narok Primary and Kirimom LMD Polling Stations, respectively all testified that they chased away those agents who did not have the required documents, to wit, the appointment letter, the oath of secrecy and National Identity Card. That the agents in their polling stations signed the respective Forms 35 and there was no complaint whatsoever. This evidence was corroborated by R2W1, the Returning Officer.
29. From the evidence, it is clear that some if not the majority of the Petitioner's agents were locked out from the polling stations. The presence and participation of party or candidates agents in an election process is a crucial and fundamental step in ensuring that an election is free and fair. For an election to be said to be credible, transparent and verifiable, the participation of agents is crucial. Indeed their presence and signing of Statutory Form 35 is but a legal requirement under Regulation 62 of the Regulations.
30. Regulation 62(1) (c) and 62 (2) of the Regulations require that an agent be authorized to be able to be admitted into a polling station. Also the Presiding Officer is required to admit into the polling station not more than one (1) agent for each political party or candidate. R2W1 told the court that in order for an agent to be allowed into a polling station, one had to have an appointment letter, oath of secrecy and National identity Card. From the evidence on record, it is clear that the Petitioner's agents who were barred from their respective polling stations did not have the required documents. PW14, the TNA Chief Agent admitted that those agents belonging to his party that were prevented from their polling stations did not have an appointment letter. That upon supplying them with the same, they were allowed back into their polling stations. Indeed the Forms 35 of the Polling stations referred to by the Petitioner seem to have been signed by many Agents. I also note that even if there were complaints lodged regarding the barring of the Agents from the polling stations, the same was unnecessary as the poll officials were enforcing the law. In this regard, I am satisfied that there was no evidence to show that the prevention of the affected agents from the polling stations was premeditated, malicious or with ulterior motive. The explanation given by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in my view was satisfactory. In my view, the

Petitioner should blame his party for not having equipped its agents with all that was required of them. I dismiss the complaint.

### ***Skewed Voter Assistance***

31. The Petitioner complained that the majority of assisted voters had their ballot papers marked by the Presiding Officers and Deputy Presiding Officers in the absence of the party agents. Kabarak, Lekiji, Morijo, Kirimom, Rabai and Narok Primary School polling stations were singled out as some of the affected areas where this vice took place. Several witnesses testified on this.
32. PW10, Namarias Lemuna was a TNA agent for Narok polling station. She told the court that a voter by the name Mrs. Muleyo Lenkasurai complained to her that her ballot papers were marked for her and she did not know who she had voted for. PW12 Muleyo Lenkasurai was a voter at Narok Polling Station. She told the court that when she went to vote she asked for a TNA Agent. The Presiding Officer refused to allow a TNA Agent tick the ballot paper for her but did it himself without asking her who she wanted to vote for. PW13, Joyce Lenaiyara was a voter at Narok polling station. When she arrived at the polling room she did not see a TNA agent. She gave her six (6) ballot papers to a lady known as Namusungu, a Deputy Presiding Officer, who marked them for her without confirming from her the persons she wanted to vote for.
33. PW15, the Petitioner on his part told the court that when he went to vote at Kabarak Polling Station at 9.30 a.m., he found assisted voters complaining. That since his agents had been chased away from the polling stations, he did not know how assisted voters were handled by the poll officials. PW4, Emuria Lorere, the KNC Candidate also told the court that his agents told him that Presiding Officers marked ballot papers for assisted voters against their wishes.
34. It was submitted for the Petitioner that the polling officials assisted illiterate voters contrary to Regulation 72 (2) of the Regulations. That since the agents of the Petitioner were chased away from the room, the 1<sup>st</sup> Respondent colluded with the 3<sup>rd</sup> Respondent to the detriment of the other candidates.
35. R1W3, Paul Kariuki Kinyua, testified that he was the Presiding Officer for Narok Polling station. He explained the steps he was taking while assisting a voter. He told the court that it is either him or his Deputy who would assist the voters. That because of the polling room being small, he would only require the presence of two agents to witness the marking of the ballot paper at a time after the voter had mentioned the name of his/her preferred candidate. That he would also allow observers to be present when undertaking the exercise. R3W1, Ezekiel Sikukuu the ODM agent at Narok Polling Station corroborated the evidence of R1W3. He said that when PW13 entered the polling room, she wanted a person wearing the Uniform of TNA but was told by the Presiding Officer that politics was not allowed in the polling room.
36. It was submitted for the Respondents that the restriction as to the number of agents who would witness the process of voter assistance was in accordance with Regulation 63(1). That the process was not skewed in favour of any candidate.
37. Regulation 72(1) and (2) of the Regulations provides how the assisted voters are to vote. If an assisted voter does not come with someone to assist him/her, the Presiding Officer or his/her deputy shall assist such a voter. Candidates or their agents are expressly excluded from those persons who are to assist such a voter. From the evidence on record, PW12 and PW13 who were assisted voters came to the polling room and asked for TNA agents to assist them to vote. The presiding officer or the Deputy denied them that opportunity and in accordance with the law, assisted the voters themselves. The said voters however complained that their ballot papers were ticked without their being asked whom they wanted to vote for. This was denied by R1W3 who explained the procedure he was undertaking in respect of assisted voters which seemed to agree with Regulation 72 of the Regulations. His testimony was unshaken and was corroborated with that of R3W1. Whilst I note that PW 12 and PW13 were insisting on the TNA agents to assist them vote which was contrary to law, there was nothing to show that R1W3 or his deputy had any reason to mark the ballot papers without or before the said voters indicated their candidates of choice. This happened in the presence of all agents. Even if the agents of the Petitioner are alleged to have been absent, there was no evidence to show that the agents for the other parties were not present. No complaint was lodged at the polling station in respect of this complaint. In any event, the agents signed the Form 35 and did not record any complaint therein. I am not

satisfied that this complaint was proved to the required standard. It is however possible that the polling officials in some instances may have marked the ballot papers as is complained of by PW12 and PW13. However, I note that there was no evidence to show that what happened in Narok polling station was replicated in many other polling stations in the constituency.

***Failure to open the polling stations within the permitted time***

38. This concerns the Petitioner's complaint that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent did not open the polling stations within the time prescribed and permitting the polling stations to close long after the prescribed time. The Petitioner complained in his Petition that the polling officials failed to open the Polling stations on time thereby denying the old and vulnerable individuals the opportunity to vote and further that the late closure of polling stations enabled people other than those on the queue within the prescribed time to vote. However, the Petitioner did not call any evidence to support these allegations. The same remains unsubstantiated.

***Allowing unregistered voters to vote***

39. The Petitioner claimed that persons other than those appearing in the voter registers were allowed to vote in some polling centres. The Petitioner admitted that he never witnessed any such unregistered person voting. He relied on the Affidavit evidence of Mpaato Leyagu. In his Affidavit witness sworn on 16<sup>th</sup> March, 2013, Mpaato Leyagu claimed that he was a TNA agent at Rabal Nursery school polling station. That after 5 p.m. a group of about 300 people turned up and joined the queue. That these voters were not registered but they continued to vote up to 10 p.m. He never stated where they came from. No names were supplied. He never explained how he knew that they were not registered voters.

40. The said Mpaato Leyagu was not called to be cross examined on his said Affidavit so as to shed light on his allegation. In this regard, I will reiterate what I stated in the case of **Josiah Taraiya Kipelion Ole Kores Vs Dr. David Ole Nkediye & 3 others NRB EP No. 6 of 2013 (UR)** that:-

***"I find fault with the Petitioners argument that there is no rule in law or evidence that requires verbal evidence for an affidavit to be deemed credible. In my opinion, an election Petition is no ordinary suit and the facts deposed therein must be interrogated. Such interrogation can only be done by testing the evidence through cross examination of the deponent. Failure to attend court for the testing of such allegations in such a deposition makes the Affidavit to be just that, mere allegations. It is evidence without any probative value. (Emphasis added).***

41. In this regard, I consider the evidence of Mpaato Leyagu and the many affidavits on record of the witnesses who did not testify to be mere allegations as they did not attend court to have their testimony tested. This complaint was therefore not established.

42. The other witness who testified on this issue is PW6, John Saitoti Leyagu. He was a TNA agent at Mugie primary polling station. That he witnessed one Julius Lebeneiyo vote at the station yet he had been registered at Longeiwan in Samburu County. On cross-examination, he remained firm that he knew the said Julius Lebeneiyo as they were both herders at Mugie Ranch. This evidence was not seriously challenged. It was submitted for the Petitioner that due to the failure of BVR Kits anybody in possession of a National Identity Card could vote.

43. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the BVR kits failed countrywide forcing the 1<sup>st</sup> Respondent to revert to the manual register which was determinable and verifiable. That PW6 was not a credible witness and that if unregistered voters had voted the votes cast would have exceeded the registered voters.

44. Although PW6 looked firm under cross examination that he knew Julius Lebeneiyo to be a registered voter in Samburu County and not in Laikipia North, his testimony is to be considered with circumspect. This is because whilst he denied having signed Form 35 for his polling station, when he was shown the Form 35 which clearly showed that he had signed, he feigned failing eye sight! That he could not see the signature which was all there! Further, he alleged that he was outside the polling room when Julius Lebeneiyo voted. How could he tell with certainty that Mr.

Lebeneiyo had voted? Further, he did not tender evidence to show that Lebeneiyo was a registered voter in Samburu and not Laikipia North. In my view, the evidence tendered on this complaint did not meet the required standard.

***Failure to supply forms 35.***

45. The Petitioner complained that Forms 35 from all polling stations were not availed to him or his agents to enable him verify the results. PW5 and PW14 testified on behalf of the Petitioner. PW5, Stephen Mwangi Kabutu, told the court that he was the Chief Agent for KNC party. That all the Forms 35 were taken away and he never signed any Form 35. On his part PW14; Danil Masiane Legei testified that he was the TNA chief agent. He only complained that he had not seen Form 36 until he attended court to testify.
46. R1W3, Paul Kariuki Kinyua was the Presiding Officer for Narok primary polling station. He told the court that eight (8) agents signed his Form 35 and he gave them a copy to share.
47. Whilst the complaint in the Petition was failure to avail copies of Form 35 to the Petitioner or his agent, in his submissions he took issue with anomalies, alterations and cancellations in the Forms 35. That these anomalies were not countersigned and that some Forms 35 were not signed by the agents. To my mind, the issue of alterations and non-countersigned Forms 35 was altogether a new issue. It was never raised in the Petition. The only issue that arose during the hearing was the claim that some agents did not sign Form 35. That issue to my mind was properly explained by the Presiding Officers who testified before me that some agents left the polling stations before the counting of votes was concluded. In this regard, the claim that no Form 35s were supplied remains unsubstantiated.

***Failure to seal or keep under seal all ballot boxes.***

48. The Petitioner complained that the polling officials failed to seal or keep under seal all ballot boxes in accordance with the law. That this created an opportunity for ballot stuffing or interference with electoral outcome. There was no evidence that was led to substantiate this allegation. However, R3W1, Ishmael Hashim the Returning Officer did admit that at the tallying centre he ordered that the ballot box for Ngenia Secondary Stream II be re-opened and the vote be recounted. This was for the alleged reason that the Form 35 delivered by the Presiding Officer did not add up. That the total valid votes and the rejected votes did not equal the total cast votes. It was submitted for the Petitioner that Regulation 83 of the Regulations did not permit the Returning Officer to do what he did.
49. It was submitted for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent that the Course taken by the Returning Officer was proper under Regulations 83 (3). That it was intended to verify the results returned for the particular polling station. The 3<sup>rd</sup> Respondent submitted that the recounting favoured the Petitioner and he should not complain.
50. I have seen Regulation 83 of the Regulations. The same allows the Returning Officer to recount only the disputed votes. It does not allow him to re-open a sealed ballot box and recount the votes. He is to cancel the results of the election if the total cast votes exceed the number of the registered voters. Once a ballot box has been sealed by the Presiding Officer at the polling station no one has the right to re-open the same save by an order of the election court. If the results do not add up, that is an issue to be agreed upon if not, it be left for the court to resolve. In this regard, I agree with the Petitioner that this was a serious electoral irregularity on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. It does not matter that the recount favoured any other candidate than the eventual winner. It remains an irregularity in the conduct of the subject election.

***Failure to faithfully transmit results from polling stations to constituency and National Tallying Centres thereby permitting alterations and that votes cast exceeded the registered voters.***

51. PW14, Danilo Masiane Legei testified that the results were not relayed electronically but physically. That because the constituency is very expansive it took too long to receive the results from the remote areas. PW15, the Petitioner produced "RNL4" which was a document containing what was alleged to be the results of the Constituency election. He stated that the same was

- supplied by R2W1 the constituency Returning officer. However, the same did not have either a signature or any stamp of the 1<sup>st</sup> Respondent. The results therein did not compare well with the results in Form 36. He claimed that the register used by the 1<sup>st</sup> Respondent was not the same as that gazetted in January, 2013. He testified that he never expected the results as contained in “RNL4” to be added or to be different from Form 36. He further testified that the results took too long to reach the tallying centre. Others reached as late as the afternoon of 5<sup>th</sup> March, 2013 which was suspicious. That when the results were finally announced, the total tallied votes was 27,792 which exceeded the total registered voters which was 27,562 for the constituency. He gave examples of polling stations where there was excess voters to be Kirimon LMD, Sieku Primary, Ngenia Primary. That out of all the 100 polling stations in the Constituency only 11 polling stations had figures that agreed with the 1<sup>st</sup> Respondents Gazetted figures of January, 2013.
52. R2W1 testified that when he announced the results at the tallying centre from every polling station, no one complained. That the results captured in Form 36 were as contained in the Forms 35 that were submitted by the Presiding Officers. That he certified the results in Form 36 to be true. He disclaimed exhibit “RNL4” as it never bore his signature. According to him, he only generated one (1) Form 36 for the Constituency. That he delivered the results to Nairobi on 6<sup>th</sup> March, 2013 and the results considered the following day. According to him, there was no delay in transmitting the results to either the Constituency or National Tallying Centres. That he only received the Petitioner’s complaint 10 days after he had declared the results.
53. The parties did not submit on these two (2) complaints. Having listened to the evidence, I am not satisfied that there was any credible evidence to show that the delay in transmitting the results from the polling stations to the tallying centre was calculated to commit any mischief with the results. There was evidence from PW14 and R2W1 to show that the constituency was vast and that since the BVR kit collapsed countrywide, the results had to be physically delivered from the far flung polling stations to Dol Dol Tallying Centre. As regards delivery of the results to Nairobi, it was not contested that R2W1 delivered the results on 6<sup>th</sup> March, 2013. Since the results were declared at Dol Dol Tallying Centre on 5<sup>th</sup> March, 2013, delivery of the same to Bomas one day thereafter, in my view, was not a delay. No evidence was led to show that the results declared at the Dol Dol constituency tallying centre differed with what the agents had recorded at the polling stations.
54. On the votes cast exceeding number of registered voters, the Petitioner testified that he had a register supplied by the 1<sup>st</sup> Respondent. That there were three polling stations namely, Ngenia primary, LMD offices and Sieku Primary where the number of voters exceeded the number of registered voters. That the total declared voters exceeded the number of registered voters as gazetted in January, 2013. That he had sought the scrutiny of voter register in his petition. R2W1 denied this allegation and maintained that the figures in Form 36 were the correct ones.
55. I have seen Exhibit “RNL4” produced by the Petitioner. The results therein differ substantially with the results declared by the 2<sup>nd</sup> Respondent in Form 36 produced in court. I also note that the Petitioner did pray in the Petition for scrutiny of the voter registers for the constituency. However, neither at the pretrial stage nor after trial did the Petitioner apply for scrutiny. Under Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013, scrutiny is to be undertaken upon an application by a party at any stage of the proceedings. This can only be done before final judgment. It cannot be undertaken as part of judgment. The Petitioner having failed to apply for scrutiny none was undertaken and the court cannot order for the same at this stage. As regards the difference between the voter register used by the 1<sup>st</sup> Respondent on the 4<sup>th</sup> March, 2013 with the one gazetted in January, 2013, the latter was not produced in evidence for a need to arise to call for the 1<sup>st</sup> Respondent to produce the one used during the election of 4<sup>th</sup> March, 2013. In this regard, I am not satisfied that there was any credible evidence to support the claim that the number of voters cast exceeded the number of registered voters.

**b. Whether the 3<sup>rd</sup> Respondent is guilty of the malpractices complained of**

56. The Petitioner complained that the return of the 3<sup>rd</sup> Respondent as the duly elected member of the National Assembly for Laikipia North was procured through breaches of the Elections Act, 2011.

In particular, the Petitioner contended that the 3<sup>rd</sup> Respondent committed several illegal acts during and after the official campaign period including on the 4<sup>th</sup> March, 2013. The allegations include; the 3<sup>rd</sup> Respondent endearing himself to the voters through the repair of the community water dam in Pois Robo community within Segera Ward, the purchasing of 50 plastic chairs for the members of Ngenia Witeithie Women Group and 2 rolls of fencing wire for Ngenia Dispensary. Accordingly, the Petitioner pleaded that as a consequence of these acts, the conduct of the elections was not free or fair. I shall deal with each particular malpractice individually.

### ***Repair of Pois Robo Community Dam***

57. On the repair of Pois Robo Community Dam, the Petitioner called one witness to testify, namely PW1, Jackson Parasian Dokhole. According to the witness, during the month of December 2012, the main community Dam in Segera Ward was destroyed by flash floods prompting the local residents to seek assistance from various quarters to repair the damaged dam. That when the assistance sought from the Provincial Administration, CDF and Olpejeta was not forthcoming, the community decided to contribute one lamb each to raise funds for the dam repair. That it was at this time that one Mukta Lenamaita, who was an ODM aspirant for the seat of County Representative for Segara Ward, informed the locals that the 3<sup>rd</sup> Respondent had offered to repair the dam. That subsequently, the 3<sup>rd</sup> Respondent repaired the dam and during the commissioning of the same in January 2013, the 3<sup>rd</sup> Respondent asked the voters of Segera ward to vote for him. PW1 further testified that in February, 2013, the 3<sup>rd</sup> Respondent held another political rally in Segara ward where he requested the electorate to vote for him on the ground that he had fixed the dam.
58. The Petitioner also testified in support of this claim. He told the court that in December, 2012, the residents of Segera ward were considering ways in which they could repair the Pois Robo dam which had been washed away by floods. That the Dam was repaired towards the end of December, 2012 and was commissioned in the early months of 2013. He recounted that during the commissioning of the said dam, there was a huge celebration attended by the 3<sup>rd</sup> Respondent and his entourage. He also recalled that there was a further celebration at the same place towards the end of February, 2013.
59. It was submitted for the Petitioner that it was not a contested fact that shortage of water was a rampant problem in Laikipia North Constituency and that the repair of the dam by the 3<sup>rd</sup> Respondent was a campaign gimmick to solicit votes from the electorate. It was further submitted that the act of influencing voters by giving gifts in law constitutes undue influence under Section 63 of the Act and that the evidence clearly showed that the 3<sup>rd</sup> Respondent was involved in the repair of the community dam. According to the Petitioner, the allegation that an NGO associated with the 3<sup>rd</sup> Respondent carried out the repair did not make a difference as the act of repairing the dam in an election context bore a different connotation and had the effect of nullifying the election.
60. In response to the allegations, the 3<sup>rd</sup> Respondent denied the allegation that he repaired the Pois Robo dam to induce the Segera community to vote for him. He testified that before becoming a Member of the National Assembly for Laikipia North, he had worked with a Non-Governmental Organization (NGO) called Ndugu Zangu Christain Community Charitable Trust which he co-founded with an Italian Missionary called Banzelli Luigi in 1996. Among the activities undertaken by the Trust was the provision of health facilities, water projects for the community, advocacy and conflict resolution. He told the court that the Pois Robo community dam was repaired in September, 2012, which was outside the official campaign period, by the said charitable trust. He further told the court that he was invited by the organization to officiate the opening of the dam after it was repaired by the organization.
61. Mr. Kanchory submitted that from the evidence, it was clear that the standard of proof for proving undue influence had not been met by the Petitioner. That it was the 3<sup>rd</sup> Respondent's testimony in Court that the Dam was repaired by the NGO, Ndugu Zangu Christian Community

- Charitable Trust as part of its core objectives and corporate social responsibility. It was further submitted that the same was not done on his behalf and/or at any rate in exchange for votes. That the repair of the dam had no influence on the voters as it was evident from the unsuccessful bid of **Mukta Lenamaita** the ODM candidate for Segera ward who both PW1 and the Petitioner stated was a close ally and campaigner of the 3<sup>rd</sup> Respondent and who PW1 claims was the one who informed the community of the offer by the 3<sup>rd</sup> Respondent to carry out the repair.
62. I have considered the evidence and submissions on the issue. Voters are supposed to exercise the right to vote freely hence **Section 63** of the **Elections Act, 2011** makes it an offence to induce or compel a person to vote in a particular way. When one pleads undue influence, it is important to provide proof to the acceptable standard that there was inducement or compulsion of the elector to vote in a certain way. The crux of the Petitioner's claim is that the 3<sup>rd</sup> Respondent unduly influenced the electorate in Segera Ward when he repaired the community dam and thereby impeded and prevented free exercise of the franchise by voters in Segera Ward.
63. From the evidence on record and having listened to the testimony of witnesses, I have no doubt in my mind that the Dam was repaired in December 2012 as the evidence of PW1 and the Petitioner as to when the repairs took place was unshaken. The point of departure was on who carried out the repairs and the motive. According to the 3<sup>rd</sup> Respondent, the project was undertaken by an NGO that he had co-founded with some Italian Missionary in 1996. That all he did was to officiate the commissioning of the said dam at the invitation of that NGO which was known to carry out water projects within communities.
64. It is clear that, the 3<sup>rd</sup> Respondent was a Managing trustee of the trust before venturing into elective politics. In my view, the mere fact that a candidate in an election carries on with development projects which may have been started prior to the electioneering period does not necessarily amount to undue influence unless the said actions are so intertwined with the elections that it is not possible to separate the two events. In this case, the evidence is that the Ndugu Zangu Christian Community Charitable Trust was founded in the year 1996 and was carrying out activities long before the electioneering period. There was no evidence to contradict the testimony of the 3<sup>rd</sup> Respondent that it was the Ndugu Zangu Trust that was involved in the repair of the Dam. The fact that the 3<sup>rd</sup> Respondent had been involved with that NGO cannot by itself be reason to believe that the activities undertaken by the NGO were his. Acts that go towards assisting the community that are not so withdrawn from what one ordinarily has done before the campaign period, should not be so readily read to be undue influence. It must be shown that such a scenario, though suspicious and while wavering on the brink of undue influence, must have been undertaken with the intention of influencing the voters to vote in a particular way. In the case before me, it was not denied that the repair of the Dam was in December 2012, before the official campaign period. There was no evidence that it was undertaken by the 3<sup>rd</sup> Respondent and for the purposes of influencing the voters to vote in a particular manner. This allegation was therefore not proved to the required standard.

### ***Purchase of chairs and barbed wire***

65. The Petitioner complained that the 3<sup>rd</sup> Respondent endeared himself to Ngenia residents by donating 50 plastic chairs to the Ngenia Witeithie Women Group and two (2) rolls of barbed wire for fencing the Ngenia Dispensary during the official campaign period contrary to law. The Petitioner, PW2 Rachel Wangu Karuri and PW3 Jacinta Muthoni Maina, testified in respect of this allegation.
66. PW2 testified that she was the Co-ordinator of woman groups in Ngenia- Gituge area. She deposed in her affidavit sworn on 21<sup>st</sup> March, 2013, that on 21<sup>st</sup> February 2013, the 3<sup>rd</sup> Respondent drove to Ngenia- Gituge area in Mukogodo East Ward with 100 plastic chairs and fencing materials packed in a green land cruiser registration No. KBA 772A accompanied by a green Land Rover KBG 414K. On cross examination she told the court that she did not know which vehicles the 3<sup>rd</sup> respondents had come with. She testified that 50 plastic chairs were given to two (2) women groups each namely, Ngenia Weteithie and Ndeithia Nguteithie, respectively. That on the material day, the 3<sup>rd</sup> Respondent addressed the residents of Gituge and asked the

- women to take the 50 seats donated by him and sit on them. She also stated that the 3<sup>rd</sup> Respondent asked the electorate to vote for him as he only required 100 votes from the area. She told the court that one Paul Ngobia, R3W2, also attended the rally and urged the electorate in Gituge to vote for the 3<sup>rd</sup> Respondent. She concluded that the 3<sup>rd</sup> Respondent garnered 127 votes from that area.
67. PW3 on the other hand testified that she was the Chairlady of Ngenia Witeithie Women Group and also the Treasurer of the Ngenia Dispensary. She told the court that on 16<sup>th</sup> February, 2013, the women group had a harambee. That at this harambee, the 3<sup>rd</sup> Respondent approached the women group and asked them if they had a problem of which they requested him to purchase them 200 plastic chairs and fence the Ngenia Dispensary. According to the witness, the 3<sup>rd</sup> Respondent decided to purchase 100 chairs, 50 for the Ngenia Witeithie Women Group and the other 50 for the women group at Gituge. That the 3<sup>rd</sup> Respondent also promised two (2) rolls of barbed wire and promised to return on 21/02/2013. The witness further testified that on 21/02/2013, the 3<sup>rd</sup> Respondent returned to Ngenia and gave her women group 50 chairs and two (2) rolls of barbed wire as promised before proceeding to Gituge. That this was the first time he met Mr. Paul Ngobia, R3W2, and that the first time he talked to him was when the latter called her to Nanyuki in May, 2013.
68. The Petitioner in his testimony told the court that there was clear evidence of undue influence in Ngenia area as the 3<sup>rd</sup> Respondent was able to secure 127 votes in a predominantly TNA zone due to the purchase of the 50 plastic chairs to Ngenia Witeithie Women group and the two (2) rolls of barbed wire for the Ngenia Dispensary.
69. It was submitted for the Petitioner that it was evident from the evidence by PW2 and PW3, that the 3<sup>rd</sup> Respondent gave the women group 100 chairs and also purchased two rolls of barbed wire to the dispensary and asked the residents of the Ngenia area to vote for him. According to Counsel, this was bribery and undue influence on the part of the 3<sup>rd</sup> Respondent. It was further submitted that though R3W2, Paul Ngobia claimed responsibility for the purchase of the items, it was clear that he was an agent of the 3<sup>rd</sup> Respondent and the effect of the malpractice was therefore the same in law.
70. The 3<sup>rd</sup> Respondent however denied the Petitioner's allegations. He deponed that at no one time did he or his agents purchase any chairs or fencing wire for the Ngenia Women groups or residents. He called one witness R3W2, Paul Ngobia in support of his case.
71. R3W2 testified that he was the one who purchased and delivered the 50 chairs and 2 rolls of barbed wire to Ngenia Witeithie Group on 16<sup>th</sup> February, 2013. He testified that there were no other 50 chairs delivered to Gituge for another women group as alleged by PW2 and PW3. He was firm that it was only 50 chairs for Ngenia Witeithie Women Group that he purchased on 15<sup>th</sup> February, 2013 and delivered them to the women group on 16<sup>th</sup> February, 2013, when the group was holding a function known as "Magetha." He told the court that he came to know about the "Magetha" through church announcements and through an invitation by the group in December, 2012. That he delivered the 50 chairs and roll of barbed wire to the Ngenia Witeithie Group in his personal capacity and not at the behest of the 3<sup>rd</sup> Respondent. He confirmed that he had met PW3 before 16<sup>th</sup> February, 2013 and that he was a local ODM operative for 10 years whilst she was a women leader. That he was well known to her and had met her on several occasions one of them by coincidence in Nanyuki Town when he asked her about the allegations in her affidavit of which she denied. Lastly, the witness told the court that the 3<sup>rd</sup> Respondent passed in Ngenia on 16<sup>th</sup> February 2013, while on his way to a rally at Ethi Trading Centre. He testified that after attending the Ngenia Witeithie function, he proceeded to Ethi Trading Centre for a political rally there.
72. The 3<sup>rd</sup> Respondent also testified that he had requested the people in Ngenia to vote for him on 16<sup>th</sup> February 2013. He admitted that he knew R3W2 because he was his supporter though not personally involved in his campaign. He denied that he knew, PW3 as alleged.
73. Counsel for the 3<sup>rd</sup> Respondent submitted that the allegation that the 3<sup>rd</sup> Respondent bought chairs and barbed wire for women and the dispensary at Ngenia was effectively rebutted by R3W2 who stated both in his Affidavit and oral testimony that he was the one who bought the chairs and barbed wire and that he did not do this on behalf of the 3<sup>rd</sup> Respondent or to induce voters.

Further, it was submitted that R3W2 also stated that the chairs were 50 and not 100 as claimed and it would appear that the allegation of 100 chairs was tailor-made to fit the 127 votes garnered by the 3rd Respondent in Ngenia Secondary Polling Station.

74. I have considered the rival arguments by the parties. As stated earlier, voters are supposed to exercise the right to vote freely. Voter bribery and undue influence are grave electoral offences and recognized under Section 63 and 64 of the Election Act. The standard of proof required in such an instance is slightly higher than that of ordinary allegation in an Election Petition. An act of bribery and undue influence should be proved beyond reasonable doubt. They have grave consequences when proved. This is so because proof of a single act of bribery or undue influence is not only sufficient to nullify an election but has other criminal consequences. Given the evidence adduced by the Petitioner, was there undue influence or voter bribery on the part of 3<sup>rd</sup> Respondent in Ngenia and Gituge as alleged by the Petitioner?
75. PW2 and PW3 testified that there was the purchase of the 100 plastic chairs to two women groups in Ngenia by the 3<sup>rd</sup> Respondent. The said chairs were allegedly presented to both groups on 21<sup>st</sup> February 2013. However, this evidence was contradicted by R3W2, Paul Ngobia who testified that he purchased 50 chairs on 15<sup>th</sup> February, 2013 and presented them together with two (2) rolls of barbed wire to Ngenia Witeithie Group on 16<sup>th</sup> February, 2013. His evidence on the date of presentation and the number of chairs involved was not seriously challenged. He produced receipts of purchase which was also not challenged. Between the evidence of R3W2 and PW2 and PW3, the evidence of R3W2 looked credible. The evidence of PW2 and PW3 is suspect. I say so for the following reasons.
76. With respect to the evidence of PW2 on the 50 plastic chairs offered to the Women's Group in Gituge, I find that the witness contradicted several averments in her affidavit during her testimony. The Witness in paragraph 2 of her affidavit stated as follows;

***“2. THAT on 21<sup>st</sup> February 2013.....the ODM parliamentary aspirant for Laikipia North drove to Ngenia/gituge areas in Mugogodo East ward with 100 plastic chairs and fencing material packed in a green land cruiser registration No. KBA 772A accompanied by a green Land Rover KBG 414K”***

77. During cross examination, she admitted that she did not know the vehicles that the 3<sup>rd</sup> Respondent used to carry the 100 chairs she talked about in the affidavit. She only testified about 50 chairs given to women in Gituge as opposed to the 100 chairs deposed to in her Affidavit.
78. As regards PW3, she talked of the 3<sup>rd</sup> Respondent promising 100 seats during a function on 16<sup>th</sup> February, 2013. That she had never before met R3W2, Paul Ngobia before 21<sup>st</sup> February, 2013 and that she only spoke to him for the first time when they met in Nanyuki. The question that arises is how did she come to meet in Nanyuki this person she had allegedly only seen once on 21<sup>st</sup> February, 2013? If R3W2 had been a political operative in the local politics for 10 years and she was a women group leader, is it possible that PW3 did not know or had not met him before the alleged 21<sup>st</sup> February, 2013? Simply put, her story was not convincing.
79. One other thing that convince the court to disbelieve PW2 and PW3 is that in the Petition, the allegation was about 50 plastic chairs being donated to Ngenia Witeithie Women Group. How then do these increase to 100 plastic chairs for both Ngenia Witeithie and Getuge women groups in the evidence? I am inclined to believe that 50 plastic chairs and 2 rolls of barbed wire were donated on 16<sup>th</sup> February, 2013 to Ngenia Witeithie women group. The same were purchased by the personal funds of R3W2. There was no evidence to show that the same was done with the tacit approval of or on behalf of the 3<sup>rd</sup> Respondent. The evidence of R3W2 that he was the local chief campaigner for all Cord candidates starting from the President all down to the County Representative was unshaken. His actions cannot be attributed to the 3<sup>rd</sup> Respondent. For the foregoing reasons, I reject this allegation.
80. As regards the allegations of bribery of voters in various polling stations through the agents of the 3<sup>rd</sup> Respondent and failure to enforce the Electoral Code of conduct, no evidence was tendered to prove this fact. The particulars of the alleged agents, the involved polling stations and the time of such bribery was never disclosed. It remains an unsubstantiated claim.

81.From the foregoing, I find that the Petitioner has established that his agents were excluded from various polling stations for the better part of the election day. This was however properly explained by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. He has also proved that the 2<sup>nd</sup> Respondent committed a serious irregularity by ordering the re-opening of the Ballot Boxes for Ngenia Secondary Stream II. He also established that some polling officials recruited did not have the requisite qualifications. The rest of the allegations were not established by any credible evidence. The evidence tendered did not meet the criteria required in an election petition.

82.From the totality of the foregoing, I am not satisfied that the irregularities complained of was so substantial as to have affected the results of the election. The Petitioner failed to prove his case to the required standard. I would therefore answer the first issue in this Petition in the positive whilst I answer the second issue in the negative and accordingly dismiss the Petition with costs. The costs are capped at Kshs.2.5million. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent will be entitled to a maximum of Kshs.1million and the 3<sup>rd</sup> Respondent to a maximum of Kshs.1.5million.

**DATED and DELIVERED** at Nairobi this **4<sup>th</sup>** day of **October, 2013**.

.....

**A. MABEYA**

**JUDGE**

***In the presence of:-***

*Hassan court clerk*

*Ms. Mutua holding brief for Mr. Issa for Petitioner*

*Mr. Juma for 1<sup>st</sup> and 2<sup>nd</sup> Respondent*

*Mr. Saitabao for 3<sup>rd</sup> Respondent*