



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI
MILIMANI COMMERCIAL COURTS
ELECTION PETITION NO: EP 7 OF 2013
IN THE MATTER OF ARTICLE 105 OF THE CONSTITUTION OF KENYA 2010
IN THE MATTER OF THE ELECTIONS ACT NO.24 OF 2011
AND
IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES, 2013
AND
IN THE MATTER OF THE COUNTY REPRESENTATIVE FOR NAIROBI SOUTH WARD

ESTHER WAITHIRA CHEGE.....PETITIONER

VERSUS

MANOAH KAREGA MBOKU.....1ST RESPONDENT

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....2ND RESPONDENT

PETER K. MUIGAI3RD RESPONDENT

JUDGMENT

Esther Waithira Chege, the Petitioner herein and Manoah Karega Mboku, the 1st Respondent were candidates alongside eight others for the elective post of County Assembly Representative for Nairobi South Ward, in Starehe Constituency, Nairobi County in the Republic of Kenya in the general election held on 04/03/2013. Esther vied for the seat on a Narc Kenya party ticket while Manoah vied on ODM party ticket. The election was conducted by the Independent Electoral and Boundaries Commission (IEBC), the 2nd Respondent and whose official as Returning Officer for Starehe Constituency was Peter K. Muigai, the 3rd Respondent.

There were six Polling stations in the ward namely Plainsview primary school, Mariakani primary school,

Our Lady of Mercy primary school, Our Lady of Mercy secondary school, Nairobi South primary school and Highway secondary school. Each polling station was divided into streams each headed by a presiding officer making a total of 39 streams where elections were conducted.

Upon receiving all the results from Presiding Officers from the streams and tallying them at the tallying center at Jamhuri High School, the Returning Officer as mandated by law declared the results for all the candidates on 05/03/2013. The results were that Manoah had garnered the highest number of votes being 6,971 votes as against the other candidates. Esther was declared to have garnered 6,447 votes being the second highest to that of Manoah. Manoah was therefore declared by the Returning Officer the duly elected County Assembly Representative for Nairobi South Ward. Esther was not satisfied with the results as declared. She contended that according to her own tally, compiled from results she received from the polling stations, she had garnered 6,812 votes and Manoah had garnered 6,771 votes. According to her therefore, she had the highest number of votes and ought to have been declared as the duly elected ward representative. Otherwise, she also pleads that there were malpractices in the conduct of the elections on the part of officers of the 2nd Respondent and the 3rd Respondent in collusion with the 1st Respondent thereby making the entire election process in the ward unfair and therefore the same should be nullified and a fresh election held. She thus filed this petition dated 02/04/2013 to challenge the results as announced by the Returning Officer as agent of the IEBC declaring Manoah as winner of the election. As a result, she contents that no true and complete election took place for the ward in so far as the same purported to declare the 1st Respondent as the winner and no true return of its vote has taken place. She makes the following prayers in the petition:

1. Scrutiny, recount and examination of the tallies of the votes for the affected streams namely:
 - a. Plainsview primary school, stream 8;
 - b. Highway secondary school, stream 1;
 - c. Nairobi South primary school, stream 5; and
 - d. Our Lady of Mercy primary school, stream 1.
2. That it be determined that the 1st Respondent was not validly elected and thus his election and gazette be declared unconstitutional, illegal, null and void *ab initio* and quashed;
3. That it be determined that the Petitioner was validly elected for the said seat and the IEBC and the Returning Officer be directed to issue the certificate to her and gazette her accordingly; or
4. In the alternative it be determined that the elections in the said ward for the County Assembly Representative was null and void and an order to issue for a fresh election to be held.

The petition is supported by the witness statement of the Petitioner Esther Waithira Chege (PW1) in the form of an affidavit sworn on 02/04/2013 plus the annexures thereto, witness statements also in the form of affidavits sworn by five witnesses and the accompanying annexures. The Petitioner testified at the hearing. The witnesses, four of whom testified at the hearing are Eva Wairimu (PW2) who was the Petitioner's chief agent, Johnson Ithoka Mangeli (PW3), an agent for Chama Cha Uzalendo (CCU) party at Nairobi South primary school stream 5, Stephen Otieno Mdunga (PW4) the Petitioner's Narc Kenya party agent in Nairobi South primary school stream 5, Janekelvin Mutio Kitonyi (PW5) the chief agent for CCU party and Patrick Ogeto Mong'are a CCU party agent in Highway secondary school stream 1. Patrick was said to be unavailable to testify and the Petitioner did away with his evidence.

The 1st Respondent filed his response to the petition dated 18/04/2013 supported by his witness statement and six other witness statements and annexures. He averred that the election was free and fair and in accordance with the law and that although there were apparent errors which also affected him, if corrected they would not affect the final result. He was opposed to the scrutiny and recount of the votes. He prayed that the petition be dismissed with costs and he be declared the duly elected County Ward representative for Nairobi South Ward. He testified at the hearing Manoah Karega Mboku (DW 1) as well as his witnesses. Samuel Okoth Rangwel (DW 2) was the ODM party agent in Mariakani primary school stream 4, Kisito Nyanjong (DW 3) ODM party agent at Highway secondary school stream 5, Erick Omondi Kungu (DW 4) ODM party agent at Our Lady of Mercy primary school stream 1, Harriet Savai (DW 5) UDF party agent at Plainsview primary school stream 5, Christine Wanjiku Waciku (DW 6) TNA party agent at Mariakani primary school stream 6 and Jashon Ouma Abwanda (DW 7) who was the 1st

Respondent's chief agent.

The 2nd and 3rd Respondents filed a common response to the petition dated 16/04/2013 and aver that the election was in accordance with the law, free, fair and transparent. They denied all the allegations of impropriety leveled against them by the Petitioner. Their response is supported by the replying affidavit of Peter K. Muigai, the 3rd Respondent who also testified at the hearing (DW 8) as well as the further affidavits and annexures thereto of other witnesses who also testified at the hearing. The witnesses were the Presiding Officers in various streams namely Julius Gichine Kamau (DW 9), for Highway secondary school stream 1, Robert Ochieng Otieno (DW 10) for Plainsview primary school stream 8 and Brian Odiwuory Ong'ang'o (DW 11) for Our Lady of Mercy primary school stream 1. The 2nd Respondent also filed copies of forms 35 and 36 for the Ward in court as required by law on 15/04/2013.

Where not expressly stated in this judgment, the laws referred to and in their shortened formats are the Constitution of Kenya, 2010 (the Constitution), The Elections Act, 2011 (the Act), the Elections (General Regulations) 2012, (the Regulations) and the Elections (Parliamentary and County Elections) Petition Rules, 2013 (the Rules). I have also in some instances herein referred to the IEBC for convenience and ease of expression. Where this is the case, it means both the 2nd and 3rd Respondents.

Learned counsels for the parties agreed and formulated the following issues for the court's determination as follows:

1. Whether the 1st Respondents votes were understated by 330 votes.
2. Whether the discrepancies in the tallying of votes were material to affect the results of the election.
3. Whether there were any election offences committed on 04/03/2013 at Nairobi South Ward.
4. Whether credible and valid elections were carried out by the 2nd and 3rd Respondents.
5. Was the 1st Respondent validly elected?
6. Whether the Petitioner is entitled to the reliefs sought in the petition.
7. Who is entitled to costs?

I have rearranged the issues to conform to the way I will proceed to consider and determine them. My determination though will not be restricted to the above issues. I will consider and determine any other issue as arises from the petition and the evidence tendered.

Learned counsels for the parties made both written and oral submissions on the petition and availed authorities for the court's consideration. The oral submissions were made in court on 05/07/2013.

I have read the pleadings, the supporting affidavits and witness statements and the exhibits attached, heard the witness testimonies and the submissions by learned counsels together with the accompanying authorities. I consider that this petition is based on two broad grounds that are that are interrelated. The first relates to the tabulation, counting and tallying of the votes cast in the election which according to the Petitioner was faulty and therefore caused an erroneous result to be declared in favour of the 1st Respondent as winner thereby denying her a deserved win. Her contention is that if proper counting and tallying was done, she would have been found to have won the election and declared as such. Therefore, she says, this court upon considering the evidence supporting the petition should find in her favour, cancel the declaration of the 1st Respondent and declare her the winner.

The second broad ground which should be in the alternative to the first is that the processes of the elections in respect of the county ward representative were so flawed that it could not be said that a free, fair, transparent and accountable election was had as would therefrom be determined a winner and so the whole process should be annulled and fresh elections ordered for by the court.

These broad grounds can be broken into specific grounds as pleaded by the Petitioner in the petition and proceed to consider each taking into account the complaint raised in the petition, the supporting evidence, the response thereto by the Respondents, the arguments for or against the complaint by learned counsels

and the court's consideration and determination on the issue. Sometimes, with respect to arguments raised by counsels I may not lay them down as elaborately as they did in submissions but I must say that having read and listened to them, my consideration of the issue takes into account those arguments without specifically saying so.

The burden of proof of any complaint raised by the complainant lies upon her. The standard of proof of any of the complaints is as stated in the case of **Odinga & 5 Others v Independent Electoral & Boundaries Commission & 4 Others [2013] KLR-SCK** where the Supreme Court held *inter alia* that where a party alleges non-conformity with electoral law, the petitioner must not only prove that there had been non-compliance with the law, but that such failure of compliance had affected the validity of the elections and the threshold of proof should in principle be above the balance of probability though not as high as beyond reasonable doubt.

On the first broad question the specific issues raised by the Petition are:

- I. Discrepancies in the results announced at the streams and those entered in the form 35 and eventually form 36 with respect to the Petitioner which deprived her of votes and increased those of the 1st Respondent. According to the Petitioner her own tally returned the result that she had garnered 6,812 votes and the 1st Respondent 6,771 votes and therefore she was the winner. Her complaint over this is captured in paragraph 15 of the petition and supported by her sworn statement at paragraph 25 and her testimony. Her complaint here is specific to and the evidence was that the results for the 3 streams entered by the presiding officers in the respective forms 35 and eventually transposed into form 36 at the tally center were at variance with those announced. Her complaint is thus as follows:
 - a. Highway secondary school stream 1 Petitioner's final tally was entered as 50 votes instead of 225. She contents she was denied 175 votes here.
 - b. Nairobi South primary school, stream 5, Petitioner's final tally was entered as 9 votes instead of 199. She contents she was denied 190 votes here.
 - c. Our Lady of Mercy primary school, stream 1, 1st Respondent's final tally was entered as 141 votes instead of 41 votes. She contents the 1st Respondent was unjustifiably added 100 votes here.

The Petitioner's evidence on the complaint at Highway secondary school stream 1 was to be given by Patrick Ogeto who did not turn up to testify. She had no other evidence. The evidence of Janekelvin (PW5), the Petitioner's other witness was however that in Highway secondary school stream 1 the Petitioner had 300 votes. Apparently, Janekelvin was not present during announcement of results in that stream. She said that she got them from one of her party's (CCU) agents Patrick Mong'are. Mong'are was the Petitioner's witness who could not be traced to testify. Janekelvin's evidence is at variance with that of the Petitioner on how many votes she garnered in that stream. In cross-examination by Mr. Oriaro for the 1st Respondent, the Petitioner said she was not relying on Janekelvin's evidence but on what she was told by her own agents and so her votes were 225. Janekelvin's evidence in that stream is of no value, first for being rejected by the Petitioner and second for being hearsay and therefore unverifiable.

Nairobi South primary school stream 5, the Petitioner availed Stephen Otieno Mdunga (PW 3) who testified that he and other agents at his stream were made to sign the form 35 by the Presiding Officer before the counting was done. It was in this stream that the Petitioner contents she was denied 190 votes.

Our Lady of Mercy primary school stream 1, the Petitioner relied on the evidence of Janekelvin Mutio Kitonyi (PW5). But in her evidence, Jane was not sure herself of the votes garnered by the 1st Respondent. Her own agent told her the 1st Respondent had garnered 141 votes and she entered this in her own tally sheet which she produced in evidence. In her testimony she denied the authenticity of that result saying that she had been told by a neighbor that in fact, the 1st Respondent had only 41 votes. Once again, the evidence of Janekelvin here is not reliable as it is all hearsay. She could not trust her own agent yet in court she wants to place reliance on the word of a person whom we are not even told how she came to be in the polling station.

In response to these allegations, the 1st Respondent conceded that indeed the Petitioner's vote tally was understated at Highway secondary school stream 1 and Nairobi South primary school stream 5 and that in fact the correct vote count for her was 250 and 199 votes respectively. He however denied that his tally at Our Lady of Mercy primary school stream 1 had been unjustifiably increased by 100 votes. He maintained that his score there was 141 votes. In cross-examination, the Petitioner said her tally at Highway secondary school stream 1 was 225 and not 250 as stated by the 1st Respondent or 300 as stated by Janekelvin.

The 2nd and 3rd Respondents in their response to this contention denied the allegations raised by the Petitioner. The denial is set out in paragraph 14 of the response to the petition and paragraph 16 of Peter's replying affidavit as well as the affidavits of Julius and Brian who were the Presiding Officers at the respective streams namely Highway secondary school stream 1 and Our Lady of Mercy primary school stream 1. They all stood by the results as entered in form 36. Peter's position was that he simply transposed the results from the relevant form 35 for the stream to form 36. Julius, relying on the entries in form 35 filed in court by the 2nd Respondent and the one annexed to his affidavit maintained that for Highway secondary school stream 1 he had correctly entered the results for the Petitioner as 50. Brian on his part also maintained that he had correctly entered the results for the 1st Respondent in the form 35 as 141 and it was not 41 as contented by the Petitioner. The Respondent's did not avail the Presiding Officer for Nairobi South primary school stream 5.

The court considered this issue through an application for scrutiny filed by the Petitioner and from the pleadings, affidavits, the testimonies of the witnesses at the hearing and submissions by counsels made an order for scrutiny of the votes by way of recount only in two of the streams complained of by the Petitioner that is, Highway secondary school stream 1 and Nairobi South primary school stream 5 as well as three other streams. The three other streams were one where the Petitioner had raised an issue but not on incorrect entry of results in the forms, that is Plainsview primary school stream 8 and two others where from the evidence tendered the court was satisfied of its own finding that there were sufficient reasons to order a scrutiny, that is, Mariakani primary school stream 4 and Highway secondary school stream 5. I will deal with the results of the scrutiny shortly after considering the other streams where scrutiny was also done.

The complaint at Plainsview primary school stream 8 was supported by the Petitioner's witness Wairimu (PW 2) who said that the mode of counting did not satisfy her and she twice got votes that were meant for the Petitioner in the 1st Respondent's batch. The response by the Presiding Officer Robert Ochieng Otieno (DW 10) in court was that the mode of counting was agreed at by way of consensus building by the IEBC officers and the parties' agents present.

II. At Mariakani primary school stream 4 and Highway secondary school stream 5 the complaint came from the 1st Respondent who said that his votes were reduced by a margin of 330 votes. He said that for Mariakani primary school stream 4 his votes were entered by the presiding officer in form 35 as 137 but at the tally center they were transposed into form 36 as 7 instead of 137. His contention was supported by the evidence of his witness Samuel Okoth Rangwel (DW 2) who said that he was present during the entire voting and counting process and that the results announced for the 1st Respondent were that he had garnered 137 votes in that stream.

The complaint for Highway secondary school stream 5 was that the 1st Respondent's votes were entered by the presiding officer in form 35 as 201 but at the tally center the result was transposed into form 36 as 1 instead of 201 thereby reducing his votes by 200. He supported his complaint with the evidence of Kisito Oyugi Nyanjong (DW 3) his agent in that stream.

The Petitioner's response to this complaint during cross-examination by counsel for the 1st Respondent was that she was not aware of those discrepancies.

The 2nd and 3rd Respondents conceded that in fact, at the Tally Center there was a transposition error in

respect of the 1st Respondent's results for Mariakani primary school stream 4 and Highway secondary school stream 5. He only realized that folly after he was served with the petition. However, the 1st Respondent's chief agent Abwanda (DW 11) said that he noticed the anomaly during the tallying. He informed the 1st Respondent who raised the issue with the Returning Officer but the Returning Officer told them that it did not have an effect on the 1st Respondent's win. The Returning Officer, Peter in his evidence conceded that the results he transposed in form 36 and declared for the 1st Respondent were not correct even though the change would not affect the overall result that he won the election. He purported to correct that anomaly by preparing a fresh tally sheet which he produced in court alongside the one with erroneous entries.

The submissions by all learned counsels for the parties on the issue of the anomalies in tabulation, counting and tallying the votes were made both in the main suit and on the application filed by the Petitioner for scrutiny by way of recount of the votes in the streams complained of. The application was determined and the court allowed a recount in the affected streams save for Our Lady of Mercy primary school stream 1 which was rejected. The recount was done on 27th and 28th June, 2013. The results for the Petitioner and the 1st Respondent together with the observations made by the court were as follows:

Highway secondary school stream 1. Esther 250, Manoah 192. These results are different from those entered in form 35 as well as form 36 for Esther as 50 votes. Esther was thus deprived of 200 votes here and adjustment to her final tally has to be made accordingly.

Nairobi South primary school stream 5. Esther 198, Manoah 224. This result is different in respect of Esther from that entered in form 35 and form 36 as 9 votes and in respect of Manoah from that entered in form 35 and form 36 as 324 votes. Here, Esther was deprived of 189 votes while Manoah was added 100 votes. Their respective counts and tallies have to be adjusted accordingly.

Plainsview primary school stream 8. Esther 165 votes, Manoah 209 votes. These results correspond with those in form 35 filed by IEBC in court as well as those entered in form 36.

Mariakani primary school stream 4. Esther 182, Manoah 136. These substantially correspond to the entries in form 35 filed by IEBC save that instead of Manoah being entered as 137, it should have been 136 because one vote that was counted as his was actually a rejected vote. The results are however different from those entered for Manoah in form 36 as 7 votes. Manoah was therefore deprived of 129 votes in the final tally. This was conceded by the IEBC and so his tally as declared has to be increased by this margin.

Highway secondary school stream 5. Esther 149, Manoah 201. These results correspond to those entered in form 35 filed in court but are different from those entered in form 36 in respect of Manoah as 1 vote. Here Manoah's final tally was reduced by 200 votes and has to be adjusted accordingly.

I will deal with the other observations made during the recount as the next issue on the first broad issue shortly.

The results of the recount established that in total, Esther was deprived of 389 votes and these have to be added to her tally entered in form 36 and declared by the IEBC as 6,447 to make it 6,836. Manoah on his part was added 100 votes and deprived of 329 votes. This had the effect of reducing his final tally by 229 votes which have to be added to the declared result of 6,971 votes to make his final tally 7200. In the final analysis of the results that ought to have been entered in form 36 Esther, the Petitioner would have 6,836 votes and the 1st Respondent Manoah 7200 votes. The recount therefore established that Manoah led Esther and therefore all the other candidates in the election in the final tally by 364 votes. In that case he deserved to be declared the winner.

This is assuming though that a recount was the only issue in the petition. It was not and so I the other issues have to be considered before making the final decision.

III. An issue that was observed during the recount of the votes was on the completion of forms 35 by the presiding officers. First, it was apparent that there were several forms 35 completed by the presiding officers after the counting. From the evidence given by the presiding officers in court, the forms completed were to cater for one to be delivered to the returning officer to assist in tallying of results, one to be affixed to the ballot box, one to be dropped into the ballot box before it was sealed after completion of the counting process, one to be affixed on the public entrance to the polling station and then in order to comply with **Regulation 79 (2)(c)** (the second 2) they had to provide each political party, candidate or their agent with a copy of the declaration of the results. In a case like the present one where there were ten candidates it means that for the party, candidates or agents alone, the presiding officer had to have no less than ten forms and then add on the four others making a total of fourteen. Mr. Havi made very lucid submissions on what the copies ought to look like and what he said is the correct position in law. Under the Evidence Act (Cap.80) Laws of Kenya, section 65 a copy must resemble the original in every respect. There must therefore be an original and then copies made therefrom. The copies must be produced from the original by a uniform process.

What was witnessed in all the streams where recount was done was that presiding officers were completing several forms 35 thereby making each of them an original and not copies. The result was that it was difficult to have the same results reflected in each of the forms. That is how they ended up with some forms submitted to the Returning Officer and subsequently filed in court bearing different entries from the one affixed outside the ballot box and/ or put inside the ballot box and /or issued out to the agents. Discrepancies therefore arose in some cases with respect to the signing of the forms by the agents and entries for the number of votes cast for a candidate. In one case the presiding officer and in another the deputy presiding officer did not sign one of the forms but signed another. The same happened for agents who would sign one of the forms and not another.

In spite of these discrepancies the Petitioner seemed to agree that the results announced by the presiding officer orally were not being challenged and that was why she asked in her petition and subsequent application for a recount. Upon the recount being done it was established that the oral results which ought to have been contained in only one original form 35 for a particular stream were verifiable. The Petitioner had no problems with the results as recounted these have been used to correct the final tally for her and the 1st Respondent.

IV. An issue which could not have been foreseen and so was not raised in the petition was that the Returning Officer did not file a proper form 36 in court as required by law. What he filed cannot pass as form 36 because he did not complete and sign it at the completion of the tally but afterwards. However, the Petitioner annexed to her petition a copy of form 36 and she did not dispute its authenticity at the time. The 1st Respondent also annexed a similar copy on his response. This though was not what was filed in court by the Returning Officer. He explained that he inadvertently gave out all the forms he had completed and signed to the agents and by the time he realized it, all had left. I am satisfied from his evidence, which is not challenged by the Petitioner that he prepared and issued a form 36 which he duly signed and dated as required under **Regulation 83 (d)**. His explanation that he inadvertently gave out all the ones he had signed and dated is reasonable and therefore acceptable.

The next broad issue is that the election was flawed. Here the Petitioners complaints are several. She raised various issues with respect to four streams namely Plainsview primary school stream 8, Highway secondary school stream 1, Nairobi South Primary school stream 5 and Our Lady of Mercy primary school stream 1, regarding the conduct of the elections right from the admission of candidates' agents into the polling streams when they opened to the tallying and announcement of the results by the Returning Officer at the Tallying Center. Some of the issues raised here overlap with the ones in broad issue one above. As can be seen three of the streams here are the same ones considered in issue one above.

1. First, that her agents were denied entry into some of the polling streams. This, according to her resulted in compromised results being announced by the Presiding Officers. Her complaint is in paragraphs 6 and 7 of the petition. The Petitioner gave evidence on this issue in paragraphs 7, 8, 9 and 10 of her statement.

She specifically pointed out Plainsview primary school streams 1 and 8, Highway secondary school stream 1 and Nairobi South primary school streams 1 and 7. She also said in cross-examination by counsel for the 2nd and 3rd Respondents that at Mariakani primary school stream 1 her agent had been denied entry and was only allowed in after she spoke to the 3rd Respondent who directed the Presiding Officer to allow her agent in and this was done. At Highway secondary school stream 4, the Presiding Officer promised to talk to the Returning Officer over the issue but no positive answer was received. She gave as an example Plainsview primary school stream 8 where she alleged that most of the votes cast for her were fraudulently counted as cast for the 1st Respondent.

The 2nd and 3rd Respondents were the ones in charge of admitting candidates' and party agents into the voting streams. In response to this complaint they said in paragraphs 4 and 5 of their response that due to the large number of contested seats in the election, it was logistically impossible to allow each candidate's agent alongside several other persons such as officials for the 2nd Respondent and observers into the polling center. The 3rd Respondent conceded that the Petitioner raised this complaint with him. He said that in order to accommodate that complaint he advised Presiding Officers to allow at least one agent for a particular party in and this was in accordance with the law. Counsel for the 2nd and 3rd Respondents submits that in spite of this complaint the Petitioner did not avail any of her agents who were denied entry into a polling stream and also to show that they had all the valid documents required for admission into a stream as an agent. She submits further that not even the Petitioner nor her chief agent Eva has availed any of those documents in their evidence. She relies on the evidence of the 1st Respondent's witnesses as well as the IEBC witnesses all who said that no agent was denied entry into the polling streams where they were. In that case, she submits, there is no proof of refusal of entry of the Petitioner's agents. Counsel for the Petitioner on his part relies on the concession by the Returning Officer that the possibility of some agents being denied entry was there due to logistical problems occasioned by the large number of people who would be required to be in the voting and counting hall. The first issue to consider here is whether indeed there was a failure to admit the Petitioner's agents into the halls. There is a likelihood of such an issue having arisen as seen from the evidence of the Petitioner and the Returning Officer that in at least one case an intervention had to be done and the issue sorted out. As indicated above, there were 39 streams. In one, the issue was sorted out. The Petitioner mentioned five others in her petition. However, she did not avail one single agent who actually was denied entry to testify and be cross-examined as to why she was denied if at all. The burden is upon her to prove her allegation. Moreover, the law, Regulation 62 (2) provided that for purposes of voting, the presiding officer shall admit to the polling station not more than one agent for each candidate or political party. Therefore, where a candidate is vying through a political party as the Petitioner was herein, if her party's agent has been admitted her own agent would not be admitted. Given that there were six positions being vied for at the election, for the Petitioner's complaint that her agent was not admitted to be valid, she must prove that there was no other agent for any of the other seats for her political party. She did not do this because her position is that her own agents were the one denied admission. For purposes of counting the Petitioner has to show that her agent satisfied the provisions of Regulation 74 (1). Where that Regulation is not satisfied then a person may not be admitted into the counting center as an agent. The Petitioner has not proved that her alleged agents had satisfied these requirements. Finally on this issue Rule 79 (7) provides that the absence of a candidate or an agent at the signing of a declaration form or announcement of results shall not by itself invalidate the results announced. This means that there must be more and it leads to the second point here of whether the absence of the agents as alleged should invalidate the results. Here, I will agree with the submissions by counsel for the 1st Respondent that the Petitioner appears to be blowing hot and cold at the same time. Her first cry was that in spite of the alleged anomalies, she all the same won the election if only proper counting and tallying was done. In that case, she asked for a recount which was done. She at the same time says that after all the entire election was not properly done and so should be nullified because her agents were not allowed into the voting and counting hall. However, she has not shown how, apart from the alleged absence of her agents in some of the streams the election was flawed. Her allegation that her votes at Plainsview primary school were fraudulently counted as cast for the 1st respondent were disproved by the recount which did not reveal such an anomaly in that stream. She has therefore not discharged her burden of proof on this issue. Consequently I find that there is no proof that the Petitioner's agents were either denied or unjustifiably denied admission into the voting and counting centers and that any denial of admission materially affected the results as announced by the returning

officers.

2. The Petitioner also complains that forms 35 were not given to all agents and so by extension her agents after they were completed by the presiding officers. This complaint is in paragraphs 8 and 9 of the petition and supported by her statement at paragraphs 11 and 12. This issue was conceded to by the 1st and 2nd Respondents. The evidence by the witnesses for the IEBC was that they were giving one copy of the form 35 to the agents for them to share. They did not give a form to every agent present. **The Elections (General) Regulations, 2012 Regulation 79 (2)(c)** (the second one as there are two 2s) provides that the presiding officer shall provide each political party, candidate or their agent with a copy of the declaration of the results. This, I find was not adhered to by the presiding officers and therefore by the 2nd and 3rd Respondents. However, I do not find any prejudice suffered by the Petitioner so as to materially affect the outcome of the election and to invalidate it given that she managed to get all the results of the election. She said that the results of the declarations were posted on the doors of the polling stations and these were accessible to her and that was how she managed to get all the results.

3. The Returning Officer (DW8) refused to give the Petitioner's Chief agent (PW 2) a print out of the form into which the tallies were fed for verification. The tallies from the streams were not released to the Petitioner's Chief agent until after six hours of declaration of the results of the election. The 3rd Respondent in response in his testimony said that party agents were present at the tally center when the exercise was going on and they saw what was happening.

4. The Returning Officer appeared to side with the 1st Respondent and his agents who appeared to be directing him on what to do. The evidence in support of this complaint was given by Eva. She said that at the tallying center the conduct of the Returning Officer and Manoah with his agents appeared to her suspicious because they would walk out of the tallying hall together and whenever she would follow them to find out what was transpiring, they would disperse. She had to confront the Returning Officer and ask him why.

In response, Manoah said that at the tallying center, he was consulting with the Returning Officer and he did not take him aside to collude with him in anything. His witness Jashon (DW 7) said that he was also present. He said that the only time he was with the Returning Officer was when Eva, the Chief agent for the Petitioner went there with a letter to deliver to the Returning Officer. He went over to see what the issue was all about.

5. The Returning Officer failed to respond to a letter delivered to him by the Chief agent of the Petitioner to recount the votes. The evidence in support here was given by Eva who delivered the letter on behalf of the Petitioner. The 1st Respondent's chief agent Abwanda (DW 11) said he saw the delivery of the letter. When cross-examined, both the Petitioner and Eva conceded that the Returning Officer had no authority to order a recount of votes at the streams. The request was therefore made to the wrong person and could not be acted upon. Eva conceded that she did not raise the issue of the recount at any of the streams where she felt that anomalies had been detected. She particularly mentioned Plainsview primary school stream 8 where she said she had to intervene twice to get the Petitioner's votes being counted as those for the 1st Respondent. But after the counting exercise, she did not raise any issue with the presiding officer. After the recount it was found that no vote for the Petitioner had been fraudulently counted as that of the 1st Respondent as alleged. The findings here are that a recount as requested by the Petitioner to the Returning Officer was by law not fisible. Therefore the refusal by the Returning Officer to act upon that request was in order and cannot be said that it affected the election in any way so as to render it invalid.

6. The Returning Officer refused a retally requested by the Petitioner's Chief agent. The evidence in support of this was given by the chief agent Eva (PW 2). She said that she had refused to sign form 36 due to some of the anomalies in the results entered therein which differed from the results she had from the streams. The 1st Respondent's chief agent, Abwanda (DW 11) said that indeed Eva refused to sign form 36. I think she had a good reason to refuse given the findings from the recount which showed that indeed the Petitioner's votes had been understated in two streams by a total of 389 votes. These were substantial votes given the margin of the win by Manoah which was 524 as per the results declared. The

Returning Officer cannot allege as he did in his testimony that he had no authority to do a retally and yet he did it later in the case of Manoah and came up with different results. What he could not do was to reverse the results that he had announced as that would have to await a court order.

However, during the recount it became clear that even if a retally had been done, the error in the entries on forms 35 for the two stations would not have been detected. The Returning Officer correctly transposed the entries as made in the forms 35 which though erroneous were as made by the presiding officers. This issue was however settled by the recount which showed that Manoah still lead but this time by a slimmer margin of 364 votes. The complainant's chief agent here had reasonable basis to complain and it would have been better if her complaint had been responded to telling her that it had been noted but nothing much could be done to help unless by order of the court. That would have gone a long way to allay her fears that the 2nd and 3rd Respondents were colluding with the 1st Respondent to deny the Petitioner her win.

7. The form 36 was only signed by the Returning Officer, the 1st Respondent, his agent and one other agent Michael Kamanda. The Petitioner's refusal to sign on account of the discrepancies was not noted by the Returning Officer. I do not seem to find a provision in the Rules that requires the Returning Officer to have the form signed by candidates or their agents or to note anywhere their refusal to sign as contended by the Petitioner. This complaint therefore appears to be mute.

8. There were election offences committed by all the respondents. With respect to the 2nd and 3rd Respondents the offences alleged are:

- i. Colluding with the 1st Respondent in falsifying entries in forms 35 and 36 in favour of the 1st Respondent. The only instance that the Petitioner mentions that the agents of the 2nd and 3rd Respondents were seen together with the 1st Respondents and/or his agents was at the tallying center. Even so there is no evidence to prove that such contact which the 1st Respondent was for purposes of colluding in order to falsify the results of the poll.
- ii. Making entries on the stream tally forms 35 and 36 indicating the 1st Respondent as the winner of the election knowing very well or having reasonable cause to believe that it was false or not believing that the same was true. This allegation is answered by the results of the recount. It is true that in two streams Highway secondary school stream 1 and Nairobi South primary school stream 5 the Petitioner's votes were understated and that at Nairobi South primary school stream 1 the 1st Respondent's votes were overstated as 324 instead of 224. In response the 1st Respondent readily conceded to these anomalies and said that they could be rectified. I am however not satisfied that the presiding officers who made these entries did so with knowledge that the entries were wrong. As for Highway secondary school stream 1 the scrutiny showed that although two forms 35, the one filed by IEBC and the one outside the ballot box erroneously indicated the Petitioner's vote as 50, the one inside the box correctly captured her result as 250. If the presiding officer intended to falsify the results he would not have entered the correct result in the form inside the ballot box. Moreover, Esther was not the only candidate affected by mistakes of the presiding officer. One other candidate, John Wanyoike had his vote on the outside form indicated as 13 instead of 113 as entered in the form inside and which was his correct vote after recount. Yet another one Washington Oscar Ogwel was indicated in all the forms 35, that is the one filed in court, the one outside the ballot box and inside to have 30 votes when in fact his correct votes were 3 as verified at the recount. Furthermore, this was the presiding officer who had to change his totals of the number of valid votes cast as entered on the form 35 from 661 to 441 at the tally center. However, upon recount, the correct tally was found to be 634 votes. The extra 27 votes must be attributed to the ones he incorrectly entered for Washington. In my assessment, this was an incompetent presiding officer and not one who was acting with knowledge to falsify. He appears to have been greatly challenged in the mathematics of addition and subtraction. His incompetence did not however materially compromise the integrity of the election and the results. His limitations in mathematics were cured by the recount.

With respect to Nairobi South primary school stream 5, the 1st and 2nd Respondents did not avail the presiding officer to testify. The 1st Respondent readily conceded the discrepancy. Here, the Petitioner was deprived of 189 votes and the 1st Respondent added 100 votes by virtue of the form 35 filed in court. However, the entries in the forms found stuck outside the ballot box and the one inside, the 1st Respondent's votes were correctly entered as 224 although the ones for the Petitioner were still erroneously entered as 9. I am not satisfied that the erroneous entries were deliberately made by the presiding officer and that they were so material as to invalidate the election in that stream. The discrepancy was corrected by the recount.

We then come to the discrepancies in made in the entries in form 36 by the Returning Officer. Peter (DW 8) said that he transposed the results into form 36 as were appearing in forms 35 for the various stations save for Mariakani primary school stream 4 and Highway secondary school stream 5 where he understated the 1st Respondent's votes with a total of 330 votes (the correct figure is 329 after recount). I have looked at the entries in forms 35 filed in court and compared the entries made therein with those in form 36 regarding the complaints raised by the Petitioner. The entries for Highway secondary school stream 1 and Nairobi South primary school stream 5 were correctly captured and correspond with those in the respective form 35. The entries for Mariakani primary school stream 4 and Highway secondary school stream 5 for the Petitioner were correctly transposed but for the Respondent they were understated. The 3rd Respondent readily conceded this. The Petitioner therefore has no reason to allege as against the Returning Officer that he knowingly made false entries in form 36 in order to favour the 1st Respondent. There is no proof of that allegation.

9. Contravention of the provisions of the Elections Manual by the Returning Officer. The evidence in support of this complaint by the Petitioner was that the presiding officers and that Returning Officer failed to record the fact of some agents failure' to sign the forms 35 or 36 on the forms as the case required. All the 2nd and 3rd Respondents' witnesses said their duty was only to record the fact of the failure or refusal by the agent and this was to be done in the diary and not on the forms themselves. The Petitioner sought to rely on the provisions in the Election Manual but upon a perusal it was found that some of the contents therein were outdated as they were referring to some forms that were not used in the present election. In fact Brian Odiwuory Ong'ang'o (DW 11) said that the anomalies in that manual had been discovered during their training and they were advised not to rely on it. Instead, a different manual had been availed to them shortly before they embarked on the voting exercise. The Petitioner had no witness to challenge this evidence and despite Mr. Havi's very thorough cross-examination of the witnesses on this issue I find that their evidence stood unchallenged. It follows that the manual annexed to the Petitioner's affidavit was not the one followed by the presiding officers during their work in the election. It cannot be used to support her complaint. All the same, Regulation 79 (4) and (5) only require the presiding officer to record the fact of the candidate or agent's failure to sign or their absence. It does not say that this has to be done in the form 35 as contended by the Petitioner. The witnesses for the 2nd and 3rd Respondents testified that they were to record this in the poll day diaries.

I have not seen any provision in the law which provides that a candidate or his agent be given a print-out or form on which tallies are being entered. In that case, I find that there was no contravention of the law where the Petitioner's chief agent's request was not granted.

In view of the foregoing I find that the Petitioner has not proved the commission of any election offence by any of the Respondents or any other person for that matter.

10. No proper counting, totaling and tallying of votes cast in the disputed polling centers. This complaint was answered through the recount and the findings were that though there were discrepancies, these were not material as to invalidate the election exercise.

I will now sum up by looking at what the effect on the entire election in the Ward was of the discrepancies in completing the forms 35 as well as proceed to make findings on the issues for determination as formulated by the parties.

It has been established that there were discrepancies in completing forms 35 by the presiding officers. This arose due to their completing several of them instead of one then to generate copies from it. This led in some instances to their failing to correctly capture the results for some candidates in one or several of the forms as they had announced orally and some agents failing to sign all the forms. The recount however established that there would at least be one of the forms that correctly or substantially so captured the correct result. It follows therefore that there were correct results but in the process of entering in several forms, mistakes were made. I do not think these were deliberate but rather arose due to the logistics involved for instance, how to get uniform copies from the original. Otherwise, the results have been confirmed through the recount to have been verifiable and therefore reliable. The discrepancies in the forms 35 did not therefore materially affect the election so as to render it invalid.

Applying the law on election petitions as set out in the **Raila Odinga** case cited at the beginning herein the foregoing findings lead me to the following determinations on the issues raised.

1. Whether the 1st Respondent's votes were understated by 330 votes. Yes. The understatement though was by 229 votes. The Petitioner's votes were also understated by 389 votes. Upon correction of these understatements the final tally should be, the 1st Respondent had 7200 votes and the Petitioner 6,836 votes.
2. Whether the discrepancies in the tallying of votes were material to affect the results of the election. No. In spite of the discrepancies, which I find to have been minor, the results were verifiable and the recount established this.
3. Whether there were any election offences committed on 04/03/2013 at Nairobi South Ward. No. There was no proof of any election offence committed by any person.
4. Whether credible and valid elections were carried out by the 2nd and 3rd Respondents. Yes. The elections carried out for the Nairobi South Ward by the 2nd and 3rd Respondents were substantially in conformity with the Constitution, the Elections Act, 2011, the Elections (General) Regulations, 2012 and so were valid and credible.
5. Was the 1st Respondent validly elected? Yes. His election was verified as valid from the entire evidence adduced herein and including the recount of votes conducted after the hearing.
6. Whether the Petitioner is entitled to the reliefs sought in the petition. No. The Petitioner has not established her case to the required standard in order of the court to invalidate the election.
7. Who is entitled to costs? This is dealt with below.

In the result I find that the Petitioner has not proved her case to the required standard to warrant this court to cancel the 1st Respondent's declaration as the duly elected county ward representative for Nairobi South Ward and either declare the Petitioner the duly elected representative or to order that a fresh election by way of by-election be held. The petition is consequently dismissed. I have found that the petition was substantially occasioned by officers of the 2nd Respondent failing to make proper entries in form 35 which led to understatement of the Petitioner's final votes and which prompted her to feel that there was reason to challenge the results as declared. In that case, it is ordered that the 2nd Respondent shall bear the costs of the petition which are awarded to the 1st Respondent. Taking into account the complexity of the matter, the research put in by learned counsels on the new laws governing the conduct of elections, the strict timelines within which the petition had to be conducted meaning that counsels had to leave some other work in their offices and concentrate on this petition, I would cap the costs at KShs 1,500,000/=. The sum payable is subject to assessment by the court in the manner of civil cases.

I wish to end by commending all the persons who participated in this petition particularly the Petitioner and the 1st Respondent. The Petitioner put across her case very brilliantly and appeared to have all her facts at her fingertips. She set a very good tempo for the case with her brilliance which made the case proceed quite flawlessly. She truly has the capability to be a leader as she was seeking in the election and I must wish her well in her endeavor. The 1st Respondent demonstrated a high degree of honesty. He was clear that he had won the election but did not wish votes to be brought his way or taken away from the Petitioner unjustifiably. He therefore readily conceded the anomalies and interestingly, the tallies by his agents corresponded with what the correct tally should have been almost 100% save for one vote that was

wrongly attributed to him. He is commended for his honesty and for that he truly deserves to lead the people who gave him the mandate through the election. I also wish him well in his assignment. I need not say much about the industry and immense work put in by learned counsels. That can be attested from the length of this judgment.

Order accordingly.

Delivered in open court this 2nd day of August 2013.

In the presence of:

.....for the Petitioner

..... for the 1st Respondent

..... for the 2nd & 3rd Respondents

Court Assistant/Interpreter Kariuki

ANDAYI W. FRANCIS

SENIOR PRINCIPAL MAGISTRATE