



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT HOMA BAY

ELECTION PETITION NO. 1 OF 2013

ISAIAH ODAK ONYANGO.....PETITIONER

VERSUS

ISAIAH AGWENGE ODERA.....1ST RESPONDENT

THE RETURNING OFFICER

KASIPUL CONSTITUENCY.....2ND RESPONDENT

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....3RD RESPONDENT

JUDGMENT

Isaiah Odak Onyango and **Isaiah Agwenge Odera**, hereafter referred to as the Petitioner and 1st Respondent respectively, were among the candidates who vied for the County Assembly Representative for West Kasipul Ward in the 4th March, 2013 general elections.

The Independent Electoral and Boundaries Commission (I.E.B.C), hereafter referred to as the 3rd Respondent, is a body established under Article 88 of the Constitution of Kenya, 2010, and was responsible, through the Returning Officer, hereafter referred to as the 2nd Respondent, for conducting the said elections.

After counting and tallying, the 2nd and 3rd Respondents declared the 1st Respondent as the winner and duly elected County Representative for West Kasipul Ward.

Aggrieved by the said declaration, the Petitioner herein filed this petition on 25th March, 2013 against the Respondents on the grounds:

- a. *“The 2nd and 3rd respondents failed and /or ignored to take great care while scrutinizing the votes of the petitioner and the respondents.*
- b. *The tallying of the votes for the petitioner and the 1st respondent was deliberately meddled by the 2nd and 3rd respondent’s presiding officers and clerks so as to give the 1st respondent a lead over the petitioner.*
- c. *The petitioners’ agents were not allowed to scrutinize the ballots with respect to the 1st respondents.*

- d. *The petitioners' agents were never allowed by the employees of the 2nd and 3rd respondents to sign elections results tallying sheets (form 35)."*

He therefore sought:

- a. *"An order for scrutiny and recount of all ballots cast with respect to all the candidates participating at the election of County Assembly Representative for West Kasipul Ward.*
- b. *An order declaring the petitioner the duly elected County Assembly representative for West Kasipul Ward should the results of the recount prove the petitioner as leading with the valid votes cast*
- c. *Costs of this petition to be met by the respondents."*

PLEADINGS

PETITIONER

The Petitioner (PW1) filed his affidavit in support of the petition together with affidavits of his witnesses Elizabeth Achieng Ochieng (PW2), Jechonia Odhiambo (PW3) and Paul Ouda Kongeche.

The **Petitioner** avers that his names and those of the 1st Respondent are almost similar and that there would have been a likelihood of mix up at the time scrutiny of votes in terms of names unless care was taken. He further avers that some agents were denied an opportunity to scrutinize the ballots cast in his favour at some of the polling stations and others sent away by the respondents and denied participation in the scrutiny, tallying and the counting of ballots cast in his favour.

His witness **Jechonia Odhiambo** avers that he was the Petitioner's agent at Dol Primary School polling station where the casting of votes went on well but the scrutiny, tallying and counting of votes at the said polling station was riddled with secrecy, unnecessary strictness and he was not allowed to look at the particulars of the person for whom a vote had been cast and hence he was not able to know whether the ballot being counted was for his principal candidate or for another candidate all together. He further avers that there being two candidates bearing the name **Isaiah**, he was denied the opportunity to verify the particulars of the person for whom ballot had been cast so as to confirm whether the ballots being counted were for the Petitioner or the 1st Respondent and that he was not given form 35 to sign or to take to his principal.

The contents of the affidavits of Elizabeth Achieng Ochieng and Paul Ouda Kongeche are similar to averments by Jeconia Odhiambo save that they deponed the same as the Petitioner's agents at Mititi Primary and Alero Nanga polling stations respectively, and that, Paul Ouda further avers that there was very dim light in the polling room at the time of verification, counting and tallying of ballots and therefore he was unable to see what votes were for whom.

1ST RESPONDENT

The 1st Respondent filed his response together with affidavits of his three witnesses.

1st Respondent (DW1) opposed the petition sought that it be struck out firstly because the agents were not denied an opportunity to scrutinise the ballot cast and that the alleged refusal to sign the election results cannot itself invalidate the results contained in form 35 and does not render the results from various polling centres invalid. Secondly, there are no valid grounds pleaded to justify an order for scrutiny and recount and that the petition herein raises no reasonable cause of action, is incompetent and not supported by any valid, cogent and credible grounds. He sought that he be determined as duly and validly elected as the member of the County Assembly of West Kasipul Ward on the elections held on 4th March 2013.

In his affidavit, he avers that there is no similarity of names as they only share the name "Isaiah" and that

he has a clean shaven look while the Petitioner keeps deadlocks and has a Rastafarian look. He further avers that Paul Ouda Kongache was not an agent at Alero Nanga polling station as he alleged in his affidavit as the Petitioner's agent there was Erick Ochieng Owange.

Pamela Akinyi Abonyo (DW2) avers that at Dol Primary polling station where she was the 1st Respondent's agent, the voting went on smoothly and denied that scrutiny, tallying and vote counting at the said station was riddled with secrecy or unnecessary strictness and further avers that even though there were two candidates by the name **Isaiah**, the presiding officer gave her ample opportunity to confirm details of the ballots, make necessary verifications and confirm whether the ballots counted were for Isaiah Agwenge Odera or Isaiah Odak Onyango. She was given form 35 to sign and a copy to take to her principal candidate.

Kitinga Benard Charles (DW3) avers that he was an agent at Alero Nanga polling station representing ODM candidates and that Paul Ouda Kongeche never represented the Petitioner at Alero Nanga Polling station as alleged and cannot allege not to have verified the votes for the said candidate. He further avers that though two of the candidates bore the name **Isaiah**, one had short hair while the other had long hair as indicated on their pictures on the ballot papers stationed at the top and bottom respectively, and that this made it easier for classification, verification and counting which was done in the presence of all agents representing the candidates and therefore, they could tell if their candidate had been voted. He was finally given form 35 to sign and a copy to take to his principal candidate as evidence of the votes garnered.

Susan Adhiambo Magak (DW4) avers that the casting of votes went on peacefully at Mititi Primary School polling station where she was the 1st Respondent's agent and that scrutiny, tallying and counting was done in a transparent manner in that the presiding officer called out the three names of the two candidates with the names Isaiah , giving the agents opportunity to confirm details on the ballot and verify whether the ballot was for the Petitioner or the 1st Respondent, and that finally, all agents were allowed to sign form 35 and each given a copy to take to take to their respective principal candidate.

2ND AND 3RD RESPONDENTS

The 2nd and 3rd Respondents also filed their response together with affidavits of three witnesses in support.

In response to the petition, the 2nd and 3rd Respondents prayed that it be determined that the 1st Respondent was duly elected and that the election was valid on the grounds that that first, the petition is premised on falsehoods, half-truths and contains unsubstantiated allegations, since all the ballots were scrutinized and there was nothing special about the 1st Respondent to call for attention. Secondly, the names are not similar and that the issue of similarity of names is not one of the grounds that would challenge validity and outcome of an election in any regime of law. Thirdly, the elections were conducted in strict adherence to the law and regulations and that they were conducted in a free, fair, credible and transparent manner and, all forms were signed.

Michael Mutyaubyu Mwose, (DW5) the Returning Officer, avers that issues regarding of similarity of names lack factual basis and are incomprehensible as the Petitioner and 1st Respondent only share the Christian name and that there is nothing to suggest that the Petitioner suffered any actual prejudice, since tallying of votes was done with due diligence in full glare of all the agents and the public. He further avers that the averments by Jeconia Odhiambo and Elizabeth Achieng Ochieng that false entries were made in form 35 are false since all the agents were present at the time of declaration of results and were given form 35 to sign which they did.

Kennedy Odhiambo Oguta, (DW6), the Presiding Officer at Alero Nanga polling centre, avers that the voting at Alero Nanga polling station went on well and that during counting there was adequate light during the process as the 3rd Respondent had supplied the polling station with a gas lamp. Further, all the agents who were present at the close of counting process were given an opportunity to sign form 35

save that none of them was given a copy to take to their principal because they left the polling station before he signed, since he was the last person to sign the form after verification.

Samuel Ogado Okelo, the Presiding Officer Dol Kodere Polling centre avers that the voting went on well and that the counting process continued till 12.30 a.m in the morning in the presence of the public, all polling clerks, the county officers and some of the agents of the contestants after which, all the agents of the contestants who were present were given an opportunity to sign form 35 and he pinned one copy at the door of the polling station.

AGREED ISSUES

At the pre-trial conference the issues for determination as framed and agreed to by the parties are:

1. *Whether the votes counted were counted for Petitioner or 1st Respondent, for the fact that there are similarities in names of the Petitioner and the 1st Respondent.*
2. *Whether the evidence of the four witnesses for the Petitioner is sufficient enough to call for scrutiny and recount of votes.*
3. *Whether there was anything peculiar in the names of the Petitioner and the 1st Respondent that would cause confusion at the time of counting votes and their scrutiny.*
4. *Whether the prayers sought by the Petitioner are justified by the Petitioner particularly prayer (a) of the petition which calls for recount and scrutiny of votes.*
5. *Whether the 1st Respondent's election was valid, free and fair.*
6. *Whether the I.E.B.C in anyway misconducted itself in the elections.*
7. *Whether the irregularities and malpractices alleged in the election if any, were of such magnitude as to render the elections invalid.*
8. *Whether the petition itself is competent.*
9. *Whether the agents of the petitioner did sign the form 35 or whether they were denied an opportunity to sign form 35.*
10. *The total number of votes received by the 1st Respondent as against the Petitioner in light of the averment in paragraph 2 of supporting the Notice of Motion dated 24/5/2013 and the results by I.E.B.C.*
11. *The polling stations the Petitioner has issues with in light of generalization by Petitioner in prayer (a) of the petition as against affidavits of his witnesses which zero- in on three (3) polling stations that is Dol Kondera, Mititi and Alero Nanga primary schools polling stations.*
12. *Whether Paul Ouda Kengeche was an agent for the Petitioner at the Alero Nanga polling station and if so, whether he did sign form 35 and given a copy.*
13. *Whether there was sufficient light in Alero polling station in light of paragraph 5 of Paul Ouda Kengeche's affidavit sworn on 23/3/2013 as against the averments in paragraph 8 of Micheal Mutyaumbyu Mwose's affidavit sworn on 29/4/2013.*
14. *Whether the order of scrutiny and recount should be in respect of all candidates participating in the said election as framed in prayers (a) of the petition or only in respect of Petitioner and Respondent.*

At the hearing of the petition, all witnesses who swore affidavits appeared in court to confirm their affidavits and for cross examination except for **Paul Ouda Kengeche** for Petitioner and **Samuel Ogado Okelo** for 2nd and 3rd Respondents and whose affidavits were abandoned.

ORAL EVIDENCE

The Petitioner's case

The Petitioner (**PW1**) confirmed his affidavit and on cross examination, he told the court that he voted at Ondiko Primary polling station at about 7.00 a.m and went home before proceeding to Agoro Sare tallying centre where a dispute arose concerning Nyagowa polling station whereupon the Returning Officer arrested the Presiding Officer and the case is pending at Oyugis Court.

He did not count the ballots and could not recall the provisional results but the results were declared.

His reservations on results were due the similarity of his names and those of the 1st Respondent and the fact that their photos were placed close to each other. He however agreed that he did not resemble the 1st Respondent, that they both come from the same area and that the residents knew them.

The other reservation he had was illiteracy which caused some voters to simply tell the clerks that they wanted to vote for Isaiah after which they could be assisted and that this resulted in people voting for the 1st Respondent though they intended to vote for the Petitioner.

He told the court that the issue of illiteracy also affected scrutiny and counting but he agreed that the issue of literacy could not arise during the exercise as most clerks and presiding officers were teachers.

He also had reservation in respect of Kalading polling station though he did not mention it in the affidavit or the petition, a fact that caused him to say that there was **something lacking in the petition**.

He explained that when he went to Dol polling station, Jechonia told him that things were alright. However, the Petitioner saw Jechonia with voters in the booth and assisting voters to put their ballots in the ballot boxes. The Petitioner found this weird and questioned him. Jechonia replied that the presiding officer had told him that there were about 150 people who were yet to vote and that they must vote for them, starting with the dead voters.

The Petitioner admitted that these were irregularities which were close to an election offence, but he did not report to the police who were there or to 3rd Respondent. The remarks by the presiding officer were **“Smooth elections”**.

He further told the court he never ran on TIP TIP ticket and that Paul Ouda Kongeche was not his agent but an agent for TIP TIP at Alero Nanga polling station . He termed the averments in the affidavit of Paul Ouda Kongeche in support of the petition as false and went on to confirm that this made the petition **“wanting”**.

Elizabeth Achieng Ochieng (PW2) told the court that to be an agent, one had to be literate and that is how she was picked to be one at Mititi polling station. Despite that, she does not know form 35 and did not see MMM2 (form 35) but she signed some forms. She then admitted that she was given a form 35 which she signed but when she was referred to her affidavit where she indicated that she was not allowed to sign form 35, **she denied signing the affidavit in support of the petition, and to confirm that the signature on the affidavit was indeed not hers, she signed on a piece of paper and showed it to court and the advocates**.

She explained that during counting, there were six agents and they sat around the table on which the ballot box was placed and that from where she sat, she could see the votes being counted as there were two gas lamps in the room and the light was sufficient.

She further told the court that the presiding officer could pick a ballot paper, raise it up and shout either “Odera” or “Odak”. That when he got a ballot for Odera he could give a clerk, when he got one Odak, he could give another clerk and the same process was repeated and in her presence until the votes were finished. She did not visit the polling station the following day and therefore could not tell if the results were pinned on the door or not

On voting, she told the court she reported to presiding officer that some elderly persons had difficulties voting and were asking for “Rastaman” as they did not know his name. He allowed her to assist them in the presence of a clerk, and since she knew the “Rastaman” was Isaiah Odak Onyango and his portrait had Rastas, she could guide them to vote. She explained that they called him “Rastaman” because of his hair (dreads).

Jeconiah Odhiambo (PW3) told the court that he was an agent at Dol Kodera polling station and that voting went on well.

He went on to say that there was only a small issue of counting as he did not see the ballot papers being counted though someone could pick the ballot and shout the name therein.

He asked the presiding officer for the form 35 to sign but he replied that it was not time yet. The form 35s was to be signed after the results were announced. She just heard the results and left before she could sign the form.

The 1st Respondents case

The 1st Respondent (DWI) cast his vote at Dol Primary School polling station and then visited various polling stations where he confirmed from agents that the election was running very smoothly and that the only issue was in regard to Nyagowa polling station whose ballot boxes were brought late at Agoro Sare tallying centre. Consequently, the provisional results his agents gave him were that he got **3,429** votes as against his closest opponent (Petitioner) who got **2,915** votes and that after the results from Nyagowa were factored in, the final results released by I.E.B.C were that he got **3469** votes while his closest opponent (Petitioner) got **3384** votes.

On similarity of names, he told the court that his names and those of the 1st Respondent are not and will never be similar. Besides their facial appearance is very different and that he is always clean shaven while the Petitioner maintains his hair in Rasta form.

Pamela Akinyi Abonyo (DW2) told the court she was one of the three agents sponsored by ODM (Orange Democratic Movement) at Dol polling station and that the lighting during the counting was good and that the agents were allowed to scrutinize the ballot papers during the counting which ended at around 11.30 p.m.

On the size of the photographs of candidates on the ballot papers, she told the court that it was the same size as the photograph on the National Identity Card.

Kitinga Benard Charles (DW3) was with Paul Ouda and Eric Ochieng at Alero Nanga polling station but he was the only ODM agent at the polling station.

He told the court during counting, the lighting was okay and all the agents were allowed to scrutinize the ballot papers during the counting were given the form 35 to sign and signed it. He termed the whole exercise as smooth.

Susan Adhiambo Magak (DW4) termed the whole process of voting and counting as smooth saying that most people knew how to vote and that anyone who did not know would be assisted by only one person, and that the person assisting would take oath, assist only once and have his little finger marked.

She was able to differentiate between the Petitioner and the 1st Respondent because the Petitioner who is **Isaiah Odak Onyango** and also known as **Ken** has Rasta while the 1st Respondent, who is Isaiah **Odera**, is clean shaven and elderly. Besides, Ken's photograph was at the top while Odera's photograph was at the bottom.

On counting which she says ended about midnight, she told the court that the Presiding Officer had brought emergency lamps but there was electricity and the lighting was therefore okay.

She explained that each time the Presiding Officer lifted the ballot paper, read names, showed the agents and gave all of them an opportunity to scrutinize the votes and that all the agents signed the form 35.

Michael Mutyaubyu Mwose (DW5) told the court that each polling station including Dol had a gas lamp and explained that he was at Agoro Sare High School tallying centre. He recalled that the ballot boxes

from Nyagowa polling station came to the tallying centre very late causing some disquiet among all the people present and that since the presiding officer and deputy presiding officer could not explain the delay or where they had been, DW5 took action against them and the case is pending in Oyugis court.

He explained that there **was a consensus** with chief Agents and Returning Officer and it was agreed that the tallying be done for the Nyagowa. **This was done and the tallying corresponded with the figures in form 35. The discrepancies found in respect of Nyagowa polling station were adjusted accordingly and amendments done.** The Petitioner was leading with a total of **464** votes while the 1st Respondent had **38** votes at Nyagowa polling station and that despite all that, the 1st Respondent still got the majority votes in the whole process as shown in MMM1(results of the elections).

He termed the elections in Kasipul Constituency were free and fair and the results reflected the will of the people.

Kennedy Odhiambo Oguta (DW6) told the court that he was the presiding officer in Alero Nanga polling station and that there was no electricity connection in the room. He was however provided with one gas lamp which he lit at 6.00 p.m. He placed it on top of the table which was at the center of the room where all the agents had a clear view as he opened the ballot box, poured the contents on the table, picked a ballot paper at a time, showed it to all, read the name for who it was marked and placed it in front of a clerk standing for the particular contestant and who was not supposed to touch it. This process went on until all the ballot papers were finished and each candidate had his heap of ballot papers on the table and that the light remained on until they closed the station at 11.00 p.m.

After counting and scrutinizing, the agents signed the two form 35s. He was not using carbon paper. He pinned one form on the wall and retained the other. By the time he figured out how to give agents copies of the one he was left with, they had all left.

On the alteration in MMM2 (Form 35 for Alero Nanga Primary School), he explained that he made a mistake and recorded a total of **329** votes without subtracting the **two rejected** votes. He therefore made a correction to read **327** and countersigned and that thereafter, there was no complaint about the said figure as entered.

On voting he explained that the BVR failed about two minutes into the exercise but on advice by the Returning Officer, they proceed manually and the voting went on smoothly.

WRITTEN SUBMISSIONS

The Petitioner's submissions

1. The miniature passport size photographs in the 2013 general elections were to say the least a measure aimed at assisting voters to identify the candidates but only names and not pictures can identify people and that where names are similar as in this case, identity can only be achieved if precaution is taken by giving all agents equal opportunity to participate in counting and tallying process, and confirmation done by all agents signing form 35 which was not done in this case. That the holding of the ballot paper high in the air for all and sundry to see cannot be discerned and therefore the process of casting, counting and tallying did not meet the litmus test.
2. The similarity of names called for proper scrutiny and verification but the area being an ODM stronghold, the officers charged with manning election process lacked independence to conduct the elections without fear or favour and that the overwhelming presence of ODM sympathizers either as agents or subordinate staff manipulated the tallying process in favour of the 1st Respondent and influenced the outcome.
3. Recount and scrutiny is justified as it was pleaded in the petition; there is discrepancy in the declared results as per the evidence on record; it is not clear as to which results to go by; the margin was only 85 votes ; form 35s were inadequate, some signed by extra agents and contained alterations that are not countersigned or explained.
4. The 2nd and 3rd Respondents failed to conduct themselves in a manner as to validate the elections

herein; the alterations in form 35 were never countersigned; the tallying process was not transparent; there was no proper verification or scrutiny and therefore the elections were not valid, free and fair.

5. The petition is competent going by the overriding objective of the Elections (Parliamentary and County Elections) Petition Rules, 2013.

The 1st Respondent's submissions

1. The petition is incompetent, fatally defective for non-compliance with the mandatory provisions of Rule 10 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.
2. The Petitioner and the 1st Respondent only shared the baptismal name; have distinctive features between them and that there was no evidence to show anyone was misled by the names.
3. The Petitioner failed to file application for scrutiny and recount and the court cannot delve into the issue.
4. There is no complaint made in the petition about the 1st Respondent's misconduct and there is no evidence to prove misconduct of the 3rd Respondent's officials.
5. Jechonia Odhiambo denied signing the affidavit in support of the petition and the Petitioner failed to call one Paul Auda Ongeche and abandoned his affidavit.

2nd and 3rd Respondent's submissions

1. PW2 and PW3 denied signing affidavits in support of the petition and therefore the same should be expunged from court record and consequently the evidence by Petitioner as to what transpired in various polling stations where he was not present remains hearsay.
2. Paul Ouda Ongeche, the alleged agent of the Petitioner was disowned by the Petitioner who subsequently declined to call him as a witness and withdrew his affidavit.
3. The Petitioner failed to tender evidence that the 2nd and 3rd Respondents in any way conducted themselves in contravention of principles laid down in the Constitution or any written law and also failed to explain why he did not raise his complaints with the 3rd Respondents or the police.
4. There was nothing peculiar in the names of the Petitioner and the 1st Respondent as they only share the name **Isaiah** and besides the two had distinct features in their portraits in that the Petitioner spotted deadlocks while the 1st Respondent was clean shaven.
5. The Petitioner failed to lay basis for scrutiny and recount; was given an opportunity to make an application for scrutiny and recount but he categorically stated in court that he did not wish to make any, thus waiving his right to scrutiny and recount.
6. The irregularities and malpractices alleged, if any, were not of such magnitude as to render the election invalid as provided by section 83 of the Elections Act, 2011.

DETERMINATION

I have considered the evidence on record and the submissions by the parties in light of the agreed issues which I further condense for convenience as follows:

1. **The similarity of names/ whether there was anything peculiar in the names of the Petitioner and the 1st Respondent that would cause confusion at the time of counting votes and their scrutiny so as not to be certain that votes cast were actually for the Petitioner or 1st Respondent.**

The Petitioner and 1st Respondent confirmed to court that they come from the same area, duly conducted their campaigns prior to the elections and are well known by the electorates.

The Petitioner and the 1st Respondent only share one name that is, **ISAIAH** otherwise there is neither similarity nor anything peculiar in the said names.

I do not agree with the Petitioner's counsel that "**only names and not pictures can identify people...**"

Other than the names, identity was buttressed by the portraits put on the ballot papers in which ever order they were arranged. The said photographs cannot be regarded as **miniature** as described by counsel for the Petitioner.

DW2's evidence is that the said portraits were the size of the photograph in a National Identity Card. In my view the size was adequate for proper physical identification of the candidates.

All witnesses who testified in court admitted, and the court did confirm, that the Petitioner and 1st Respondent are not alike. The two have distinct features which could help voters and agents distinguish one from the other. While the Petitioner is youthful, wears dreads which make people refer to him as Rasta or Rastaman, the 1st Respondent maintains a clean shaven head and is elderly.

During counting, the evidence on record is that the presiding officer called out the names "**Odera**" or "**Odak**" depending on the name of the ballot paper picked for counting and could raise it high for all to see before giving it to the clerk.

Even though counsel for the Petitioner has an issue with this kind of verification, he did not state how else it would be done. In my considered view the method was transparent and fair. **I am satisfied that there was no possibility of confusion due to the names.**

2. **Whether Paul Ouda Kengeche was an agent for the Petitioner at the Alero Nanga polling station and if so, whether he did sign form 35 and given a copy/Whether there was sufficient light in Alero polling station in light of paragraph 5 of Paul Ouda Kengeche's affidavit sworn on 23/3/2013 as against the averments in paragraph 8 of Micheal Mutyaumbyu Mwose's affidavit sworn on 29/4/2013.**

From his testimony, the Petitioner was a candidate for National Agenda Party. He disowned Paul Ouda Kengeche as his agent saying Paul was an agent for TIP TIP at Alero Nanga polling station. In paragraph 3 of his affidavit in support of the petition, Paul Ouda Kengeche depones:

"THAT I was an agent of the petitioner duly appointed to serve as such at Alero Nanga Primary School Polling Station hence I am further competent to swear this affidavit".

Terming this averment as false, the Petitioner told the court that he did "**not know if we can trust anything else he (Paul) says in the affidavit having lied in paragraph 3 of the affidavit**". He declined to call this witness and withdrew the affidavit.

Consequently, DW5's evidence that all polling stations were supplied with gas lamps and the evidence by DW3 and DW6 that there was enough light at Alero Nanga polling station remain unchallenged.

In the circumstances, I consider the affidavit of Paul Ouda Kengeche as of no evidential value and find issue No. 3 above as non- issue and the court need not belabor the same.

3. ***Whether the evidence of the four witnesses for the Petitioner is sufficient enough to call for scrutiny and recount of vote as prayed in the petition/The total number of votes received by the 1st Respondent as against the Petitioner***

By his blanket prayer for "**An order for scrutiny and recount of all ballots cast with respect to all the candidates participating at the election of County Assembly Representative for West Kasipul Ward**", the Petitioner appears to be on a fishing expedition.

Rule 33 (4) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 provides:

"Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of..."

The Petitioner voted at Ondiko polling station before proceeding to Agoro Sare tallying centre. Relying on what he was told by his agents he tried to raise issues with other polling stations including Ombek and Kalading and when reminded in cross-examination that these were not mentioned in the petition, he responded that his petition is “**wanting**”.

The affidavits of his witnesses zero- in on only three (3) polling stations that is Dol Kodera, Mititi and Alero Nanga Primary Schools polling stations.

PW2 and PW3 contradicted the evidence in the affidavits filed in support of the petition and denied the signatures in their alleged affidavits while Paul’s affidavit was abandoned leaving only the hearsay evidence of the Petitioner regarding these polling stations.

Sec 82 (1) of the Elections Act provides that:

“An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.”

It is also provided in Rule 33(1) of Elections (Parliamentary and County Elections) Petition Rules, 2013 that:

“(1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

“(2) Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.”

Though the Petitioner did not plead the results of the election and he did not know the results even as at the time he testified, the 2nd and 3rd Respondent nevertheless availed the results showing that the 1st Respondent got **3,469** votes while the Petitioner got **3,384** votes.

Regarding discrepancy in results, the 1st Respondent clarified in court that the results he gave in the supporting affidavit to his Notice of Motion dated 24/5/2013 as 3,429 votes as against the Petitioner’s 2,915 were provisional results before results from Nyagowa were factored in.

Though DW5 referred to averments in affidavits by Jechoniah Odhiambo and Elizabeth Ochieng ***that false entries made in form 35*** which he denied, there are no such averments by the two witnesses or anywhere in the pleadings before me and there was no such reference in the testimony by any witness in this matter.

On the alterations in form 35, **the Petitioner never pleaded** the same but it came up in testimony of DW6 regarding MMM2. DW6 explained that he made a mistake and recorded a total of **329** votes without subtracting the **two rejected** votes. He therefore made a correction to read **327** and countersigned and thereafter there was no complaint about the said figure as entered.

With that explanation that is not rebutted and the same having not been pleaded, I hold that this is a non-issue.

Even though the results herein as availed by 2nd and 3rd Respondents show a margin of 85 votes an order for scrutiny cannot be made as a matter of course.

In the case of ***Ali Hassan Joho vs Hotham Nyange and Another [2006] KLR***, Maraga, J, as he then was, declined to grant an order for scrutiny and recount until a foundation was laid even though the margin was 1061 votes.

Going by the contents of the petition herein, there was need for the Petitioner to lay basis for scrutiny and

recount and therefore on its own motion, the court directed that the Petitioner to file an application for scrutiny and recount by close of his case, and serve the Respondents but he did not. It was only at the close of the hearing of the petition that his counsel told the court that the Petitioner had not complied with the court's directions and did not wish to make the application for scrutiny and recount. He therefore failed to lay the basis as required and the court cannot delve much into that issue.

4. Whether the agents of the petitioner did sign the form 35 or whether they were denied an opportunity to sign form 35

Though the Petitioner did not annex any of the forms 35, the 2nd and 3rd Respondent availed the forms 35 for Alero Nanga and Dol Koderia polling stations and they were signed. There is no proof that the 2nd and 3rd Respondents denied any of the agents an opportunity to sign the forms. In any event, failure by a candidate or his agents to sign form 35 cannot invalidate results.

5. Whether the 1st Respondent's election was valid, free and fair/Whether the I.E.B.C in anyway misconducted itself in the elections/ Whether the irregularities and malpractices alleged in the election if any, were of such magnitude as to render the elections invalid.

The assumption is that the election officials complied with the law in conducting the elections and the burden lies with the Petitioner to prove otherwise. In MOHAMED JHAZI –VS- SHARIF NASSIR A. TAIB, Election Petition No. 9 of 1983, it was held that the burden of proof throughout rests on the Petitioner and the quality of evidence that is advanced is to be considered with a thoroughness and gravity which is commensurate with the dire consequences that can follow.

The Petitioner testified how Jechonia was told by the presiding officer that “**they must vote for the remaining 150 voters starting with the dead**”. Even though the Petitioner termed this conduct as weird and one which could amount to an election offence he confirmed that he did not lodge any complaint with the 3rd Respondent regarding the manner the elections were conducted.

Counsel for the Petitioner also submitted:

“... the area being an ODM stronghold, the officers charged with manning election process lacked independence to conduct the elections without fear or favour and that the overwhelming presence of ODM sympathizers either as agents or subordinate staff manipulated the tallying process in favour of the 1st Respondent and influenced the outcome.”

These matters raised by the Petitioner in his testimony and through submissions in regard to Issue No. 5 above are not pleaded. I apply the principle in the case of Mahamud Muhumed Sirat vs Ali Hassan Abdirahman and 2 Others Nairobi Petition No. 15 of 2008 [2010] eKLR where it was held:

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

It is the duty of the Petitioner to prove that there were irregularities and malpractices and that they were of such magnitude that they substantially and materially affected the results of the elections.

In Joho vs Nyange & Anor (supra) the court held that:

“The burden of proof in election petitions lies with the petitioner as he is the person who seeks

to nullify an election. While the burden of proof has to be done to the satisfaction of the court, it cannot be said that the burden of proof required in election petitions is proof beyond reasonable doubt. Like in fraud cases, the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences a very high degree of proof is required.

The Petitioner herein has failed to prove any of the allegations contained in the petition.

Section 83 of the Elections Act, 2011 provides that:

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

There is no issue raised against the 1st Respondent in the whole electoral process. There is no tangible evidence that the 2nd and 3rd Respondents conducted themselves in any way in contravention of the Constitution or any written law.

6. Whether the petition itself is competent

A glance at the petition herein dated 22nd March, 2013 and filed on 25th March, 2013 shows the casual and hurried manner in which it was drawn. Of importance is failure to comply fully with the mandatory provisions of **Rule 10 of the Elections (Parliamentary and County Elections) Petition Rules, 2013** especially to state the results of the election and how it was declared. The said Rule is in mandatory terms:

“10. (1) An election petition filed under rule 8 shall state —

(a) the name and address of the Petitioner;

(b) the date when the election in dispute was conducted;

(c) the results of the election, if any, and however declared;

(d) the date of the declaration of the results of the election;

(e) the grounds on which the petition is presented; and

(f) the name and address of the advocate, if any, for the Petitioner which shall be the address for service.”

I am alive to the Court of Appeal authority in **Mututho vs Kihara and 2 Others [2008] KLR** on the said non-compliance and the consequence thereof:

“The Petitioner does not have the results even now. Her Advocate has stated as much. If she does not have the results, what is she challenging? The issues she raises are meant to nullify a particular result but if she has not given the results, any finding on the issues raised would serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election but without the results, it might not be possible to relate the irregularities to the result.”

I am also alive to **Article 159 (2) (d) of the Constitution of Kenya, 2010** which provides that justice shall be administered without undue regard to procedural technicalities and the Supreme Court interpretation of the said Article 159 in the **Raila Odinga Vs. I.E.B.C. & Others Petition No. 5 of 2013** where it stated:

“Article 159 (2) (d) of the Constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court”.

Again **Rule 4 (1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013** provides that the overriding objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.

While the non-compliance with **Rule 10** cited above may not necessary warrant dismissal of the petition in light of the above principles, the cumulative effect of the said defect when the petition is heard on merit has a big impact.

When in this matter the Petitioner fails to plead the results and how they were declared; does not even know the results as at the time he testifies in court; does not even recall the provisional results; and wishes to rely on the same to show discrepancies, alterations, inconsistencies and the margin of votes in his quest for nullification of the election of the 1st Respondent, then the petition cannot be described in any other way. It is not only incompetent but also lacks merit.

I am satisfied that the whole election process from voting to scrutiny and tallying, was smooth, fair, and transparent and in accordance with the law and that the results reflected the will of the people of West Kasipul.

ORDERS

1. The petition is hereby dismissed with costs to the Respondents.
2. ISAIAH AGWENGE ODERA was duly and validly elected as member of the County Assembly of West Kasipul Ward on the general elections held on 4th March, 2013.
3. A certificate under Section 86 (1) of the Elections Act, 2011 shall issue to that effect.

DATED, DELIVERED and SIGNED at HOMA BAY this 29th day of August, 2013.

P. GICHOHI

CHIEF MAGISTRATE

PRESENT:

1. No attendance for Petitioner
2. Mr. G.S Okoth for 1st Respondent
3. Mr. Omondi for 2nd and 3rd Respondent
4. Nyaoke George Court Clerk