



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT AT MAKUENI

ELECTION PETITION NO. 1 OF 2013

ISAAC MUYA MUNYWOKI..... PETITIONER

VERSUS

MUTINDA MWANGANGI..... 1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC)..... 2ND
RESPONDENT**

JUDGMENT

The petitioner herein, Mr. Isaac Muya munywoki, filed this election petition on 10th April, 2013 challenging the declaration of the 1st Respondent by the 2nd Respondent as the duly elected Member of the County Assembly, Waia/Kako Ward, Mbooni constituency, Makueni County, following the General Elections held on the 4th of March, 2013. The seat of the County Assembly Member Representative for Waia/Kako Ward was competitive and had attracted seven candidates, among them was the Petitioner and the 1st Respondent. The candidates were as follows; Anthony Sony Mutinda, David Mwanzia Kiamba, Fredrick Kilinda Masika, Isaac Muya Munywoki (Petitioner), Mutinda Mwangangi (1st Respondent), Raphael Muli Matia and Shadrack Kioko Muthama.

There were thirty one (31) polling stations within Wai/Kako Ward, at the close of voting and after vote counting had been concluded, the 2nd Respondent declared and returned the 1st Respondent as the duly elected candidate for County Assembly Member of the aforesaid ward. As required by law, the 2nd Respondent vide Gazette Notice No. 3160 of 13th March, 2013, formally gazetted the 1st Respondent as the duly elected County Assembly Member for Waia/Kako Ward. Aggrieved by the above declaration, the Petitioner filed this petition challenging the declaration of the 1st Respondent as the winner of the contest of 4th march, 2013. The Petitioner has listed seven(7) grounds in support of his petition and is seeking four prayers as listed hereunder;

- (a) a declaration that the 1st Respondent was not duly or validly elected,
- (b) a declaration that the election was void,
- (c) an order that a fresh election be held, and
- (d) an order that the costs of this petition be borne by the Respondents.

The grounds cited by the petitioner are as follows;

- (1) That the results of the elections of 4th March, 2013 were manipulated by the 2nd Respondent to the detriment and or disadvantage of the Petitioner,

(2) That the conduct of the elections was not free, fair and transparent due to massive bribery or payment of money by the 1st Respondent, his agents or persons privy to him, to voters within the ward as a bribe or inducement to vote in his favour,

(3) That the agents of the Petitioner were ejected from several polling stations by the 2nd Respondent,

(4) That the presiding officer permitted and or authorized a party/candidates' agent to, exclusively and without participation of other agents, assist voters with disability and or those unable to vote contrary to regulation 72(1) of The Election (General) Regulations, 2012,

(5) That the presiding officer, in the absence of the Petitioner's agents, assisted voters with disability aforesaid, who were unaccompanied by a qualified assistant in contravention of Regulation 72(2) of the above referred Regulations,

(6) That the presiding officer(s) disregarded all regulations regarding vote counting by failing to display to the Petitioner's agents ballot papers for them to ascertain the votes, and

(7) That the 2nd Respondent conducted the elections of 4th March, 2013 in complete disregard of The Constitution, The Elections Act, 2011 and Regulations thereby rendering the elections invalid.

Both Respondents filed their respective responses to the Petitioner's petition on 6th May, 2013. The 1st Respondent has disputed the petitioner's allegations and contends that he was validly declared as the winner of the elections of 4th March, 2013. The 1st Respondent avers that the elections in dispute were free, fair and transparent and that the 2nd Respondent conducted the elections in accordance with the law. The 1st Respondent contends that the allegations by the Petitioner are untrue and full of falsehoods, that the petition is baseless, lacks merit and ought to be struck out. The 1st Respondent prays that it be determined that he was validly elected and that the petition be dismissed with costs.

The response of the 2nd Respondent mirrors that of the 1st Respondent in material particulars. The 2nd Respondent avers that neither its officers nor the police were informed of any election malpractices by any candidate or agent. The 2nd Respondent further avers that its presiding officers assisted voters with disability in the presence of candidates, their agents, accredited observers and party agents in accordance with regulations. The 2nd Respondent denies allegations that it ejected the Petitioner's agents and contends that all votes were cast, counted and tallied in accordance with the relevant regulations. According to the 2nd Respondent, the petitioner lost in an election conducted in a free and fair manner. The 2nd Respondent avers that the elections were conducted substantially in accordance with The Constitution and the law and that any irregularity which may have arisen did not affect the validity of the elections. The 2nd Respondent contends that the results as declared reflects the verdict of the electorate which the Petitioner has refused to accept. The 2nd Respondent prays that it be determined that the 1st Respondent was duly elected and that the elections were valid and that the petition be dismissed with costs.

During the Pre-Trial Conference held on 14th June, 2013 the parties agreed on three(3) issues for determination by this court. The issues are as follows;

(1) Whether the County Assembly elections in respect of Waia/Kako Ward in Mbooni Constituency within Makueni County held on 4th March, 2013 was conducted in a free, fair, transparent and credible manner in compliance with the provisions of The Constitution and all relevant provisions of the law,

(2) Whether the 1st Respondent was validly elected and declared as County Assembly Representative, Waia/Kako Ward in Mbooni Constituency of Makueni County, and

(3) What consequential orders and reliefs this court ought to grant upon the determination of this election petition.

The parties further agreed that the evidence as contained in their respective affidavits accompanying the

Petitioner's petition and the Respondents' responses to the petition be treated as their evidence-in-chief and that the adverse party be at liberty to cross examine the deponent(s). The parties also gave an indication as to the number of witnesses they intended to call even though not all witnesses in their respective lists of witnesses were called at the end of the hearing. The Petitioner gave notice of his intention to seek a recount and or scrutiny of votes, this was done through the petitioner's notice of motion application dated 12th June, 2013 which was filed on the date of the conference. The prayers in the aforesaid application were partially allowed by this court on 2nd August, 2013 vide a ruling of the said date. This court will revisit later the results of the scrutiny and recount of votes within the body of this judgment.

The hearing of this election petition commenced on 1st July, 2013 and ended on 11th July, 2013. The Petitioner testified in support of his petition and called four(4) witnesses, in fact the Petitioner testified as PW5 after his witnesses had given their testimonies. The Petitioner's supporting affidavit which constitutes his evidence- in-chief is dated 10th April, 2013. In paragraph (3) of the above mentioned affidavit, the Petitioner says that at the close of vote counting the 2nd Respondent gave him form 36 and forms 35 with respect to only four polling stations which he has named as Mukuku Pri. Sch(140), Mbimbini Pri. Sch(162) , Wambiti Pri. Sch(147) and Malatani Pri. Sch(146) .

During the elections the Petitioner had not appointed his personal agents but was relying on party agents appointed by the Democratic Party(DP) which had sponsored the Petitioner during the elections of 4th March, 2013. The Petitioner was not present at the constituency tallying centre, he was given the above forms 35 by his party agents and form 36 by the Returning Officer (herein after referred to as the RO) a day after the elections. The Petitioner produced F.36 as Pexh.1 and the four(4) F.35s as Pexh.2(a), (b), (c) and (d). The Petitioner says he was not satisfied with the conduct of the elections and complained in writing to the RO, the Petitioner's complaint letter was produced as Pexh.3. The Petitioner says he was not given F.35s for the remaining twenty seven (27) polling stations despite incessant demand and even after he visited the 2nd Respondents offices in Tawa.

The petitioner says he was forced to instruct his advocate who wrote to the 2nd Respondent on 27th March, 2013 demanding the immediate release of the withheld F.35s. When the 2nd Respondent failed to release the forms, the petitioner says he filed an application before the High Court in Nairobi wherein the 2nd Respondent was compelled to release all the F.35s for all the 31 polling stations within Waia/Kako Ward. The Petitioner produced his advocate's letter dated 27/03/2013 as Pexh. 4. The Petitioner produced a bundle of F.35s for all the polling stations as Pexh.5 and F.36 that he was given as Pexh. 6.

According to the Petitioner, the results he garnered at the polling stations as entered in the respective F.35s were different from those entered for him at the tallying centre as reflected in F.36. The Petitioner cited the example of Malatani Pri. Sch polling station(146) where he says he garnered 105 votes but he was given 05 votes as per Pexhs. 1 and 6. The Petitioner blames the 2nd Respondent for reducing his votes by 100 votes. The Petitioner says the results announced at the polling stations and signed by the Presiding officers (herein after referred to as PO) and agents were later altered.

The Petitioner cited the example of Mukuku Pri. Sch.(140) results as shown in Pexh. 2(a) where the rejected votes are shown as being two(2), the Petitioner says a similar F.35 for Mukuku in the bundle produced as Pexh. 5 shows the rejected votes as being seven(7). The petitioner says the total number of valid votes cast was affected by the alterations. The petitioner has also named Wambiti Pri. Sch. (147) as one such station where there were alterations of results as shown in Pexh.2(c) and Pexh.5. According to the Petitioner, there were errors in the final tally, Pexh.1 shows that he garnered 1219 votes while Pexh.6 shows that he garnered 1231 votes.

The Petitioner has also taken issue with the way counting of votes was conducted at Mukuku Pri. Sch. (140) and Nduluku Pri. Sch. (139) polling stations. According to the Petitioner the votes were not properly displayed to his agents during counting. He further says voters with disabilities were not properly guided at Kikuswi Pri. Sch. (142) polling station while his agent at Kingaathuni Pri. Sch. (148) was ejected and it took his intervention for him to be readmitted. Voting had gone on in the absence of the ejected agent, according to the Petitioner the elections of 4th march, 2013 were not free and fair and a

repeat of the elections should be ordered.

On cross examination by Mr. Mutia for the 1st Respondent , PW5 admitted that he did not receive Pexh. 2 (a), (b), (c) and (d) directly from the 2nd Respondent but through his agents . As such PW5 was not present when they were filled. PW5 conceded that Pexh.2(a) was not stamped by the 2nd Respondent. PW5 further conceded that irrespective of the alterations in Pexh. 2 (a), (b),(c), and (d) as compared with corresponding forms in Pexh. 5, the results of the candidates remain unchanged. PW5 conceded that it was not the 1st Respondent who ejected his agent from Kingaathuni Pri. Sch.

On cross examination by Mr. Kivuva for the 2nd Respondent, PW5 admitted that he did not witness any vote counting in any polling station. PW5 relied on what the agents told him regarding what happened during vote counting. PW5 conceded that it was neither the 1st Respondent nor the officials of the 2nd Respondent who ejected his agent, according to PW5 , his agent who testified as PW2 was ejected after he was given ' lunch' by a DP agent. PW5 did not attend the tallying centre but there was a party agent who did not dispute the results that were announced, PW5 later disputed the results that had been announced.

PW5 wrote Pexh. 3 dated 6th March, 2013 and handed over to the RO expressing his dissatisfaction with the declaration of the 1st Respondent as the winner of the elections of 4th march, 2013. PW5 conceded that the 1st Respondent was declared the winner with 1918 votes to his 1231 votes, thereby leading him by a margin of 687 votes. According to PW5, if his 100 votes were not deducted, the 1st Respondent would still have led him with a margin of 587 votes. PW5 says his agents were not given F.35s to sign in the polling stations as required. PW5 conceded that typographical errors that were noted affected other candidates besides him. PW5 could not tell if some of his votes were added to those of the 1st Respondent.

PW5 could not tell who benefited from the 100 votes that were deducted from his tally. The petitioner says there were many irregularities and that he was the 3rd candidate with the most votes, the 2nd candidate with the most votes had 151 more votes than those of the petitioner. On re- examination, pW5 says he had complaints with regard to 4 polling stations. PW5 says the elections were not fair since his votes were deducted, he gave the example of Malatani Pri. Sch where he says he lost 100 votes. The petitioner says he can't tell how many votes he garnered due to the mistakes of the 2nd Respondent

PW1 who was a witness for the petitioner says in her evidence-in-chief that the presiding officer at Mukuku primary school polling station (140) was assisting voters who did not know how to read and write but in the absence of the agents for the candidates. PW1 says that she was the agent for the petitioner in the aforesaid polling centre. It is the evidence of PW1 that she collected F. 35 for the petitioner showing Mukuku polling station results for the petitioner and other candidates, however PW1 who was a registered voter at Mukuku says that she was not given the form to sign. PW1 identified Pexh. 2(b) as being the F.35 she collected for PW5.

PW1 denied signing F.35 for Mukuku polling station produced in the bundle marked Pexh. 5. On cross examination by Mr. Mutia for the 1st Respondent, PW1 told this court that she was an agent for DP and was appointed by a DP official. PW1 further told the court that she was an agent for Raila odinga who was a presidential candidate for the Coalition For Reforms and Democracy (CORD) but was told she could not be an agent for two parties. PW1 says she was not allowed to enter the polling booth and see how persons with disabilities were being assisted to vote. PW1 could not recall the name of the PO for Mukuku, she conceded that she did not lodge any complaint with him regarding her dissatisfaction with the way the voters with disability were assisted.

On cross examination by Mr. Kivuva for the 2nd Respondent, PW1 said she could not tell how many voters with disability were assisted to vote. PW1 could not also recall the names of the said voters who were assisted. According to PW1, none of the assisted voters complained that they were made to vote for persons other than those they intended to vote for. None of the voters also complained against the PO.

PW1 conceded that there was no problem noted during voting but said problems arose during vote counting. According to PW1, the votes cast were counted without being displayed to the agents.

PW2 in his evidence-in-chief says that he was an agent for the petitioner at King'aathuni primary school polling station (148), he says at around 10.00 AM he was ejected by the presiding officer for no apparent reason and was only readmitted after the petitioner intervened. On cross examination it emerged that PW2 was ejected by members of the public after he was given some money outside the polling station some few meters from the polling hall entrance. In fact PW2 fled so that the members of the public could not dispossess him of the money he had just been given.

PW2 was given Ksh. 1,000/= and as he made for the polling station hall, he was accused of having received a bribe. After PW2 had fled he was later brought back by the Petitioner and found voting going on. PW1 who says he does not know how to read and write, confirmed signing F.35 for Kingaathuni which was produced as Pexh. 5. PW2 absolved the PO from any involvement in his ejection, the person who gave money to PW2 was not an accredited observer or voter at the polling station. PW2 was given money some three(3) yards from where members of the public were standing.

On cross examination by Mr. Kivuva for the 2nd Respondent, PW2 admitted that he never complained about his ejection to the police or to the officials of the 2nd Respondent. According to PW2, there were no irregularities noted before he was ejected and he didn't witness any when he returned. On being re-examined, PW2 told this court that he was given the money in question in full view of members of the public but denied that the money was in the form of a bribe.

PW3 told the court that he was an agent for Wiper Democratic Movement (WDM) party during the elections of 4th March, 2013 and was stationed at Nduluku primary school polling station (138). According to PW3, the ballots for county assembly member candidates were not properly displayed during counting. At the end of vote counting PW3 signed F. 35 without raising any complaint, he did not complain to the party that had appointed him as an agent.

On cross examination by Mr. Mutia for the 1st Respondent, PW3 told the court that he complained orally about vote counting but did not put the same in the form of comments while signing F.35. PW3 could not recall who the Petitioner's agent at Nduluku was. PW3 admitted that he never lodged any complaint with the police. On cross examination by Mr. Kivuva for the 2nd Respondent, PW3 told this court that he does not know the PO of Nduluku but that he knew his deputy. According to PW3, all votes were counted well save for those of County Assembly Member candidates.

PW4 in his evidence-in-chief says that he voted at Kikuswi Pri. Sch (142) on 4th march, 2013 and was assisted by one Pius Waema. This was occasioned by the fact that PW4 does not know how to read and write, according to PW4, the aforesaid Waema assisted him in the absence of any other person. PW4 says he was not accompanied by a person of his own choice who could assist him and had sought assistance before Waema stepped in. PW4 says Mr. Waema did not mark a ballot paper for the candidate whom PW4 wanted to vote for. PW4 did not complain because the person who had assisted him is a village elder. On cross examination by Mr. Mutia for the 1st Respondent, Pw4 admitted that he knows how to read and write but has a problem with his eye sight. PW4 further told this court that he did not inform the PO about his inability to read and write.

PW4 first told the petitioner about what transpired on 4th march, 2013 on 10th April, 2013 when he was taken to Nairobi to sign his affidavit. PW4 told this court that he would not have complained if his preferred candidate had won. On cross examination by Mr. Kivuva for the 2nd Respondent, PW4 told the court that he did not complain to anybody after he had voted. Even though PW4 had said in his evidence-in-chief that he had used the candidates' photos to identify his candidate, he said on cross examination that he was using party symbols.

The 1st Respondent testified as DW1, he adopted the averments in his affidavit dated 4th may, 2013 as his evidence-in-chief. DW1 told the court that he offered his candidature for election as a County Assembly Member for Waia/Kako Ward during the elections of 4th March, 2013 and was declared as

duly elected. The 1st Respondent contends that nobody lodged any complaint of any election malpractice against him during the campaigns leading to the elections. DW1 further avers that he never appointed any agent during the polling day, he specifically denied appointing one Mutuku Malonza and Raphael Kiema Muia as his agents.

According to DW1, he was declared a winner after garnering 1917 votes against the Petitioner's 1219 votes. DW1 avers that the Petitioner was the 3rd candidate with the most votes. DW1 says the elections of 4th march, 2013 were free, fair and transparent. According to DW1, the officials of the 2nd Respondent conducted the elections in accordance with the law and the results of the election were not compromised. DW1 says that the petition is based on falsehoods, is baseless and ought to be struck out with costs. DW1 avers that majority of the people of Waia/Kako Ward voted for him and that the results announced reflects the will of the voters. DW1 referred to the affidavits of Mutuku malonza and Raphael Kiema malonza, both dated 4th May, 2013, wherein they both denied acting as the agents of DW1.

On cross examination by Mr. Mathuva for the Petitioner, DW1 told the court that he voted at Nduluku Youth Polytechnic polling station (138) and that he did not go to any other polling station. DW1 further told the court that he went to the tallying centre around 2 AM on 5th march, 2013 to witness the tallying process. DW1 was contesting the polls under the sponsorship of The Independent Party (TIP) which had appointed party agents who were also acting for the party candidates.

According to DW1, the 2nd Respondent gave him all the F.35s for all the polling stations. DW1 did not wait for vote counting at his polling station after he had cast his vote. DW1 says that he was declared the winner with 1917 votes as per the official results announced. DW1 further said that he had been a councilor prior to his declaration as having won the seat of County Assembly member. DW1 contends that the elections were free, fair and transparent.

According to DW1, he had done a lot to the people of Waia/Kako while he was their councilor and he expected to win the elections of 4th march, 2013. On cross examination by Mr. Kivuva for the 2nd Respondent, DW1 said that he didn't appoint any personal agents but had relied on the agents appointed by TIP. DW1 further said that he had no role in the appointment of the party agents. As a former councilor, DW1 says that he had supporters throughout the ward. DW1 did not hear any complaints against the 2nd Respondent's officials from any of his supporters. According to DW1, the 2nd Respondent had conducted sufficient civic education prior to the elections of 4th march, 2013 and voters with disabilities had been told what to do.

DW1 denied any association with one Pius Waema whom he says was last campaigning for the Petitioner. According to DW1, there were no complaints after the elections which were brought to his attention. The 1st respondent called one witness in support of his case. He testified as DW2 and gave his name as Musyoka Wambua, DW2 told this court that he is a registered voter at Kingaathuni Pri. Sch. (148) polling station where he voted on 4th March, 2013. While queuing to vote, DW2 saw a motor vehicle Reg. No. KBK 548T which was driven to the polling station. According to DW2, the crew of the motor vehicle were people who had been campaigning for the Petitioner.

The three crew members called PW2 whom they gave Ksh. 1,000/=, DW2 and others felt that PW2 had been given money to influence voters and they decided to eject him from the polling station. On cross examination by Mr. Mathuva for the Petitioner, DW2 denied knowledge of the 1st Respondent's home. DW2 says he knows both the 1st Respondent and PW2 well, according to DW2, PW2 was given the money openly by somebody who did not come out of the motor vehicle. As PW2 made for the polling room, people started asking him questions regarding the money he had been given. PW2 was told to stand still while being questioned, DW2 is among those who restraint PW2 from going back to the polling room.

DW2 who had witnessed voters being given money during the campaigns concluded that PW2 had been bribed. DW2 admitted that he also wanted to be given money like PW2 and his main interest was the money PW2 had been given. According to DW2, PW2 fled outside the polling station with the money otherwise he would have been dispossessed. On cross examination by Mr. Matuva for the 2nd

Respondent, DW2 told this court that PW2 was given the money about five yards from the polling station entrance. PW2 did respond to queries about the money he had been given. On further cross examination, DW2 told the court that he was not given money directly by the 1st Respondent and the Petitioner.

The 2nd Respondent called four(4) witnesses in support of its case, DW3 who gave his name as Paul Muiruri Mbugua is an employee of the 2nd Respondent and was the RO for Waia/Kako Ward. According to DW3 the elections of 4th March, 2013 were free, fair and transparent, DW3 further told this court that he didn't receive any complaint from the Petitioner on the polling day. DW3 says that he did not receive any allegations regarding voter bribery, inducement and any other form of voter manipulation during the polling day.

According to DW3 his POs assisted voters with disabilities in the presence of accredited observers, candidates, their agents and in accordance with the regulations. DW3 says that neither the Petitioner nor his agents raised any complaints until the final results were announced when it became apparent that the Petitioner had lost. DW3 further says that if there were any irregularities which may have occurred the same did not affect the validity of the elections. According to DW3 there were no substantial irregularities which would have affected the outcome of the elections. DW3 categorically states that the 1st Respondent was validly elected. DW3 produced all the original copies of F.35s for all the polling stations within Waia/Kako Ward as Dexh.1 and a certified copy of F.36 as Dexh.2. DW3 said he used Dexh.2 to announce the official results for Waia/Kako Ward.

According to DW3 tallying started on 4th March, 2013 and was completed around mid-night on 5th March, 2013. DW3 says he and his staff were tired and fatigued and were under immense public pressure to release all the results. DW3 said he noted an error in Dexh.2 wherein the Petitioner was given 05 votes for Malatani polling station instead of 105 votes which he had garnered. Another candidate called Kioko Muthama had been given 05 votes instead of 04 votes which he had garnered in the same polling station. DW3 says he noticed the mistakes after he had announced the results for the ward.

DW3 says that save for the mistake as noted above, no candidate's results were deducted. According to DW3, the mistake did not change the outcome of the poll. DW3 further says that the entries in Pexh. 2(a), (b),(c) and (d) are similar to the entries in Dex.1 save for figures representing the total number of votes cast and rejected votes. But the results of all the candidates remain unaffected, DW3 says his POs did not get right the formula used to arrive at the correct total numbers of valid votes cast.

DW3 told this court that he gave the petitioner Pexh.1 and had certified all pages but what the petitioner produced as Pexh.1 had its page 2 uncertified. DW3 says page 1 of Pexh.1 compares well with page 1 of Dexh.2. According to DW3, the Petitioner then did not ask for a recount of votes and re-tallying. DW3 summed his evidence by saying that the elections of 4th March, 2013 were free and fair and reflected the will of the voters. On cross examination by Mr. Mathuva for the petitioner, DW3 told the court that he did not visit any polling station within Waia/kako Ward on the polling day. DW3 admitted that Dexh.1 has alterations as regards the results for Mukuku pri.Sch., the alterations are on the total number of valid votes cast and the number of rejected votes. According to DW3, the alterations were done at the tallying centre to correct errors which had been noted. DW3 says the alterations did not affect the number of votes cast for any of the candidates.

During polling day DW3 says he was in constant touch with his POs and would have been informed if there were any problems they encountered. On cross examination by Mr. Mutia for the 1st Respondent, DW3 told the court that no alterations were made to any of F.35 to the disadvantage of any candidate. DW3 further says that if the 100 votes which had been deducted from the Petitioner are added to the Petitioner's tally, the petitioner would still be the 3rd candidate with the most votes.

DW4 was the PO at Kikuswi pri.Sch. (142), he says he does not know any person by the name Pius Waema and that he never allowed him to assist voters with disability exclusively. DW4 explained how voters with disability were assisted to vote by persons of their choice and the PO in the absence of persons of their choice. He says one could only assist a voter with disability once, DW4 says he received no complaint from any agent during polling day. On cross examination by Mr. Mathuva for the Petitioner,

DW4 told the court that he could only recall two voters with disability who were assisted by persons other than the PO.

DW5 told this court that he was the PO at Nduluku Pri.Sch. (139) during the elections of 4th march, 2013. DW5 says that he displayed all ballot papers to the agents of the candidates during their sorting and counting, he further says some agents had left by the time counting was completed. DW5 does not recall any agent who refused to sign F.35 at the conclusion of vote counting.

The last witness for the 2nd Respondent was DW6 who was the PO at Mukuku Pri. Sch. (140), DW6 described how voters with disability were assisted to vote by people of their choice. DW6 says he never assisted any voter with disability on the polling day. DW6 further told the court that he properly displayed the ballots to the agents during vote counting and that he received no complaints from any agent regarding the process. DW6 told the court that Pexh.2(a) is not authentic in that it was taken after it was abandoned due to errors and was not signed by the PO and any agent. DW6 says the authentic F.36 for Mukuku as contained in Dexh.1 was signed by himself and the agents of candidates.

On cross examination by Mr. Mathuva for the Petitioner, DW6 said that the total number of rejected votes were 7. Initially two(2) rejected votes were counted but it was later discovered that five(5) others had been left out. DW6 says he never gave out Pexh.2(a) to the Petitioner's agent and that he found it missing at the end of vote counting. On cross examination by Mr. Mutia for the 1st Respondent, DW6 told the court that only five(5) voters with disability were assisted to vote.

The above is the summary of the evidence as given by the Petitioner and the Respondents during the hearing of this election petition. This court in its ruling of 2nd August, 2013 ordered the scrutiny and recount of votes for both Malatani Pri. Sch. (146) and Kandulyu Pri. Sch. (156) polling stations following an application by the Petitioner. The scrutiny and recount of votes for the two polling stations was done on 7th of August, 2013 in the presence of all the parties. The results were as follows:-

(1) Malatani Pri. Sch. (146)

(2) kandulyu Pri.Sch.(156)

(a) Number of spoilt ballot papers.....1.....	1
(b) Number of votes cast.....151.....	324
(c) Number of rejected votes.....0.....	09
(d) Number of disputed votes.....0.....	0
(e) Number of rejected/objected votes....0.....	0
(f) Total Number of valid votes cast.....151.....	315

Votes for each candidate.

(1) Anthony Sony Mutinda.....33.....	42
(2) David Mwanzia Kiamba.....01.....	18
(3) Fredrick Kilinda Masika.....00.....	01
(4) Isaac Muya Munywoki.....104.....	14
(5) Mutinda Mwangangi.....09.....	35
(6) Raphael Muli Matia.....00.....	59

As would be noted from the results of the scrutiny and recount, the petitioner's votes reduced by one(1) at Malatani while the 1st Respondent's votes increased by one(1) vote. At Kandulyu the results of both the Petitioner and the 1st Respondent remains unchanged. The only candidates whose results were affected at Kandulyu was Raphael Muli Matia and Shadrack K.K. Muthama, however the variations are within the range of no more than two votes. The other notable variations between the results of the scrutiny and recount and those announced during the actual tallying process mainly affects the rejected votes and the total number of valid votes cast. One can then safely conclude, on the basis of comparison of the sample results and the actual results announced at the polling stations, that the two set of results are similar in material particulars.

At the close of the hearing of this election petition, this court invited the parties to file their respective written submissions. All the parties filed submissions within the stipulated time, though I may not reproduce the entire submissions in the body of this judgment I will try to give, in summary, what each party submitted. It was submitted on behalf of the Petitioner that the election results were manipulated to the detriment of the Petitioner. The results of Malatani Pri. Sch. polling station were cited as one such example where the Petitioner's votes were reduced by 100 votes.

It was further submitted for the Petitioner that ballot papers were not properly displayed during vote counting, the testimonies of PW1 and PW3 were cited in support of the proposition. The Petitioner further submitted that his agent was ejected, he cited the ejection of PW2 from Kingaathuni polling centre. The Petitioner also cited the improper assistance of voters with disability during the polling day. According to the Petitioner, the 2nd Respondent has admitted that there were alterations made to F.35s as alleged by the Petitioner. The Petitioner has generally challenged the evidence of the 2nd Respondent's witnesses and has sought the expunging of the evidence of DW5. According to the Petitioner, the elections of 4th March, 2013 were not free, fair and transparent and ought to be annulled and that the 1st Respondent was not validly elected.

The Petitioner did not cite any authorities in support of his submissions. It was submitted for the 1st Respondent that the Petitioner failed to enjoin the Returning Officer (RO) as required by law. According to the 1st Respondent, the elections of 4th March, 2013 were free, fair and transparent and that the 2nd Respondent properly conducted the polls in accordance with the law. It was further submitted that no misconduct on the part of the 1st Respondent was proved. According to the 1st Respondent none of the agents of the Petitioner complained to the respective POs during the election day, the 1st Respondent urges this court to find the Petitioner's witnesses as lacking in credibility.

The 1st Respondent contends that neither of the Respondents ejected the Petitioner's agent as alleged but that he was ejected by members of the public after he was given money, thought to be a bribe, in their full view. The 1st respondent contends that there was no way all the ballot papers in all contested seats could have been properly counted save for those of the county assembly member. It is the position of the 1st Respondent that whatever errors, that might have occurred, did not affect the final results of the elections.

The 1st Respondent submits that the Petitioner has failed to proof his allegations and that this court ought not interfere with the elections or overturn the same. The 1st Respondent has cited the case of *Josiah & 4 Others v Ogotu & Another*, Nairobi HC EP No. 38 of 1974 (2008) 1KLR, *Khasakhala v Mukuna & Another*, Nairobi HC EP No. 11 of 1974, (2008) 1KLR and the case of *Ambala v Waitihaka & Another*, Nairobi HC EP No. 5 of 1983 (2008) 1 KLR in support of his submissions that the Petitioner's petition ought to be dismissed. This court has read and considered the import of the aforesaid authorities.

I will now turn to the submissions of the 2nd Respondent, according to the 2nd Respondent, the Petitioner has failed to discharge his burden of proof and non of the allegations made by the petitioner have been proved. Like the 1st Respondent, the 2nd Respondent is urging this court to dismiss the petition due to the

failure of the petitioner to enjoin the RO as required by law. The 2nd respondent submits that none of the witnesses who were called by the petitioner have proved that they were indeed agents of the petitioner.

It is further submitted that none of the respondents ejected the petitioner's agent as alleged, the 2nd respondent has attacked the credibility of the witnesses called by the petitioner. Though conceding that the petitioner's votes received at Malatani were indeed reduced, the 2nd respondent contends that the same was occasioned by a typographical error which has been explained and that the same did not affect the final results of the elections in question. The 2nd respondent further concedes that there were alterations made on F.35s but that the alterations were made to correct arithmetical errors.

The 2nd respondent questions the authenticity of some of the documents produced as exhibits by the petitioner saying some of them were acquired improperly and the custodians not disclosed. The 2nd respondent has cited the authorities of *Raila Odinga & Others v IEBC & 3 Others*, Supreme Court of Kenya EP. No. 5 of 2013 (consolidated), *Wavinya Ndeti v IEBC & 4 Others*, Machakos HC EP. No. 4 of 2013, *Nelson v AG & Another*, CA of Tanzania, Case No. 24 of 1999 in support of its submissions that the petitioner's petition ought to be dismissed. According to the 2nd Respondent, the elections of 4th March, 2013 were free, fair and transparent and that the 1st Respondent who was defending the Waia/Kako Ward seat as the incumbent was validly elected. The above is the summary of the submissions of the parties.

In his submissions the learned counsel for the Petitioner has urged this court to expunge from the record the testimony of DW5, this is for reasons that he had admitted that he did not sign his affidavit. I do note that the counsel did not object to the testimony of DW5 when he was testifying and his evidence has already been admitted. It is also important to note that all witnesses who testified were sworn before they gave their testimonies, in fact this court allowed the parties to introduce their witnesses and some of the witnesses gave more evidence than was contained in their respective affidavits. It is late in the day to challenge the evidence after its admission unless one is submitting on the credibility of the witness in question.

Both counsel for the Respondents urged this court in their submissions to strike out the petition for reasons that the Petitioner did not enjoin the RO in the proceedings as required by law. Even though I find merit in the submissions on the same I believe the issue should have been raised at the earliest opportunity and the Petitioner given an opportunity to respond. I will therefore not make any finding on the issue of such failure to enjoin the RO.

The Preamble to the Constitution of Kenya, 2010 provides that the people of Kenya have the sovereign and inalienable right to determine the form of governance of the country. Article 81 of the constitution lays down the general principles that should govern the country's electoral system. Key among them is the holding of free and fair elections, which are free from violence, intimidation, improper influence or corruption, conducted by an independent body, transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.

It is for the above reasons that the constitution established the 2nd Respondent, which is the IEBC, under Art. 88(1) to conduct and oversee the holding of elections as the independent body envisaged by the constitution. In conducting elections, the 2nd Respondent ought to be guided by the Constitution Of Kenya, 2010, the Elections Act, 2011, The Elections (General) Regulations, 2012 among other laws.

The burden to prove that the elections of 4th March, 2013 were not free, fair and transparent and that the same do not meet the above mentioned constitutional principles and other statutory requirements rests with the petitioner. The standard of proof is above that of civil suits where one is required to prove a case on a balance of probabilities. In the case of *Ng'ang'a & Another v Owiti & Another*, Nairobi HC EP. No. 41 of 1993 (2008) 1KLR it was held " ***Election offences approximate criminal charges and the proof of them should be at such a high standard as to be above, and quite above, the balance of probabilities in civil litigation.***" The High Court held so in an election petition where part of the allegations raised by the petitioner included introduction of foreign pre-marked ballot papers during vote counting, which act if proved, would have constituted an electoral offence.

The issue of the standard of proof required was settled by the Supreme Court of Kenya in the case of *Raila Odinga & Others v IEBC & Others* (supra) when it held while quoting with approval the case of *Col. Dr. Kizza Besigye v Museveni Yoweri Kaguta*, Uganda EP. No. 1 of 2001 " ***...the burden of proof in election petitions as in other civil cases is settled. It lies on the petitioner to prove his case to the satisfaction of the court.....The threshold of proof should, be above the balance of probability, though not as high as beyond reasonable doubt, save that this would not affect the normal standards where criminal charges linked to an election, are in question.***"

The question then is, has the petitioner discharged the above burden of proof in the present petition? I will attempt to answer that by analyzing the evidence presented by the petitioner in support of his petition. The gist of the petitioner's evidence is that the results announced at the polling stations were later changed at the tallying center to his disadvantage. The petitioner has cited Mukuku, Mbimbini, Wambiti and Malatani polling stations. The Petitioner further avers that his votes were reduced at the tallying center, the petitioner has cited the case of Malatani polling station.

Save for Malatani polling station whose results I have analyzed while touching on the outcome of the scrutiny and recount of votes as ordered by this court, I wish to compare the votes of the petitioner in Pexh. 2(a), (b), and (c) and corresponding votes of the petitioner in Dexh.1. As per Pexh. 2(a) which contains results for Mukuku, the petitioner had 54 votes, a corresponding form in Dexh. 1 shows that the petitioner had the same 54 votes. As per Pexh.2(b) which contains the results for Mbimbini, the petitioner had 11 votes, a corresponding form shows the same 11 votes. As per Pexh.2(c) which contains the results for Wambiti, the petitioner had 309 votes, a corresponding form in Dexh.1 shows the same 309 votes.

The above analysis shows that the petitioner lost no votes in the above three(3) polling stations. The petitioner has proved that he lost about 100 votes when the votes he garnered at Malatani were being transferred from F.35 to F. 36 which is the tallying form. After recount it emerged that what the petitioner actually lost were 99 votes. Both Respondents do not dispute the fact that the petitioner lost votes in Malatani, the 2nd Respondent as explained through the evidence of DW3 who was the RO that the loss was occasioned by a typographical error. According to DW3, the tallying process took several hours and it was done under immense public pressure to have all the results released.

According to the Petitioner, the error was deliberate and was meant to disadvantage him. Nothing is farther from the truth, if the 2nd Respondent intended to rob the Petitioner of his votes, nothing would have been as easy as changing the same results for the Petitioner in F.35 for Malatani, which was not the case. It is possible for such errors, as were committed by DW3, to occur in circumstances as those that were prevailing in Tawa tallying centre. The alterations to F.35s alluded to by the Petitioner, and which have been admitted by the 2nd Respondent, only affected the computation of the number of rejected votes and valid votes cast. As explained by the 2nd Respondent through DW3, DW4, DW5 and DW6 the affected figures were derived arithmetically and some POs made errors in their calculations.

The other grievance by the petitioner is that ballot papers were not properly displayed during counting. Regulation 76(2)(a) and (b) of The Elections (General) Regulations, 2012 provides as follows; ***Each ballot paper shall be counted as follows- (a) the presiding officer shall in respect of each ballot paper, announce the candidate in whose favour the vote was cast; (b) display to the candidates or agents the ballot paper sufficiently for them to ascertain the vote.***

Regulation 80(1) provides " ***a candidate or agent, if present when the counting is completed, may require the PO to have the votes rechecked or recounted or the PO may on his or her own initiative, have the votes recounted.***" Regulation 80(2) further provides that no steps shall be taken on the completion of a count or recount of votes until the candidates and agents present at the completion of the counting have been given a reasonable opportunity to exercise the right given by the regulations.

The petitioner's star witness as regards the failure by the POs to display votes was PW3, strictly speaking PW3 was not the petitioner's agent. PW3 was the agent of WDM party which was not the party that had sponsored the petitioner. In addition to the above PW3 signed the F. 35 for the station where he was an

agent, he never complained to the PO or the party that he was acting for regarding the failure of the PO to display ballots. He never requested for a recount as he was rightly entitled, he says all other ballots save for those of the seat of county assembly member were properly displayed. I find the evidence of PW3 to be unbelievable and I do find the witness to be wanting in credibility, PW3 was, to say the least, lying to this court.

The other grievance by the petitioner is that voters with disability were assisted by POs in the absence of candidates or their agents. The petitioner has given the example of Mukuku polling station, the petitioner's agent at Mukuku was PW1. PW1 told the court that she was not allowed to enter the polling booth to see how voters with disability were being assisted. PW1 during her testimony could not recall the name of the offending PO, she never lodged any complaint regarding the way voters with disability were being assisted.

PW1 admits that none of the assisted voters complained at Makuku, PW1 did not give the names or the number of assisted voters. Regulation 72 gives an elaborate procedure on how voters with disability are to be assisted, sub regulation (7) prohibits any person other than the person being assisted and the person assisting from entering the compartment of a polling station while a voter is in the compartment for the purpose of marking his or her ballot paper and any person who contravenes the sub regulation commits an offence. This is what PW1 was trying to do, which was attempting to enter the polling booth and see how assisted voters were marking their ballot papers.

The petitioner called PW4 who said in his evidence-in-chief that he was an illiterate voter and was assisted by one Pius Waema to vote on the election day. According to PW4, the person assisting him did not mark a ballot paper for the person that PW4 had chosen to vote for. On cross examination, PW4 admitted that he knows how to read and write. With his admission it beats logic as to why he sought to be assisted as a voter with disability, if he was ever assisted as alleged. PW4 never complained that he was misled by Mr. Waema, he says he failed to do so because Waema was a village elder. When PW4 first told the petitioner that he had been misled it was more than a month after the election day. I do find PW4 to be a witness with doubtful credibility, his evidence adds no value to the petitioner's cause.

The other witness relied on by the Petitioner was PW2, it is true that he was ejected from Kingaathuni polling station but none of the respondents was involved. In fact he was not ejected, strictly speaking. What happened is that he was fleeing from members of the public who wanted to dispossess him of a Ksh. 1,000/= note which he had been given. Among those who saw him getting the money was DW2, he believed that he was given the money as a bribe which was to be applied to influence voters. But it is apparent that DW2 also wanted the money, in DW2's mind PW2 had been given free money which he never deserved or which he ought to have shared with others.

It's possible the money was not given as a bribe, it's also possible that it was so given as a bribe as perceived by members of the public. It was insensitive for those who gave the money to PW2 to have done so in the full view of members of the public. It looked no different from what part of the public had been accustomed to as campaign freebies as cryptically captured by DW2 in his testimony. It is ironical that the petition who has given prominence to allegations of bribery could have called PW2 as his witness. I believe the PO at Kingaathuni would have been in order to eject PW2, if he chose to do so, given his conduct outside the polling room. The Petitioner has alleged in his petition that several of his agents were ejected from several polling stations, but other than PW2, no other agent alleged to have been ejected was called.

Did the failure to add the 100 or so votes to the petitioner's tally affect the outcome of the vote? The answer is both a yes and no, yes in that he deserved to have every vote cast in his favour counted. And no in that even if he had the 100 or so votes added to his tally he would still have been the third(3) candidate with the most votes. The above question was considered by the High Court in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others**, Kerich HC EP. No. 1 of 2013 when Muchelule J while declining to order a recount held and I quote, "**I consider that the petitioner has not alleged that the impact of the errors and disparities was more than what the respondents admitted. He did not testify that when all errors and disparities are considered they were such that it would materially influence**

the declared results to his favour, or at all." The petitioner in the above case stood in a similar position as the petitioner herein.

He has not demonstrated to this court that the adding of the 100 or so votes that were not added to his tally, and which have been admitted to, would place him as the winner. The 1st Respondent would still be the leading candidate with the most votes even if the Petitioner's omitted votes were added. Taking into consideration the results of the recount, the 1st Respondent had 1,919, Mr. Anthony Mutinda had 1,490 votes while the Petitioner came third with 1,330 votes. I do find Pexh.1 to be a fictitious document, whereas the original from which it was derived and which has been produced as Dexh.2 has one page, Pexh.1 has been split in two pages with the last page unstamped.

On the basis of the above evidence, the Petitioner wants this court to annul the elections of 4th March, 2013. S. 83 of the Elections Act, 2011 provides as follows and I quote, "***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 election.***"

In paragraph 6 of the petition, the petitioner has listed 7 grounds in support of his petition which I have reproduced above. In ground (2) the petitioner cites massive bribery of voters by the 1st respondent or his agents within Waia/Kako Ward as an inducement in order to vote in his favour. At the close of the petitioner's case, neither the petitioner nor any of the witnesses he called adduced any evidence to proof his allegations of massive bribery or payment of money to voters on the part of the 1st respondent. The only witness who mentioned money was PW2, he was an agent of the petitioner and the recipient of the money himself.

The money was delivered to PW2 by an agent of DP which was the party that had sponsored the petitioner during the elections of 4th March, 2013. This money was given to PW2 under the full view of members of the public who were queuing to vote. There is no evidence to support the allegation of massive voter bribery, the allegation of bribery is grave and the same constitutes an election offence. As held in the case of *Ng;ang'a & Another v Owiti & Another* (supra) "***The petitioner's evidence led in support of the alleged election offences was scanty and speculative and it did not meet the required standard of proof. Some of the allegations raised in the petition were grave. A party laying such an allegation is expected to present evidence that is cogent, consistent and credible.***" I do agree with the learned counsel for the 2nd respondent, who has alluded, and I believe rightly so, that this ground may have been included in order to colour the petitioner's petition. I do dismiss the ground (2), the same being unsupported by any evidence.

In the entire evidence adduced for the petitioner there is nothing to suggest that the 1st Respondent committed any election offence, was engaged in acts of electoral misconduct or was involved in electoral malpractices. It is apparent to me that the 1st Respondent was able to persuade a majority of the people of Waia/Kako Ward to renew his mandate having been the incumbent holder of the seat.

I have reviewed the evidence of DW3, DW4, DW5 and DW6 and I do not find anything to suggest that the 2nd Respondent acted improperly while conducting the elections of 4th March, 2013. It did not act in a partisan manner as suggested nor did it manipulate the results in favour of the 1st Respondent. Whatever errors or irregularities which might have occurred have been properly accounted for and they do not affect the outcome of the elections. The elections were conducted in accordance with the Constitution and all the relevant laws.

having reviewed every piece of evidence in support of the petitioner's case, I do find that the petitioner has failed to proof any of the seven grounds cited in support of his petition. I can discern, in no uncertain terms, that the people of Waia/Kako Ward, in exercise of their inalienable sovereign will, chose to elect the 1st Respondent as their representative. I cannot and will never subvert that will in exercise of my judicial authority. In answer to the 1st issue of whether the County Assembly Elections in respect of ***Waia/Kako Ward in Mbooni Constituency within Makueni County held on 4th March, 2013*** was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the

constitution and all relevant provisions of the law *I find in the affirmative.*

In answer to the 2nd issue of whether the *1st Respondent* was validly elected and declared as the County Assembly Representative for *Waia/Kako Ward* in *Mbooni Constituency of Makueni County I equally find in the affirmative.*

As regards what consequential orders and reliefs this court should grant based on the determination of this petition I do dismiss the Petitioner's petition dated 10th April, 2013 with costs to the 1st and the 2nd Respondents. It is so ordered.

Judgment read, dated and delivered this 29th day of August 2013 at Makueni .

R.K. Koech

Ag. P. M.

In the presence of: