



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI

MILIMANI COMMERCIAL COURTS

ELECTION PETITION NO. 4 OF 2013

THE ELECTIONS ACT, 2011 AND ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013

AND

**IN THE MATTER OF ELECTIONS FOR THE NGEI WARD IN NAIROBI COUNTY,
MATHARE CONSTITUENCY**

BETWEEN

SAMUEL KAGO MUNGAI KIMARI 1ST PETITIONER

TITUS BWEYA OMUKA 2ND PETITIONER

VERSUS

MILIAM WANJIRU 1ST RESPONDENT

THE INDEPENDENT ELECTIONS AND

BOUNDARIES COMMISSION 2ND RESPONDENT

DANIEL KITHAMA MUTISO 3RD RESPONDENT

JUDGEMENT

This election petition, which is dated 16th March, 2013, was filed by the Petitioners; Samuel Kago Mungai Kimari and Titus Bweya Omuka, through their Advocates, M/s N.A Owino & Company Advocates, on the 19th March, 2013. The file record shows that the Petition was accompanied by the supporting affidavit of the first and second Petitioners respectively and sworn on the even date as is the Petition. It was also accompanied by the supporting affidavit of the Petitioners' witnesses namely Michael Ruo Wangonya sworn on the 16th March, 2013 and Mary Wangechi Kibaiya also sworn on the same date.

Other witnesses recorded statements, which were also filed on the same date as is the Petition. They were Stephen Loginus Oyugi, Benard Mulwa Mutuku and Abraham Oyugi Dollah. During the pre-trial proceedings an issue was raised by learned counsel for the 3rd Respondent in this case that because the witnesses' statements were not sworn they ought not to be treated as evidence in this case.

This court however ruled under rule 20 of the Election Petition Rules 2013, that the witness statements already made on record would be converted into sworn affidavits within the specified time in that pre-trial conference directions ruling made on the 17th May, 2013.

THE PETITIONERS' CASE

In their Amended Petition filed in court pursuant to the said ruling, the Petitioners averred that there were irregularities in the manner in which the votes they had obtained were entered in Forms 35 in various polling streams.

The trial of this petition commenced on the 24th June, 2013 when the Petitioners' side presented their first three witnesses. Mostly they made references to two forms 35 with different results from the officials of the 2nd Respondent in each instance, without them being counter signed by the said officials to show corrections had been made on the final results with the knowledge of the Petitioners' agents at all.

The 1st Petitioner demonstrated this allegation by referring the court to a second form 35 where his votes were given as 130 and his worthy opponent as 197. The second form 35 was marked in court as Pexhb 1b. Pexhb 1a's serial no. is CA 144800240479 and Pexhb 1b is serial no. CA 144800240482. The official results for that stream one as provided by the 2nd Respondent is in form 35 serial no. CA 144800240479. Its content is the same as in the form provided by the witness and marked as Pexhb 1a.

The Petitioners also cited that they were not allowed fair play in the elections because their agents were not allowed to access the polling stations on time before the vote began. In qualifying this evidence they presented some of the agents namely Stephen Loginus Ogutu(PW3 herein), who testified that on the material date he arrived at the polling station at AIPCA Ngei II early at 4.00a.m but could not be let into the polling station at 6.00 a.m. before the voting exercise could begin.

He stated that the reason for such denial of access was due to lack of approved credentials from the party he represented or the candidate on whose behalf he appeared at the station for. He said he had been assigned to be in stream no. 3 and only managed to enter at 8.00a.m when he signed the declaration of opening a polling station form without reading through to see the time the presiding officer had indicated the station opened.

The 2nd Petitioner further demonstrated the preceding ground by citing that his agent by the names Dollah Oyugi (PW4 herein) was denied access in stream nine in Lions Health Clinic polling station. The 1st Petitioner presented PW5 Michael Ruo Wangonya, who testified that he was an agent of TNA Party at AIPCA Ngei II and that when he went to the polling station early at around 3.00 a.m., he was denied access. That he later entered at around 7.30 am towards 8.00 a.m., when the voting exercise had begun. He said he did not therefore inspect boxes

The other ground for this petition is that the Presiding officers in the two polling stations refused to give forms 35 to their entire agents' team in the polling streams.

PW2's other tenet of evidence was that all the presiding officers and their deputies communicated in their mother tongue, being the Kikuyu language, and that by so doing, the voting process was interfered with and influenced to his disadvantage. When being cross examined on this issue, he stated that most of the presiding officers in the streams were of Kikuyu origin going by their names on the record.

He also alluded to the fact that ballot papers were found outside stream nine of Lions Clinic polling station by a young man. He went on to give an account of how the young man was arrested and that it took his intervention, by communicating to the area station's commanding officer that he was released. PW2 did not however say how many those ballot papers were and whether they had been cast for which of the contesting candidates.

The other tenet of Petitioners' evidence was that the Ngei ward results were not transmitted

electronically. They argued that this affected them because they and other electorates had expected results to be transmitted that way to facilitate fair play. They however said that the problem was not peculiar to Ngei ward as the machines failed to function country wide. They did not say how they were disadvantaged and how 3rd Respondent benefitted over them due to that systems failure.

RESPONDENTS' CASE

After service of the Petition upon the Respondents, the latter entered appearances in the Petition through their various advocates who also filed their several Notices of Appointment. On 2nd April, 2013 the advocates for the 3rd Respondent, Oluoch Olunya & Associates filed theirs whereas on 10th April, 2013 the advocates for the 1st and the 2nd Respondents, Kimani Muhoro & co. filed theirs.

On 2nd April, 2013 the 3rd Respondent, Daniel Kithama Mutiso, who was the declared and gazetted as the winner for the Ngei ward Representative in Nairobi county, Mathare constituency, filed his Reply to the Petition. A cursory look at it elicits that the Respondent specifically and generally denied all the allegations in the Petitioners' pleadings. On the same day the 3rd Respondent filed a list of his witnesses to include one Benson Makori, whose sworn statement is dated the 2nd April, 2013 and one Antony Makokha Were whose is also sworn on the same date.

On the 25th April, 2013 the 1st and the 2nd Respondents, being the Returning officer for Mathare constituency and Ngei ward and the Independent Electoral and Boundaries Commission, herein referred to as IEBC, respectively, and filed their joint reply to this Petition. They also specifically and generally traversed the pleadings forming the Petition and denied each and every allegation. Being the ones responsible for the conducting of elections on 4th March, 2013, they stated that the election was carried out fairly, justly, transparently and as by law required. All the Answers from the Respondents were properly filed and served upon the Petitioners on time.

The 1st and the 2nd Respondents also had their witnesses' sworn statements filed on the 25th April, 2013. These included those of one Muwanga Catherine (DW2 herein) sworn on the 22nd April, 2013, Odongo Stephen Odhiambo (DW4) of 22nd April, 2013, Wameri Ndungu Francis(DW1 herein) of 22nd April, 2013, Milliam Wanjiru(DW5) of 22nd April, 2013 and of Gichanga Benson Mwangi(DW3) also sworn on the 22nd April, 2013.

Also in compliance with Rule 21 (b) of the Elections (Parliamentary and County Elections) Petition Rules, 2013, the 1st and 2nd Respondents filed the results of Ngei Ward in Nairobi county, Mathare constituency. This they did on the 20th May, 2013. There was also attached a single document holding all the results contained in the forms 35 attached and it is known as form 36. This is the Form where aggregate results from various polling stations are entered.

As regards the complaint that the agents of the Petitioners had been denied access to the polling stations the Presiding officers who testified stated that when the polling stations opened at 6.00a.m most of the candidates' agents were present and that they signed the opening of polling station declaration forms. For instance in stream 3 at AIPCA it emerged that Ruo Wangonya, an agent of the 1st Petitioner, was the first one who signed the same.

In conclusion, the 1st and 2nd Respondents stated that the Elections in Ngei II Ward were conducted substantially in compliance with the Constitution, the statutory provisions and the election regulations. They averred that the declaration of the 3rd Respondent as the duly elected County Ward Representative of the Ngei II ward was valid and credible and that no good grounds are before court to warrant the nullification of the said results.

The pre-trial conference in this Petition was conducted on the 16th May, 2013 and both the uncontested and contested issues were framed. The former were four while the latter were twelve in number. I wish to

replicate them in this judgment as follows;

A; UNCONTESTED ISSUES

1. The Elections happened on the 4th March, 2013.
2. The 3rd Respondent was announced by the 1st Respondent as duly elected as a county ward Representative for Ngei ward.
3. The 1st and 2nd Petitioners were among the candidates contesting in the said elections.
4. The elections were conducted in two polling centers thus;
 - i.) Lions Health Clinic (007)
 - ii.) AIPCA Ngei II Primary School (008)

B; CONTESTED ISSUES

1. Was the tallying process lawfully and justly carried out?
2. Whether the voting process was carried out in accordance to the law.
3. Whether any ballot papers were found outside stream one of voting at Lions Clinic polling station.
4. Did the 1st Respondent carry out her mandate as is required by law?
5. Whether the provisional results for the County ward Representatives' elections in Ngei ward was lawfully transmitted.
6. Were the agents of the Petitioners allowed entry into the polling stations as was required by law?
7. Whether, prior to the voting, the ballot boxes were inspected by the Petitioners' agents or by themselves.
8. Did the 1st Respondent properly fill and tally forms 34 and 35 in favor of each candidate with respect to the votes cast?
9. Whether the announced results of the Ngei Ward were a true reflection of the totals in forms 34 and 35?
10. Did the anomalies/breaches, if any, materially affect the overall results of the Ngei Ward elections?
11. Who won the Ngei County Ward Representative's elections?
12. Who gets the costs of this petition?

Before evaluating the evidence and rendering its decision, this court will address the question of the burden and standard of proof. It is now accepted that in Election Petition the burden of proving the allegations made in the petitions lies with the Petitioner. In **Raila Odinga –Vs- IEBC & 3 Others, Election Petition No.5 of 2013**, the Supreme Court held thus:

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges for a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to be done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”

The same jurisprudence was enunciated by Justice Aggrey Muchelule in the case of **Nicolas Kiptoo Arap Korir Salat -Vs- IEBC and 7 Others in Kericho HC EP No.1 OF 2013** thus;

...“The next question relates to the burden and standard of proof. The jurisprudence contained in the various decisions cited by counsel in their submissions, and which culminated in the decision of the Supreme Court of Kenya in Raila –VS- IEBC and Others Petition

N0. 5 of 2013 at Nairobi, appears to me to be as follows:

- a. *the petitioner who seeks to annul an election bears the legal burden to prove the allegations contained in the petition;*
- b. *after that, the commission has the evidential burden to show that the election was conducted in accordance with the Constitution and the electoral law;*
- c. *The standard of proof is above the balance of probability though not as high as beyond reasonable doubt; and*
- d. *Where an election offence is alleged, a higher degree of proof is required.*

The evidence has to be cogent, certain and compelling'' ..

It is therefore clear that in an election petition such as the present one, where the Petitioner makes allegation or alleges that there has been breach of law by the 1st and 2nd Respondents, they must lay evidence before the court to support the allegations. It is not enough for the Petitioners to point out irregularities that took place during the elections. The Petitioners must establish that the irregularities were of such nature that it affected the exercise by the voters of the particular electoral area of their will to choose a candidate of their choice.

Further on the standard of proof, this court agrees with the holding by Lenaola J in **Bernard Shinali Masaka –Vs- Bonny Khalwale & 2 Others [2011] eKLR** where he held that:

“Further, I agree with the proposition grounded on the decision in Mbowe –Vs- Eliufoo [1967] EA 240 that any allegations made in an election petition have to be proved to the “satisfaction of the court”. Like Rawal J in Onalo, I am certain that the standard of proof, save in matters where electoral offences are alleged, cannot be generally beyond reasonable doubt, but because of the quasi-criminal nature of some election petitions, it almost certainly on a high degree than merely on a balance of probabilities, the latter being the standard in civil cases.”

So, the Petitioners are required to prove the allegations of electoral malpractices to the standard that is higher than that of a balance of probabilities that is applicable in civil cases but lower than that applicable in criminal cases *i.e.* that of proof beyond any reasonable doubt.

Upon consideration of the evidence as adduced by both the parties, the pleadings and submissions as made before this court by the counsels, I now proceed to determine the issues as framed at the pre-trial:

1. Was the tallying process lawfully and justly carried out?

a.) Alterations and /or over writings on forms 35;

The Petitioners have raised doubts on the credibility of the tallying process. In his testimony before the Court the 1st Petitioner stated that there were discrepancies in the forms 35. He stated that in stream number 7 his results in one form were shown as 30 and in another form as 130.

He further testified that there were results which were altered but that the presiding officer did not countersign against the said alterations.

While PW2 in his affidavit swore that there were alterations in the forms 35 which disadvantaged him, during cross- examination he stated that the tallying went on well and that there were no differences between the results which he had and the official results from the IEBC.

Pw3 also testified that he had noted that there were changes and alterations in forms 35 which the presiding officer did not counter sign against. He testified that he had noted discrepancies in the forms and had brought this to the attention of the presiding officer who had refused to act and rectify them.

In her testimony DW2 admitted to having made errors In the Forms 35 specifically Pexh.3 (a) which she stated was signed by the agents although she had made an error on it. In her testimony DW2 also raised an important issue she admitted to having made an overwriting on Pexh.3(c) which is serial number CA 144800240493. The overwriting was on a figure 6(six), which was made over an official entry of figure 0(zero). She admitted that she did not countersign on the said overwriting.

In **William Odhiambo Oduol v IEBC & 2 others (2013)** e KLR Justice A.O Muchelule stated the following regarding alterations and over writings in forms 35 and 36

“...it was desirable for each alteration, cancellation or over-writing to be counter-signed and stamped by the maker as a way of owning the same and saying the Form was authentic... But the correct thing should always be that every alterations and/or cancellation be counter-signed and stamped by the maker...”

I agree with the Honorable Judge’s sentiments and add that in this instant case the presiding officer was not diligent while filling the Forms 35. While the Court takes notice of the extraneous circumstances within which presiding officers work prior to and during the vote counting and tallying processes, the negligent acts by the presiding officer cannot be justified. She attempted to have the Court make a distinction between an overwriting which she admitted to having made in one Form 35 and an alteration. The Court does not see any distinction between the two. The overwriting had the effect of changing an entry of figure 0 to figure 6. This is in fact an alteration.

The law guiding on tallying process is to be found at Part XII from Regulations 73 up to 83 of The Elections (General Regulations) 2012. I have weighed the evidence wholly given by the witnesses from both sides and find that the procedures laid down were fairly followed by the 2nd Respondent’s officials involved in the process save for the oversight on the part of DW2 pointed out.

Turning to the second aspect of this issue I wish to analyze the evidence as follows;

b.) Using of the manual tallying system as opposed to the electronic tallying system

The second Petitioner has stated that the use of the manual tallying system disadvantaged him. In his testimony he stated that he was affected because the results were not transmitted electronically. **Article 81** of the constitution of Kenya 2010, enlists the general principles which the electoral system ought to comply with. At sub article (e) (v), which espouses a free and fair elections, the elections should be administered in an impartial, neutral, **efficient**, accurate and accountable manner. (**emphasis mine**). Here the aspect of electronic transmission of the provisional results falls under the requirement of efficiency and I find so.

From my reading of Regulation 82 (1) of the Elections (general) regulations 2012, I find that although there was a requirement for the results to be submitted electronically by the presiding officer, the said results were provisional and were subject to confirmation, after going through the procedures at Regulation 73.

Regulation 82 (2) states as follows:

“The results submitted under sub regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 73”.

The Court further takes judicial notice of the fact that the electronic transmission system failed country wide. I therefore find that on this issue the 2nd Petitioner has failed to prove how he was prejudiced by the failure of the system as the failure affected all the candidates, in not only Ngei Ward, but also countrywide.

2. Was the voting process was carried out in accordance to the law.

The right to vote is enshrined under **Article 38** of the Constitution of Kenya 2010. In the instant petition it is alleged by PW5 that a woman with a broken leg was not allowed to vote. DW2 admitted that she had stopped a lady with a broken leg from voting. She explained that a lady with similar features had already voted. The same ID numbers had been entered for her as having voted. DW2 explained to the satisfaction of this Court that when the lady insisted on voting again she called security agents who questioned her. DW2 stated that the lady with the broken leg had said her sister had come to vote with her ID card and that her sister also had a broken limb. DW2 therefore stated that she had good reasons to deter her from voting. Other than this incident the Petitioners have not laid before court the evidence to show that the voting process was not carried out in a lawful manner. In fact in the amended petition, as rightly submitted by counsel for 3rd Respondent, no issues on polling procedure is made mention of.

Voting procedure is also provided for at Regulation 69(1), which, in my view, was rightly followed by the presiding officer DW2 herein when she deterred the voter with an injured leg from voting a second time.

Petitioners' witness Michael Ruo stated during cross examination by the learned lead counsel Mr. Oluoch Olunya for the 3rd respondent that, **“the voting and counting went on very well.”**

3. Were Ballot papers found outside stream 1 of the Lions polling station?

In his testimony the second Petitioner claimed that there were ballot papers found outside stream 1 at Lions Health Clinic polling station for County Ward Representatives. He claimed that the person who saw the ballot papers a Mr. George Onyango was his agent. Mr. Onyango was not called in as a witness to testify to the fact that he saw ballot papers outside the said stream.

Section 58 (d) of the Elections Act, provides that any person not being a person entitled to be in possession of any ballot paper which has been marked with any official perforation, stamp or mark has any such ballot paper in his possession; commits an offence. It is my belief that if the said Mr. Onyango found such official ballot papers outside a polling station he could have been arrested and probed further. Besides, those papers found were not brought to court for examination.

The testimony by the 2nd Petitioner regarding the ballot papers is therefore hearsay evidence as he did not personally see any ballot papers outside the stream. He even admitted that he intervened when the said Mr. Onyango was arrested for him to be released. If a cognizable offence of being in possession of official ballot papers had been committed to his probable detriment why did he intervene?

Additionally the second Petitioner failed to call the OCS Huruma police station, whom allegedly came to the scene where there were ballot papers outside stream 1, as a witness. The second petitioner's evidence regarding the votes found outside stream 1 is therefore purely hearsay evidence and cannot hold water based on Section 65 of the Evidence Act.

In *Kithinji Kiragu vs. Martin Nyaga Wambora, IEBC & Another (Embu High Court Election Petition No.1 of 2013)* Judge H. I Ong'udi stated the following regarding hearsay evidence

“There having been no direct evidence by any of those present at Kangaru Boys Tallying Centre to confirm that the results of the 39 polling stations were not announced, the evidence of the Petitioner on this remains an allegation which is hearsay evidence and cannot be relied on by the Court, by virtue of S 63 of the Evidence Act. My finding on this issue is that the Petitioner failed to prove that the results of the said 39 polling stations were never announced.”

Moreover, the alleged ballot papers were not specified to be in respect of which electoral post, bearing in mind that the elections involved six positions.

Besides, the two IEBC officials in charge of streams 1 and 9 namely WAMERI NDUNGU FRANCIS and Gichanga Benson Mwangi testified and told the court that no such reports were made to them.

To this end I am not convinced that ballot papers were found outside either stream 1 or 9 as was alleged

by the Petitioners.

4. Did the 1st Respondent carry out her mandate as is required by law?

It is worthy to note here that the 1st Respondent was a Returning officer in the said elections in dispute. The Petitioners made allegations against her in paragraph 6(a, b, d, e, f, g & I) of the amended plaint. Regulation 3(3) of the 2012 election regulations makes provision with regard to the functions of a returning officer. Learned counsel for the 3rd Respondent made detailed submissions on this and I am guided as such. The allegations leveled against the 2nd Respondent are therefore misplaced in light of these clear functions of a returning officer as stipulated by law.

It is my finding thus, on this issue that the petitioners' allegations on this issue were misplaced. It is my view that that the 1st Respondent gave a clear account of what she did once she received the forms 35 with results of each candidate from the various polling stations. Her function, as per Regulation 3(3)(c) was to tally the results from each polling station in the constituency, which is what she did before announcing the final results for the county ward representative herein the 3rd respondent.

5. Whether the provisional results were lawfully transmitted:

This issue has already been dealt with as a second aspect of the first listed issue in this judgment and I need not replicate my findings thereof. I wish only to add here that as was held in the RAILA ODINGA Case (supra), failure to transmit the provisional results did not invalidate the election. Section 83 of the Elections Act is applicable here that failure to transmit results as by law provided, did not invalidate the results.

6. Were the Petitioners' agents locked out of the polling station?

It is the testimony of both the Petitioners that their agents were not allowed into the AIPCA polling station. PW1 has stated that before voting started at 6.00 am none of his agents were allowed to inspect the ballot boxes. Learned counsel for the Petitioners submitted that due to the agents' absence from the various polling streams before voting began, it is not possible to tell whether marked ballot papers in favor of a particular candidate were staffed in them in advance.

I need not belabor the preceding point for it is bear of evidential proof that in fact what is speculated ever happened. Assuming that only Petitioners agents were the ones locked out of the polling stations where is the evidence of other contestants' agents to establish this speculation of ballot boxes' staffing? My finding based on evidence before me is that the allegations remain as such-unproved.

The first Petitioner at paragraph 4 of his affidavit claimed that the presiding officers only allowed ODM candidates to enter the polling station. In his testimony before Court he highlighted stream 3 of AIPCA where his agents were not allowed in. He stated that he spoke to a presiding officer Catherine who told him that the room was congested. He added that the agents of ODM were however allowed into the polling station. That was earlier in the morning. He however testified that later his agents were allowed into the polling station. The second Petitioner also made similar assertions that his agents were locked out of PCEA polling station.

Rule 62 (1) (c) of the Elections (general) regulations 2012 provides that the presiding officer shall regulate the number of people to be admitted and admit only authorized agents into the polling station. During cross-examination PW3, Stephen Loginus Ogutu stated, **"I said I was not allowed because credentials from the party was not stamped."** By having unstamped credentials Mr. Ogutu did not meet the requirements meant under Rule 62 (1) (c) that agents must be authorized.

PW5 Michael Ruo Wangonya an agent of TNA Party at AIPCA Ngei II also testified that he was not allowed into the polling station because he did not have a badge. During cross-examination PW5 added that it took him time to get to the stream because he had to get badges from IEBC. The duty to ensure that

an agent is authorized must remain with the candidate and the 2nd Petitioner can therefore not transfer blame to the presiding officer for his agent being locked out of the polling station for lack of the requisite authorization. In this regard Regulation 62(4) requires every agent to display the official badge supplied by the Commission before one may be allowed at a polling station.

Regulation 79(7) envisions a situation where the agents or the candidates may be absent and fail to sign the declaration of results form. This, the law states shall not in itself invalidate the results announced.

From the evidence presented before the Court it is clear that the agents who were locked out of the polling station lacked the necessary authorization or identification documents. They however testified that they were later allowed in. Mrs. Owino submitted that this delay prejudiced their candidates because they were hurried to sign the declaration of opening a polling station form. Evidence of coercion was not however established in this regard. PW5 said he did not read the form before signing.

As an agent he only has himself to blame for not making the correct remarks on that form. He needed to be vigilant for he had a duty to oversee on behalf of his candidate and the party, that all went on well. Like I have stated elsewhere he in fact confirmed that there was no foul play during the whole process.

7.) Were the ballot boxes inspected by the petitioners' agents before polling commenced?

On whether the agents verified that the ballot boxes were empty before the voting stated the 1st Petitioner testified that at polling stream 3, one of his agents Michael was at the station and signed annexure one of Catherine Muwanga sworn on 22nd April, 2013 is in respect of stream 3 AIPCA. The 1st Petitioner further testified that Michael Ruo signed as the 1st one to confirm he inspected ballot boxes.

While he had previously stated that all of his agents were locked out of the polling station during cross examination he stated that his eleven of his agents were allowed into the polling station. The 1st Petitioner further admitted to having lied that his agents were locked out of the polling stations.

There is evidence before Court that agents of both Petitioners signed the declaration at the opening of the polling station at 6.00 am confirming that they had seen that the ballot boxes were empty before voting began.

PW5 admitted to having signed the declaration form and added that he saw other agents signing the form. He however claimed that he had not read through the form before signing it. This shows negligence on his part, being an agent he had the duty to act diligently. It is impossible for the Court to establish whether his allegations are true or not. The evidence before the Court is that he signed the declaration form and he has not denied this fact. The Petitioners have therefore failed to prove that their agents were unfairly locked out of the polling stations or that they did not witness the emptiness or otherwise of the ballot boxes before voting began.

It is an established legal maxim that ***“he who alleges must prove” - or “he who asserts, not he who denies must prove” “ei incumbit probatio qui dicit, non qui negat”***.

In **Fredrick Gitau Kimani vs the AG and 2 others (Nairobi High Court Petition No. 157 of 2011)** Justice Lenaola stated; “Where a person makes a claim but fails to show in a satisfactory manner the facts upon which he bases his claim, the Respondent is under no obligation to prove his defence or exception.”

The statement by Honourable Justice Lenaola, which I agree with, is premised on Section 107 of the Evidence Act. The said section provides;

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on

that person

The Petitioners therefore had the burden to prove that their agents were unfairly locked out of the polling station and were unable to inspect ballot boxes before voting began, which, I find, they have failed to do.

Issue No.8, as framed, is tied with issue no. 4 which I have made considerations on, save to add that forms 34 which she also dealt with in the tallying of the Presidential tallying was not relevant to be examined in this case, whether properly filled by 1st Respondent or not because this court lacks the jurisdiction to entertain such a question.

9.) Were the results as announced in the Ngei Ward a reflection of the Totals in forms 34 and 35?

As I have said elsewhere forms 34 do not fall within the purview of this court to discuss. However results in this case as produced by 2nd Respondent, were recorded in forms 35 by Presiding officers and in form 36 by the Returning officer, 1st Respondent in this case.

Despite the errors noted in filling of forms 35 by DW2 Catherine Muwanga who did not countersign the corrections she made on a copy of the form she gave to some of the agents as was shown in Pexhb 3a.

PW1, while being cross examined by the counsels for respondents it turned out that the final results complained of to have been altered were actually countersigned by the IEBC officials and with agents' signatures at the back save for Pexhb 3a.

I have looked at the forms of official results and find that the Petitioners did not place any material like an exercise book or otherwise where their agents recorded different totals from the one in court. During the hearing none of the Petitioners alleged to have garnered more votes than the official results presented by the 2nd Respondent. As rightly submitted by Counsel Mr. Muchoki for the said party, the Petitioners' agents would have been of much help if they had presented their perceived final tallies to convince this court that a certain number of votes in respect of their candidates were left out in the final tally. In the absence of such evidence I am left to believe the official results in court to be a true reflection of the totals in forms 35 and 36 herein of the Ngei II Ward results.

10.) Did the anomalies, if any, materially affect the outcome of the Elections?

Here a duty lies on this court to find out whether there were any anomalies in the election in dispute. From the evidence in place the Petitioners placed heavy reliance on the alterations made mainly by DW2 Catherine Muwanga who did not countersign the corrected forms Pexhb 3a. While testifying in court the witness explained how the error came about but that the totals were not affected in any case and that the error affected both the votes of the 1st Petitioner and the 3rd Respondent.

Section 83 of the **Elections Act No.24 Of 2011** provides thus:

“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.”

This section has been given judicial interpretation by various courts. In **Besigye –Vs- Museveni, Election Petition No.1 of 2001**, the Uganda Supreme Court gave an interpretation to **Section 58(6)** of the Ugandan **Presidential Elections Act** which is similar in material respect to the above. Mulenga JSC reading the decision of the majority of the court stated thus:

“To my understanding, therefore, the expression “non-compliance affected the result of the election in a substantial manner” as used in S.58(6)(a), can only mean that the votes candidate obtained would have been different in a substantial manner, if it were not for the

noncompliance substantially. That means that, to succeed, the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that his winning majority would have been reduced. Such reduction however would have to be such as would have put the victory in doubt. This is the view the learned Chief Justice of Tanzania Georges C.J., stated differently in MBOWE vs ELIUFOO (supra) when he said at p.242 D-E.

“In my view in the phrase “affected the result” the word ‘result’ means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.”

Our **Section 83** of the **Elections Act** does not contain the words “*substantial manner*” like the Ugandan Act. However, this fact does not lessen the significance of what the Learned Supreme Court Judge stated in the above decision. A petitioner is not only required to establish that there were irregularities which were committed during the elections; he must also establish that such irregularities (non-compliance with the law) were of such magnitude that it affected the outcome of the results. This is what is referred to as the “materiality test”.

Apart from that, the Petitioner is required to establish that the errors and irregularities were either occasioned by outright negligence or deliberate action on the part of the guilty party. Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. This court is mindful of the fact that at the stage where election officials are required to tally the results, some of them would have stayed awake for more than thirty-six (36) hours and therefore simple arithmetical mistakes are bound to happen.

This was the decision of Maraga J (as he then was) in **Joho –Vs- Nyange (2008) 3KLR (EP) 500**. What **Section 83** of the **Elections Act** simply provides is that in any election, because it is conducted by human beings, there are bound to be errors which can be explained. There is no election which can be perfectly conducted. However, it is only when such errors, which constitutes non-compliance with the law, materially affects the outcome of the results that the court will have no option other than to nullify the said results.

In the present petition, the alterations that the Petitioners were able to establish are not of such a nature that this court can reach a finding that they were as material as to affect the outcome of the results.

It was therefore the duty of the Petitioners to show to this court that in that process of alterations their votes were materially interfered with so as to be capable of changing the final results.

To further buffet this finding **In Election Petition 1 OF 2013(supra)** Justice Muchelule held that;-

“.....lastly there was the issue of the unsigned and/or undated corrections and alterations in forms 35 which the 2nd Respondent conceded during his testimony. The witness pointed out that the corrections and alterations did not alter or affect the final results. I have looked at the tallies in these forms. The Petitioner will ultimately have to show how the results were materially affected by the alterations to his disadvantage...”

I therefore hold in similar terms that there is no scintilla of evidence from the Petitioners to show a different position other than that, yes there were alterations but the totals remained as captured by their agents in the concerned polling stream.

11. So who won the elections for Ngei Ward in Mathare Constituency?

From the foregoing analysis of evidence it is now clear that the elections of Ngei Ward was won by the

3rd Respondent who was announced garnered 5,296 votes. The one who followed closely was Samuel Kago Mungai with 3,356 votes. The difference was 1,940 votes. That difference, according to Ngei Ward, which had registered votes of 17,708 with a voter turnout of 13,076, could be said, is a large margin and I find so in a vote system of “one past the post”. The 2nd petitioner came third with 1,208.

As they say, “numbers do not lie”. So considering all the facts that this petition has presented, and reflecting them in the mirror of the Constitutional and legal principles applicable, I return a verdict that the people of Ngei II Ward expressed their will and validly chose the 3rd Respondent as their County Ward Representative in a free and fair manner. The results, which showed the 1st Petitioner as a runner up and 2nd Petitioner as coming third, I find, was accurate. Consequently the petition filed by the Petitioners is devoid of merit and is hereby dismissed.

Scrutiny, tallying and re-count prayer

Before considering the final issue on costs, I need to point out here that the Petitioners had made a main prayer for scrutiny, tallying and a re-count. Section 82 (1) of the Elections Act, gives this court a wide berth, to order for it even if no application is made. It can also be done at any time before the case comes to an end. During the pre-trial directions stage, the Petitioners made an oral application for scrutiny. This court directed them to lodge a formal application to lay a basis for the same. To date no such application has been made. That inaction on the part of the Petitioners presumably, and reasonably so, means that they had no basis for it. This has actually come out during the analysis of the evidence herein.

In this regard I concur with Learned Counsel’s submission for 1st and 2nd Respondents that there are no substantial irregularities deducible from the petition to warrant the prayers sought. He buffeted his argument by placing reliance on the **Election Petition No. 4 of 2013 of Wavinya Ndeti -VS- IEBC and Others in MACHAKOS** where Justice Majanja stated that:

“...although scrutiny is within the Court’s discretion, the applicant must establish sufficient basis for the court to order scrutiny. Further the petitioner must not be permitted to launch a fishing expedition under the guise of an application for scrutiny in order to discover new evidence upon which to hoist his or her case to invalidate an election...”

12) Who gets the Cost of this petition?

On the issue of costs, costs usually follow the event. This court will award the cost of the petition to the Respondents. Pursuant to **Rule 34(1) (a) of The Elections (Parliamentary and County Elections) Petition Rules 2013**, this court is granted power to specify the total amount of costs that shall be paid in a petition. This court has noted the type of input, in terms of time, research, preparation of pleadings and the time spent in court during the actual hearing of the case. This court is not oblivious of the fact that counsels for the parties left all other work to concentrate on this case that was otherwise time-bound. This court therefore holds that the maximum amount of costs that shall be paid to the Respondents is Kshs. 1 Million (one Million). The 1st and 2nd Respondents shall be paid a maximum of Kshs. 0.6 Million (thus six hundred thousand only) while the 3rd Respondent shall be paid a maximum of Kshs.0.4 Million (thus four hundred thousand only) in view of the fact that he had two counsels representing him. In that regard, the sum that was deposited in court shall remain so deposited pending the taxation of the costs by the Respondents. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF AUGUST, 2013

Roseline .A. Oganyo-Mrs.

Senior Principle Magistrate.