



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATES COURT AT KAPSABET

PETITION NO. 1 OF 2013

CHARLES KIMELI KORIR.....PROSECUTION

VERSUS

EZEKIEL JUMA1ST RESPONDENT

INDEPENDENT ELECTORIAL &

BOUNDARIES COMMISSION.....2ND RESPONDENT

BARUCH KIPCHIRCHIR SUGE.....3RD RESPONDENT

JUDGMENT

On 4th March 2013, the people of Kenya went to the polls to elect their leaders in the general election of 4th March 2013. The 2nd respondent was the commission which conducted the elections. The petitioner in this case and 5 other candidates were contestants for the seat of member of County Assembly, Kabisaga ward in Mosop Constituency Nandi County. The 3rd respondent was declared as the duly elected member of County Assembly Kabisaga Ward in the results returned by the 1st Respondent in elections held on the 4th March 2013, after garnering 3219 votes as opposed to the petitioners 3217. The results were as follows:-

1. Baruch Suge (3rd respondent) 3219 votes.
2. Charles Korir (petitioner) 3217 votes.
3. Geoffrey Kitur 15 votes.
4. Mark Mutai 42 votes.
5. Pauline Sirma 39 votes.
6. Salamon Togom 50 votes.

The petitioner being dissatisfied with the result and declaration of 3rd respondent as the winner did file this petition asking for the following prayers:-

- i. That a recount of the votes cast in all polling stations in Kabisaga ward for member of county assembly be done and votes to be tallied afresh.
- ii. That upon recount of the ballots cast, the court to declare the rightful winner.
- iii. The court to direct the 2nd respondent to issue a certificate of election to the rightful member of county assembly, Kabisaga ward.
- iv. That the court finds that 3rd respondent was not validly elected and declared as the member of county assembly for Kabisaga ward and his gazetment as duly elected member Kabisaga ward be

revoked.

- v. That the certificate of election issued to 3rd respondent as the member of county assembly Kabisaga ward be cancelled.
- vi. *That the cost of this petition be borne by the respondents.*

When the petition came up for pre-trial conference on 3.5.13, the court and the parties agreed that the only issues for determination was a recount of the votes in Kabisaga ward as prayed in the petition and which apparently was the main prayer in the petition. The parties agreed that the result of recount if any will be used to determine the winner. The court directed at this point pursuant to the provisions of rule 32 of the Elections (Parliamentary and County Elections) (Petition Rules) 2013, ordered the petitioner to file an application to lay the basis for his prayer for a recount. The said application was filed and the same allowed by the court on 8.7.13 and subsequently a recount of all votes cast for member of county assembly Kabisaga ward done between 22nd – 25th July 2013 under the supervision of the executive officer of the court.

Owing to issues which emerged during the recount of rejected votes, objections to reject votes, the counsels appeared before court to tender their submissions on the same with reference to the report filed in court by the executive officer who supervised the recount.

The 1st respondent was also in hand to show and point to the court that the votes rejected, objected to rejection and those considered valid.

The petitioner contended that the votes cast were not properly counted and therefore an erroneous result was declared at all polling stations. That the number of declared votes cast in favour of all candidates did not tally with the number of valid votes cast and therefore not all valid votes cast were counted and accounted for. The petitioner also said that the county assembly ballot papers for a station like Kimogoch primary school were counted last after all the ballots which is contrary to the general order of counting as spelt out in regulation 75(2) of the Elections Act. That as a result of this deliberate delay the said station had a large number of rejected votes for member of county assembly. That the results were not posted at the polling station or given to the agents as required.

The petitioner submitted that the issue of votes not having been properly counted in Chepkoiyo primary school as raised in petition were true since after the recount the petitioner and the 3rd respondent had 351 and 287 votes respectively as opposed to the earlier declared results of 287 to 352 respectively. During a recount it emerged the 3rd respondent had been given 2 votes unfairly. One of which was outrightly rejected for lack of I.E.B.C stamp. In respect to Kimogoch primary school station where the provisions of regulation 75 Elections (General) Regulations 2012 was not adhered to in as far as counting is concerned. The petitioner said 5 votes had been marked as rejected when they ought to have been counted as valid votes. 3 were for the petitioner and 2 for 3rd respondent. The said 5 votes were kept separately in an envelope and marked contested/rejected votes for the court to look at and determine their validity after examination and add them to final tally if valid.

The petitioner submitted that on the basis of the above finding alone this proves that there were irregularities in counting and which affected the outcome of the elections as the 3rd respondent was as a result erroneously declared as the winner instead of the petitioner. The petitioner told the court the 5 votes marked as contested/rejected votes had initially been rejected. And their objection to rejection is based on fact that the votes had marks on the name of candidates and the intention of voter could clearly be seen. Hence the same should be valid and be awarded to the respective candidates. The petitioner told the court 12 ballots which had been marked as rejected were detained in the ballot box and only the 5 ballot papers in contest were brought to court. That the other rejected ballots included ballots for member of senate and presidential candidate which had been cast in the wrong ballot box. Mr. Keter learned counsel for the petitioner told the court the explanation by the 1st respondent that the votes were marked as rejected by presiding officer because they were in the wrong boxes was misleading and self-serving since the procedure in counting cannot allow a counted vote or rejected vote to be placed in a different box. That if it was rejected it ought to have been in the ballot box where it was found. The rejected vote is

not transferred to another box. The counted ballot box is sealed with its contents before moving on to the other ballot box.

The counsel said that rejection of the said votes which were otherwise valid with marks on the name of candidate and not box gave advantage to the 3rd respondent and assisted in the process of manipulation of the results.

Counsel submitted with the exception to general rules on rejection of votes provided by regulations 77(2) (a) C which states.

77(2) : A ballot paper on which a vote is marked.

- a. ***Elsewhere than in the proper place.***
- b. ***By more than one mark, or***
- c. ***Which bears marks or writing which may identify the voter, shall not by that reason only be void.***

If an intention that the vote shall be for one or other of the candidates, as the case may be, clearly appears, and the manner in which the paper is marked does not itself identify the voter and it is not shown that the voter can be identified thereby”.

The petitioner counsel contended that where the voter had marked on the name of candidate party or party symbol such vote be treated as valid. And that where the voter has marked inside the box but mark slightly exits the vote should be valid as 99% is within the box. He said where name is written such a vote is invalid as such a name could be the voters name and hence identify him/her. A vote should also not be void for reason that the party symbol, name or anywhere in the ballot paper. The counsel also stated that a signature or an alphabetical letter should not be objected to as it is a mark as envisaged under regulation 70 of Elections (general) Regulations.

For the above reason and as the results of the recount indicated the petitioner submitted that the following number from various poll stations votes ought to be rejected.

- i. ***2 votes from Chepkoiyo Primary School. These 2 being for 3rd respondent for having marks against 2 candidates i.e the respondent and another.***
- ii. ***1 vote from Sigot Primary School being a vote with marks against 2 candidates i.e the 3rd respondent and another candidate.***
- iii. ***2 votes from Ketam Primary school. 1 vote for 3rd respondent for having marks against 2 candidates i.e the 3rd respondent and another. And another vote for 3rd respondent where the voter decided to write the name for the candidate “Baruch”. The petitioner contended this identifies the voter as one Baruch.***
- iv. ***1 vote is for 3rd respondent it has marks against 2 candidates i.e 3rd respondent and another mark on another candidate.***
- v. ***1 vote from Chelonyo Primary School.***

1 vote for Petitioner which had marks against candidates i.e petitioner and another.

Counsel for the petitioner submitted that according to his tabulation the valid votes for the 3rd respondent and petitioner will be:-

Petitioner 3095 + 118 – 1 = 3212.

3rd respondent 3115 + 99 – 6 = 3208.

And further added to 5 erroneously rejected votes from Kimogoch Primary School the total votes would be:-

- a. **Petitioner 3212 + 3 = 3215.**
- b. **3rd respondent 3208 + 2 = 3210.**

He concluded by saying the petitioner had proved there were irregularities in counting of votes leading to 3rd respondent being erroneously declared the winner. And from the tabulation by the counsel Charles Kimeli Korir (petitioner) was and is the winner of the elections held on 4.3.13 for members of County Assembly Kabisaga ward. And that since at pre-trial conference it was agreed the outcome of recount will determine petition he asked the court under section 80(4) and 80(5) of Elections Act to find 3rd respondent was not validly elected and proceed to declare the petitioner the winner and duly elected member of County Assembly Kabisaga ward. And in the alternative he prayed that if the winner is not apparent (which is not the case in this petition) he prayed court to direct that a by election be held for the position of member of County Assembly Kabisaga ward. His prayer was for costs to be met by 2nd respondent to the petitioner.

The 1st and 2nd respondents through their advocate Mr. Yego of Z.K Yego Law Offices did oppose the petition and filed their response to it accompanied by an affidavit sworn by 1st respondent. In their response they termed the prayer in the petition as mis-conceived, and baseless. That the elections conducted by 2nd respondent were free, fair, accurate and transparent. The counting process and scrutiny were conducted transparently with the full involvement of the petitioners agents in all the polling station who signed the Form 35's confirming the accuracy for the said results. And that at no time did they object to any rejected votes, spoilt or disputed votes counted in favour of petitioners competitors who included the 3rd respondent. That this petition was only brought to court after the petitioner discovered the margin with which he had lost was small, making petitioners claims to be in bad faith and actuated by malice. The 1st and 2nd respondent denied any allegation of irregularities in Chepkatet Primary school, Kapkorio Ketam, Kormaet, Cheloiyo, Chepkoiyo or Kimogoch primary schools. The counsel submitted that the issues for determination had been agreed to be whether there should be a recount for Kabisaga ward and whether the 3rd respondent was validly elected and who should pay the costs.

The court having found there was need for recount and having ordered the recount to be done hence the issue of whether there would be a recount had already been spent. Counsel for the 1st and 2nd respondent asked the court to determine a preliminary issue whether the petition is incompetent for lack of material facts i.e results of election, date of the declaration of the results and who won the elections. It was his submission that Rule 10(1) (c) and (d) of elections (parliamentary and county elections). Petition Rules 2013 provide that:-

“An election petition shall be in form E.P 2 in the schedule and shall state.

The particulars of petitioner, date when election was conducted, results thereof and when they were declared and the date of declaration of the results of the election”.

The 1st and 2nd respondent contended the petitioner deliberately failed to state the result of the election and date of declaration of results which omission renders the petition totally defective, bringing into focus the provisions of section 83 of Election Act. They said election results are axis on which the petition is either allowed or dismissed. On this issue the respondents relied on the decisions in ***Mututho vs J. Kihara (Nkr C.A. No. 02/08.*** Where the court of appeal made a decision dismissing the petition as the petitioner had not stated the results of the election being challenged. And the counsel also relied on the case of ***Charles Maywa Chedotum vs Independent Electoral & Boundaries Commission and 2 others Kitale High Court Election Petition No. 11 of 2013.*** Where Justice Karanja J.R observed that the effect of Mututho decision is to render fatally incompetent any petition which does not contain the result of the election. And found the petition therein to fall within that category:

The respondents petition to be dismissed on those grounds. On the recount and re-tally order by the court on 8.7.13 Mr. Yego for 1st and 2nd respondent told the court that the contested votes comprised of votes that had marks slightly beyond box, signatures, marks other than perfect ticks, or marks on candidates

name or partly symbol instead of empty box on the right hand side. He said most of the disputes on the validity of ballot papers were flimsy and had no basis. And that the intention of the voters being clearly discernible in the said votes save for one vote in Cheloiyo Primary school which had 2 marks on two different candidates, the rest had the intention of voter clear and the same should be treated as valid and credited to the respective candidates. The only vote to be rejected should be the one with marks for 2 candidates at Cheloiyo Primary School which was for the petitioner. For the 1st and 2nd respondent the final tally ought to be,

Petitioner = 3095 + 118 – 1 votes = 3212 votes.

3rd Respondent = 3115 + 99 votes = 3214 votes.

And that its clearly evident that the 3rd respondent had the highest number of votes cast and was thus validly elected as the member for the County Assembly for Kabisaga ward. The counsel said the ballot paper in Cheloiyo Primary School polling station which was marked against the names of more than one candidate be rejected in light of the provisions of Regulations 7 (a) (b) of elections (General elections) 2013. And since the same had erroneously been credited to the petitioner the same should be less in the number of valid votes for the petitioner. The counsel further said Regulation 77(2) (a-c) of Elections (General) Regulations addresses the issue of validity of the other contested ballot papers and from the ballot papers intention of the voter is clear and hence the so called contested votes (save for the rejected vote at Cheloiyo Primary School Polling Station) should be treated as valid votes cast in favour of the respective candidates. It is in light of his submissions that he stated that the results of recount to be:

Baruch K. Suge – 3214 votes.

Charles Kimeli Korir – 3212 votes.

On issue of the 5 objected rejected votes for petitioner and respondent Mr. Yego said the explanation by the 1st respondent should be taken as plausible and believable, that the 5 votes were stray votes which had been misplaced in the ballot box they had been rejected in a different ballot box and that is why they are stamped I.E.BC rejected. And counsel said the votes were validly rejected at the time they were stamped and an illegal transfer of those rejected votes to the ballot box for the member of County Assembly could not validate those stray votes. And if anything that the petitioners against in that polling station did not object to the rejection of the said votes. Mr. Yego in conclusion of his submissions said the recount and re-tally exercise has therefore confirmed that the tallying was accurate and verifiable as the final tally has returned a margin of 2 votes between the petitioner and 3rd respondent, just as did the final tally of 1st respondent.

That the recount has confirmed the election of 3rd respondent as a member of County Assembly Kabisaga was administered in a transparent, impartial and neutral manner in compliance with provisions of Article 81(e) (v) of the Constitution of Kenya 2010, the Elections Act and Regulations made thereunder. He referred the court to the case of **Nicholas Salat vs Independent Electoral and Boundaries Commission, Prof. Wilfred Lesan and 3 others** Where Justice A. Muchelule noted:-

“I understand legal sufficiency in the election to mean that the election was conducted in a free, fair and credible manner and that it accurately represented the will of the electorate. It would not necessarily mean that the election was devoid of errors, mistakes or irregularities. It means that if there were such errors, mistakes or irregularities they were not of such magnitude that they substantially or materially affect the result”.

With regard to costs, counsel submitted the petitioner should pay the costs of the petition for seeking to overturn the popular will of the people of Kabisaga ward. He prayed the petition to be dismissed and court to find that the 3rd respondent was duly elected as the member of the county assembly for Kabisaga ward.

The 3rd respondent through his counsel D.K. Korir of D.K Korir and associates did make his final submissions to the petitioner had filed his petition asking for a recount of votes cast in Kabisaga ward. The court found favor in application by the petitioner to have a recount and re-tallying of the votes cast for Kabisaga ward for member of County Assembly. The exercise was done and report filed back.

That the report found the petitioner garnered 3095 of votes cast with 118 votes in his favour being contested/disputed and 4 rejected. Further that 3rd respondent on his part garnered 3115 votes with 99 votes in his favour being contested/disputed and 5 rejected.

It was further his submission that on 28.8.13 the parties looked at the report and the closely the contested votes. And it was found that they were valid since the intention of the voter could be discerned. This applied to all save for 1 vote at Cheloiyo Primary School where the voter voted for 2 different candidates which was in clear breach of electoral rules and the same was rejected. It was in favour of the petitioner. Counsel said upon recount it was clear that 3rd respondent had garnered 3214 votes whilst petitioner had 3212 (in view of his rejected vote at Cheloiyo primary school polling station).

On the rejected votes the 1st respondent (Mosop Constituency Returning officer) and the Executive Officer of this court who oversaw the exercise stated that it was because they had no security features particularly the I.E.B.C stamp, and 5 votes which were retrieved from wrong box had been marked "I.E.B.C rejected". He said the explanation was satisfactory and was true. Even in view of the fact at counting of votes at the polling stations all the agents did sign on the relevant Form 35St hat they were satisfied with the results.

Mr. Korir for 3rd respondent concluded by saying since it had been agreed at the pre-trial conference that if count found it fit to order a recount, which it did, then the recount will conclusively determine the petition. He said it followed then that the 3rd respondent was validly elected as a Member of County Assembly Kabisaga ward having garnered 3214 votes. And hence the petition should be dismissed with costs to respondents and so the 3rd respondent.

I have gone through the submissions which have been made by learned counsels before me, I have also looked at the authorities referred to as well as considered the applicable provisions of law.

Indeed the main prayer of this petition was dealt with at the interlocutory stage when an application regarding it was heard and determined. And the court ordered a recount and re-tally of the votes cast for member of county assembly Kabisaga ward. The arguments by the counsels which have been expressed in these judgment for and against the petition are for purposes of highlighting the genesis of the petition and bringing afore the different perspectives of the petitioner and respondents to this petition may not necessarily be directly addressing the situation after the re-count. The second prayer of the application was that upon re-count of the ballot cast he court to declare the rightful winner. This forms the basis of my decision at this juncture having already found that the re-count and re-tallying has been done. This prayer can be merged with the rest of the prayers save for prayer on costs since they all become applicable upon the determination of final tally pursuant to prayer (i) of the petition.

During the pre-trial conference it was agreed that if the court found it fit to order re-trial the same would determine the petition. For this reason I do find that the issues for determination are:-

- a. ***Who is the rightful winner for Member of County Assembly Kabisaga ward as per the result of the re-count.***
- b. ***Who is entitled to a certificate of election for Member of County Assembly Kabisaga Ward.***
- c. ***Who should bear the costs of the petition.***

1. I will deal with the issue in this sequence as per the findings during the re-count. During the re-count the Executive Officer who oversaw the re-count as ordered by the court returned the following results in his report:-

The petitioner garnered 3095 votes with 118 contested votes. The 3rd respondent garnered 3115 votes with 99 contested votes. The counsels were in agreement that there were contested votes for each candidate upon the contested votes being presented to the open court and having been examined by learned counsels representing the parties it was agreed that most of the contested votes were in fact valid votes save for a few which I will address in a short while in this judgment. Most of the contested votes for the candidates had marks elsewhere than in the proper place, had more than one mark or had mark which bore writings which may identify the voter but in which the intention of the voter clearly appears and were marked in such a way that the voter couldn't be identified. Counsels agreed that Regulation 77(2) of Elections (General) Regulations had exception to the general rule on rejection of votes and that this votes were not void as per Regulations 77(2).

And for these reason the contested votes from polling stations save for the ones I will mention below were admitted as valid and accredited to each respective candidate. There were contested votes form some polling stations which were objected to by counsel for the petitioner against being declared valid votes to be added to tally of each candidate. Counsel for petitioner only admitted to 1 vote at Cheloiyo primary school station in favour of the petitioner to be an invalid vote hence to be rejected and be lessened from the petitioners valid votes. Counsels for respondents also agreed to this 1 vote in favour of the petitioner being rejected as it had clear marks against the names of 2 candidates which is forbidden by Regulation 77(1) (b) of Elections (General) Regulations which sub section provides 77(1).

At the counting of votes at an election any ballot paper –

- a.
- b. ***On which votes are marked or appear to be marked against the names of more than one candidateshall, subject to sub-regulation (2) be void and shall not be counted.***

On this, the issue of contested 1 vote at Cheloiyo primary school in favour of the petitioner was sorted out and 1 vote rejected which means that among the 118 contested votes for the petitioner 117 were found to be valid and hence are to be added to the final tally.

Counsel for petitioner asked the following votes from contested votes to be rejected

- i. 2 votes form Chepkoiyo primary school in favour of the 3rd respondent. The court and the parties had occasion to examine this 2 contested votes in court. Counsel for respondents told the court that they should be taken as valid votes alongside the others they had agreed on. However the court finds that these 2 votes cannot be taken to be valid since they had marks for 2 candidates. The voter did mark the ballot twice against different candidates, one was 3rd respondent and another candidate by virtue of the Provisions of Regulation 77(1) (b) The said 2 votes are void and cannot be counted. This means that from the 99 contested votes that 3rd respondent had 2 votes are not valid.
- ii. 1 vote at Sigot primary school station. Counsel for petitioner said it should be rejected while counsels for the respondents argued it should be counted as valid. Counsel for petitioner said the vote had mark against 2 candidates i.e the 3rd respondent and another. The court had occasion to examine the said 1 votes from Sigot Primary school and the court found that in it the intention of voter was clear since the main mark was on the candidate the voter chose while the other mark was a slight slip of pen which made an imaginary mark elsewhere by virtue of Regulations 77 (2) a- c such a vote as the one herein is not void but should be counted. The 1 vote at Sigot Primary was for petitioner.
- iii. 2 votes from Ketam primary school polling station. The 2 votes were for 3rd respondent. The petitioners counsel asked they be rejected while respondents counsel submitted that the 2 votes should not be void. 1 vote was said to have been marked for 2 candidates i.e 3rd respondent and another candidate while the other vote did have the name of the voter written which identifies the voter as one Baruch. The petitioners counsel argued that by writing name this could have

identified the voter as Baruch which is not the scenario envisaged in Regulation 77(2) (c). The court looked at the 2 votes. For the vote which is said to have had marks against more than one candidate, I do find that there was one main mark against the preferred candidate and the other which is said to be a mark was a slip of pen which created an imaginary minute mark. For that reason I do find the intention of the voter could clearly be discerned that the voter voted for the preferred candidate where the clear visible and heavy mark was.

On the vote with name written on it. I do find that it is misleading to insinuate that the voter wrote his name on the vote. This is because the names written on the vote are the names of the preferred candidate and the name is written in the proper place for marking against that candidate. There could be many other people out there with similar name to the one of candidate but by virtue of the fact that the voter has written the name in a ballot paper where one of the contestants is known by that name as opposed to writing the name on a plain paper or on a board, for the voter to be identified the intention of the voter is clear and can be discerned as who he wants to vote for. One cannot know the identity of the voter now that he has written the name of the candidate on the ballot paper it can't be assumed that the name of candidate is also his name, names are shared by many people all over but by writing it where a candidate is contesting by that name the intention is clear. I do find the vote with name of candidate written on it is not void. The 2 votes were for the 3rd respondent.

- iv. 1 vote at Barekeiywet primary school. This votes was said to have had a mark for 2 different candidates the 3rd respondent and another. From what the court saw in court there was the main mark put by pen by voter against the preferred candidate. The other mark which is there is that which resulted from I.E.B.C stamp link making a mark on ballot paper. This ink wasn't within the control of voter and may have touched ballot when it was being stamped. This can't make the vote void, since the intention of voter is clear whom he wanted to vote for. I do find this vote not to be void. The same was in favour of 3rd respondent.
- v. 1 vote from Cheloiyo primary school polling station. The parties had all agreed that this vote be rejected since it had mark for more than one candidate, hence it was rejected and I don't need to decide on it.

Objected rejected votes:-

I will also look at the objected contested votes which were 5 in number which were placed in a separate envelope for the court to determine the validity of their rejection. Counsel for the petitioner ask that they be considered as valid votes and they be accredited to the respective candidates and to be added to final tally. The said 5 votes, 3 for the petitioner and 2 for the 3rd respondent were all stamped "I.E.B.C" rejected. The 1st respondent

did explain to the court that this were stray votes which had been rejected in a different ballot box and wrongly placed where they were found. That they had been rejected at the ballot box where they were wrongly found.

Counsel for petitioner did not agree with this but stated that the explanation is not tenable since if the ballot papers were found in the wrong box and rejected there they should have been kept and should be found within that wrong box. That there is no way they would have been transferred to the current ballot box. He said this is because the way votes are counted for every seat can't allow that all the contents of a particular box are counted and returned to the same box which is sealed. He said the votes are valid since the marks they have and places they are put are admitted under Regulation 77(2). I do agree with counsel for the petitioner that these rejected ballot papers ought to be in the box where they were wrongly found as stated by 1st respondent. And even the 1st respondent does admit that they were wrongly put in that box.

Looking at the issue of these votes, from the evidence presented the agents of the petitioner who were at Kimogoch primary school from where these ballot papers emanated did not record any objection to the rejection of the 5 votes. If they had done so, the court would have seen it in the Form 35 of the Kimogoch

primary school. No issue was raised about them at the polling station until at the time of this petition. It is not denied that the agents of the parties were given a chance to ensure the votes tallied were correct. The law provides they can ask for a recount up to two times. I also do note the votes having been stamped I.E.B.C Rejected unlike the other contested votes which hadn't been stamped I.E.B.C rejected. These must have been found in the wrong box. And once I.E.B.C had stamped them rejected no amount of them being kept in the box they were found or them being transferred to another ballot box can validate them. They were rejected and so shall they remain.

The 3rd respondent may have done wrong by moving them to a wrong box but this does not make a difference to the end result whenever they were rejected. This is buttressed by the fact that no objection to their rejection was raised by the agents at the polling stations showing that the votes had been outrightly rejected. Counsels for the respondents asked the court to reject the 5 stray votes which had been rejected to and consider them void.

There may have been anomalies in putting/transferring the rejected votes to the wrong ballot box but I find this was not an excuse to have made the rejected votes valid. Neither was this anomaly so pervasive and serious as to vitiate the validity of the counted votes. I do adopt the sentiments made by,

Hon. Muchelule J. in Nicholas Kiptoo Salat vs I.E.B.C & Others in Election Petition no. 1/13 at High Court in Kericho where he observed that “legal sufficiency in the election to mean that an election was conducted in a free, fair and credible manner and that it accurately represented the will of the electorate. It would not necessarily mean that the election was devoid of any errors, mistakes or irregularities. It means that if there were any such errors, mistakes or irregularities they were not of such magnitude that they substantially affected the results”.

I do adopt this observation in answer to the petitioners contention that there was faulty counting and re-tallying of votes cast for Kabisaga Ward. And indeed the result of re-count showed there was no such error and even if there was the same did not affect the result after the recount which returned a margin of 2 votes as declared earlier by 1st respondent. Counsel for the petitioner also contended in his petition that the counting of votes from Kabisaga Ward for Member of County Assembly was conducted last contrary to the order of counting provided in Regulation 75 of Election (General) Regulations. In answer to this the court finds that the counting of members of county assembly last did not affect the result and even the recount proved so. I rely on **section 83 of Elections Act which provides:**

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

Counsel for the 1st and 2nd respondent, Mr. Yego wanted the court to determine a preliminary issue whether the Petition herein was incompetent for lack of material facts as stipulated in Rule 10 (1) (c) and (d) of Elections (Parliamentary and County Elections) Petition Rules 2013. I have looked at the petition and do find that paragraph 5 of the petition addresses the requirements of Rule 1 (1) (c) and (d) and that further the affidavit in support of the petition in paragraph 4 and 5 gives the same details and gazette notice gazetted the same is attached. I do find that this is an issue which was not but ought to have been raised by way of an inter locutory application prior to or during the pre-trial conference and does not therefore fall for determination at this stage. Justice J. Karanja made the same observations in **Kitale Election Petition no. 11 of 2013 Charles Maywa Chedotum and Philemon Chepkwony vs I.E.B.C and Samwel Moroto** and I do adopt the said observation. Even after finding that the provisions of Rule 10 (1) (c) and (d) of Elections (Parliamentary and County Elections) Petition Rules 2013 were not flawed. Further the provisions of section 83 of the Elections Act as quoted earlier in this judgment are clear and I do apply the said provisions herein accordingly.

All matters aside from the foregoing as per result of the re-count and after considering the votes earlier rejected and now considered valid. I do find the people of Kabisaga Ward expressed their will as to who their Member of County Assembly Ward will be through the following results.

Petitioner. 3095 + 117 (one contested votes having been rejected). While others were treated as valid.

3rd Respondent 3115 + 97 – (2 contested votes having been rejected) while the rest were treated as valid.

Petitioner 3095 + 117 = 3212.

3rd Respondent 3115 + 97 = 3212.

The results reflect a tie between the Petitioner and the 3rd Respondent which is the result reflected after re-count. From this there is no winner. The winner cannot be discerned as there is no candidate with the majority vote. An electoral system should at all cost be designed to implement the will of the people and this court has to ascertain that:-

As observed by D.S. Majanja J. in Kalembe Ndile and Another vs Patrick Musimba Musau, Machokos High Court Election Petition no. 1 (consolidated with E.P 7.13) The Hon. Judge stated:-

“Under our democratic form of government an election is the ultimate expression of sovereignty of the people and electoral system designed to ascertain and implement the will of the people. The bed rock principle of Election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible”.

I associate myself with the sentiments of the Learned Judge and do find that this court has a mandate to give effect to the intent of the people of Kabisaga Ward in as far as their Member of County Assembly is concerned.

2. On issue of who is entitled to the certificate of elections as prayed in the petition, I do find neither the Petitioner or 3rd Respondent is entitled to it as there is no clear winner. I do find that the elections for Member of County Assembly Kabisaga Ward were conducted in a free, fair and transparent manner upholding the tenets of our constitution and in accordance with principles laid down by electoral laws. That the result as reflected in tally by 1st Respondent and by the re-count revealed a margin of 2 votes between the winner and the runner s up. That the final tally has changed upon consideration of the votes which were rejected by the party agents themselves. This is because the 1st and 2nd respondent told the court to that all the rejected votes were valid. And the re-count proved this right since most of the rejected votes were admitted to be valid by both counsels for the Petitioner and 3rd Respondent and also their agents during the re-count. Those that 1st Respondent had rejected by stamping them the same were found by the court to be correctly so rejected. Save for the 3 votes which were found to be void, the rest of the rejected votes were found to be valid and accredited to the respective candidates.
3. This then brings me to the issue of who should bear the costs, I do find that no irregularities or errors, mistakes can be pointed out to any one party that made the results herein different from the early tally used to declare the 3rd Respondent the winner. In the spirit of the interest of litigation in election matters wanting to ascertain the intention and the will of the electorate I will order that each party bears their own costs for this petition.

The upshot is that I declare the result for Kabisaga Ward Member of County Assembly null and void.

Certificate as per section 86(1) of the Elections Act 2011 to issue accordingly.

I further declare fresh elections be held within the time stipulated by law.

I wish to thank all the parties herein. I thank the learned counsels for the parties for the decorum and courtesy demonstrated and extended largely to one another during the trial. I salute their excellent research and diligence in conduct of this matter. I thank the parties and their supporters for conducting

themselves in a peaceful manner throughout the hearing of the petition. Am grateful to the team led by Mr. Peter Isiaho which Participated in scrutiny and re-count portraying diligence and commitment. I thank my court clerk for her commitment to work during the hearing of this petition. All members of staff and personnel who came in handy whenever duty called for it.

Special gratitude to Judiciary Working Committee on Election preparation (J.W.C.E.P) for their preparatory work and support through the entire period of this petition. To all I say thank you.

To the candidates, should they choose to be bound by Judgment of this court. I wish each of them the best of luck in the fresh Elections.

B. MOSIRIA (PM)

27.9.13

It is so ordered.

Judgment read in open court in presence of :

Mr. Keter for Petitioner.

Mr. Yego for 1st and 2nd Respondent.

Mr. Mitei and Mr. Korir for 3rd Respondent.

B. MOSIRIA (PM)

27.9.13

Mr. Yego. We are grateful for the co-operation given by staff and diligence of the court. We are also asking we have a look at the 2 votes at Chepkoiyo for the 3rd Respondent which were rejected so that we can have way forward. We will then pray the ballot boxes be released to 2nd Respondent.

Court. The ballot boxes to be released to the 2nd Respondent. After counsels for Respondent look at the 2 rejected votes for the 3rd Respondent at Chepkoiyo Primary School polling station before the Executive Officer.

B. MOSIRIA (PM)

27.9.13 1)n .E.B.C and Samwel Moroto efore fall for determination at this stage. justice (c)nd (or that