



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT WEBUYE

ELECTION PETITION NO. 1 OF 2013

ERIC SOITA PATROBA-----PETITIONER VERSES

MARTIN WAFULA WAWIRE-----1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION----2ND RESPONDENT

ODUL B. ARGWINGS-----3RD RESPONDENT

JUDGEMENT

The petitioner filed a petition on 10/4/13 following county Assembly Elections for sitikho ward held on 4/3/13. The petitioner was among the candidates in the aforesaid election for the County Assembly representative seat. The 1st Respondent was one of

the candidates and was declared to be the winner. The 3rd Respondent was the Returning officer duly appointed by the 2nd Respondent as its official to conduct the said elections. The 2nd respondent is I.E.BC .

In the said election, there were 7 candidates and the official results that were gazetted were as shown hereunder;

<u>candidate</u>	<u>votes</u>
1.Dorice nafula songoi	590
2.Douglas simiyu kiteki	716
3.Macheso maraka	452
4.Martin wafula wawire	2539
5.Patrick nasonga nalianya	59
6.Robert kikai wa mwanja	591
7.Eric soita patroba	2150
TOTAL	7216

In the Petition the petitioner seeks the following prayers;

- 1) There be a scrutiny of votes recorded as having been cast in the aforesaid Ward Election for county Assembly representative from all polling stations in the election held on 4th march 2013.
- 2) There be a scrutiny of the rejected, void and spoilt ballot papers from all polling stations relating to the said election.
- 3) There be a scrutiny of the actual voters Registers used at all polling stations within sitikho Ward during the said election.
- 4) There be a recount of all valid ballot papers cast at the said Election.
- 5) The said County Assembly Representative for sitikho Ward Election held on 4th march 2013 be determined and declared null and void.
- 6) It be determined that the 1st Respondent was not and has not been validly elected as the county Assembly Representative for sitikho Ward.
- 7) The said election of the 1st respondent as county Assembly Representative sitikho Ward be determined and declared null and void and a certificate to that effect be issued.
- 8) Such election offences and malpractices on the part of the omission and commission of the 2nd and 3rd respondent as disclosed and found this honourable court be reported to the to the D.P.P for appropriate action.
- 9) The honourable court to find the 1st respondent has committed serious electoral offences and order her barred from participating in subsequent elections for a period of at least 5 years or as the court may deem just and expedient.
- 10) The respondents jointly and /singularly be condemned to pay your petitioner's costs and incidentals to this petition.
- 11) Such further orders and consequential orders as this honourable court make lawfully make.

The grounds set out in the petition are listed below;

1) ground 1 (para 12 of the petition)

“that the results for sitikho ward county Assembly election as announced

,declared and published by the 2nd respondent's officers and employees and by the 3rd respondent contained widespread instances of manipulation of results through manipulation of forms 35 and 36 and in some instances the votes exceeded the number of registered voters. This is flagrant breach of the fundamental constitution principles and the in violation of the provisions of the Act and Regulations”

2) ground2 (para 13 of the petition)

“ that the 2nd respondent and its officers and employees in breach of the constitution ,the Election Act and the Regulations failed to establish electoral systems which are accurate,secure,verifiable,accountable and /or transparent and declared results which in many instances had no relation to votes cast at the polling stations. Further ,the 2nd respondent officers and employees developed methods of the election system which were opaque and intended to manipulate the results of the winning candidate in the course of which the petitioner's agents were all together excluded from the electoral process.”

3)ground 3(para 14 of the petition)

“ that a reconciliation between the votes casts in the county Assembly election of

4th march 2013 and those cast for other elections at the same ward revealed a huge discrepancies between the votes cast in the county assembly elections and those of the president ,Gubernatorial,member of parliament and senate”

4) ground 4(para 16 of the petition)

“ that the numerous instances of huge discrepancies in the total number of votes

delayed by the 2nd and 3rd respondents their officers and employees in sitikho ward county assembly Election is inexplicable upon any reasonable hypothesis other than the existence of actual ballot stuffing multiple voting or

gerrymandering or inflation of the number of votes in the tallying therefore by the

2nd and 3rd respondents herein or their officers or their condoning of or connivance in the same to the advantage of the 1st respondent thereby rendering his alleged win invalid ,illegal,null and void.”

5)ground 5(para 17 of the petition)

“ that the 2nd respondent and its officers and employees employed and relied on manual tallying system which system was not only illegal and irregular but lacked transparency ,accountability and was used and relied on by the 1st respondent in collusion with the 2nd respondents officers and employees to manipulate the electoral process and in particular during the voting,counting ,tallying and transmission of election results for sitikho Ward county Assembly Representatives”

6)ground 6(para 18 of the petition)

“ that the 2nd respondent officers and employees took advantage of the manual tallying system and this to the advantage of the 1st respondent by excluding the petitioner's agents from several counting and tallying centres and further by declaring the election results for the county Assembly on unsigned form 35. The

2nd respondent's officer and employees also used and relied on a multiplicity of form 35 with variant entries for some of the poll, and futher making alterations and corrections on the said forms without the knowledge on involvement of the petitioner's agents.”

7) ground 7(para 21 of the petition)

“ that the 2nd and 3rd respondents unlawfully and contrary to the actual votes cast declared the 1st respondent as dully elected instead of the petitioner who had scored the highest number of votes.”

8) ground 8(para 23 of the petition)

“ that the 2nd and 3rd respondents used a falsified and /or incorrect voter register which excluded voters who had been duly registered to the detriment of the petitioner.”

9) ground 9(para of the petition)

“that petitioner and his agent were denied access to statutory forms including form 35 and 36.”

10) ground 10 (para 26 of the petition)

“that 2nd and 3rd respondents declared the 1st respondent as duly elected on the basis of unsigned and falsified and/or incorrectly filed statutory forms.”

11)ground 11(para 27 of the petition)

“ that the petitioner and his agents were denied the right to verify the serial number of ballot papers and seals on the ballot boxes before and at end of the polling exercise in every polling centre.”

12) ground 12(para 28 of the petition)

“ that the petitioner agents at polling centres were discriminated against,were intimidated and threatened by the polling officials thereby casting strong doubts as to their neutrality.”

13) ground 13(para 29 of the petition)

“ that the 2nd and 3rd respondents allowed the 1st respondent to campaign at the polling centres contrary to the election code of conduct.”

14)ground 14(para 30 of the petition)

“ that the 1st respondent engaged in massive voter bribery before at on the polling day.”

15)ground 15(para 31 of the petition)

“that the 2nd and 3rd respondents failed to take any security and precautionary measures to save guard the election materials and thereby exposing same to abuse and misuse and of which situation the 1st respondent took advantage to massively rig the elections.(i) the ballot seals were deliberately loosed.

(ii) there was not proper accounting of ballot seals

used and unused.”

16) ground 16(para 32 of the petition)

“ that the petitioner was denied access to polling stations and he was intimidated

and his agents treated with contempt ,spite and hatred by the polling officials of the 3rd respondent.”

17)ground 17(para 33 of the petition)

“ that the assisted voters were compelled to cast their vote for the 1st respondent and in most instances ballots were marked in favour of the 1st respondent against the wishes of the voters.”

18)ground 18(para 34 of the petition)

“that some favoured voters were issued more than one vote and others cast their vote more than once especially at nambalayi ,mang'ana,kuywa and ngachi and primary school polling centres polling centre which registered an abnormal turnout in the records of the of the 3rd respondent contrary to what was actually witnessed or the ground.”

19)ground 19(para 35 of the petition)

“ that the officers and officials who manned the election process were incompetent ill prepared biased,compromised and failed the test of neutral referees.”

20)ground 20 (para 6 of the supporting affidavit)

“that he has information from several eye witness that the 1st respondent put in motion a system of intimidation ,violence and harassment against his percieved supporters to the extent of preventing them from exercising their free will.”

21) ground 21(para 8 of the supporting affidavit)

“that the number of cast votes in his favour as per form 35 differed in the material particulars to what was announced at the polling centres and also differed in what was captured at the tallying centre.”

22)ground 22(para 9 of the supporting affidavit)

“that at nambalayi and mang'ana polling stations the results as announced by the 3rd respondent were completely different from what was announced at the polling centres.”

23)ground 23(para 10 of the supporting affidavit)

“that the number of votes for kuywa polling centre did not correlate with the voter turnout in other polling stations across the county.”

24) ground 24(para 11 of the supporting affidavit)

“that at kuywa and ngachi polling station the votes announced at polling centre was different from those announced at tallying centre.”

25) ground 25(para 13 of the supporting affidavit)

“that he has information which information I verily believe to be true in some polling station some voters voted more than once and that some unregistered people participated in the said election.”

26) ground 26(para 14 of the supporting affidavit)

“that he has information which information I verily believe to be true that people who had died prior to the said election ,their identity card were used to participate in the said elections namely one dimina nabisino kafunja who died in february

2013.”

27) ground 27 (para 15 of the supporting affidavit)

“ that there was deliberate falsification of entries in form 35 and 36 to my detriment and in favour of the 1st respondent .Annexed hereto are copies of form

35 marked EPS 3-7.”

28) ground 28(para 17 of the supporting affidavit)

“that he personally witnessed at kuywa polling station,the 2nd and 3rd respondents failed to take any precautionary steps to safeguard the election materials and therefore exposed them to abuse

by the 1st respondent.”

29)ground 29(para 19 Of the supporting affidavit)

“that a routine checkup revealed the assisted voters had their ballot papers marked without the verification of his agents.”

30)ground 30(para 8 of the 1st further affidavit)

“that the said form 36 is inconsistent with the statutory forms 35 from several polling stations as illustrated in the attached forms for nambalayi,ngachi,mangana and kuywa.”

31) ground 31(para 9 of the 1st further affidavit)

“that the 2nd and 3rd respondents inflated the figures of registered voters in sitikho ward which distorted the final results of the county assembly

representative. For example the registered voters for nambalayi polling station in the principal register compiled by the 2nd respondent was 741 whereas those on form 35 from the said polling station was 737.”

32)ground 32 (para 11 of the 1st further affidavit)

“that the biometric voter registration (BVR),Electronic Voter identification(EVID) and the results transmission system(RTS) in sitikho ward recorded 95 % failure,hence affected the accuracy, security, verification ,transparency and accountability of the results that led to the 1st respondent emerge as winner,contrary to the provisions of the constitution of kenya ,Election Act 201 and other laws governing the elections.”

33)ground 33(para 13 of the 1st further affidavit)

“that the 1st respondent in conspiracy with election officers deployed by the 2nd and 3rd failed to use and / or compromised the administrative procedures adopted were ineffective as witnessed by massive breakdown of the EVID and RTS. The massive breakdown gave the already compromised election officials an opportunity to rig the elections in favour of the 1st respondent.”

34)ground 34(para 21 of the further affidavit)

“that the election officers deployed by the respondents use a falsified and / or incorrect voter register which had several names of voters that registered more than once or twice as illustrated by the petitioner in the voter registers for nine(9) out of 14 polling station used for identification of eligible voters in the entire sitikho Wards. These are kuywa, nambalayi, khalumuli, ngwelo, kakimanyi

,sitikho,mukite,bukunjagabo, and mwembula.”

35) ground 35(para 20 of the 1st further affidavit)

“that an independent scrutiny of all election materials including the polling day dairy, valid votes cast,statutory forms 32,33,35 and 36 from the 14 polling stations will attest to the fact that he won election for county assembly in sitikho Ward.”

36) ground 36(para 24 of the 1st further affidavit)

“that his agents /new ford kenya election agents in some polling stations didn't sign forms 35 to

authenticate the results and where they did it was a routine to demonstrate their presence at the designated polling station, which should not be

misinterpreted or construed to mean they accepted the falsified result for their respective polling station. There were several alterations on forms 35 for various polling stations in Sitikho ward that were not countersigned by the presiding officer in these stations.”

The court ordered a scrutiny of forms 33, 35 and 36, the principal register and the marked register and a recount of the valid, spoiled and rejected votes which was conducted by the E.O and a report submitted to court and the matter proceeded for hearing.

The petitioner (pw1) was examined and re-examined on the content of his petition (above grounds) in his petition, supporting affidavit and his further affidavit and his 7 witnesses were examined and re-examined on the contents of their affidavits.

The petitioner in xx stated that he is a registered voter but he never carried his voters card. He had a problem with the IEBC and party register used during nominations but he had not yet scrutinize the IEBC register to see errors on it. During campaign after nomination he never perused the IEBC register for Sitikho. Sitikho and Milo ward where he was a councillor were merged. They were 7 candidates in Sitikho ward and 2 were former councillors. During campaign

period IEBC called all candidates in 4 meetings and told them how to behave and campaign and he signed a code of conduct. He was to report any offence on election to the IEBC officer in charge of the ward (the returning officer) and one day he did that but he cannot recall the date it was verbal not written report as he knew the R.O could take action. He lent the council Ksh 600,000/= and it was paid back after he took the council to court and he never colluded with council workers. Most of his projects as a councillor were for primary schools and roads. He does not recall taking money for a project already in existence and pocketing the money. The council never gives the councillor money the council is the one in charge of every project and his work as the councillor is to be the people's watchdog. He does not pay taxes in the Ksh 10,000/= he gets from his power saw business. In 2007 during campaign he never ensured those against him were jailed in order to win the election but robbers attacked him and killed his father and he reported and suspects were arrested. He had no problem with Hon Eugene Wamalwa. He voted in Kakimanyi primary school polling station where he was born where he got 382 votes and 1st respondent got 163 votes. Elections at Kakimanyi on 4/3/13 started well and in the evening boys were drunk. In the room

there was a crowd and it was disorderly and his agents at this polling station were Ngano and Martin Musundi but he voted he was not prevented to vote because of the crowd. He was denied to talk to his party agents who were present at that polling station. IEBC gave him form 35 for that polling station when he came to court. Elections at Kakimanyi polling station were not free and fair and he never put this in his petition. 4 agents signed form 35 for Kakimanyi polling station. The New Ford Kenya agents were trained by the party and IEBC and the agents were paid by the party. The party was to ensure the agents reach the polling station but if they had a problem he could have helped them. He met his agent (Martin Wefafa Musundi and Kere Ngano) of Kakimanyi polling station and their names are not appearing in form 35. His 2 agents have not sworn affidavit saying they were agents there and they were prevented to sign form 35 and he never mentioned this in his affidavit. He cast his vote at 7.30 am and left his agents there and on going back to the said polling station he was prevented from entering but this is not in his affidavit. It's not clear who won the election between the 2 of them. The 1st respondent was issued the certificate but he wants the election nullified because they were not fair. In form 36 it shows the result were declared at the polling centre on 6/3/13 and he is aware he was to file his petition within 28 days. From

6/3/13 28 days end on 3/4/13 and he filed the petition on 10/4/13. He thought he was to file the petition 28 days from the date of gazettment so he is within time

so he never made an application to file petition out of time. He never filed another petition in Bungoma. He served the 1st respondent using a process server (mr masakuli) but he never saw his annual licence. The result were announced on

6/3/13 at around noon- 1 pm at the tallying centre but he never congratulated the

1st respondent then walk away. He never forwarded any complaint to IEBC that the 1st respondent was committing election offence in para 19 of the petition but he complained to the incharge on phone but has no document to prove he did that. One saturday the 1st respondent was giving money to his neighbour but he never complained to IEBC and he never put this in his affidavit .when he went to kakimanyi to vote he never met the 1st respondent there. Its hard to confirm who won the elections. According to what his agents told him he got 2695 votes and

the 1st respondent got 2395 votes but as per forms 35 and 36 the 1st respondent was ahead of him which he is disputing. The register he is referring to in para 23 of the petition is the principal register. People were registered more than once in the provisional register supplied to him by IEBC . He has not looked at the main register apart from the provisional one. Agents on the ground told him they were denied the right to verify the serial numbers of the ballot papers and seals on the

ballot boxes before and at the end of the polling exercise in every polling centre. Even him he was denied at kakaimanyi but he never asked to see the same. He went to nambalayi at noon and was also denied and he never went back to nambalayi as the people were hostile. His agents were there at nambalayi when they started and finished the exercise. He personally saw the 1st respondent campaigning at kuywa polling station at 10.30 and khalala at 11 and he took photos of this. He has no document to prove the 1st respondent was given permission to campaign at polling stations by the 2nd and 3rd respondents. As per para 5 of his supporting affidavit he was told by people including his agents that the 1st respondent was bribing voters before and on the polling day. It does not

say he himself he witnessed the same but he never mentioned his informers. He met the 1st respondent at a wedding in a church during the campaign period and he saw him giving people money and the step he took was to come to court he never wrote letter to IEBC or Anti corruption. He cannot recall the names of the people who were bribed. At kakimanyi where he voted he never witnessed any assisted voter being forced to vote for a particular person his agent is the one who told him. IEBC officials failed to be neutral as they were favouring the 1st respondent as his ODM agents were the ones allowed to witness the process. In nambalayi the officer incharge(one philip mwangale) was incompetent. New ford kenya had agents in all polling stations. It was the parties duty to ensure agents reach the tallying centre not IEBC. Violence in para 6 of his supporting affidavit means people were being chased. The 1st respondent and his supporters never assaulted him they just chased him away and threatened him and the police officers were present and he reported to them but he never went to the police station. He knows appearance of some of the people who chased him away.

People told him that the ID of dimina nabisino kufunja was used to vote. He cannot prove that dimina died but he was at her funeral. In kuywa,mangana and ngachi the entries are different. He won the elections but according to the anomalies they cannot establish who is the winner. He went to kuywa stream one at 10.30 and he was chased away he never entered the said polling station his agent is the one who told him people were given 2 ballot papers and they voted twice. He won 3 previous elections and lost this one because of anomalies. He never shook hands with the 1st respondent after the election of 4/3/13 and then later changed his mind. In his affidavit malick chonge ngao does not state he was an agent of eric soita or new ford kenya. He won in many polling stations and

won the elections but he came to court because of irregularities. In para 2 of his

1st further affidavit he stated that the results were declared on 5/3/13. There was

voter education before election. He does not understand the term ballot stuffing in para 6 of his 1st further affidavit and the word gerrymandering in the same para means 1st respondent's supporters were hanging around the polling station after voting saying they are keeping security but he never mentioned this in his affidavit. The register he is referring to in para 9 of his further affidavit is the provisional principal register. In para 11 of the 1st further affidavit he meant the failure of the machine made the 1st respondent emerge as winner and if the

system was used it could have been fair but in 2002 when he won the election it was manual and the elections were free and fair. He attended the IEBC meeting where voting procedure was explained. The 1st respondent never contributed to the failure of the machines but if people voted twice the 1st respondent benefited from that. The offences he is referring to in para 12 are violence, harassment, treating of voters and intimidation and he reported to people manning those polling station but there is no date on that para. The law allows manual or electronic voting. On the poll day it never rained and he hire a m/v which he used to move around and he was with 4 other people. He first walked to the polling station and voted is when he called for the m/v. The 4 people with him were registered voters and he told them to cast their vote early before they joined him and they visited only kakimanyi, kuywa, khalala and nambalayi polling stations. None of the 4 people with him swore an affidavit. They have 3 AP

camp in their ward and the nearest police station is webuye. Milo AP camp is the nearest to kuywa polling station. He reported at milo Ap camp. On the poll day he does not recall meeting any of the 1st respondent's children. None of his son was an agent at kakimanyi. In para 33 of his 1st further affidavit when he said the results were premeditated he meant the results affected him. He is not aware that the new ford kenya agents were not paid after the elections. He does not know

that there some centres where his party never fielded agents. His agent was to carry letter from IEBC ,letter from the party and ID before he is allowed into the polling station and if an agent does not have them the party is to blame. If a party agent wants to leave a polling station and go home he cannot be prevented from leaving and elections cannot stop and sealing of boxes will still be done if he is away and 1st respondent cannot be blamed for that. He was the favourite candidate in kakimanyi, bukunjangabo, milo, nambalayi, mukite, mangana, ngachi and ngwelo. The other candidates have not filed any petition or sworn any affidavit. He was chased at kuywa polling station he never entered any of the streams and his agents were inside the polling centre, at khalala things were okay and at nambalayi many people who had already voted were hanging around. His

agents at kuywa which had 2 streams were malick and mbakaya. In each polling station he had one agent. He cannot recall the name of his agent at khalala but in nambalayi joshua was his agent. The principal register is the one marked. The register he saw when he was at kakimanyi voting had his photograph so it is different from the provisional register annexed to the 2nd and 3rd respondents response. The forms 36 annexed to the petition and that annexed to the 2nd and

3rd respondents response are the same and they are dated and signed. In khalala the p.o, his deputy and the agents signed form 35, in sitikho the p.o, his deputy and agents signed form 35, in kuywa (1) the p.o, his deputy and his agent signed form

35, in kuywa(2) only the deputy p.o and his agent signed form 35, in mangana the p.o, his deputy and agents signed form 35, in yalusi the p.o, his deputy and the agents signed form 35, in khalumuli the p.o, his deputy and agents signed form

35, in ngwelo the p.o and his deputy and agents signed form 35, in nambalayi only the p.o and his deputy signed form 35 no agent signed it, in milo the p.o, his deputy and 6 agents signed form 35, in bukunjagabo the p.o, his deputy and 2 agents signed form 35, in kakimanyi the p.o, his

deputy and 4 agents signed form

35, in mwembula the p.o, his deputy and agents signed form 35, in ngachi the

p.o ,his deputy and his agent signed form 35. He has issues with where his agents never signed form 35. on the polling day he asked for form 35 in the 3 polling stations he visited and they refused. When he went to bokoli he was given the forms 35s and form 36 annexed to his petition. When the elections closed and votes were being counted he was at kakimanyi until midnight then he went home he was at bokoli (tallying centre) the following day. He only asked for form 35 at kakimanyi but he never said this in the petition and after the p.o read the results then he stuck form 35 on the ballot box and he went home he does not know if he stuck one on the wall. He phoned his agents and told them to get forms 35 after the process and they told him they were denied the same. He never saw his agents asking for forms 35 and 36 and they were denied. His agents told him they were not involved in the process of sorting out the votes. His agents signed forms 35 as a sign of presence. You sign accurate thing and what you have seen. In the forms

35 annexed by the respondents the entries are correct but what his agents told him are different. The forms 35 were written at polling centres. The constituency polling centre is the tallying centre. His agent told him he is the one who won in nambalayi and his votes had been reduced by 200. In ngachi he had 61 votes as per form 35 but its not correct as his agent never signed it. In kuywa in form 35 its ok but there is a problem in form 36 The entries in form 35 in nambalayi is wrong as his agent told him he got 426 votes there not what is inform 36 and his agent

never signed form form 35.

polling station	form 35	form 36
mukite	Petitioner 265 votes 1st respondent 88 votes	Same as form 35. so there is no problem there
kalala	Petitioner 109 votes 1st respondent 128 votes	“
sitikho	Petitioner 76 votes 1st respondent 215 votes	“
kuywa(1)	Petitioner 76 votes 1st respondent 347 votes	“
kuywa(2)	Petitioner 67 votes his agent signed it 1st respondent 385 votes	63 votes 385 votes
mangana	Petitioner 237 votes 1st respondent 133 votes	109 votes(there is problem) 128 votes(there is problem)
yalusi	Petitioner 58 votes	Same as form 35

	1st respondent 68 votes	
kalumuli	Petitioner 115 votes	“
	1st respondent 57 votes	
ngwelo	Petitioner 207 votes	“
	1st respondent 100 votes	
nambalayi	Petitioner 226 votes	26 votes
	1st respondent 341 votes	341 votes
milo	Petitioner 317 votes	
	1st respondent 211 votes	Same as form 35
bukunjagabo	Petitioner 256 votes	
	1st respondent 123 votes	Same as form 35
kakimanyi	Petitioner 383 votes	
	1st respondent 163 votes	Same as form 35
mwebula	Petitioner 42 votes	
	1st respondent 179 votes	Same as form 35
ngachi	Petitioner 61 votes	48 votes(there is problem)
	1st respondent 47 votes	6 votes(there is problem)

There is a problem in results in form 35 and 36 in both their results. The errors in this forms were not deliberate. In kakimanyi the p.o counted the presidential votes 1st,then

governor,then senator, then women representative,then mp and finally theirs which were

4902 votes. Voting ended at 6 pm and counting ended at midnight in the presence of his agents. IEBC had no work pressure there was no resting time between tallying for different posts. Entries in form 36 were wrong and without knowledge of his agents. In mukite ,khalala and sitikho there is no other form 35 but in kuywa there is another form

35 which is not before court. Inflation of number of votes was done in kuywa. People registered twice in the principal register he was given. He was not a kuywa and nambalayi at tallying time he was told. He can sign a form inflated during tallying. When system failed errors occurred. There was no secrecy at the voting booth as many people were there. If you dip your finger in ink after voting you cannot vote twice but other people known to other candidates were not dipping their finger in ink. According to forms 35 the registered voters were exceeding cast votes. In kuywa the people who voted exceeded the registered voters and he was told by his agents in kuywa and ngachi that some people were registering twice. He believes the principal register used during the poll day had defects and he knows there are people who voted twice. There is no affidavit of a person who says he went to vote and he missed his name and he was denied to vote. In the petition there is no double registration ground but in the provisional register

people were registered twice. He never attended dimina's funeral

and was told she died and her ID was used to vote at kuywa but her name does not

appear in the provisional register . Nobody has sworn an affidavit to say dimina died and he went to her funeral. There is no death certificate of dimina. He never wrote any official complaint to IEBC but he called them. He did not make complaint with police but the police were present at the polling stations and he reported to them but it was not written in the OB. The offences and malpractices by the 1st respondent were intimidation, harassment, bribery and violence. He was told about the intimidation, harassment and violence in para 6 of his supporting affidavit he never witnessed but no witness has said he reported this offences in the OB. No witness said they were assaulted , reported to police, was given a p3 and went to hospital and he

wrote a complaint letter complaining of violence at a specific polling station and he never voted because of the violence but the one who was chased wrote an affidavit. He was told there was bribery all over he never saw but they never reported to police or to IEBC through a letter as IEBC was also part of the problem. In forms 35 where agents signed they never indicated that there was bribery in polling stations or that work was ok or bad. He was told the 1st respondent was bribing people on the poll day he personally never saw this or the 1st respondent campaigning on the poll day. While at kuywa when he was being chased he saw the 1st respondent giving people money from far but he never reported to police and none of the 4 people with him swore affidavits to say the

saw this. Campaign is grouping people and doing politics. No witness has sworn an affidavit to say he saw the 1st respondent campaigning. No assisted voter has sworn an affidavit to say he was forced to vote for the 1st respondent. In kuywa he never wrote a letter to the p.o to complain about campaigning. He never complained about voter education in his petition. He was not keen on what was happening at bokoli. He never went to ngachi and never saw anyone given more than one vote. Even in kuywa, mangana and nambalayi he never saw his agents told him. People told him they voted twice but no one has sworn an affidavit. His agent in kuywa one robert mbakaya never wrote in form 35 that people voted twice. In kuywa 2 also his agent signed form

35 but he never said people voted more than once. In mangana his agent one alex wanyama signed form 35 and in nambalayi no agent signed form 35. kuywa has more than 1000 voters and when he reached there there were very many people there whom he never counted. According to what his agents told him he got 2695 votes and the 1st respondent got 2395 votes but he never wrote this in his petition. Many agents have not signed many forms 35s and the Law says all agents at polling stations must sign form

35. On being shown election regulation 79(3) and (6) the petitioner states that if his agent was not given the form by the p.o how could he give reason not to sign. Joshua

his agent in nambalayi in his affidavit says he declined to sign form 35 but he never said the reason he refused to sign it. Scrutiny of forms 32,33,35 and 36 will show he won the election. Since agents were not signing forms 35s' then there was a problem. According to forms 35s' he lost the election by 94 votes. According to form 36 supplied to him before corrections he had lost by 385 votes. In elections there can be errors but this was over board. Both their Entries in form 36 are reduced none is increased. In the provisional register there people registered more than once and this is an irregularity.

The 9 polling stations where people registered twice are;

Polling station	People who registered twice
mwebulu	misiko
mukite	Vivian nyongesa agnetta

kuywa Jaes kwale wekesa
khalumuli Mahanu meshack mutaki
bukunjagabo Ainea masibo webo and rosemary
wanyonyi
nambalayi Loice musimba lusala and peter wanimo
kakimanyi Mutoni justin
ngwelo Joseph mukongolo nyongesa

But if their names were corrected and only appear once then its ok.

He never saw the provisional register being used on the election day. In the petition he only complained about kuywa, ngachi, mangana and nambalayi. He never complained of double voting in the above polling stations. As per the provisional register nambalayi

had 741 voters and as per form 35 the number is 737 it possible the 2 people registered twice could have been removed. BVR is the machine used to identify person to get vote. BVR and EVID is the machine used by IEBC which failed. RTS is solar used outside polling station. When the system failed he wanted the election to be done properly. When the system failed some people voted twice. He is presuming people know to specific candidates were not being given ink. Displaying results on projector on the wall is not transparency and the agents writing then down is not accountable. He was chased and the police present were watching. Agents were present inside bokoli.

During campaign he never went to any wedding but went for a funeral however he never gave the bereaved money as its not allowed in law. Rigging means stealing votes and he never saw any IEBC officer doing this his agents told him. He does not know how many days the p.os and clerks were trained and he has not seen their curriculum. He never saw the 1st respondent or his agents falsifying the votes. He was at kakimanyi during tallying and his agents were sitted far from the people doing the sorting, counting and tallying after tallying he went home he does not know how the ballot boxes were transported. He never saw with his own eyes the agents complaining. Para 22 of the further affidavit should read legal not illegal right. He never saw his agents being denied access in other polling stations as he was in kakimanyi. He is sure all party agents reached and entered their polling stations and they were intimidate. He went to kuywa and he was chased.

The work of an agent is to witness not assist a voter and his agent was inside but was denied to witness voting so there was collusion as p.o never allowed every agent to witness assisted voters vote. He suspect people who registered twice were allowed to vote twice for the 1st respondent. He suspects uncle simiyu voted for him but he never saw him vote for him. He cannot recall the amount of money he used in his campaign. The agent of nambalayi polling station said the results were less by 200 votes. The difference btw 2695 and 2395 is 300 votes. 1st respondent never assaulted him but his supporters roughed him up and the police there saw this and he never reported at the police station or write a letter to to IEBC but he reported to the IEBC officer and the police manning the polling station. If you are inside the court if people make noise on the road it will attract your attention but you will not know what is going on there. His petition is not just full of hearsay as he saw some offences and others his agent told him. Agents were not given forms 35s'. He asked for form 35 at kakimanyi after tallying

where he had one agent. If there was one form 35 for 12 agents IEBC should have done photocopy for all the agents. No agent was given form 35. The returning officer is related to the 1st respondent. He never saw votes being stuffed in the ballot boxes but

the scrutiny will say if he is lying. He never complained officially but when he got the principal register is when he knew it had mistakes and it was IEBC's fault. In re exam the petitioner stated that he said

election were rigged because people were registered twice but he never personally witness the rigging he was told by his agents. The IEBC officials were not properly trained because they allowed people to vote twice, seals in ballot boxes were loose and others were broken, in some polling stations agents never signed forms 35 and the forms 35 were not filled according to the Law, the election officials were favouring the 1st respondent, and the agents never witnessed the assisted

voters vote. He still stands by para 18 of his further affidavit. He saw the R.O could not solve his complaint as most of his officers were involved in mistakes that is why he

came to court. He was personally roughed up at kuywa and denied access to the polling station and this is intimidation. His agents also told him they were intimidated. What philip said in para 6 of his affidavit its wrong. There should have been 12 forms 35s' given to the 12 agents present. In para 50(a) to (f) the 3rd respondent is saying what his officers told him so its not wrong for him to say what his agents told him. The R.O interfered in the election process as the results he announced were entered wrongly. And he interfered with form 36. Officials interfered with results at nambalayi polling

station as his agent told him there he was ahead with 426 votes, in kuywa he got 143 and he was given 139, in mangana he got 337 and he was given 109 votes, in ngachi he got

61 votes and he was given 49 votes so there was numerous interference with the election process. The 1st respondent's supporters were bribing people and were harassing his supporters when they went to vote. Ballot stuffing means votes put in box which were not suppose to be inside that ballot box. He was told people were voting twice and he suspected there was ballot stuffing. 1st respondent was not elected validly. In form 35 of nambalayi no agent was present for opening and closing of the ballot boxes. He has not seen a register of complaints by losers of election. He can only bring his complaint to court. He is registered as a voter in kakimanyi. If he was not registered he could not

have participated in the election as he could not have been cleared when he presented his papers. In 2002 he defeated the 1st respondent in the said election and the 1st respondent was satisfied with the results. He is more experienced in election. When he was a councillor he never mismanaged projects. He took the council to court because he was given a bouncing cheque not because he likes going to court. He filled the code of conduct form. A councillor is just suppose to identify project the town clerk is the accounting officer a councillor does not deal with money directly. He never attacked

Hon wamalwa for supporting mudavadi. On 25/10/07 he was violently robbed and his father was killed and suspects were arrested but were released on a technicality he never arrested them because they were supporting his opponent. He does not have any dispute with Hon dan wanyama's his MP. Kakimanyi was over crowded, boys were drunk and you could not vote in secret but he voted. His agent never signed form 35 of kakimanyi and the statutory comment therein was that the colour of the ballot paper was tricky to the voters most of them so it to be white. He was not satisfied with results at kakimanyi because they were not transparent. As per the many defects entered in form 35 and 36 its

not clear who won the election of sitikho ward that is why he came to court. The election results were declared on 13/3/13 and Article 87(2) of the Constitution talks of

declaration of kenya Gazette and IEBC not the local announcement by R.O at Bokoli of

6th so the last date for him to file his petition is 11/4/13 and he filed his petition on

10/4/13 so he filed it on time and he could not ask court for an extension of time. He never filed another petition elsewhere. The petition was served on the respondents by a licenced process server one john who filed his returns. In para 13 of the R.O's response he described the the register he was given as a principal register and the source of the principal register is the marked register. His agent who was at kuywa is the one who told him the 1st respondent's agents were campaigning there he never saw this personally. He saw the 1st respondent giving voters money at mzee nixons and on the poll day when he was chased at kuywa polling station he saw the 1st respondent giving voters money directly. He was

also told by his agent at kuywa that voters were being

given soda and ksh 50/= before voting and others were being given sugar and tea leaves. At a funeral he saw the 1st respondent bribing people with money but he took no step. In kakimanyi he never witnessed assisted voters voting but his agents told him how the process was being conducted and he believed them. The p.o at nambalayi was biased

his agent was not allowed to witness the assisted voters voting and his votes put in form

35 is not the votes he got there. Gerrymandering means that the 1st respondent got advantage for offences and it denied him the advantage. If electronic was used it could have been accurate and he blames IEBC as the same failed. The election offences by IEBC were allowing people to register and vote twice, agents not signing forms 35 and wrong entries in forms 35 and 36. The election offences by the 1st respondent through his supporters are harassment, intimidation, treating voters and violence. His strong holds were 8 out of the 14 polling stations. He has an issue with his entries in form 35 of mukite, kuywa(2) and nambalayi.. his votes were 2695 and the 1st respondent had 2395 so he won with 300 votes. Its the party's duty to ensure agents reach the polling stations and they did. Before the elections were manual and they were okay but this one was terrible.

Polling station	Forms 35
mukite	6 agents signed his included there is alterations on votes of robert kikai and its not countersigned
khalala	9 agents signed his included there is alterations on douglas votes and its not countersigned
sitikho	7 agents signed his included there is alterations in no. of spoilt ballot papers and his votes are not clear and not countersigned
kuywa(1)	4 agents signed including his.
kuywa(2)	7 agents signed his included ,there is alterations on his votes whicch is not countersigned,p.o never signed it but he commented
mangana	9 agents signed his included no of spoilt and rejected votes altered and not countersigned
yalusi	4 agents signed his included total no. of cast votes in words is not clear
kalumuli	9 agents signed his included
ngwelo	8 agents signed his included , no. of rejected votes is not clear.
milu	6 agents signed his included,douglas votes are altered and not countersigned
bukunjangabo	2 agents signed his includedthe p.o just wrote one name
kakimanyi	4 agents signed his did not sign ,no. of votes cast and no. of valid votes are altered but not countersigned
mwembula	8 agents signed he is not sure if his signed

ngachi 7 agents signed his included,patrick's votes are altered but not countersigned

Patrick and macheso votes are not clear,p.o was philip mwangale wanyonyi and the nambalay

i one who signed the affidavit has a different name,the deputy p.o was chess wafula not philp mwangale wafula,no agent signed form 35,p.o said well done exercise.

Those agents who signed forms 35 signed them as a sign of presence and IEBC never gave an explanation why other agents were not there. He was denied forms 35 even his agents. The election of sitikho were not accurate because the was double registration,wrong entries in forms 33,35,36. He was told in form 33 for nambalayi the entries were correct but in form 35 and 36 were wrong entries even mangana. The election was not secure because seals in some polling stations were loose. If agents signed forms 35 truthfulness of the results could be verifiable. There was no accountability as forms 35 were not signed. The election was not transparent as a stranger signed form 35 in nambalayi. The 1st respondent is not the one who won the elections because of the mistakes he has pointed out. He came to court because he is not able to know who won the elections in sitikho ward.

Pw2 joshua nyongesa yawa in his affidavit stated that he was a new ford kenya agent at nambalayi polling station. He requested for the serial numbers of the ballot books and the p.o promised to give him later. Unlike other agents the p.o did not allow him to witness the marking by assisted voters even when they had expressed loudly in favour of new ford kenya and on complaining the p.o threatened to chase him out. He was surprised to learn that the petitioner's results were less by 200 when they announced at the constituency tallying centre. He declined to sign form 35. On xx pw2 stated that the name appearing in his ID is joshwa not joshua in his affidavit. He is a new ford kenya party member. He stayed at the polling station from 6 am to 2.30 am. He saw the petitioner outside the polling station through the window when he heard noise. There were police officers at the gate of the polling station. He is a registered voter and voted later at that polling station and never encountered any problem. He only carried his

phone to the polling station not a document or weapon. Milo AP camp which is 1 km away is the nearest to nambalayi. The signature of pw2 in the affidavit and the one he signs before court are noted to be different. The agents were trained by the party and no politician was present. No agent was told to inspect the ballot papers. Voters came and asked to see him saying they want new ford kenya. The voter was saying in low voice I

am for ford kenya and other agents and p.o heard them. Vote is secret. The voters entered and said they do not know how to write, they know him ,they are for new ford kenya but they never planned this as a party and the p.o picks another agent. The p.o was asking one agent to assist an assisted voter then the p.o leaves and he favoured the ODM agent. He wrote the complaint on a book. Kakimanyi to nambalayi is a distance that take 35-40 minutes by motorcycle. He has the petitioner's mobile number. on

re-exam pw2 stated that his name was wrongly typed in the affidavit. He signed in court while tense. The agent picked by p.o was the one marking on behalf of the assisted voter not p.o. He went to the p.o and complained in low voice and he was told to sit down or he will be removed from the room. He never signed form 35 because it had different entries with entries in form 33. The petitioner's votes were 426.

pw3 jefrica makasi in her affidavit stated that on 4/3/13 she voted at kuywa polling station but on her way to the polling station at around 10 am she met 3 badobodas well known to her and one of them (antony wekesa) told her to take ¼ kg of sugar and 5/= tealeaves packet and she votes for martin not eric and on declining they started harrassing her and she fled to rose cassims's home and eluid wekesa,elijah wanyama and alice olando came and escorted her to the polling centre to vote and while at the gate he saw rowdy people at the gate harrassing a new ford kenya county representative candidate forcing him to leave and the same molesters were ferrying voters to and from the polling station. on xx pw3 stated that she cast her vote in stream one. Her home is

100 metres from kuywa polling station and she cast her vote properly because there was a policeman next to her. Police are 80 kms from kuywa. She met 9 people whose names she never mentioned because she was scared next to the school compound. She saw the

¼ kg sugar and tea leaves and she never took them so she cannot show court the same. She reported to the police around the compound who helped her go vote. She never went to the police station today. There is no case pending between her and the 9 people who harassed her and wanted to kill her. She cast her vote at 11.30 am then went home. While at the voting booth nobody (IEBC officer or agent) forced her to vote for a particular candidate as she knows how to read and write. She went to rose cassim's home at 10 am but she was not there. She stays at kuywa not lugulu. She never took photo to show ¼

kg sugar and tea leaves. She never reported to the chief or at milo police station. She stayed at rose's place for less than 2 minutes then she was rescued. On re exam pw3 stated that the county representative she was talking about was the petitioner.

Pw4 Enos jonah biketi in his affidavit stated that on 4/3/13 he voted in nambalayi polling station but about 50 metres from his home he met 5 people he knew who asked

him who his candidate of choice in respect to county representative was and on telling them it's his secret they persisted that nambalayi polling station it must be martin and nothing else and on resisting their persuasion they started hurling crude, nasty and unpleasant words against him which attracted people until one daniel wanjala intervened and onlookers rebuked them. On xx pw 4 stated that he voted at 3.45 pm and left home at 3 pm. Inside the polling station he was given a chance to vote nobody told him to vote for a particular candidate. He never named the 5 people for security reasons. He reporting to the police at the polling station but not to the p.o, the chief, at AP post or

the police station. He never took a photo of the 5 people. When he went at 3pm the exercise was going on well it had not been stopped. He voted for the people he planned to vote for thing that happened outside never changed his vote. On re exam pw5 stated that moses wanjala ngabo was among the 5 people harassing him. He meant county assembly representative of sitikho ward. If outside the polling station is bad it can affect how people vote inside the polling station.

Pw5 malick chonge ngao in his affidavit stated that on 4/3/13 elections he was an agent at kuywa polling station. The p.o refused to give him the serial numbers of ballot books when he requested. He saw a polling clerk (micheal nyongesa) issuing 3 ballot papers of county representative and governor and he called his county representative and informed him and he advised him to report to the p.o but on complaining to the p.o the p.o told

him it's not his work. The p.o never allowed him to witness the marking by clerks for those voters who were unable unlike other agents of Ford kenya and ODM Party. On xx pw5 stated that he was an agent in stream 2. The election started when all party agents and police were present. When he said county representative he meant county assembly representative. He was present when counting was done and boxes were closed. He signed form 35 to prove he was present but he never commented where it's written

reason of refusal to sign. Micheal gave out one ballot paper for governor and 2 for county assembly representative. He never reported to the policeman at the polling centre. The voter was to choose the agent to help him. He was told he could write a complaint letter to the p.o but he never did. Many people were assisted to vote but he never witnessed even once but he never complained in writing. In the form 35 annexed to the petition and the one annexed to the 2nd and 3rd respondents response the petitioners votes are different. On re exam pw5 stated that he was also told verbal

complaint is allowed. The petitioner got form 67 votes that is why he signed form 35 if it was 63 votes he could not have signed it.

Pw6 Eluid wanjala wekesa in his affidavit stated that he voted at kuywa polling station

on 4/3/13 but on his way to the polling station he saw jefrice makasi being harrassed by familiar people and jefrice escaped to the home of rose cassim to seek refuge and in the company of others they took jefrice from the hiding place to go vote. The same gang of rowdy people harassed the petitioner when he arrived at the gate of the polling station forcing him to leave. On xx pw6 stated that his home borders the polling station. At around 10.15-10.30 am he was at kuywa polling station stream 1 and he left home at

9.55 am and reached there at 10 am. By 10.45 am he had voted and left the polling station. The Achief's place is 1 km from the polling station. There was no problem inside the polling station he voted. In stream one the policeman was sitted outside near the door. He was nearing the gate of the polling station when he saw people chasing jefrice. He never mentioned the names of the people harrassing jefrice because of security. He reported to the police manning the polling station at 10.03 am not at the

police station. Rose cassim was not at home when they went there but he talked to rose's child. He has not been asked to go and record a statement at the police station

concerning incident of jefrice. Jefrice voted before him. on re-exam pw6 stated that when he went to vote he had his phone and watch but the time he gave court was an estimation as he was using his shadow.

Pw7 robert katola mbakaya in his affidavit stated that in the 4/3/13 elections he was a New ford kenya agent at kuywa polling station and the presiding officer did not allow him to witness how polling clerks assisted voters who could not mark for themselves unlike other party agents who were freely verifying and on raising alarm about it the p.o told him to keep quiet. On xx pw7 stated that the petitioner is in his clan. He was in stream one. He signed form 35. there were many assisted voters. He wrote a complaint in a paper but he never annexed it to his affidavit. He reported to his party coordinator and the police at the polling station. In the form 35 he signed the petitioner had 76 votes and the 1st respondent had 347 votes. No assisted voter complained in an affidavit he was assisted badly. In the form 35 he never wrote anything where its written reason for refusal to sign. On re exam pw7 stated that he signed form 35 without seeing the front page.

Pw8 barasa kundu nyukuri a political analyst had his report expunged and he was stood down in the middle of being xx and the petitioner decided to close his case without calling him and the remaining witnesses who had sworn affidavits and were not before court.

The 1st respondent(1RW1) in his response to petition and on being xx and

re-examined on the same denied all the allegations levelled against him in the petition and he called 8 witnesses before closing his case who also denied all the allegations levelled against him by the petitioner.

1RW 2(patrick simiyu makheti) an agent at kuywa polling station stream 2 denied what pw 7(robert katola mbakaya) and pw 5(malick chonge ngao) stated in their affidavits and what they stated before court on xx and re-exam.

1RW3(nelson sikuku nyongesa) an agent at kuywa polling station stream 1 denied what pw 7(robert katola mbakaya) and pw 5(malick chonge ngao) stated in their affidavit and what they stated before court on xx and re-exam.

1RW4(anthony wekesa wafula) a voter at kuwya polling station 1 denied what pw

3(jefrice makasi) stated in her affidavit and what she stated before court on xx and re-exam.

1RW5(wanjala ferdinard khaemba) a registered voter at kuywa stream 2 denied the contents of evans m.

simiyu's affidavit and that of pw3.(jefrice makasi).

1RW6 (moses wanjala ngabo) a voter at nambalayi polling station denied what pw 4 (enos jonah biketi) stated in his affidavit and what he stated on xx and re-exam.

1RW7 (jack muricho simiyu) an agent at nambalayi polling station denied what pw2(joshua nyongesa yawa) stated in his affidavit and what he stated on being xx and re-examined.

1RW8(rose cassim) a voter at sitikho ward denied what jefrice makasi (pw 3) stated in her affidavit and what she stated on being xx and re-examined.

2RW 1 who was the R.O(the 3rd respondent) in his response to the petition and in his affidavit denied all allegations levelled against him and IEBC and he called 2 witnesses before closing his case who also denied all the allegations levelled against the 2nd and

3rd respondents in their affidavit. On xx 2RW1 stated that IEBC is guided by Article 86 of the constitution. Form 35 is a document of accountability and signing of form 35 by an agent confirms he agrees with results or if they disagree they show reason for disagreement. Ordinarily forms 35 are suppose to be signed by agents but where no agent has signed the accountability threshold is not reduced. Results in form 35 are

transferred to form 36 and its expected to be accurate. Once results are announced its only the election court that can change. The p.o and security are to transport election materials to the tallying centre and to the store room but Its not a legal requirement for the agents to do so. They only open the ballot boxes at the tallying centre when the margin between the 2 candidates is one or two votes. They do not record sequence of arrival of ballot boxes at the tallying centre. There are 2 declarations one at the tallying centre and one by IEBC through a gazette notice. In sitikho there was 98% compliance with election Laws. IEBC took responsibility for application and failure of the electronic devices. Manual was the only option the other one was to stop elections and they could achieve the constitution threshold through manual. Technology failed 100% in sitikho and the whole country. He annexed the provisional register not the principal register used. The provisional register has names of people who appear to have registered twice. The counterfoil of ballot papers is also an accountable and verifying tool. IEBC only trained chief agents who trained political party agents. The security were to guard

polling stations and 400 metres radius from there and the area is marked with a string and strangers cannot do business there. The p.os hand over the forms 35 to the R.O personally. In nambalayi he had 2 deputy p.os as some stations had 2 deputy p.os depending on population. All stations with over 800 voters had 2 streams and 2 p.os. Where there were 2 p.o's any one of them could sign form 35. philip mwangale wafula is not the same person as philip mwangale wanyonyi they have different ID nos. He has the form 35 for nambalayi which the p.o one philip mwangale wanyonyi personally delivered to him but he cannot recall the time . The returns from the polling stations began arriving at tallying centre from 10.30 pm on 4/3/13 until 5th around 10 am. He checked to see if the box released is the one returned. The form 35 he annexed to his affidavit was the one he was given as the R.O. In form 35 of nambalayi eric got 226 votes and in form 36 he got 26 votes but he discovered this discrepancy later and it a data entry error which does not undermine accuracy. The form 35 is dated 4/3/13 by the p.o and 5/3/13 by the d.p.o and no agent signed it. Failure of agents signing does not

invalidate the process. In maangana eric had 237 votes in form 35 and 109 votes in form

36 a difference of 128 votes which discrepancy does not change the result. Ngachi eric got 61 votes in form 35 and 48 in form 36 a difference of 13 votes ,kuywa eric got 67 votes but its not very clear in form 36 its 36 votes. Eric lost 341 votes and martin 46 votes. Mistakes are not cotemplated or preplanned. The micro soft excel sotfware was under contol of IEBC and was sourced by IEBC. All the forms 35 are secure. The form

36 he used to declare results had discrepancies in respect to mangana,nambalayi and ngachi. If forms 35

are signed by the p.o,d.p.o, and agents it increases their verifiability. If cast votes exceed registered voters he will cancel the results and this was meant to

cure incidences of ballot stuffing. There is overwriting in forms 35 of mangana,kalumuli and kuywa 2 but they are no countersigned. The p.o in kuywa never signed form 35. a varying no. of agents signed forms 35 but there is no law providing for the minimum agents to sign. Assisted voters are assisted by the p.o in the presence of atleast 2 agents which the p.o has discretion to choose. Form 38 is the last form he fills. Regulation 87(2) of the election regulations gives sequence. He used soft copy form 36

to announce results. They trained all p.os and deputy p.os and made them aware of election offences. It is an offence if a voter registers in 2 polling stations and if an IEBC officer knowingly registers somebody twice he also commits an offence. voting twice is an offence and any IEBC officer who allows a voter to vote twice also commits an offence. Identification of voters device failed by 10 am ,the batteries had run down and it did not compromise the voting. The Law does not allow him to correct form 35. they have a correspondence file of complaint. In polling stations the complaints are entered in the poll day diary. Agents control their own time in the polling station. If there is a problem the 1st person to report to is the p.o. Complaints of ballot stuffing,ballot box going to person's home ,p.o taking tea with candidate,& p.o favouring one side on issue of assisted voters cannot be raised verbally. A complaint can be verbal or in writing depending on circumstances. Issue of assisted voters can be addressed verbal and if not dealt with agent can write it in form 35. boxes should be sealed in the presence of

agents. The wrong entries in form 36 were not deliberate or premeditated,they were made by 2 tally clerks as he announced and the entries were being posted on the wall and everyone was seeing. The register used in sitikho ward was 100% correct. They have 5 forms 35 and issue one to agents to photocopy. The security features in form 35 are sr no.,insription of printer,IEBC letter head,security code,IEBC stamp,p.o's stamp. The forms 35 are filled individually and they should be the same. What matters is the figures are the same not if they are in small or big letters. The form 35 on page 227 does not have the IEBC stamp on it but this does not invalidate the form as the results are

confirmed by 7 agents present. If he corrects form 36 eric will get 2491 votes and martin

2585 votes and the margin could be 94 votes. The forms 35 are accurate. Refusal to sign form 35 by agents does not invalidate the results,the agents are to sign the same or record reasons he has refused to sign. He will not refuse to accept form 35 if no agent signs it if there is no complaint. He visited all the polling stations and there was no incidence reported to him. He announced on soft copy of form 36 on 5th,issued martin a certificate on 5th,and he printed form 36 on 6th and signed it on 6th. On 8th he took the results to nairobi. He was impartial and there is no case against him in respect to 2013 elections. On the form 35 of kuywa(2) annexed by the petitioner the IEBC stamp is there.he never received any written or verbal complaint about election exercise from

candidates or any voter. The ICT challenges were not to favour any candidate they cut across. Petitioner's agent signed form 35 on pg 230 and pg 247. There is no complaint in forms 35 or a written complaint to him. As per form 35s martin is the winner and he

used them to declare the winner at the tallying centre. The agents were allowed to record the SR NO.S as read by p.o. Each polling station had 2 security officers. All p.os

handed the ballot boxes to him at bokoli tallying centre. He never prevented any candidate or chief agent to be present at the tallying centre and there is no affidavit to that effect. No one protested what was read in form 35. In forms 35 no agent complained that he was not allowed to witness the assistance of assisted voters and neither is there a complaint letter to p.o on the same. No agent wrote letter to IEBC saying exercise is over and he was denied form 35. He never received a complaint that he favoured more people to be registered in certain region or that he favoured one candidate to campaign and disallowed others. No candidates in sitikho ward is charged in the Anti corruption court and there is no letter to IEBC that a candidate bribed voters. He has not been summoned to testify over harassment and he has not received a letter to that effect. He never got a report of voter intimidation. He had a meeting

with all candidates before elections and they discussed election rules and how to report any complaint. He expected candidate to write to him if there was a problem but he never received any. All allegations by the petitioner are not in form 35 nor were they reported at the police station nor were they reported to him in writing or verbally nor has martin been charged in Anti corruption court. Scrutiny will reveal if the ballot boxes were loosened. His officers were interviewed, vetted by political parties, candidates and public and were declared competent. The election were free and fair and no one raised any complaint at the polling or tallying centre. on re-exam 2RW1 stated that signing forms

35 and results being projected on the wall means the process was transparent, accountable, verifiable, and accurate. Chief agents verified forms 35 at the tallying station. No election materials disappeared on 4/3/13 or 5/3/13. no agents complained that he requested to escort ballot boxes and he was refused. If he stopped elections when EVID failed he could have committed an offence. The purpose of projecting the results on the screen(wall) is for candidates/agents to bring to his attention any mistake so that he rectifies it before announcing. He has not been charged in any court with dishonesty or falsifying documents. There is no Law that erasures have to be countersigned. Nobody came to court to say the results in form 35 of kuywa(2), kakimanyi and mangana are not what was on the ground. On 4/5/13 to date he has never received any complaint from party, agent, voter or candidates. Agents were allowed to carry writing materials. Joshua yawa an agent at nambalayi complains of results announced at constituency tallying centre so he is ok with results of the polling station and he said he

declined to sign form 35. No witness has testified that he was forced to vote for martin. Voters who enters polling station and says he wants makokha of x party to assist him this is not allowed as this amounts to campaigning at a polling station. The allegations by the petitioner in the petition are not proved so court should uphold the election of martin and dismiss the petition with costs to the respondents.

2RW2 Isaac wafula nangweso a deputy p.o at kuywa stream 2 in his affidavit stated that he never refused to give the serial nos of the ballot books to malick chonge ngao when

he requested for them, that polling clerks were under strict instructions to issue only 6 ballot papers to each vote, michael nyongesa did not issue 3 ballot papers of county representative and governor as he was under his close supervision and malick never raise any complaint with him in regard to this matter and malick signed form 35 and the same does not contain any complaint raised by him. On xx he stated that his p.o was a woman. Malick complained against the p.o not him. Micheal was the one issuing ballot papers for county representative and governor. He was closer to where the ballot papers

were being issued than the p.o. The p.o had complaints diary and there was no complaint on it neither was there a verbal complaint. He signed all the 5 forms 35 but he only saw the the p.o signing 3. the p.o is the one who put the comment. He saw malick sign all the forms 35. Both himself and the p.o(zibeta) were present from the beginning to the end. The serial nos were read to agents at the beginning and at the end. There is no complaint letter by michael that he saw michael issuing 3 instead of 2 papers. All agents witnessed assisted voters equally. He has not been called to any police station that michael has committed any offence. On re-exam he stated that if an agent talked to the p.o he could have seen him. The police at the polling station never arrested michael for giving out 3 papers and the agents never protested to that effect either. He did not go on health break the whole day. He never shifted from his position the whole day. He never knew any agent before. He signed form 35 at 1am on 4/3/13. IEBC had trained and competent clerks nobody complained they were not. No assisted voter has sworn an affidavit saying his ballot paper had already been marked by the clerk or that he was assisted badly. As IEBC they were not trained to favour any body and they never favoured any party. Malick's affidavit is all lies.

2RW3 Philip mwangale wanyama wanyonyi the p.o of nambalayi polling station in his affidavit stated that the agents were involved in the process of helping assisted voters and the same was open to any agent. In the morning he had received a report that a politician had trained voters to claim that they were illiterate and required assistance of a specific agent, and after 10 voters requested for the same agent of new ford kenya joshua nyongesa yawa he decided that other agents apart from the said agent help the

voters as the p.o has discretion to allow agents to witness the assistance of illiterate voters. no agent signed form 35 or expressed their dissatisfaction with the election process at the polling station. in xx he stated that the name wanyonyi is not in his ID. He had 2 deputy p.os jesse wafula and philip mwangale wafula who is not his relative. He noticed the 10 people at 11am coming asking to be assisted by the new ford kenya agent and he decided other agents apart from that agents help as it was not fair for the other agents but this was not a sanction/punishment against new for kenya and he doesnot recall the provision of the law which made him give this direction. He later allowed him to witness after 3 hours.. He cannot recall if the assisted voters were few or many. They were shouting inside the polling room that they want to be assisted by new ford kenya agent which is an offence which he had to restrict. 3 voters told him there is a politician who trained voters to claim they are illiterate and require to be assisted by a specific agent and when they came asking only for new ford kenya agent he was alarmed as this confirmed the earlier report. If voters at a polling station says he supports a certain party its an offence because it influences other people and this suggests agents colluded with voters. No agent signed form 35. he signed form 35 on 4/3/13 and handed it over to his d.p.o a few minutes after mid night to sign. Josua yawa in his affidavit said he declined to sign form 35. there was no complaint from the beginning to the end. He never threatened joshua and was not taken to the police station for that. On re -exam 2RW3 stated that there is no place for the 2nd d.p.o to sign form 35. he is not related to any candidates. All agents witnessed assisted voters vote. A person can request something shouting and

yawa in his affidavit said loudly. Joshua never said the reason he refused to sign form

35. N/A means no agent. After tallying results he gave form 35 to one agent who was there to give other agents to sign and he was doing other things then he realised the agents went away without signing it so he indicated no agent. On the form 35 there is no complaint/reason of refusal to sign. Yawa never complained to him verbal or in writing that he was refused to witness assisted voters. When a voter came and never asked for a particular agent he allowed joshua to witness. He never barred joshua to witness for 3 hours. Contents of affidavit of yawa are not true.

Upon the conclusion of the hearing of this petition and upon considering the submissions by the parties counsels the following are the **issues for determination**:

1) whether or not the respondents, their agents, campaigners, supporters and employees singularly, jointly and severally contravened, violated, and breached provisions of the constitution of kenya 2010, IEBC Act, Election Act 2011, Election Regulations 2012 and Election (parliamentary and county elections) petition Rules 2013 in relation to sitikho

ward county assembly member election and if so what is the consequence of the same.

2) whether or not the respondents, their agents, campaigners, supporters and employees singularly, jointly and or severally committed election offence and is so what is the consequence of the same.

3) whether or not the county Assembly member elections for sitikho ward was conducted in a free, fair, credible, accountable and transparent manner and if not so what is the consequence of the same.

4) whether or not the 1st respondent was validly elected as the sitikho ward county

Assembly member.

5) what consequential declarations, orders and reliefs this court should grant based on the determination of the petition.

6) what should be the order as to costs

7) whether or not the court should issue any other, further and consequential orders it may lawfully make.

BUT before I deal with this issues I will first deal with a preliminary issue raised by the

1st respondent's counsel in his submissions and when he was xx the petitioner. Which was whether the petition was valid in light of the date of filing of the petition. I find this p.o cannot be dealt with at this particular juncture as it is an interlocutory application which should have been raised before the hearing of this petition begun and in any case I find it lacks merit as the position now as per decided cases annexed to the petitioner's submissions(***FERDINARD NDUGU WAITITU vs IEBC and 8 OTHERS EP 1/13***

HCT AT NAIROBI, JOSIAH TARAIYA KIPELIAN OLE KORES VS DR DAVID OLE NKEDIENYE AND 3 OTHERS HCT AT NAIROBI EP NO.6/13 AND CAROLINE MWELU MWANDIKU VS PATRICK MWEU MUSIMBA AND 2

OTHERS HCT AT MACHAKOS EP NO. 7/13) on this issue is that the declaration referred to is the one in the kenya gazette so the petition was filed within time as the same results were declared in the kenya gazette by IEBC on 13/3/13 and the petitioner filed his petition on 10/4/13 which was the 28th day after the declaration of the results in the gazette by IEBC. I therefore dismiss this p.o.

I will now deal with the issues in this petition.

ISSUE 1 (whether or not the respondents, their agents , campaigners, supporters and employees singularly, jointly and severally contravened ,violated and breached provisions of the constitution of kenya 2010, IEBC Act, Election Act, Election Regulations and Election(parliamentary and county elections) petition Rules 2013 in relation to sitikho Ward county Assembly member election and if so what is the consequence of the same) . IS COVERED BY GROUNDS ,2,5,6,9,10,11,16,29,32 &

36 .

ground 2

” that the 2nd respondent and its officers in breach of the Consttution ,election Act and the Regulations failed to establish electoral system which are accurate,secure,verifiable,accountable and or transparent and declared results which in many instances had no relation to votes cast at the polling stations. Futher the 2nd respondent officer and employees developed methods of the election system which were opaque and intended to manipulate the results of the winning candidate in the course of which the petitioner's agents were all together excluded from the electoral process.”

I find the petitioner failed to prove that the 2nd respondent breached the constitution, election Act and regulations because the manual system used which the 2nd respondent resorted to when the electronic system failed was not accurate, secure, verifiable,accountable and transparent as the witnesses petitioner included testified that the 2nd respondent's personell inside the polling stations(Presiding officer,Deputy Presiding officer and clerks) took voters through the voting process making it simple. The agents stated that at opening of polling stations they verified that the ballot boxes were empty thus complied with regulations 67(1) of the regulations. The voters were identified by means of a principal register which contained a photo names of voters and the names were cancelled against the register after they voted thus complied with regulation 69 achieving accuracy as well as verifiability as once cancelled a person

could not vote a 2nd time. There were polling clerks who gave out ballot papers and all this was in the presence of agents allowing accuracy and verification. The voter would go to the booth where he would choose his candidate. If illiterate the Presiding officer would assist in the presence of 2 agents thus ensuring accuracy,accountability and verification thus there was compliance with regulation 72 of the regulations. The voter would then put his vote into the ballot box in the presence of agents thus there was compliance with regulation 70 ensuring security of vote,protecting the intergity of the system. The agents stated that the votes were counted in their presence and the

P.OS(presiding officers) promptly announced the results at the polling stations. So regulation 76 was complied with. When the Returning officer received the ballot boxes and forms 35 from the presiding officers at the tallying centre he could read aloud the results which could be confirmed by the chief agents,the entries could be entered on excel soft ware in the computer,the contents of which were displayed onto a projector on the wall for all to see and no one complained about the entries but when he tried to print the form 36 and sign it the printer failed and as mandated by the law he promptly declared the results on 5/3/13 and printed and signed the same in bungoma the next day. Further I find the petitioner failed to prove that his agents were excluded from this

whole election process as none of his agent testified that he was not at the polling station during the voting,counting and signing of the forms 35 and when they were signing the said forms 35 none of them complained that they were excluded in the above electoral process. The only evidence that the petitioner's agent were excluded in the election process is when illiterate voters went to nambalayi polling station shouting they are

new ford kenya and they want thats party's agent to assist them vote and the presiding officer there used his power correctly not to allow the said agent to witness such voters vote for 3 hours to maintain order in the polling station as this amounted to campaigning at the polling station. I therefore dismiss ground 2.

ground 5” that the 2nd respondent and its officers and employees employed and relied on manual tallying system which was not only illegal and irregular but lacked transparency,accountability and was used and relied on by the 1st respondent in collusion with the 2nd respondents officers and employees to manipulate the electoral process and in particular during voting,counting ,tallying and transmission of election results for sitikho ward county Assembly representative.”

I will only deal with whether the manual system was illegal or irregular or not as I have already dealt with the other part of this ground above . I find the manual system is not illegal and irregular as under Article 86 of the constitution and regulation 59(2) of the elections regulations either electronic or manual method can be used in an election in kenya. Further in HON RAILA ODINGA case the supreme court held that where electronic systems failed the only option is manual system. I therefore dismiss ground 5

ground 6” that the 2nd respondent officers and employees took advantage of the manual tallying system and this to the advantage of the 1st respondent by excluding the petitioner's agents from several counting and tallying centres and further by declaring the election results for the county Assembly on unsigned forms 35. the 2nd

respondent's officers and employees also used and relied on multiplicity of form 35 with variant entries for some of the poll and futher making alterations and corrections on the said forms without the knowledge on involvement of the petitioner's agents.”

I find the petitioner failed to prove that the 2nd respondent excluded his agents from the counting centres as at the end of counting the votes at the polling centres the petitioner's agents signed all the forms 35 except two for nambalayi polling station where no agent signed and his own agent said he refused to sign the same himself after counting and at kakimanyi polling station his agent never came to court to say why and how he was excluded.

I also find the petitioner failed to prove that the 2nd respondent excluded his agents at the tallying centre as the R.O(returning officer) stated that he allowed all the political party chief agents into the tallying centre(bokoli) and there is no written complaint to that effect and the petitioner never called his chief agent to prove this.

I also find the petitioner failed to prove that the election results of sitikho were declared on unsigned forms 35 as all the forms 35 before me are signed by the p.o(presiding officers) ,D.p.o(deputy presiding officers) and agents except the one for nambalayi polling station which only the p.o(presiding officer) and D.p.o(deputy presiding officer) signed no agent signed but the p.o(presiding officer) indicated the

reason why they did not sign as N/A which he explained in court to mean no agent which he further

explained that after the counting he gave it to one agent to pass it to the rest to sign after they finished counting as he did other work and later realized they left without signing the same and also kakimanyi his agent never signed form 35 but I will deal with the issue whether this affected the outcome/result of the election later in this judgement.

I also find the petitioner never proved that there was a multiplicity of forms 35 with variant entries of the poll as both form 35 annexed to the petitioner's affidavit ,the one annexed to the 3rd respondent's affidavit and the ones found inside the ballot boxes had same entries except a few which were written in capital letters and others in small letters but with the same meaning.

I find the petitioner failed to prove that the 2nd respondent made alterations and corrections on some of the said forms 35 without the knowledge or involvement of the petitioner's agents as even though I perused the said forms 35 annexed to the petition

and the 2nd respondent's response and found 4 out of the 15 forms 35 had corrections or alterations as below

-sitikho where the no. of spoilt ballot papers is altered

-kuywa 2 where the petitioner's votes are changed from 67 to 63

-mangana where no. of spoilt ballot papers and rejected votes are altered

-kakimanyi where no. of votes cast are altered his agents signed the forms for sitikho,kuywa(2) and mangana with the said alterations on them meaning they agreed with the alterations otherwise they could have refused to sign the forms because they had alterations. In kakimanyi his agent should have indicated he is not signing form 35 because of the alterations.

Ground 9“ that the petitioner and his agents were denied access to statutory forms including forms 35 and 36.”

I find the petitioner failed to prove the same which if proved could have contravened regulation 79 and 83 of the Elections Regulations as the petitioner annexed some of the forms 35 and form 36 to his petition and the R.O (3rd respondent) explained that they issue one form 35 to the agents to photocopy among themselves and he could not print the form 36 on the date he declared the results as the printer developed a mechanical problem but he printed it the next day and gave it to the petitioner when he went to his office later. Further none of his agents sworn an affidavit to state he was denied access to form 35 and the fact that his agents signed 13 out of 15 forms 35 means they were not denied access to the same.

I therefore dismiss ground 9.

ground 10“that the 2nd and 3rd respondents declared the 1st respondent as dully elected on the basis of unsigned and falsified and incorrectly filed statutory forms.”

I have already dealt with the issue of unsigned forms 35 above.

I find the petitioner failed to prove that the forms 35 were falsified as the petitioner's agents when signing the said forms never stated this and the one for kakimanyi and nambalayi who never signed the said forms never indicated in the said forms they were falsified either. further the scrutiny and recount showed the votes awarded to the candidates on forms 35 were more or less accurate. The minor difference of 8 votes for the petitioner and 5 votes for the 1st respondent is accounted for by the inclusion of a vote that was rejected but established valid or error in counting the votes which is human error as no election can be 100% accurate . There being no material discrepancies noted between the

results declared by the presiding officers at the polling stations and the once found by the E.O on scrutiny and recount of the votes as per the table below I find the petitioner failed to prove the forms 35 were falsified.

Polling station	Petitioners results form	Petitioners in results S&R	Petitioners results on form	1st respondent in results S&R	1st respondent on
	35		35		
kuywa(1)	76	76	347	347	
milo	317	317	211	210	
bukunjangabo	256	254	123	122	
ngwelo	207	207	100	100	
khalumuli	115	116	57	58	
ngachi	61	61	47	47	
mangana	237	236	133	133	
sitikho	76	77	215	215	
khalala	109	109	128	128	
kakimanyi	383	387	163	159	
mwembula	42	42	179	179	
yalusi	58	58	68	68	
mukite	265	265	88	88	
kuywa(2)	67	68	385	385	
nambalayi	226	226	341	341	
Total	2491	2499	2585	2580	

further still even though the petitioner's agent for nambalayi polling station stated that the petitioner's votes there were 426 not 226 as indicated in form 35 he never stated this

in form 35 when he refused to sign it and neither did he say this in his affidavit on annex a copy of the book were he was recording the results at the polling station after they

were counted. In his affidavit he said he had an issue with the petitioner's results as captured at the tallying centre which is where form 36 is filled not the polling station and I take this to mean he was okay with the petitioner's votes as captured in form 35 which was 226 votes and this was confirmed by the scrutiny of the votes in the ballot box of that polling station which even if it had no name of polling station on it or form

33 or form 35 the sr of the box(SR no. 194895) was the same as the one on the list the court E.O(executive officer) got from IEBC when receiving the ballot boxes.

I find the petitioner failed to prove the forms 35 were incorrectly filled as his agents signed the said forms and never complained therein that the were incorrectly filled and I

have perused the said forms and find they have been filled correctly as even though the one in nambalayi is not signed by any agent as per regulation 79 it properly filled as the p.o(presiding officer) there indicated why no agent signed it. Further still even though

his agent for kakimanyi never signed the form 35 for that polling station it still correctly filled as the p.o there and other agents signed it. I therefore dismiss this part of this ground.

I further find that form 36 was signed as the one annexed to the petition and 2nd and 3rd respondents response are signed by the R.O(returning officer) and I also find its not proved that the form 36 was falsified as the the R.O(returning officer) said the errors on it were not premeditated but were human errors by his tallying clerks who were entering the entries in form 36 in the computer. so this part of this ground is dismissed. However

I find the petitioner prove the form 36 was incorrectly filled as I noted that the entries in

4 polling station differed in form 35 and 36 as below.

Polling station	Form 35	Form 36
	Petitioner 67/63 votes	Petitioner 63 votes
kuwya(2)	1st respondent 385 votes	1st respondent 385 votes
	Petitioner 237 votes	Petitioner 109 votes
Mangana	1st respondent 133 votes	1st respondent 128 votes
	Petitioner 226 votes	Petitioner 26 votes
nambalayi	1st respondent 341 votes	1st respondent 341 votes
	Petitioner 61 votes	Petitioner 48 votes
ngachi	1st respondent 47 votes	1st respondent 6 votes

I will deal with the issue of whether the said irregularities of incorrectly filled form 36 affected the outcome/result of the elections or not later in this judgement.

Ground 11 “ that the petitioner and his agents were denied the right to verify the serial numbers of ballot papers and seals on the ballot boxes before and at the end of the polling exercise in every polling centre.”

I find the petitioner failed to prove the same as his 13 agents in 13 polling stations out of

15 polling stations signed the forms 35 and never complained to that effect in the said forms and his 2 agents who never signed forms 35 never complained on the said

forms ,neither did they complain in writing to the Presiding officer and Returning Officer and am left to believe the Returning Officer's and Presiding officers' evidence that the same were read out to the agents before the polls started and at the end of the poll.

I therefore dismiss ground 11.

ground 16” that the petitioner was denied access to polling stations and he was intimidated and his agents treated with contempt,spite and hatred by the polling officials of the 3rd respondent.”

I find the petitioner failed to prove the same as the respondents denied the same and the petitioner on xx said he never visited all the polling stations and in kuywa polling station where he claims he was intimidated he claims he was intimidated by the 1st respondent,s supporters not the 3rd respondent's officials. There is also no written complaint he made

to the 2nd respondent. His agents also never wrote down the said complaint when signing forms 35. I therefore dismiss ground 16.

ground 29 “that a routine checkup revealed the assisted voters had their ballot papers marked without the verification of our agents”

I find the petitioner failed to prove this ground which if proved could have been contrary to Regulation 72(2) of the Election regulations as the petitioner never complained in writing to the P.O(presiding officer) or R.O(returning officer) neither did his agents put down the said complaint on form 35 when signing the same. Further in nambalayi

polling station where his agent was denied to witness some assisted voters being assisted by the p.o(presiding officer) to vote it was because voters had gone there saying loudly they are for new ford kenya they want to be assisted by the new ford kenya agent there and the p.o(presiding officer) was in order to denied the new ford kenya agent not to witness the said voters vote for sometime to maintain some order in the polling station

as this amounted to campaigning at the polling station . Further still the p.o(presiding officer) there stated thatt after 3 hours he allowed all the agents equally to witness the assisted voters vote 2 at a time. I therefore dismiss ground 29.

ground 32” that the biometric voter registration(BVR),electronic voter identification(EVID) and the result transmission system(RTS) in sitikho ward recorded 95% failure hence affected the accuracy,security,verification,transparency and accountability of results that led to the 1st respondent emerge as winner contrary to the constitution of kenya,election Act 201 and other laws governing the elections”

I find the petitioner proved that the BVR,EVID and RTS failed by 95% in sitikho ward

as the Returning officer said they only worked until 10 am before they failed. I will deal with the issue as to if such failure affected the outcome/results of the elections or not later in this judgement.

ground 36”that his agents /new ford kenya election agents in some polling stations did not sign form 35 to authenticate the results and where they did it was a routine to demonstrate there presence at the designated polling station which should not be misinterpreted or construed to mean they accepted the falsified results for there respective polling station .there were several alterations on form 35 for various polling station in sitikho ward that were not countersigned by presiding officer in these stations.”

I have already dealt with the issue of unsigned forms 35 above so I will not deal with it again however I find the petitioner failed to prove that where his agents signed the forms 35 it was only to demonstrate their presence at their designated polling station not

to accept the falsified results therein as the said agents who signed the said forms did not indicate this when signing the forms 35.

The petitioner proved that some forms 35 had alterations that were not countersigned by the p.os(presiding officers) as on perusing all the forms 35 I found 4 of them had alterations as indicated in ground 6 above which were not countersigned by the p.os(presiding officers) in those stations but I will deal with the issue whether this affected the outcome/result of the elections later in this judgement.

ISSUE 2 (whether or not the respondent. Their agents,campaigners,supporters and employeessingularly,jointlyandorseverallycommittedelectionoffencesandifso whatis the consequence of the same.) IS COVERED BY GROUNDS

1,4,7,8,12,13,14,15,17,18,19,20,21,22,23,24,25,26,27,28,30,31,34.

ground 1” that the results for sitikho ward county Assembly election as announced ,declared and published by officers and employees and by the 3rd respondent contained widespread instances of manipulation of results through manipulation of forms 35 and 36 and in some instances the votes exceeded the number of registered voters this is flagrant breach of the fundamental constitution principles and the in violation of the provisions of the Act and regulations”

since I have already dealt with the ground of manipulation(falsification) of forms 35 and 36 above I will only deal with the issue of whether the votes cast exceeded the

number of registered voters. I find the petitioner failed to prove the same which if proved could have been a violation of sec 59(1)(a)of the Election Act as a scrutiny and recount ordered by the court showed that in no polling station did the votes cast exceed the number of registered voters. The court Executive officer found in all the polling stations the number of voters who cast their votes as per the marked registers did not exceed the number of the registered voters as per the principal registers.

I therefore dismiss ground 1

Ground 4

” that the numerous instances of huge discrepancies in the total number of votes delayed the 2nd and 3rd respondent their officers and employees in sitikho ward county assembly Election is inexplicable upon any reasonable hypothesis other than the existance of actual ballot stuffing,multiple voting or gerrymandering or inflation of the number of votes in the tallying therefore by the 2nd and 3rd respondent herein or their officers or condoning of or connivance in the same to the advantage of the 1st respondent thereby rendering his alleged win invalid,illegal,null and void.”

I find the petitioner failed to prove the same as he failed to prove there was ballot stuffing and multiple voting and inflation of number of votes as the entries for each candidate in the forms 35 which were signed by the petitioner's agents were more or less the same after the scrutiny and recount of the votes in the ballot boxes. Further when the marked register was scrutinized by the court Executive officer it never showed that any voter voted twice. Further since the registered voters never exceeded the voters who cast their votes ballot stuffing was not proved. His agents also never complained of

ballot stuffing ,multiple voting and gerrymandering while signing the forms 35. There was also no prove that there were people hanging around at the polling station after voting which is what he said he meant by the term gerrymandering as there is nothing to show he reported the same to the 2nd and 3rd respondent or the police. I therefore dismiss ground 4

ground 7” that the 2nd and 3rd respondents unlawfully and contrary to the actual votes cast declared the 1st respondent as dully elected instead of the petitioner who had scored the highest number of votes.”

I find this was not proved as the respondents denied the same and a scrutiny, recount and retally of votes in the ballot boxes showed otherwise(that the 1st respondent had

2580 votes and the petitioner had 2499 votes). Further the petitioner in his own evidence on being xx and re-examined said he came to court to know who won the elections he does not know who won.

I therefore dismiss ground 7.

ground 8” that the 2nd and 3rd respondents used a falsified and incorrect voter register which excluded voters who had been dully registered to the detriment of the petitioner”

I find the petitioner failed to prove the same as the respondents denied the same and the petitioner on being xx said the register he is saying was falsified and incorrect was the provisional principal register supplied to him by the 2nd and 3rd respondents not the

actual on used during voting day which had voters photos. Further no voter sworn an affidavit or testified in court and stated that his/her name was excluded in the principal register. Further still the scrutiny of the principal and marked registers used during the election by the E.O revealed that all the voters who had registered twice their names were in the exemption list meaning the provisional register with errors had been cleaned up.

I therefore dismiss ground 8

ground 12” that the petitioner,s agents at polling centres were discriminated against ,were intimidated and threatened by the polling officials thereby casting strong doubts as their neutrality.”

I find the petitioner failed to prove the same as the respondents denied the same and the petitioners agent when signing forms 35 never stated that they were discriminated against,intimidated and threatened by the polling officials at their respective polling stations neither did the petitioner do a written complaint to the 2nd and 3rd respondents.

I therefore dismiss ground 12

ground 13” that the 2nd and 3rd respondents allowed the 1st respondent to campaign at the polling centres contrary to the code of conduct.”

I find the petitioner failed to prove the same as the respondents denied the same and there is no written complaint the petitioner wrote to the 2nd and 3rd respondent complaining of the same and neither did he report at the police station. Further still his agents in the said polling stations never stated in their affidavits that the they saw the 1 st respondent campaigning at their polling stations neither did they put down the complaint on forms 35 which they signed.

I therefore dismiss ground 13

ground 14” that the 1st respondent engaged in massive voter bribery before and on the polling day.”

I find the petitioner failed to prove the same as the 1st respondent denied the same and in xx the petitioner said he never reported the same to the police or anti corruption commission and there is no written complaint he wrote to the 2nd or 3rd respondent on the same either . further still his witness(pw3) who supported him on this ground said that the the 1st respondents supporters tried to bribe her with sugar and tea leaves on the poll day but on refusing they harassed her and she fled to rose cassims home however she did not report to the police making it is hard for me to believe this offence was committed.

I therefore dismiss ground 14.

ground 15”that the 2nd and 3rd respondents failed to take any security and precautionary measures to safe guard the election materials and thereby exposing same to abuse and misuse and of which situation the 1st respondent took advantage to massively rig the elections(i) the ballot seals were deliberately loosened.(ii) there was not proper accounting of ballot seals used and unused.

I find the petitioner failed to prove the same as the respondents denied the same and the

3rd respondent stated that in all polling stations there were police officers guarding the polling station which fact the petitioner and his witnesses also admitted on xx. The petitioner also failed to prove the 1st respondent rigged the elections as he never gave evidence to prove this. Further still even through some of the ballot boxes that were received by the court E.O(executive officer) had broken,loosened or missing seals the contents of the said boxes were more or less the same as entries made in the forms 35 which the petitioner's agents signed so its not proved they were deliberately loosened. It was also not proved that the used and unused ballot seals were not accounted for. As there is no evidence to that effect adduced.

I therefore dismiss ground 15

ground 17 “ that the assisted voters were compelled to cast their vote for the 1st respondent and in most instances ballots were marked in favour of the 1st respondent against the wishes of the voters.”

I find the petitioner failed to prove the same as the respondents denied the same and no assisted voter swore an affidavit and testified in court that he/she was compelled to cast their vote for the 1st respondent or that a ballot was marked in favour of the 1st

respondent against his/her wish.

I therefore dismiss ground 17.

ground 18”that some favoured voters were issued more than one vote and others cast their vote more than once especially at nambalayi,mangana,kuywa and ngachi primary school centre polling centre which registered an abnormal turnout in the records of the 3rd respondent contrary to what was actually witnessed on the ground.” I find the petitioner failed to prove that in nambalayi,mangana,ngachi and kuywa(1) some voters were issued with more than one vote and others voted more than once as none of his agents in the said stations stated this in his affidavit or evidence before court or in form 35 which they signed. Even though his agent of kuywa(2) said he saw a voter

being given 3 ballot papers for county representative and governor he signed the form 35 of the said polling station and never indicated this. The petitioner also failed to prove

that the above 4 polling stations registered an abnormal turnout as in kuywa(1) 495 out of 555 voters turned up to vote, in kuywa(2) 519 out of 556 voters turned up to vote, in ngachi 204 out of 217 voters turned up to vote,in mangana 517 out of 596 turned up to vote and in nambalayi 660 out of 737 voters turned up to vote.

I therefore dismiss ground 18

ground 19” that the officers and officials who manned the election process were incompetent ,ill prepared ,baised , compromised and failed the test of neutral referees”

I find the petitioner failed to prove the same as the respondents denied the same and the

3rd respondent(the Returning officer) stated that the Presiding officers' were competitively recruited as the positions were advertised in the local dailies and shortlisted applicants interviewed before the successful applicant were recruited as presiding officers and they were vetted by political parties and the public and then they were trained on their roles as presiding officers. There is also no evidence to

prove the said officers were bias, or compromised. There is also no complaint written to the Returning officer by the petitioner complaining that any of his presiding officers, deputy presiding officers or clerks is incompetent.

I therefore dismiss ground 19

ground 20”that I have information from several eye witness that the 1st respondent put in motion system of intimidation, violence, and harrasment against my percieved supporters to the extent of preventing them from from exercising their free will.”

I find the petitioner failed to prove the same as the respondents denied the same and

even though one of the petitioner's supporters (pw3) stated that she was harassed by the

1st respondent's supporters on the way to kuywa polling station when she refused to take the bribe they gave her of sugar and tea leaves she still voted. Further she never reported the incident at any police station and no other supporter of the petitioner claimed he was harassed, intimidated or that violence was metted out on him and he was prevented from voting so its hard for me to believe this allegation.

I therefore dismiss this ground.

ground 21”that the number of cast votes in his favour as per form 35 differed in material particulars to what was announced at the polling centres and also differed in what was captured at tallying centre.”

I find the petitioner failed to prove that his votes in forms 35 differed from what was announced at the polling centres as his agents signed the forms 35 without putting down any complaint meaning they were agreeing with the contents in the forms 35 and the petitioner never attached any other document where his agents recorded a different

figure from what is in forms 35 as they were allowed to go into the polling stations with their writing materials. However I find that some of his votes in 4 polling stations (nambalayi, kuywa(2), mangana, ngachi) were wrongly captured in form 36 which was filled at the tallying centre as follows

polling station	form 35	form 36
kuywa(2)	Petitioner 67 votes	changed to 63 votes
mangana	Petitioner 237 votes	109 votes
ngachi	Petitioner 61 votes	48 votes
nambalayi	Petitioner 226 votes	26 votes

I will deal w with whether this irregularity will affect the outcome/results of this election or not later in this judgement but I dismiss the 1st part of this ground

ground 22”that at nambalayi and mangana polling stations the results as announced by the 3rd respondent were completely different from what was announced at the polling centres”

I find the petitioner failed to prove the same as the 3rd respondent(the R.O) stated that he was announcing what was on form 35 from the polling stations but his tallying clerks wrongly enter the same

in form 36 in the computer and the petitioner never called his

agent who was at the tallying centre to say the 3rd respondent announced different figures from what were in form 35.

ground 23"that the number of votes for kuywa polling centre did not correlate with the voter turnout in other polling stations across the county.

Polling station	Voter turnout
mukite	475 voters out of 549 registered voted
khalala	422 voter out of 504 registered voted
sitikho	468 voter out of 558 registered voted
kuywa(1)	497 voters out of 555 registered voted
kuywa(2)	519 voters out of 556 registered voted
mangana	517 voters out of 596 registered voted
yalusi	242 voters out of 272 registered voted
khalumuli	577 voters out of 680 registered voted
ngwelo	665 voters out of 773 registered voted
nambalayi	660 voters out of 737 registered voted
milo	699 voters out of 811 registered voted
bukunjangabo	512 voters out of 587 registered voted
kakimanyi	692 voters out of 817 registered voted
mwembula	274 voters out of 296 registered voted
ngachi	204 voters out of 217 registered voted

After comparing the above I find this ground is not proved and its dismissed.

ground 24”that at kuywa and ngachi polling station the votes announced at the polling centre was different from those announced at tallying centre”

I find this is not proved as the Returning officer said the results he read out at the tallying centre is what was in forms 35 of the said polling stations. I therefore dismiss this ground.

ground 25”that I have information which information I verily believe to be true in some polling stations some voters voted more than once and some unregistered people

participated in the said election.

Since I have already dealt with the issue of double voting above I will only deal with the

2nd part of this ground. I find the petitioner failed to prove that some unregistered people voted as he never called any such person to prove this and when the E.O scrutinized the marked and principal registers its only the voters whose names appeared in the principal register are the ones who voted as per the marked register.

I therefore dismiss ground 25.

ground26”thatIhaveinformationwhichIverilybelievetobetruehatpeoplewho died prior to the said election,their identity card were used to participate in the said election s namely one dimina nabisino kufunja who died in february2013”

I find the same was not proved as the respondents denied the same and the petitioner never produced a death certificate or burial permit to prove that the the said dimina is deceased. I therefore dismiss ground 26.

ground 27”that I know as a fact that there was deliberate falsification of entries in form 35 and 36 to the detriment and favour of the 1st respondent.

Since I have dealt with the issue of falsified entries in the forms in the above , I will only deal with the issue of whether the said errors in entries in form 36 favoured the 1st respondent . I have noted the errors affected both the petitioner and 1st respondent so they never favoured the 1st respondent as per the table below.

Polling station	Form 35	Form 36
	Petitioner 67 changed to	Petitioner 63 votes
kuywa(2)	63votes	1st respondent 385 votes
	1st respondent 385 votes	
	Petitioner 237 votes	Petitioner 109 votes
mangana	1st respondent 133 votes	1st respondent 128 votes

	Petitioner 226 votes	Petitioner 26 votes
nambalayi	1st respondent 341 votes	1st respondent 341 votes
	Petitioner 61 votes	Petitioner 48 votes
Ngachi	1st respondent 47 votes	1st respondent 6 votes

I therefore dismiss ground 27.

ground 28”that I personally witnessed at kuywa polling station the 2nd and 3rd respondents failed to take any precautionary steps to safeguard the election materials and therefore exposed them to abuse by the 1st respondent”

I find the petitioner failed to prove the same as the respondents denied the same and his agent at the said polling station signed the form 35 without putting down such a complaint and neither did the petitioner write a complaint to the 2nd respondent to that effect. The petitioner on being cross examined also admitted there were police officers guarding the said polling station and never told the court how the 1st respondent was abusing the election materials. The petitioner also said he never entered kuywa polling station he was chased at the gate how could he see the election materials being abused by the 1st respondent.

I therefore dismiss ground 28

ground 30”that the said form 36 is inconsistent with the statutory forms 35 from several polling stations as illustrated in the attached forms for nambalayi,ngachi,mangna,kuywa.”

I already dealt with this ground above.

Ground 31” the registered voters for nambalayi polling station in the principal register complied by the 2nd respondent was 741 wheres those on form 35 from the said polling station was 737”

I find the same is not proved as the respondents denied the same and when I look at the form 35 for the said polling station annexed to the 2nd and 3rd respondents response the number of registered voters is 737 and the report by the E.O who scrutinized the principal register the number of registered voters is 737.

I therefore dismiss ground 31.

ground 34” that the election officers deployed by the respondents used falsified and/or incorrect voter register which had several names of voters that registered more than onces or twice as illustrated by the petitioner in vote registers for 9 out of 14 polling stations used for identification of eligible voters in the entire sitikho ward

,these are kuywa,nambalayi,khalumuli,ngwelo,kakimanyi,sitikho,mukite,bukunjagabo and mwembula”

since I have already dealt with the issue of whether the register used was falsified above I will only deal with the issue of whether in the 9 polling stations people double registered or not. As per the table below I find this people double registered.

P/station	People who double registered
kuywa	Wekesa james khwatenge

nambalayi	Beli peter wanimo and lusimbo loice musalia
Khalumuli	Meshack makhanu mutaki
ngwelo	Mukongolo joseph nyongesa,wafula tobias simiyu and wafula judith nafula
kakimanyi	nil
sitikho	3 voters
mukite	nil
bukunjangabo	Masibo ainea koyabe,nasambu wanyonyi, nasenge josephine kitembe
mwembula	Ndeke robert masibo

I will deal with the issue of whether this irregularity affected the outcome/results of the elections later in this judgement

After a careful consideration of all the the evidence its my finding that irregularities exist as highlighted in this judgement which include incorrectly filled form

36,alterations on forms 35 which were not countersigned , cases of double registered voters ,failed EVID,BVR and RTS systems and Forms 35 not signed by agents for kakimanyi and nambalayi polling stations and the one for kuywa 2 is not signed by the presiding officer. The question I have to answer is what is the effect of these irregularities on the results of the election and I rely on Section 83 of the Election Act states and I quote

“No election shall be declared to be void by reason of non- compliance with the 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 results of the election.”

firstly I find **double registration** did not affect the outcome/results of the election as the said voters who were double registered were in the IEBC exemption lists and those who voted only voted once while some of them never voted at all but no one complained he was refused to vote. As per the scrutiny report before court.

Secondly I find **alterations in forms 35 of kuywa(2),sitikho,mangana and kakimanyi which were not countersigned by the P.OS(presiding officers)** did not affect the outcome/result of the elections either as in sitikho the no. of spoilt ballot paper was altered in form 35 to 0 & on Scrutiny and Recount revealed it was nil. The one for kuywa (2) the figure for the petitioner in form 35 were altered from 67 to 63

votes but the scrutiny and recount revealed he had 68 votes meaning he was denied there

5 votes only. Mangana the no of spoilt ballot papers was altered and I cannot tell if its 9 or 4 and rejected votes are altered to 8 and scrutiny and recount revealed they were 7 and 4 respectively and in kakimanyi the no. of cast votes were altered to 691 from 692 and scrutiny and recount revealed the were 691 votes. so this alterations were minimal. Further despite the petitioner being added this 5 votes the scrutiny and recount report showed petitioner still lost the elections with 2499 votes and the 1st respondent won

with 2580 votes. I find the khalwale case is not applicable to this case as in the khalwale case the 77 out of 78 forms 16As were improperly filled that is why the elections were nullified but here only 4 had errors(minimal alterations) which never affected the outcome/results of the elections as the petitioner only gained 8 votes after the scrutiny and recount which still does not make him the winner. The magara case is also not applicable to this case as in that case several forms 16 As were not signed by the p.os(presiding officers) and the results were nullified and this is not the case here as all the forms 35 were signed by the p.os(presiding officers) in this case. the garrissa case is also not applicable to this case as there there was no scrutiny .

Thirdly I find the errors in the forms 36 did not affect the outcome/result of the election as when the forms 35 for all the polling stations ,the valid and rejected votes and the spoilt ballot papers were scrutinized by the court E.O(executive officer) who retallied

the candidates results and the errors in the 4 polling stations corrected the 1st respondent still emerged the winner with 2580 votes against the petitioner who got 2499 votes. The malindi case is not applicable here as there there were 2 forms 36 one correctly filled and the other one with errors.

Fourthly I find failure of the EVID,BVR and RTS did not affect the outcome/result of

the election as as the manual system used after the electronic system used failed I found was almost completely accurate as the only irregularities/error proved were minimal in entries in forms 36 and 35 as proved in the scrutiny and recount report.

lastly I find the the failure of the petitioner's agent at kakimanyi and nambalayi polling stations to sign forms 35 there did not affect the outcome/results of the elections as per regulation 79 of the Elections Regulations the failure of an agent to sign form 35 doesnot by it self invalidate the results of a polling station. Further the scrutiny and recount revealed that the entries in form 35 for nambalayi polling station were 100% accurate and the one for kakaimanyi had minimal/insignificant errors as petitioner was added only 4 votes and the 1st respondent was deducted 4 votes only. Further still the p.o(presiding officer) of nambalayi gave a satisfactory reason why no agent signed the form 35 of nambalayi. Making the said form valid as per Regulation 79 of the elections Regulations. The form 35 of kuywa 2 annexed to the 2nd and 3rd respondents response even if it was not signed by the p.o(presiding officer) the one annexed to the petition was signed by the p.o(presiding officer) so it was authentic as all the other entries in the two forms were the same so results in that polling station cannot be cancelled and

deducted from the total votes of each candidate as the case could have been if both were not signed by the presiding officer.

ISSUE 3 WHETHER OR NOT THE COUNTY ASSEMBLY MEMBER ELECTIONS FOR SITIKHO WARD WAS CONDUCTED IN A FREE,FAIR,CREDIBLE,ACCOUNTABLE AND TRANSPARENT MANNER

&

ISSUE 4WHETHER OR NOT THE 1ST RESPONDENT WAS VALIDILY ELECTED AS THE SITIKHO WARD COUNTY ASSEMBLY MEMBER .

& ISSUE 5 WHAT CONSEQUENCES ,DECLARATIONS,ORDERS AND RELIEFS THIS COURT SHOULD GRANT BASED ON THE DETERMINATION OF THE PETITION.”

Having said the above I find the elections of sitikho ward was conducted in a manner that substantially complied with the constitution and elections laws and in a manner that was free ,fair,credible , accountable and transparent. I am satisfied that the results of the election reflected the free choice and will of the people of sitikho ward as the

irregularities proved above were insignificant/minimal and could not alter the outcome/results of the said

election. I therefore find the 1st respondent was validly elected as the member of county Assembly for sitikho ward. I consequently find the petition lacks merit and its hereby dismissed. A certificate under section 86 of the Election Act shall accordingly issue.

ISSUE 6 costs

since the costs should follow the event I award costs to the respondents which should not exceed ksh 300,000/= for the 1st respondent and 300,000/= for the 2nd and 3rd respondents to be taxed by the court.

ROA IN 30 DAYS.

Delivered and signed at webuye this 26th day of september, 2013. in the presence of:

The Petitioner

Court clerk- kibiti

S.N.ABUYA

MAGISTRATE'S