



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT MACHAKOS
THE ELECTIONS ACT, 2011
ELECTION PETITION NO. 3 OF 2013

FRANCIS MWANIKI NGUNGAPETITIONER

-VERSUS-

OLIVER NZEKI MUNYAKA1ST RESPONDENT

RETURNING OFFICER MACHAKOS

TOWN CONSTITUENCY.....2ND RESPONDENT

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION3RD RESPONDENT

JUDGEMENT

Francis Mwaniki Ngunga the petitioner herein filed the petition dated 8.4 .13 seeking orders :-

1. That an order for recount and scrutiny of all the votes cast at Kathome trading centre (polling centre Number 030) and in all the other polling stations within Mua Ward in the elections for the member of County Assembly Mua Ward held on 4th March 2013.
2. A determination that the 1st respondent Oliver Nzeki Munyaka was not duly and validly elected .
3. A determination that the petitioner herein Francis Mwaniki Ngunga was validly elected.
 - a. The petition is based on the grounds that;
 - b. The results of kathome trading centre (No. 030) were not entered in form 35 as required under Rule 79 of the Elections (General) Regulations 2012 under the election Act No.24 of 2011.
 - c. That the entire voting process within Mua Ward was full of irregularities chief among them announcement of inaccurate results which gave the 1st Respondent an undeserved victory.
 - d. That the petitioners agents were not shown or provided with form 35 and did not sign form 35 as per rule 79 of the regulations.
 - e. That the ballot box for kathome trading centre (No. 030) was not sealed before it left the station hence creating an opportunity for manipulation of the results in favour of the 1st Respondent.
 - f. That the results of voting at kathome trading centre were tampered with to create a false and misleading impression that the 1st respondent garnered 126 votes when indeed he got less . The said polling centre was petitioners strong hold and he has every reason to believe that he (the petitioner) garnered more than 266 votes.
 - g. That the presiding officer at the polling station complained of was very un-co-operative as all the

- requests by the petitioner's agents to be provided with form 35 for signing were ignored.
- h. The petitioner pleaded that he does not require any other determination except a recount and scrutiny of the votes cast at all the polling stations in Mua Ward.

The petitioner (PW1) in his affidavit dated 8.4.13 deposed to facts in support of the allegations in the petition. He stated in his affidavit that he was a Wiper democratic party candidate and that he complained to IEBC in writing on 5.4.13 over the said irregularities vide the letter annexure "FMN6". Abraham Mwendwa Masave (PW2) and John Kioko Malonza (Pw3) also swore affidavits dated 8.4.13 in support of the petition.

In his response to the petition dated 24.4.13 filed herein, the 1st **respondent Oliver Nzeki Munyaka (Dw4)** denied the allegations of irregularities in the voting process in the petition and the affidavits in support thereof and stated that he was duly elected and a county assembly representative of Mua Ward on a National Party of Kenya (NPK) ticket after garnering **2692** votes against the petitioners **2572** votes. He terms the petition as ill conceived and an abuse of the process of this court and seeks its dismissal with costs.

Jackson Sila Waema(Dw5) and Patrick Wambua Mwangangi (Dw6) the witnesses of 1st respondents swore affidavits dated 24.4.13 filed herein . They deposed that they were agents at kithome polling station and that before counting commenced all the agents were briefed on the counting procedure and informed that they were to sign forms at the end . Further the counting went on smoothly till 2.00am . They also stated that agents of petitioner left in celebration after he was announced a winner at Kathome polling centre and that is why they did not sign the form 35. Jackson said he was a wiper agent for the Wiper governor candidate and he looked out for the interest of the other Wiper candidates and that he was happy that petitioner won in that station. They further said that the counting was tedious and most agents went away to sleep. In response to the allegation that a copy of the results the results were not affixed at the public entrance, Jackson said the voting was done in a tent which was dismantled after the exercise.

The 2nd and 3rd respondents filed a joint response through the firm of Anne Kiusya and company advocates which is undated and filed herein on 30.4.13. The same is based on the following grounds;

1. The elections were conducted according to the law.
2. The petition does not meet threshold of beyond reasonable doubt.
3. The petition is unsupported by concrete evidence and law.
4. They denied that the results were not entered in form 35 as required.
5. They denied any irregularities as alleged or at all and state that no irregularities were reported.
6. That the elections were free, fair, transparent and credible and that the results were affixed at public entrance as required.
7. That the petition is replete with falsehoods in an effort to exaggerate facts and circumstances intended to secure for petitioner an unjust advantage and they particularly denied;
8. That the agents were denied or were not provided with copies of form 35
9. That the ballot box for Kathome Trading centre polling station was not sealed as it left the station.
10. That the results of the voting were tampered with in favour of a particular candidate.
11. That the petitioners agents were ignored or not allowed to sign the declaration in respect of the declaration of results.
12. That the petition is incompetent for failing to fully comply with rule 10 of the Elections (parliamentary & county election) Petition Rules 2013 hence it is incompetent.
13. That the complaints raised are not prejudicial and would not affect the result of elections under regulation 79 sub regulation 6 & 7 and regulation 83 sub –regulation 1 paragraph d (i) of the General Elections (General) Regulations 2012.
14. That the petitioners supporting affidavit and those of his intended witnesses are incompetent full of false hoods and have no probative value.
15. That the petition lacks merit , is frivolous ,does not disclose any infringement of rights and has not met the required threshold hence should be dismissed .
16. The 2nd and 3rd respondents pray that the petition be dismissed with costs and for a determination

that the 1st respondent was duly elected and the election was valid.

The 2nd and 3rd respondent's case is supported by the replying affidavits of Rebecca Mutune Daminano the returning officer Machakos town constituency (Dw6) and Mr David Kavoo the presiding officer at Kathome Trading centre (Dw7). They denied any irregularity in the election and stated that that election was held in a free and fair manner as per the will of the people of Mua Ward.

I have noted from the pleadings that no specific allegation of malpractice or any offence was made against the 1st respondent or his agents herein. The only issue the respondent has with him is that he benefitted from the irregularities of the election process carried out by 2nd and 3rd respondents agents .

It is crucial to note that the for contested results for Mua Ward are as follows;

Total registered voters – 9,035

Total votes cast- 7,771

Total rejected votes- 184

NAME OF CANDIDATE	RESULTS AS PER FORM 35
BARNARD KYALO RAPHAEL NZIOKA	132
CHARLOTTE JOYCE NZOKA	652
FRANCIS MWANIKI NGUNGA	2572
GIDEON WAMBUA NGULI	184
OLIVER NZEKI MUYAKA	2692
REUBEN MUSEMBI MUANGE	244
SEBASTIAN MAITHIYA MATHEKA	943
ZACHEAS MWATU NZEI	158

On 6.8. 2013, this court ordered a recount and scrutiny of all the votes cast in Mua ward under section 82 (1) of the Election Act and the same was done from 12.8.13.to 14.8.13 under the supervision of Mr owino the Executive officer of Mavoko court and parties were duly represented during the process. The report was filed herein. Disputed votes kept aside for court's determination were 49.

The result of upon recount at kathome trading centre (030) as per the report was as hereunder;

NAME OF CANDIDATE	RESULTS AS PER FORM 35	AS PER RESULTS RECOUNT	AS PER VARIATION
BARNARD KYALO RAPHAEL NZIOKA	26	27	+01
CHARLOTTE JOYCE NZOKA	94	98	+04

FRANCIS MWANIKI NGUNGA	266	271	+05
GIDEON WAMBUA NGULI	13	13	00
OLIVER NZEKI MUYAKA	126	130	+04
REUBEN MUSEMBI MUANGE	26	28	+02
SEBASTIAN MAITHIYA MATHEKA	12	12	00
ZACHEAS MWATU NZEI	51	52	+01

The over-all recount result (exclusive of the disputed votes) is as hereunder ;

NAME OF CANDIDATE	RESULTS AS PER RECOUNT
BARNARD KYALO RAPHAEL NZIOKA	132
CHARLOTTE JOYCE NZOKA	657
FRANCIS MWANIKI NGUNGA	2567
GIDEON WAMBUA NGULI	178
OLIVER NZEKI MUYAKA	2676
REUBEN MUSEMBI MUANGE	242
SEBASTIAN MAITHIYA MATHEKA	926
ZACHEAS MWATU NZEI	157

DISPUTED VOTES

I now proceed determine the disputed votes. The following votes (Number. 1 -35) votes were marked for the stated candidates by the voters and they have marks of some black ink which appear spilled on them. Votes listed as Number 36-43 have writings at the back of then written in red marker pen and it appears due to pressing of the pen the same writing appear at the front too has not affected the mark placed in favour of each candidate. The law is clear that the voters mark can be a tick, a cross thumb print or any mark and this is not in dispute. Regulation 77 and 78 is clear on the issue of rejection of ballot papers.

1. CA 0039900005554-SEBASTIAN MAITHYA MATHEKA
2. CA 0039900006071- FRANCIS MWANIKI NGUNGA
3. CA 0039900005573-OLIVER NZEKI
4. CA039900005599- OLIVER NZEKI
5. CA0039900005983-GIDEON WAMBUA NGULI

6. CA0039900006021- GIDEON WAMBUA NGULI
7. CA0039900005765-GIDEON WAMBUA NGULI
8. CA 0039900006063- GIDEON WAMBUA NGULI
9. CA0039900005725- FRANCISMWANIKI NGUNGA
- 10.CA 0039900006048-FRANCIS MWANIKI NGUNGA
- 11.CA0039900005997- SEBASTIAN MAITHYA MATHEKA
- 12.CA0039900005646 -SEBASTIAN MAITHYA MATHEKA
- 13.CA0039900006013- FRANCIS MWANIKI NGUNGA
- 14.CA0039900005696- BARNARD KYALO RAPHAEL NZIOKI
- 15.CA0039900005610- OLIVER NZEKI MUNYAKA
- 16.CA0039900005776- SEBASTIAN MAITHYA MATHEKA
- 17.CA0039900005998 SEBASTIAN MAITHYA MATHEKA
- 18.CA0039900005668- OLIVER NZEKI MUNYAKA
- 19.CA0039900006073-OLIVER NZEKI MUNYAKA
- 20.CA0039900005535- OLIVER NZEKI MUNYAKA
- 21.CA0039900005715-REUBEN MUSEMBI
- 22.CA0039900005753-SEBASTIAN MAITHYA MATHEKA
- 23.CA0039900006067-ZACHEUS MWATU
- 24.CA0039900005638-GEDION WAMBUA
- 25.CA0039900005684- SEBASTIAN MAITHYA MATHEKA
- 26.CA0039900006019- OLIVER NZEKI MUNYAKA
- 27.CA0039900005687- SEBASTIAN MAITHYA MATHEKA
- 28.CA0039900005525- OLIVER NZEKI MUNYAKA
- 29.CA0039900005634- SEBASTIAN MAITHYA MATHEKA
- 30.CA0039900006051- SEBASTIAN MAITHYA MATHEKA
- 31.CA0039900006065 - SEBASTIAN MAITHYA MATHEKA
- 32.CA0039900006055-GIDEON WAMBUA NGULI
- 33.CA0039900006018- SEBASTIAN MAITHYA MATHEKA
- 34.CA0039900005649- OLIVER NZEKI MUNYAKA
- 35.CA0039900005636- SEBASTIAN MAITHYA MATHEKA
- 36.CA0039900006206- OLIVER NZEKI MUNYAKA
- 37.CA0039900006595-GIDEON WAMBUA NGULI
- 38.CA003996658- SEBASTIAN MAITHYA MATHEKA
- 39.CA0039900006220- OLIVER NZEKI MUNYAKA
- 40.CA0039900006593- ZACHEUS MWATU NZEI
- 41.CA00339900006209-CHARLOTTE JOYCE NZOKA
- 42.CA0039900006270- FRANCIS MWANIKI NGUNGA
- 43.CA 0039900006364- BARNARD KYALO RAPHAEL NZIOKI
- 44.CA039900006558-REUBEN MUSEMBI

The main principle in determining election petitions as I have stated herein above is that the court must establish the will of the voter. The ink seemed to have spilled during handling of the ballot papers by IEBC officials and it would be unreasonable to assume that the voters who marked them spilled that ink in a manner that is almost similar. The will of the voters in each of the said votes is very clear as the votes are marked in favor of specific people. I proceed to award the votes to the respective candidates as marked by the voters.

45.CA0039900006058 was marked in favour of both FRANCIS NGUNGA AND SEBASTIAN M.MATHEKA. This is clearly rejected vote as one cannot tell whom the voter intended to vote for.

46.CA0039900009381- This vote is stamped by IEBC as spoilt yet the voter marked a clear tick on the box. The intention of the voter was to vote for FRANCIS MWANIKI NGUNGA. I do not see any justification for marking the same as spoilt and no reason was given for the same under regulation 78(3). I award him the same.

47.CA 39900008199- has a mark of a straight line which touches the names of GIDEON WAMBUA

MUNYAKA, OLIVER NZEKI AND REUBEN MUSEMBI MUANGE. The intention of the voter is not clear. I find this to be a rejected vote.

48.CA 0039900007240- has marks against the names of CHARLOTTE JOYCE NZOKA, FRANCIS MWANIKI NGUNGA AND REUBEN MUSEMBI MUANGE. The intention of the voter is not clear in the circumstances. Vote is rejected.

49.CA39900000232- this vote has been marked for both OLIVER NZEKI MUNYAKA AND SEBASTIAN MAITHIYA MATHEKA. This vote is a rejected one for the said reasons.

The result as per determination of disputed votes is as hereunder:

NAME OF CANDIDATE	RESULTS AS PER determination of disputed votes
BARNARD KYALO RAPHAEL NZIOKA	+2
CHARLOTTE JOYCE NZOKA	+1
FRANCIS MWANIKI NGUNGA	+6
GIDEON WAMBUA NGULI	+7
OLIVER NZEKI MUYAKA	+11
REUBEN MUSEMBI MUANGE	+2
SEBASTIAN MAITHIYA MATHEKA	+14
ZACHEAS MWATU NZEI	+2

The final result after recount and determination of disputed votes is as follows:

NAME OF CANDIDATE	FINAL RESULT
BARNARD KYALO RAPHAEL NZIOKA	134
CHARLOTTE JOYCE NZOKA	658
FRANCIS MWANIKI NGUNGA	2573
GIDEON WAMBUA NGULI	185
OLIVER NZEKI MUYAKA	2687
REUBEN MUSEMBI MUANGE	244
SEBASTIAN MAITHIYA MATHEKA	940
ZACHEAS MWATU NZEI	159

The final difference of the votes garnered by between Oliver NZeki Munyaka is and Francis Mwaniki Ngunga is 114.

During recount and scrutiny, several anomalies were noted in the following stations;

Code 029 stream 2- No counter foils were found inside the ballot box.

Code 030 stream 1- the lid of the box was broken , and 2 seals were loose. There were two form 35 with different serial numbers .ie CA 0399000042171 and CA 0399000042173.

Code 031 stream 1- form 35 inside the ballot box was not signed. Form 35 affixed on the ballot box was signed.

Code 033 – stream2 one seal No. 1801385 was broken and no counterfoils in the ballot box.

Code 035-stream 1, one seal was loose .ie no . 3787576. 4 broken seals No. 3787693, 3787698, 377619 and 3787700 were found in the ballot box.

Code 037 stream 1- 2 side seals were missing, 2 form 35 were found inside the ballot box with different serial numbers i.e CA039900042214 and CA 0399000042213.

Code 038- stream 1 had one broken seal no. 1511637 and one loose no. 1511881

It is clear that the issues of broken lid and seals , unsigned of form 35 and different sets of form 35 and lack of counterfoil arose during recount. I will determine them later in these judgement .

The parties agreed that case proceeds by way of viva voce evidence and each deponent adopted their respective affidavits and they were later cross-examined on the same and finally re-examined. The petitioner called 3 witnesses and the respondents called 2 witnesses.

Evidence

Pw1 Francis Ngunga Mwaniki is the petitioner herein, he testified that he was not at the polling stations at the material time. He said he relied on the word of Pw2 and pw3 that the process of counting and tallying of the votes at Kathome trading centre was flawed. He said he did a formal complaint to IEBC about the irregularities upon receiving the information. He admitted on cross –examination that he had not named all the polling stations in Mua Ward in his petition.

Pw2 Abraham Mwendwa is petitioner’s 1st witness. He adopted his affidavit filed herein. He said he was a wiper agent for the county representative at kathome trading centre and that the results were inaccurate ,he denied signing form 35 and said he did not see it that day. He said he did not see Jackson Sila(DW12) and John Kioko (pw3)sign the form 35 and that the ballot box was not sealed. He admitted that he pw3 and other agents signed the record of seals at the end of counting . Nn re-examination he admitted that he signed the same while voting was still going on. He left the polling centre at 2.30 am.

Pw3 John Kioko Malonza was also the petitioner’s agent at kathome trading centre on the material day. He said he witnessed the counting of votes but he did not participate in tallying. He however took no records of the votes. He believed that said he believed petitioner could have got 90% votes. He denied that the signature at the back of form 35 was his but admitted signing the record of seals at the close of voting n the IEBC response, but said he signed it in the morning while voting was going on. He admitted not reporting forgery of his signature on the form 35. He said they were not allowed to escort the boxes and that the boxes were not sealed. He denied that he went celebrating after signing the diary.

DW1 Oliver Nzeki Munyaka is the 1st respondent herein. he told this court that he was duly returned as the winner of the disputed election herein upon winning in a fair manner . He did not witness the tallying at kathome trading centre .

DW2 Jackson Sila Waema testified that he was a wiper party agent during the election at kathome trading centre. He said he signed all the form 34 for all candidates save for the president. He termed the exercise

as tenuous . He said that he signed the form 35 for this election as most agents left before the end of it and that the agents of petitioner left while celebrating after he was declared a winner in that centre. He said he signed form 35 after confirming that all details were well recorded and because his candidate had won. Dw2 further told this court that sealing was done in the presence of all the agents. He said he was interested in all wiper candidates.

Dw3 Patrick Wambua Mwangangi told this court that he was a NPK party agent stationed at Kathome trading centre on the material day and that his candidate lost at that station and so he left in disappointment and so he did not sign form 35. He said he signed the record of seals at the close of voting in the polling day diary (page 24) upon conclusion of voting. He said he saw wiper agents walking away while celebrating after their candidate was announced winner.

Dw4 Rebecca Damiano Mwortune works for IEBC as the Machakos constituency elections co-ordinator . She testified that the election was free and fair. She took the court through the process counting , tallying, sealing signing form 35 and affixing results in a conspicuous place. She admitted that there were alterations and overwriting in some form 35 which were not countersigned and some counter signed. Dw4 admitted that some discrepancies in the figures were in some polling stations but the same were slight and did not affect the outcome. She said that candidates or parties are entitled to have at least 2 agents as per section 30 of the election Act. She further told this court that the results for Katelembo stream 2 was filed in another file and that she combined the results of Katelembo 2 streams in form 36.

Dw5 David Mutua Kavoo was the presiding officer at Kathome trading centre polling station. He admitted there were 2 form 35 for this election in the said station i.e 039900042175 (which signed by agents i.e PW3 and Dw2) and 033990000174 which was not signed by agents and stated that the latter is the one he submitted to IEBC. He said he allowed the agent to sign the poll book before counting ended as they insisted that it was cold and they wanted to leave. He denied that the poll book was signed at day time. He stated that the sealing was witnessed by pw3 and Dw2 and denied manipulating results against the will of the voters.

PRINCIPLES

The principles of determining election petitions were laid down in the case of **MORGAN VERSUS SIMPSONS & ANOTHER 1974 3 ALL E.R 722,728** where Lord Denning held that (1)''if elections were conducted so badly that it was not substantively in accordance with the law as to elections, the election is vitiated , irrespective of whether the result is affected or not... (2)if elections was so conducted that it is substantially in accordance with the law, as to elections, it is not vitiated by breach of the rules or a mistake at the polls – provided that it did not affect the result of the election.(3)But even though the elections were conducted substantially in accordance with the laws as to the elections, never the less if there was a breach of the rules or a mistake at the polls and -it did affect the results –then the election is vitiated'' .

Section 83 of the Elections Act was enacted in the spirit of the said principles and it provides that ,'' ... no election shall be void by reason of non - compliance with any written law relating to that election if it appears that the election was held in accordance with the principles laid down in the constitution and that written law and that non compliance did not affect the result of the election...''

The basis of the electoral law in Kenya are Articles 38 and 81 of the constitution of Kenya . Article 38 guarantees citizens political rights which include a right to free, fair and regular elections based on universal suffrage and free election and free expression of the will of the electors. Article 81 (e) of the constitution provides for the general principles for the electoral system; i.e elections must be held in a free, fair, peaceful, efficient , neutral , transparent, accurate and accountable manner.

The standard of proof of elections petitions in Kenya is not on a balance of probability or beyond any reasonable doubt but it is above the balance of probability and below that of reasonable doubt as was held by Supreme court of Kenya in the **petition No. 5 of 2013 RAILA ODINGA –VS- THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS** . The position

was also restated by Hon. Majanja –J in *Election petition No. 1 & 7 of 2013 (consolidated) case of Kalembe Ndile & another versus Patrick Musimba -& 2 others Majanja -J*. In deciding the same, the court must make a finding on whether the will of the people was respected in the process.

Where a petition is alleging irregularities or non compliance with the law, the petitioner must not only prove the irregularity or non -compliance but must also prove the same affected the result.

In the case of *John Fitch v Tom Stephenson and 3 others, (2008)EWHC 501 (OB)* cited by counsel for 2nd and 3rd respondents, it was held that ...’the courts will strive to preserve an election as being in accordance with the law even where there have been an election as being in accordance with the law , even as where there have been significant breaches of the official duties and election rules providing the results of the election was unaffected by those breaches.....this is because where possible, the courts seek to give effect to the will of the electorate..’. In *Joho vs Nyange & Another (2008) 3 KLR (EP) 500*: Maraga J (as he then was) stated as follows;

“In my view the errors made and the irregularities committed in this petition fall in two categories. The first one is the errors or mistakes that I would call innocent even though negligent. The second category is those deliberate irregularities or forgeries that were committed.

In respect of the first category I would like to say this: Error is to human. Some errors in an election like this, conducted under a frenetic schedule, are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental they should always be excused and ignored. But where deliberate irregularities or forgeries are committed, different considerations come into play. In either case, however, serious consideration should be given as to what effect, if any, that those errors, whether innocent or deliberate, have on an election before the same is vitiated. As I have said if they are minor and do not affect the election or its results they should be ignored. This is what I understand section 28 of the National Assembly and Presidential Elections Act to be providing for when it declares that:

‘No election shall be declared void by reasons of a non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in that written law, or that the non-compliance did not affect the result of the election.’

The law is therefore clear as to when an election can be nullified if it is not conducted substantially in accordance with the law as to elections. It will also be nullified, even though it is conducted substantially in accordance with the law as to elections, if there are errors or mistakes in conducting it which, however trivial, are found to have affected the results of an election.

But when is an election said not have been conducted substantially in accordance with the law as to elections which errors or irregularities can affect the results of an election?

To start with I do not think that anybody is in doubt as to the law as to the parliamentary elections which we are here concerned with. It is the National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya together with the Rules and Regulations made there-under.

It is not very (sic) non-compliance or every act or omission in breach of the election regulations or procedure that invalidates an election for being non-compliant with the law. As I have said minor breaches will be ignored. An election is said to be non-complaint with the law as to election when it is conducted in violation of the principles of an election by ballot. This is how Stephenson L.J expressed this point in the case of Morgan –vs- Simpson (1974) 3 All ER 722 at P 731.

“For an election to be conducted substantially in accordance with that law there must be a real election by ballot and no such substantial departure from the procedure laid down by parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot. Instances of such substantial departure would be allowing voters to vote for a person who is not in fact a candidate or refusing a qualified candidate on some illegal ground or disenfranchising a substantial proportion of qualified voters.”

And the result of an election is affected when the cumulative effect of the irregularities reverse it. For instance when a large proportion of the voters are by some blunder in the conduct of the election, as happened in Harrison Garama Kombe vs Ali Omar & Others, Civil Appeal No. 52 of 2006 (CA), do not turn up to vote, the result is said to be affected.”

I have considered the pleadings , evidence and the submissions together with the cited authorities by counsel herein and I proceed to frame the following issues for determination;

- a)Whether the counting and tallying of the votes in Mua Ward was done in a manner that is free and fair,
- b)Whether 1st respondent was validly elected or not?
- c)Whether petitioner won the election and whether this court should make such a declaration?
- d) who bears the costs of this petition?

DETERMINATION

- a. ***On whether the counting and tallying of the votes were done in a free and fair manner;*** it is important that I make a determination on each and every related allegation of irregularity and the noted irregularities during recount .i.e to box of Kathome polling station not sealed, agents not allowed to sign form 35 and alterations in form 35, missing form 35 ,missing counterfoil and allegation that petitioners agents were not allowed to escort the ballot box to the tallying centre to arrive at a conclusion on this issue.

Allegation that the ballot box for kathome polling station was not sealed.

It is the petitioners case that the ballot box for Kathome polling station was not sealed. Pw2 and pw3 admitted signing the polling day diary as agents, record of serial numbers of ballot boxes and seals used at the start of polling, record of seals used at the close of polling and record of the ballot boxes and seals used at the end of counting(see page 18,20,22, 24 of the 2nd and 3rd respondents response) before the counting ended. Dw5 testified that he allowed the agents to sign the record of serial numbers of ballot boxes and seals used at the end of counting before the counting ended as they insisted on the same saying it was cold and they wanted to leave. This is surely a lame excuse as Dw5 could have denied them the forms before the appropriate time and record that in the form 35. Most of the agents of petitioner must have therefore left the station by the time the results were announced as alleged by the respondents as they had already signed for the seals . This act of the presiding officer allowing agents to sign the record of seals before sealing was done is clearly irregular as the same are supposed to be signed after sealing and not before the counting ends as happened herein. The agents were also at fault for signing the forms before the end of the process. It has not been proved that this act of Dw5 was done with a view to give undue advantage to any candidate. Dw5 admitted on cross-examination that he did not fill the serial numbers of the ballot boxes in the polling day diary and he said that this was due to mistake which was not deliberate. The said serial number of Kathome trading was seen during recount and noted to be 173050. This point in my view was sorted out by the recount. There was an allegation by the 2nd and 3rd respondents in the application dated 8.8.13 that the Ballot boxes were interfered with and they wanted the suppliers of the seals to attend the recount to confirm if the seals originated from their company. On 12.8.13, the application came up for hearing and the other parties did not object to it. The same was allowed and 5 ballot boxes were identified to be inspected by the supplier . The supplier's

representative attended the recount and as per the report no anomaly detected in all the 5 boxes and he promised to write official letter to the court. The said report was not made. The recount report revealed that one lid was broken and several seals were broken and/ or loose as particularized herein above. Mr Makundi for petitioner submitted that this was evidence of that the boxes were not properly sealed and left room for tampering with the boxes. Mr Wambua for 1st respondent and Mrs Wambua for 2nd and 3rd respondent maintained that the box was properly sealed. There is no credible evidence that one was seen tampering with the seals or the boxes. Dw2 said he witnessed the sealing and that it was properly done. I saw the seals which were on the boxes and Dw5 said the boxes were duly sealed. The quality looked weak and so there is a possibility that they broke during movement to the tallying centre or to court. In any event if there was an intention to break the seals or lid to benefit a particular candidate then it would have been evident during recount but this was not the case as the variations noted were minor and the same affected all the candidates .i find that the box was properly sealed .

Allegation that the petitioners agents were not allowed to escort the ballot papers

It emerged from evidence of petitioner that his agents were not allowed to escort the ballot papers and that they were told by IEBC officials that the vehicle could not accommodate agents due to its capacity. I have already found herein above that some of the agents of petitioner must have left the polling centre before the end of the process and in any event there is no requirement under the regulations that agents must escort the ballot papers and under the new law, counting is done at the polling centres.

Allegation that the petitioners agents were not allowed to sign the form 35 at Kathome trading centre polling station and alteration in the form 35.

The petitioner testified that his agents reported to him that they were not were not allowed to sign the form 35 for kathome trading centre polling station. Abraham Mwendwa Masave (Pw2) said in his affidavit and evidence that the results were announced at kathome centre polling station before he saw the form 35 and that he complained to the presiding officer but he told him it was unavailable and unnecessary. He protested at this but the presiding officer ignored him . On cross-examination by Mr Wambua, he admitted signing the particulars of agents, record of seals of ballot boxes used at start of polling and record of serial numbers of ballot boxes and seals used at the end of counting by candidates/agents (on pages 18,19 and 24 respectively of the 2nd and 3rd respondents response) . He denied that he did sign the form 35 as he left a soon as he learnt that his candidate had won. Pw3 John Kioko told this court that he did not sign form 35 but record of seals used at the end of voting . He admitted that his usual signature is the one on the affidavit filed herein and that he also signed the record of seals used at the close of voting in the polling day diary. He denied that the signature on the form 35 filed in court was his. To counter this evidence, the 1st respondent called Jackson Sila Waema (Dw2) a wiper democratic party agent who testified that he signed the form 35 for the election herein in that capacity as the other Wiper agents left the station in jubilation upon the petitioner being announced the winner in that polling station. He said he saw John Kioko sign the form 35. He further said that the available agents witnessed the signing of form 35 after sealing. Dw4 Rebecca Damiano Mwontune testified that the law allows form 35 to be signed by 1 agent of each candidate and that if the agent does not sign then the reasons must be recorded. Further that under section 30 of the Elections Act, a candidate can only appoint an agent where the party has not appointed one for him. David Kavila (Dw6) the presiding officer testified that the form 35 was signed by Pw3 and Dw2. The evidence of Patrick Wambua Mwangangi (Dw3) is not of any probative value on this point as he testified that he left upon learning that his candidate had lost in that station and he did not see the form 35. On whether Dw2 had capacity to sign the form 35 for the wiper party, he said he was the governors agent but he decided to sign the form for the county representative as the other agents left earlier while celebrating the win of their candidate. Dw4 said an agent can only sign the form 35 for his candidate only under section 30 of the Act. Dw5 confirmed that Dw2 signed the said form. I have seen the said section 30 of the Election Act and the same provides that ‘ (1) a political party may appoint an agent for its candidate at each polling station.

(2)a candidate nominated by a political party may appoint an agent of the candidates choice .

(3) an independent candidate may appoint his own agent''

. The catch word here is 'MAY'. It is clear that having an agent is not a must and it is left at the discretion of the party or candidate and that an agent can be appointed by a party or a candidate. Nowhere in that section is it stated that the agents appointed by the party and candidate cannot work together . Does the fact that Dw2 signed the form 35 and yet he was not a petitioner's appointed agent go to the root of the results? I saw Dw2 during his testimony and he said he signed the form on satisfaction that all was well. This evidence was not shaken at all. He impressed me to be truthful. I find that Dw2 signed the form 35 as an agent of Wiper party which pw1 belonged to. Regulation 79(6) of the Election general regulations provide that "the refusal or failure of a candidate or an agent to sign a declaration form under sub-regulation (4) or to record reasons for their refusal to sign as required under this regulation shall not by its self invalidate the results announced under sub-regulation 2(a). It is my considered view that the fact that Dw2 signed the form 35 on behalf of the Wiper party agents who allegedly left does not go to the root of the election result in view of the said regulation 79 (6).

I have looked at the evidence of pw3 and compared the signatures on his affidavit filed herein and the one on the form 35 filed herein, the said signatures have similar features and they appear to have been done by one hand. Pw3 admitted signing the affidavit and Dw2 said he saw him sign the same. He termed the signature on the form 35 a forgery but this was not pleaded and he admitted that no action was taken by him to protest the same . It is therefore not true that pw3 did not sign the form 35 as he alleges .He must have signed the same .

The petitioner has proved that there were irregularities in the tallying at Kathome trading centre . Do the said irregularities affect the result herein? I am guided by the afore stated Joho and Simpson case in arriving at the decision on this question. I have seen the variations in the recount and I noted that no candidate solely benefitted from the error as the 17 votes which were not considered during the first count were distributed among 6 out of the 8 candidates upon recount. There was no departure from the basic principles of elections in Kathome polling centre. It is clearly an arithmetical error and the effect of the variation on total votes garnered by each candidate is so minimal that it does not go to the root of the result. The irregularity is also curable under section 83 of the Elections Act . There was no spoilt vote on the first count but upon recount 3 votes were rejected. I have carefully analysed the evidence herein, the pleadings and the recount report and I find that there is no evidence that the results were doctored to favor 1st respondent. There were minor irregularities in the election process which did not affect the result at the said Kathome polling station.

Anomalies in Form 35 for the other polling centres

It is true that some of the form 35 had figures which were altered and not countersigned by the makers. The reason why the other agents did not sign the form 35 was not recorded and Dw5 attributed this to human error . The recount also revealed that in 037 stream 1 two form 35 with different serial numbers, 031 had unsigned form 35 in the box and the signed one was affixed to the box. This is cured by regulation 79(6) of the general regulations and section 83 of the Act together with the recount as the same did not affect the result.

Lack of counterfoils

There were no counterfoils found in code 029 stream 2 and 033 stream 2 . Rule 33(4) (g) of the said rules provided that scrutiny shall be limited to counterfoils among other documents. In the case Thomas Musau and others versus IEBC & others E . P No. 2 of 2013 Machakos, the Election was nullified for lack of counterfoils in 9 ballot boxes and lack of IEBC stamp on 19 form 35 and the court held that'' **108) It is a requirement for a Presiding Officer to seal counterfoils of the used ballot papers in a tamper proof envelope for purposes of being delivered to the Returning Officer (see Regulations 73(3) (4) of the Regulations).**

109) A counterfoil may be defined as the part of a document retained by the issuer as a record of a transaction. It is indeed an important document.

110) In the case of Manson Onyongo Nyamweya versus James Omingo Magara and 2 Others [2009] eKLR, D Musinga J. (as he then was) held that ;-

“If scrutiny showed that the documents in the ballot boxes were substantially non-compliant or that certain statutory documents were not contained therein, a recount of the ballots per se cannot cure the inherent defect. The presence of a ballot paper in a ballot box is validated by the counterfoil thereof and the marked voters register. Without the two there is no telling how it found its way in the ballot boxes” HC PETITION NO. 2/2013 Page 51 of 57

111) Lack of the counterfoils is therefore grave as the ballot papers in the ballot boxes cannot be ascertained and verified if indeed they were duly cast as votes or not. Missing counterfoils would basically mean that ballot papers in ballot boxes were not the ones used by the voters.

In the instant case result for 033 (katelembo primary school) stream 2 was also not filed in court as required under Rule 21 (b) of the Election petition (parliamentary and county elections)Rules 2013 . The said rules provides that ‘.....the commission shall deliver to the registrar the results of the relevant election within 14 days of being served with the petition...Form 36 filed in court by 3rd respondent indicates that total registered voters in both streams in that station was 1,058 , total votes cast 917 total rejected votes 23, and that the candidates garnered votes as indicated here below;

NAME OF CANDIDATE	RESULTS AS PER FORM 36
BARNARD KYALO RAPHAEL NZIOKA	18
CHARLOTTE JOYCE NZOKA	84
FRANCIS MWANIKI NGUNGA	397
GIDEON WAMBUA NGULI	11
OLIVER NZEKI MUYAKA	276
REUBEN MUSEMBI MUANGE	81
SEBASTIAN MAITHIYA MATHEKA	17
ZACHEAS MWATU NZEI	10

The recount showed variation of 8 votes which were distributed among 4. In this box for stream 2 No. 191164 the counterfoil was not found . Dw4 said that the result was filed in another file and that the final results were in form 36. We were not told which file the said form 35 was filed in another file and why that was done. How did the returning officer arrive at the final figures herein? I appreciate that the Elections were 6 in a day and the law is not specific of where the registers should be kept but this would have at least accounted for the votes for Katelembo stream 2 in the absence of the counterfoil. The position applies to results of 029 stream two. No explanation was given to on lack of the said counterfoils. It was argued by the respondents that the scope of the petition is limited to Kathome trading centre which prominently featured in the body petition and to which the affidavits of Pw2 and pw3 are limited to. The petitioner argued that they sought recount and scrutiny in ‘‘Kathome trading centre and all the other polling stations in Mua ward. ‘‘ It is true the petitioner pleaded as he stated . The respondents cited the case of *Mahamud Muhumed Sirat v. Ali Hassan Abdirahman and 2 Others Nairobi Petition No. 15 of 2008 [2010] eKLR* Justice Kimaru stated that:

“From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that

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

Also decision of Justice Majanja in *Wavinya Ndeti versus IEBC and 4 others E.P No. 4 of 2013 Machakos and KaKuta Hamisi versus peris Tobiko E.P No. 5 of 2013 Nairobi* where the Judges held similar views.

Hon Justice Makhandia in *Justus Mungumbu Omiti v. Walter Enock Nyambati Osebe & 2 Others (EP No. 1 of 2008)* 2010 eKLR Kisii that:

All issues raised in the petition and those which crop up during the hearing, whether pleaded or not, and which had the potential to affect adversely the final result, and the will of the voters in a Constituency must come under spotlight, scrutiny and interrogation. They have to be interrogated and determination made thereon. In this case all illegalities and irregularities which impugn the credibility of the outcome of the elections have to be considered. It will be a sad day indeed if such evidence which comes through the petitioner, his witnesses, the respondents and their witnesses, as well, to be discarded and rendered irrelevant, or inadmissible merely on grounds that the same was not the subject of any pleading At the end of the day what is of prime concern to this court, is whether the elections were conducted in a fair, free and transparent manner, and that they reflect the will of the voters and more importantly whether the Respondent was validly elected. Such determination cannot be made, if relevant evidence is locked out on technical grounds that the issues addressed by such evidence were not pleaded.

In E.P no. 3 of 2008, *Dickson Daniel Karaba vs John Ngata Kariuki & 2 others* Justice Warsame held that ***".....you do not need to plead evidence and you do not need to amend your pleadings if you wish to introduce a particular piece of evidence in satisfaction of your case. It is for the court to decide to weight and relevance of evidence....."***

Election petitions are inquisitorial proceedings whose aim is to ascertain the will of the voters . In this case the court ordered scrutiny and recount under section 82 of the Elections Act. I appreciate that elections are never perfect as they are conducted by human beings and human is to error as was held in the *Joho* case and also conversant with the provisions of Article 159 (d) of the constitution and section 83 of the Elections Act. I am faced with several high court decisions with divergent views over the same issue . The issue of lack of counterfoils is too serious to be ignored even if it was not specifically pleaded and is for the reason that it is a glaring irregularity as was held by Justice Makhandia in the said *Walter Nyambati* case . The will of the people can only be determined if the source of the votes is properly accounted for as was held by lady justice Mutende in the *Thomas Musau* case . Counterfoils are very important documents in an election as the same must be sealed in the ballot box for reference in case of a dispute. It has emerged that the source of the votes in the two stations is not known as there were no counterfoils in the said two boxes . This is mistake attributed to the 2nd and 3rd respondents and /or their agents.

Did the said irregularities affect the final result?

It is trite law that a petitioner has to prove that the irregularities substantially and materially affected the result as was held in the aforementioned *Joho vs Nyange case and John Kiarie Waweru case vs. Beth Mugo & 2 others E.P 13 of 2008- (Kimaru J)* . The standard of proof is that above balance of probability and below reasonable doubt as was held in the *Raila odinga case*. I appreciate that the a free and fair election is not only determined by the number of votes garnered but by looking at the entire voting process and considering the will of the voters as was held in the *Rtd Col Dr Kizza Besigye versus Electoral commission & Yoweri Museveni case and Bortner versus Town of Woodbridge* cited by the 2nd and 3rd respondents . The though the recount in the 18 polling stations revealed that the respondent

was on the lead by a margin of 114 votes, the lack of counterfoils in 029 stream 2 and Katelembo stream 2 caused by the 2nd and/or agents of the 3rd respondents is material and substantially affects the end result and thus not curable under section 83 of the Election offences . The election for Mua ward county representative was thus not free and fair.

Whether the 1st respondent was validly elected?

It thus follows from the foregoing that the 1st respondent was not validly elected as Mua Ward member of county assembly for Mua Ward and so I proceed to declare his election as null and void. I order that Certificate to issue under section 86(1) of the Elections Act.

Whether the petitioner won the election?

Having found herein above that the election was null and void for failure to account for the results in two polling stations, the winner of the election can only be determined after fresh election.

I order that fresh elections be held in Mua Ward.

costs

On the issue of costs , It is trite law that costs follow event . I find no offence or irregularity committed by the 1st respondent which affected the result. I order that the 3rd respondent pays costs to petitioner and 1st respondent not exceeding a total of Khs 500,000/= which shall be assessed at later stage. The security deposited by the petitioner shall be refunded to him upon expiry of the Appeal days.

I wish to appreciate the counsel in this case for conducting themselves with the decorum expected of advocates and taking their time to do detailed research which assisted this court in deciding this petition. I also wish to thank the court clerk Amos Mukapa and the ICT officer Michael Ouma tirelessly gave me support I needed to ensure that the proceedings run smoothly . I cannot forget to thank Lucianna Thuo the legal researcher who all dedicated her time to assist me with research in this case.

30 days Right of Appeal.

T.A ODERA

PRINCIPAL MAGISTRATE

16.9.13

DELIVERED AND SIGNED IN OPEN COURT AT MAVOKO ON THIS 16TH DAY OF SEPTEMBER 2013 IN THE PRESENCE OF MRS. WAMBUA FOR THE 2RD RESPONDENTS . MR MAKUNDI FOR PETITIONER AND MR WAMBUA FOR 1ST RESPONDENT ABSENT. PETITIONER AND 1ST RESPONDENT ARE BOTH PRESENT.

T.A ODERA

PRINCIPAL MAGISTRATE

16.9.13

