



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT MERU
ELECTION PETITION NO. 1 OF 2013

JOHN MBAABU MURITHI PETITIONER

VERSUS

JACOB MWIRIGI MUTHURI 1ST RESPONDENT

LUCY MBITHI R/O BUURI CONSTITUENCY 2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 3RD RESPONDENT

JUDGMENT

The last general elections were held on the 4th March, 2013. The elections were conducted by the 3rd Respondent which is the constitutional body established under Article 88(1) of the constitution. The 3rd Respondent appointed the 2nd Respondent as the Returning Officer for Buuri constituency where Kibirichia Ward is located. During the aforementioned elections voters in Kibirichia Ward, Buuri Constituency went to the polls to elect their representative to the County Assembly. The petitioner, John Mbaabu Murithi, the 1st Respondent, Jacob Mwirigi Muthuri and five others were duly and validly nominated as candidates for Kibirichia Ward representative. The election proceeded and the following results were announced:-

Festus Kinoti Ntaari	-	394 votes
Gedeon Kimathi Nkanatha	-	841 votes
Jacob Mwirigi Muthuri	-	3522 votes
John Mbaabu M'Murithi	-	3494 votes
Mwirigi Lazarus Nkonge	-	359 votes
Patrick Mwenda Kiambati	-	134 votes
Solomon Gatobu Miriti	-	547 votes

Based on the same results, the 2nd Respondent declared the 1st Respondent as the duly elected County Representative for Kibirichia ward. Later the results were gazetted in the Kenya Gazette Notice (special issue) No. 45 of 13th March, 2013.

The petitioner being aggrieved by the results filed the present petition. The respondents filed their respective responses.

THE PETITIONERS CASE

The petition dated 3rd April, 2013 was filed in court on the 4th April, 2013. In summary the petitioner contends that the tallying of votes showed that he had won the elections of Kibirichia Ward. That the tallying was improperly, illegally and randomly done by changing actual figures in Form 35 particularly from polling station No.100 Kibirichia Market. That the actual votes were changed by the counting clerks and the presiding officers to “force” a tally which would give the 1st Respondent an undeserved win over the petitioner. That the 2nd and 3rd Respondent through their agents deviated from the normal practice of showing the ballot paper to the candidates’ agents during counting and so there was difficulty differentiating between the votes for Jacob Mwirigi Muthuri and Lazarus Mwirigi Nkonge as only one name “Mwirigi” was announced during the counting. That the 1st Respondent illegally and wrongfully influenced the 2nd and 3rd Respondents together with their agents to doctor results in favour of the 1st Respondent. The petitioner therefore sought the following orders.

- (a) A declaration that Jacob Mwirigi Muthuri was not validly elected.**
- (b) That the court orders recounts of all votes from all polling stations within Kibirichia ward.**
- (c) That in the alternative, the court orders for a repeat election in Kibirichia Ward.**
- (d) That costs be borne by the respondents.**

The petition was supported by affidavits of the petitioner, Martin Mburugu, Robert Mwenda Muthuri, Rev. Fredrick Kiogora Nkanatha, Lawrence J. J. Kirimi and David Kirimi all who testified as witnesses for the petitioner. In summary the evidence of the petitioner was as follows:-

The petitioner (PW1) stated that though the election was peaceful, during counting there was massive alteration and doctoring of results in favour of the 1st Respondent. That in some instances some voters were misled during voting. That counting was not done in a transparent manner as two candidates shared name “Mwirigi” yet only one name was mentioned making it difficult to know which candidate was being referred to. The petitioner cited several polling stations where he alleged there were irregularities. He believed that if the court ordered for a recount then he was likely to emerge the winner.

In cross examination the petitioner admitted that he had not been at the counting halls and tallying centre because he was unwell and that he relied on the evidence of his agents and witnesses.

PW2 a witness for the petitioner testified that he was an election observer for National Council of Churches of Kenya. That after voting he went to the tallying centre at Timau. While at the tallying centre he witnessed Forms 35 for Marurui Primary school being altered in favour of the 1st Respondent. That he saw the petitioner’s votes being changed to read ‘36’ instead of ‘361’. That when he demanded to know why that happened he was called an intruder and thrown out of the tallying hall. He thereafter got a cell phone number of the petitioner and notified him of the ongoings. PW2 alleged that before the doctoring of the results he heard the petitioner being announced the winner of the election for county representative for Kibirichia Ward.

PW3 testified that he was an agent for the petitioner at Kibirichia market. After voting he witnessed the counting being done. That during counting the polling clerks were not showing openly the ballot papers to all parties present and that they did not differentiate between 2 candidates who shared name

“Mwirigi”. After the initial counting the petitioner garnered 327 votes while the 1st Respondent garnered 269 votes. There was a protest prompting the presiding officer to order a recount. Upon a recount being conducted the petitioner garnered 327 votes while the 1st Respondent’s votes reduced to 144. That he thereafter signed form 35 as his complaint had been addressed.

PW4 testified that during the elections of 4th March, 2013 he was an agent for ODM. He was present at Kibirichia market during the counting of votes. That there was lack of accountability during counting as the clerks did not differentiate between 2 candidates sharing name “Mwirigi”. That during the first counting the petitioner garnered 327 votes while the 1st respondent garnered 269 votes. That after a recount was ordered the 1st Respondent’s votes reduced from 269 to 144. That he could not understand the discrepancy in the figures and therefore decided not to sign Form 35 for Kibirichia Market.

PW4 in his affidavit alleged that some illiterate voters were misled during the voting exercise.

In cross examination he testified that he raised a complaint and agents were allowed to oversee those who were being assisted.

PW5 testified that he was a registered voter at Kibirichia Boys Secondary school in Kibirichia ward. On 4th March, 2013 during the voting exercise he witnessed old men and women who were illiterate being misled to vote in favour of the 1st Respondent. That the 2nd and 3rd Respondents rigged the elections in favour of the 1st Respondent. PW5 however was unable to give the names of the people he alleged were being misled. In cross examination by the advocates for 2nd and 3rd Respondent he admitted that he was one of those who signed Form 35 for Kibirichia Boys Secondary School.

PW6 testified that he was a registered voter at Kibirichia Ward during the last elections. On 4th March, 2013 he voted at Ntugi market. That during the voting he saw a person being allowed to vote twice in favour of the 1st Respondent. In cross-examination PW6 admitted that as an agent for K.N.C. he signed form 35 for Ntugi Market willingly yet he did not deem it fit to indicate his reservations on the said form.

1ST RESPONDENT’S CASE

The 1st Respondent in response to the petition filed an answer to petition dated 8th May, 2013 and a replying affidavit sworn on the same day. The 1st Respondent also filed witness affidavits of Gideon Kimathi Nkanatha and Reuben Mutuma Kirimi both of whom were presented to give evidence during the hearing. The 1st Respondent case was that the election for county assembly representative for Kibirichia ward was conducted in a free and fair manner. The 1st Respondent in his evidence denied the allegations of malpractices leveled by the petitioner and the witnesses. The witnesses for the 1st Respondent including Gedion Kimathi Nkanatha who was also a candidate in the same election maintain that the election was fair and in accordance with the principles laid down in the Constitution and Electoral Laws.

2ND AND 3RD RESPONDENTS CASE

The 2nd and 3rd Respondents filed an answer to petition dated 15th April, 2013 and filed in court on the 18th April, 2013. They also sought to rely on a Replying Affidavit sworn by the 2nd Respondent on 17th April, 2013 and filed in court on the 18th April, 2013. The 2nd Respondent gave evidence in court during the hearing.

It is the 2nd and 3rd Respondents’ case that the election for County Assembly representative for Kibirichia Ward was conducted in compliance with the principles of the constitution and written law and if at all there was any non-compliance or irregularities, the same was insignificant, in respect of isolated incidents, and thus did not materially affect the outcome of the elections as to undermine the democratic will of the people of Kibirichia Ward.

It is also instructive to note that on the 9th September, 2013 the court did on its own motion order for recount and tallying of all votes for Marurui Primary School, polling station No. 087.

This was after the court considered the evidence and submissions of the parties on the issue of recount and tallying. The exercise was limited to determining the number of votes garnered by each of the candidates at the said polling station and to investigate if the said results tally with the entries in Form 35. The exercise was conducted on the 12th September, 2013 and the following emerged:-

From the recount of votes at Marurui Primary School (087) the candidates garnered votes as follows:

Festus Kinoti Ntaara	-	07
Gedeon Kimathi Nkanatha	-	96
Jacob Mwirigi Muthuri	-	270
John Mbaabu Murithi	-	37
Lazarus Mwirangi Nkonge	-	06
Patrick Mwenda Kiambati	-	03
Solomon Gatobu	-	50

From the recount the petitioners votes increased by one. The 1st Respondents votes were as was entered in Form 35. The votes for Gideon Kimathi Nkanatha, a witness for the 1st Respondent, equally increased by one.

Later in this judgment I intend to deal with the effect of the results of recount and tallying at Marurui Primary School (087).

AGREED ISSUES FOR DETERMINATION

During the pretrial conference, the parties did agree on the following issues for the court's determination:-

(i) Whether the 1st Respondent was validly elected as the county assembly representative for Kibirichia Ward.

(ii) Whether there were anomalies in the counting and tallying of votes.

(iii) If there were such anomalies in the counting and tallying, whether they materially affected the outcome of the elections.

(iv) What reliefs or consequential orders should be made in the circumstances.

(v) Who should bear costs of the petition.

I have carefully considered the evidence on record by all the parties. I have addressed my mind to the submissions filed by the advocates on record.

Before delving into the issues for determination, it is important to set out the legal position regarding the law on election petitions. It is of particular importance to highlight the law on the twin issues of burden of proof and standard of proof in electoral disputes.

It is now settled that in an election petition the burden is on the petitioner to prove all the allegations

leveled against the respondents by firm and credible evidence. If the allegations are with respect to non-conformity with the law or permitting the commission of electoral mal-practices as are alleged in this petition, cogent evidence must be laid forth and further it must be proved that the alleged non-conformity or mal-practices affected the validity of the elections.

In the case of Joho -v- Nyange and another (2008) 3KLR EP 500 at Page 507 Maranga J (as he was then) stated as follows:-

“Election petitions are no ordinary suits. Though they are disputes “in rem” fought between certain parties, election petitions are nonetheless disputes of great public importance – Kibaki -v- Moi Civil Appeal No. 173 of 1999. This is because when elections are successfully challenged, by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituent’s social and economic activities. It is for this reason that I concur with the election court’s decision on Wanguhu Ng’ang’a & another -v- Geoge Owiti & another Election Petition No. 41 of 1993 that election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are therefore not the kind of evidence required to prove election petitions. As I have said, they should be proved by cogent, credible and consistent evidence”

The general position which has been adopted in election petitions both under the old regime of electoral laws and under the prevailing legal framework is that not only does the burden of proof rest with the petitioner but that the standard of proof is above the balance of probabilities though not as high as beyond reasonable doubt. This position has been captured in several court decisions.

In the case of John Kiarie Waweru -v- Beth Wambui Mugo & 2 others (2008) e KLR at page 4. Justice Kimaru expressed himself thus:-

“ The burden of establishing all these allegations regarding the conduct of the said elections and results announced thereafter is on the petitioner. This court is aware of its duty to consider and determine the evidence adduced by the parties to this election petition after putting in mind the fact that the election that is sought to be nullified is in respect of an exercise of the right of voters of Dagoretti Constituency to elect a representative of their choice. This court will not interfere with the democratic choice of voters of Dagoretti constituency unless it is established to the required standard of proof that there were irregularities and electoral mal-practices that rendered the said elections null and void and therefore subject to nullification. It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did occur; he must establish that the said electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the elections held on 27th December, 2007 ”
(underline mine)

On the issue of standard of proof the court in John Kiarie Waweru case (supra) held as follows;

“As regards the standard of proof which ought to be discharged by the petitioner in establishing allegations of electoral malpractices, there is consensus by electoral courts that generally the standard of proof in electoral petition cases is higher than that applicable in ordinary civil cases i.e. that proof on a balance of probabilities. The standard is higher than proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases. Allegations of electoral malpractices like for instance bribery require higher proof”.

In the decision of the supreme court of Kenya Raila Odinga and others -v- IEBC and others; petitions No. 3, 4 and 5 of 2013 the court held that;

..... *“we find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law but that such failure of compliance did affect the validity of the elections”*

Regarding the standard of proof, the supreme court in **Raila Odinga and others -v- IEBC & 3 others (supra)** held as follows:-

“The lesson to be drawn from the several authorities is in our opinion that this court should freely determine its standard of proof on the basis of the principles of the constitution and of its concern to give fulfillment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies is subject to the rational values and principles of governances declared in the constitution (Article 10), judicial practice must not make it burdensome to enforce the principles of properly conducted elections which given fulfillment to the right of franchise. But at the same time a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should in principle, be above the balance of probability, though not as high as beyond reasonable doubt save that this would not affect the normal standards where criminal charges linked to an election, are in question in the case of data specific electoral requirements (suit as those specified in Article 38(4) of the constitution for an outright win in the presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt”

As I proceed to address the issues that emerged for determination during the hearing of this petition I note that the first 3 issues to wit; whether the 1st Respondent was validly elected as county assembly representative for Kibirichia Ward, whether there were anomalies in the counting and tallying of votes and whether if there was such anomalies, they materially affected the outcome of the election are intertwined. In my view the first issue is wide and probably captures the key question that this court ought to answer as it examines the petitioner’s and the respondents’ case.

I will therefore address the 3 issues simultaneously.

From the evidence the petitioner complained of alleged commission of diverse election offences including fraudulent alteration, manipulation and ‘doctoring’ of results, intimidation and harassment of agents and voters’, undue influence, collusion and rigging.

The petitioner also complained about the conduct of the 2nd and 3rd Respondents with regard to conduct of the elections. In summary he complained that his agents were denied the right to participate in the election, that there was fraudulent tallying and return of the votes cast, there was complicity in harassment and intimidation of party agents, there was manipulation of results by altering figures in Forms 35 without countersigning, failing to address agent’s concerns and failing to differentiate two candidates sharing a middle name.

As regards manipulation of results by altering figures in forms 35 without countersigning the petitioner (PW1), PW2 and PW4 alleged that the results were manipulated to give the 1st respondent an underserved win. Having examined the evidence carefully I find the petitioner’s (PW 1’s) evidence worthless. He admitted that he did not witness any of the alleged instances of manipulation of results and that he was relying on information from his agents. One of his agents PW4 (David Kirimi) testified in court and confirmed that though issues had arisen during counting at Kibirichia market, his concerns were raised and addressed.

He admitted that he voluntarily signed form 35 for Kibirichia Market having been satisfied that the results were correctly tabulated. Though the advocate for the petitioner repeatedly urged that tallying at Kibirichia Market was not accurately done because the recount done did not explain the source of 125 votes which had initially been tabulated in favour of the 1st Respondent, the evidence of PW4 (David Kirimi) clearly poured cold water to any claim of manipulation. In cross-examination and re-examination PW4 readily admitted that his complaints as an agent were addressed and that he thereafter voluntarily signed form 35 for Kibirichia Market. Infact in Form 35 for Kibirichia Market PW4 does not appear to have raised any concerns or reservations. I accordingly dismiss any claim of irregularity at Kibirichia market polling station as lacking in substance.

The evidence of PW2 informed my decision to order for partial scrutiny at Marurui Primary School (087).

PW2 had alleged that while at the tallying centre he witnessed manipulation of results in form 35. That he actually saw the petitioners results being altered from '361' to '36'. Indeed form 35 for Marurui primary School presented in court has an alteration with respect to the votes garnered by the petitioner. The scrutiny and recount revealed that the petitioner garnered 37 votes instead of 36 as recorded in Form 35. The 1st respondent's (incumbent) votes remained unchanged at 270 while that of another contender, Gideon Kimathi increased by one to 96. The import of the results on recount is that PW2 was an untruthful witness. The allegations that the petitioner's votes were changed to read '36' in place of '361' is totally untruthful and unfounded. The change of results of the two candidates in my view is understandable regard being had to the circumstances under which officials of the 3rd respondent worked. The officials worked for long hours and actually conducted what has been dubbed as six elections in one. The slight discrepancy is what can be attributed to honest human error. There is no evidence whatsoever that the results were altered to favour any particular candidate and in particular the 1st respondent. In my assessment the results of the recount does not substantially affect the outcome of the results of Marurui Primary School as would lead to nullification of the entire results. In any event the scrutiny ended up establishing that the electoral officials substantially did their work in compliance with the law.

The petitioner also made a case that there were several alterations made in Forms 35 for several polling stations that were not countersigned and stamped as required. He specifically cited Forms 35 for the following polling stations; Kimbo Primary School, Kibirichia primary School, Kibiricha Market, Mujujune Market, Kibirichia girls and Gathuine Primary school. While it is true that they were several alterations made in forms 35 for several polling stations, there is absolutely no evidence that the alterations were actuated with ulterior motive and done to give any of the candidates undue advantage. The 2nd Respondent in her evidence stated that the alterations were made in good faith either to make writings legible or to correct arithmetic errors. She added that there was no doctoring of results. It was incumbent upon the petitioner to bring forth cogent and credible evidence to the effect that the alterations were driven by ulterior motive to give undue advantage to the 1st Respondent. On this issue I call in aid the Nigerian case of Alhaji Waziri Ibrahim -v- Shehu Shagari (1983) All NLR 507 where the court held:-

“An amended document by itself does not speak of the motive behind the amendment. Without more, an altered and amended document is as genuine as an unamended one. Therefore, the admission of exhibits C to V the returns from the states from which exhibits bond B1 were collated without any evidence to add a sting to the innocent amendment appearing on some of them offers no help to the case of the appellant. I find myself therefore unable to accept the submissions of the learned counsel for the appellant that because returning officers amended and altered the returns C to V from 15 states that fact ipso facto means returning officers have not complied with Sections 65(4), 66, 70 and 119 of the Electoral Act 1982. There must be evidence of indictment or of immoral, unlawful and illegal motive.”

..... it is conceivable that the occasion may genuinely arise when a statement of votes cast may of necessity be altered or amended for instance where a mistake in arithmetic is discovered during the counting of the votes and when a recount is made under Section 68 of the Electoral Act 1982”. (underline mine)

I need not say more on the issue of alterations.

The allegations of intimidation and harassment of agents and voters was couched in general terms in the petition. Neither the petitioner nor his witnesses led forth evidence in proof of intimidation or harassment. I dismiss the allegations as unfounded and unproved. On the allegations of undue influence and/or collusion I again find no cogent and independent evidence to prove the allegations. There is no evidence of any formal complaint lodged either to the police or to any election official. In the Ugandan case of Toolit Simon Akecha -vs- Oulanya Jacob L'Okari & Amor E.P. No. 7 of 2011(2011) UGFC 56 (unreported) learned Justice Rubby Aweri Opiyo held.

“No single report was made to the police of local authorities. No arrests were made”..... in the words of Mulengo JSC in Baesigye’s case (Supra) there would be need for independent evidence (emphasis added)

I therefore dismiss the allegations of there being undue influence and conclusion as there is no proof.

The petitioner also hinged his case on alleged breach of electoral regulations. In particular the petitioner alleged that some of the Forms 35 were not signed by agents. He singled out Form 35 for Ntharagwene polling station (no. 091) which was not signed by any agent. There was no evidence as to how the failure to sign form 35 by agents affected the results of the election. Failure of agents to append their signature on form 35 in itself would not invalidate an election. This position is expressly provided for in Regulation 79(6) of the Elections (general) Regulations 2012 which states thus:

“The refusal or failure of a candidate or an agent to sign a declaration form under sub-regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation 2(a)”

The petitioner made general allegations that agents were denied the right to participate in the elections and to verify results. Not a single agent testified to support this allegation. Furthermore a perusal of all Forms 35s for all the polling station reveal that not a single agent signed the form under protest. I therefore dismiss the allegation as lacking concrete proof.

The petitioner (PW1), PW5 and PW6 made general allegations that the election was conducted in a partisan and biased manner. That illiterate and incapacitated voters were made to vote in favour of the 1st Respondent. This ground of the petition falls short of the requirement of Rule10(e) and 10 (3)(b) of the Elections (parliamentary and country elections), Petition Rules, 2013. The allegations are not captured in the grounds on which the petition is presented. Further no witness affidavit from any witness in respect of Kibirichia Boys polling station and Ntugi Market polling station were filed by any voter to support the allegations. No mention was made of any name of illiterate voters who were misled.

In the Busia High court E.P. No. 1 of 2013 **Philip Osare Ogutu -v- Michael Onyora Arunga & others (2013) eKLR Justice Tuiyot** held:

“The grounds upon which an election is challenged ought to be contained in the petition (Rule 10(e)) of the Election Petition Rules) and the facts relied on by the petitioner set out in the affidavit in support of the petition (Rule 10(3)(b) of the Election Petition Rules). The petition and the affidavits in support should disclose the petitioner’s cause of action and a cursory look at the two should reveal the petitioners case

..... it is now opportune to say this; there can be no quarrel with the principle that any evidence that goes beyond pleadings must either be rejected outright or disregarded. I say this because in the affidavit in support of the application the petitioner has included new evidence and evidence that is extraneous to the petition. This court is not obliged to look at that evidence”

Other than failing to plead the case with specificity the evidence presented by the petitioner fall for short of that required to prove the serious allegations lodged against the respondents. In the case of **Makwaledi Bagwasi -v- Seabe Morueng & another Misc. Application No. 2228 of 2004**, the High court at Botswana held ;

“Where a petitioner asserts that on election official was biased against him, he should adduce evidence to show the manner in which the election official was biased. In the instant case the petitioner made what amounted to bald allegations and did not adduce any evidence to prove those allegations”.

The result is that the allegations of collusion or bias in favour of the 1st Respondent lacks basis and are accordingly dismissed.

The petitioner also alleged that 2 of the candidates; Jacob Mwirigi Muthuri and Lazarus Mwirigi Nkonge shared name 'Mwirigi' and so there was confusion in counting of votes. This allegation was supported by the evidence of Robert Mwenda Muthuri (PW4) and David Kirimi (PW3). Both witnesses testified that they were agents for different parties at Kibirichia Market where they were registered voters. As already indicated herebefore PW3 was the agent for the petitioner. In his evidence he testified that his concerns were addressed by a recount after which he willingly signed Form 35 for Kibirichia Market. He made no reservations at the time of signing Form 35. I note from a careful examination of the said Form 35 for Kibirichia Market that four other agents equally signed the same and none of them appeared to have raised any issues. I accordingly find the allegations of there being a mix-up of names during counting farfetched and probably tailored to make the court order a recount and scrutiny where none is merited. I accordingly dismiss the same as not proved to the required standards.

Having carefully examined the evidence, the question that then requires answering is whether there were non-compliance to the principles of the constitution and written law that affected the outcome of the results of the election.

In my analysis of the evidence I find no evidence to prove that there was non-compliance with the principles of the constitution or written law that would significantly affect the outcome of the election.

As a whole, I found evidence of what would amount to honest and innocent mistakes on the part of the officials of the 3rd Respondent during the compilation of declaration forms. These include instances when alterations were made without being countersigned or stamped as would ordinarily have been expected. There was also the incident of the petitioners vote being increased by one after a recount at polling station No. 087. The result of the scrutiny for instance did not support the contention by the petitioner that his votes were changed from 361 to 36. There was evidence by the 2nd Respondent that the electoral staff worked for long hours and it would be unreasonable to expect that minor mistakes honestly made would not have occurred.

In the case of **Rishad Hamid Ahmed Amana -v- Independent Electoral and Boundaries Commission and others – Malindi High court E.P. No. 6 of 2013** Justice L. Kimaru held;

“A petitioner is not only required to establish that there was irregularities which was committed during elections, he must also establish that such irregularities (non-compliance with the law) were of such magnitude that it affected the outcome of the results. This is what is referred to as the materiality test.

Apart from that the petitioner is required to establish that the errors and irregularities were either occasioned by outright negligence or deliberate action on the part of the guilty party. Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. This court is mindful of the fact that at the stage where election officials are required to tally results, some of them would have stayed awake for more thirty six (36) hours and therefore simple arithmetic mistakes are bound to happen. This was the decision of Maraga J (as he then was) in Joho -v- Nyange 2008 3KLR E. 500. What Section 83 of the Elections Act simply provides is that any election, because it is conducted by human beings, there bound to be errors which can be explained. There is no election which can be perfectly conducted. However, it is only when such errors, which constitute non-compliance with the law, materially affect the outcome of the results that the court will have no option other than to nullify the said results” (underline mine)

And in the case of **Joho -v- Nyange (supra)** the court held;

“Error is to human. Some errors in an election are nothing more than what is always likely in the conduct of human activity. If the errors are not fundamental, they should be excused or

ignored. It is not every non compliance or every act 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 And the result of an election is affected when the cumulative effect of the irregularity reverses it. For instance when a large portion of the voters are by some blunder on the conduct of the election as happened in do not turn up to vote, the result is said to have been affected”.

From the foregoing, it is my finding that the petitioner has not been able to establish irregularities of such a nature that this court can come to the conclusion that they were so material as to affect the outcome of the results. While it is true that the vote margin between the petitioner and the 1st Respondent was not large (28 votes), that alone cannot be a ground to impeach the elections of Kibirichia Ward. The voters of Kibirichia Ward elected the 1st Respondent in an election that in my assessment was free, fair and transparent and whose outcome reflected the will of the electorate of Kibirichia Ward.

What reliefs or consequential order should the court make?

Having come to the conclusion that the election of the 1st Respondent as county representative was fair, transparent and credible, I cannot interfere with the right of the voters to elect their representative to the county assembly.

In the premises, I find the 1st Respondent having been validly elected as county representative for Kibirichia Ward.

The petition therefore lacks merit and it is hereby dismissed.

Who should bear costs of the petition?

Section 84 of the Elections Act provides;

“An election court shall award the costs of and incidental to a petition and such costs shall follow the cause”.

Rule 34 of the Elections (parliamentary and County Elections) petition Rules 2013 has provided guidelines and highlights on certain factors which the court in the discretion may take into account in regard to costs.

In this case I have determined that the petitioner has been unsuccessful on all the complaints he raised. I have also come to the conclusion that he made unsubstantiated allegations of bias or partiality against the presiding officers and returning officers. There is therefore no reason for me to depart from the general principle regarding costs. The petitioner shall accordingly pay costs to the respondents.

The costs awarded should not be exorbitant to unjustly enrich the parties. Both the 1st Respondents advocate and the advocate for the 2nd and 3rd Respondents have submitted that the court should award kshs.2,000,000/= each to their respective clients. They both cited the case of Rishad Hamid Ahmed Amana (supra). The petition herein was with respect to county representative elections which cover a less extensive area compared to parliamentary elections which was the subject of the petition in the Rishad Amana case.

In my view the total costs for each party awarded costs shall be capped at Ksh.400,000/= . The costs shall be taxed and certified by myself. In this regard, the sum that was deposited in court shall remain so deposited pending taxation of the respondents' costs.

As I conclude this matter I wish to indicate that none of the parties committed an election offence. A certificate shall issue forthwith pursuant to the provisions of Section 86(1) of the Elections Acts.

Lastly, I wish to thank the learned counsels for the petitioner, learned counsel for the 1st Respondent and learned counsel for the 2nd and 3rd Respondents for the diligence they exhibited in prosecution of their respective clients' cases in court. They showed courtesy to court and to each other during the entire hearing of the case. I also wish to thank my court clerk Mr. Kirimania and the entire court staff at Meru Law Courts whose efforts made it possible for me to hear and conclude this petition within the time prescribed.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF SEPTEMBER, 2013.

D.O. Onyango

AG. SENIOR PRINCIPAL MAGISTRATE

In the presence of:

Mr. Ondari for the petitioner

Mr. Kiambi h/b Mr. Mwanzia for 1st Respondent and for Meli for the 2nd and 3rd Respondents

The petitioner and 1st Respondent present

The 2nd Respondent - absent