



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE`S COURT AT MALINDI**

**ELECTION PETITION NO. 1 OF 2013**

**IN THE MATTER OF THE ELECTIONS ACT, 2011 LAWS OF KENYA**

**IN THE MATTER OF THE ELECTIONS FOR THE GANDA COUNTY ASSEMBLY  
REPRESENTATIVE FOR GANDA WARD WITHIN MALINDI CONSTITUENCY OF KILIFI  
COUNTY**

**BETWEEN**

**JOSEPH  
KIPONDA.....PET  
ITIONER**

**AND**

**THE INDEPENDENT ELECTORAL &**

**BOUNDARIES  
COMMISSION(IEBC).....1ST  
RESPONDENT**

**STEPHEN BAHATI  
MLANDA.....2ND  
RESPONDENT**

**JUDGEMENT**

The 4th day of March, 2013 is a day that will go down the annals of Kenya`s history. It was a turning point for many a politician and the citizens of Kenya. On 4/3/2013 the country of Kenya held its first ever general elections under the new constitution. The elections were different in many aspects such as the technology that was being used right from the registration of voters exercise to the tallying of votes and subsequent announcement and declaration of results. This time round the citizens of Kenya voted for 6 elective posts namely;-

- (a) President of the Republic of Kenya
- (b) County Governor
- (c)County Senator
- (d)Member of National Assembly

(e) County Women representative to the National Assembly

(f) County Assembly representative

The President and County Governor posts were contested for by candidates with their running mates. Being the first election process of its kind, challenges were expected and they were indeed experienced.

Article 38(3) (c) of the Constitution of Kenya provides as follows;-

***“Every adult citizen has the right, without unreasonable restrictions to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office”.***

The Petitioner Joseph Ngumbao Kiponda in exercise of his political rights under Article 38(3)(c) of the Constitution of Kenya vied for the post of County Assembly Representative for Ganda Ward within Malindi Constituency in Kilifi County. The Petitioner did so pursuant to a certificate of Nomination dated 18/1/2013 and issued to him by The National Alliance Party of Kenya(TNA) of which he was and probably still is a member. However the Petitioner was not alone in the race. He had the following competitors.

(a) Ali Said Masoud

(b) David Iha Mitsanze

(c) Emmanuel Bahati Ngala

(d) Erastus Juma Katana

(e) Iddi Hamisi Iddi

(f) Mbarak Borafya Omar

(g) Omar Hamisi Abdalla

(h) Peter Ngumbao Mwanyale

(i) Stephen Bahati Mlanda

(j) Thomas Kingi Kahindi

Following the voting exercise, the counting and subsequent tallying of votes the Independent Electoral and Boundaries Commission through the then Returning Officer for Malindi Constituency one Hamisi Halfani Tsumo, declared the following results as far as Ganda County Assembly Ward was concerned;

1.	Ali Said Masoud	145 Votes
2.	David Iha Mitsanze	925 Votes
3.	Emmanuel Bahati Ngala	755 Votes
4.	Erastus Juma Katana	139 Votes
5.	Iddi Hamisi Iddi	64 Votes
6.	Joseph Ngumbao Kiponda	1,255 Votes
7.	Mbarak Borafya Omar	329 Votes

8. Omar Hamisi Abdalla	248 Votes
9. Peter Ngumbao Mwanyale	747 Votes
10. Stephen Bahati Mlanda	1,548 Votes
11. Thomas Kingi Kahindi	709 Votes

The Returning Officer further proceeded to declare STEPHEN BAHATI MLANDA (2nd respondent herein) as the duly elected member for Ganda County Assembly ward. The Petitioner emerged 2nd in the race and as per the declared results, there was a margin of 293 votes between the 2nd respondent and the Petitioner. The Petitioner being aggrieved and or dissatisfied with the voting exercise and subsequent declaration of the results, filed this petition on 26/3/2013. The Petition is premised on the following grounds;-

- a. That the voting exercise was marred with irregularities, threats to voters and the petitioner's agents at polling centres, would be voters threatened with dire consequences by dissident groups, unprofessional conduct by the IEBC officials and the petitioner was denied official records of the results;
- b. That the 2nd respondent perpetuated irregularities which included bribing of voters by agents and supporters of the 2nd respondent, intimidation of the petitioner's supporters during the polling day and the 1st respondent's officials openly misled the petitioner's supporters on the candidate's to be voted in while taking full advantage of the level of illiteracy amongst the voters within Ganda County Assembly ward;
- c. That there was a breakdown of biometric voter registers in various polling stations leaving space for the old older of rigging;
- d. That fear of imminent attack by dissident groups or goons hired for that purpose was rife and cases were reported of physical harm in several areas within Ganda;
- e. That the petitioner presented a sworn affidavit to the 1st respondent to include the name "Joseppe" on the ballot paper as the name had gained currency with his supporters before and during the campaigns but the 1st respondent declined to do so hence highly compromising the petitioner's chances of winning;
- f. The 1st respondent breached the petitioner's right to a fair administrative action by breaching the principles of fairness and reasonableness in contravention of Article 88 of the Constitution, and such, the 1st respondents decision, findings and recommendations lacked any merit and was unreasonable and *ultra vires* thus null and void.

Consequently the petitioner prayed for the following orders;

1. **A declaration that STEPHEN BAHATI MLANDA was not validly elected as the County Assembly Representative for Ganda Ward in the elections held on the 4th March, 2013.**
2. **An order declaring that the Petitioner herein is the candidate who was validly elected as the County Assembly Representative for Ganda ward in the elections held on 4th March, 2013.**
3. **In the alternative, an order directing the IEBC to declare fresh elections for the position of County Assembly Representative for the Ganda County Assembly ward of Kilifi County.**
4. **Any further orders, directions and declarations that this Honourable Court may deem fit to grant in the interest of justice.**
5. **Costs of this petition.**

The Petition was supported by the petitioner's own affidavit and the affidavits of 22 others who included the petitioner's agents during the elections and voters.

The Petition is opposed by the Respondents. The 1st respondent filed a response to the petition which was supported by 17 affidavits sworn by the 1st respondent's Returning officer, Malindi Constituency and Presiding officers from the various polling stations within Ganda Ward. The 1st respondent denied the allegations contained in the Petition and contended that the elections were free and fair and devoid of the malpractices alleged in the Petition. The 1st respondent noted that the allegations in the petition were stated in an ambiguous manner with no specific allegations of fact or mention of the officers alleged to have committed the alleged offences. It was the 1st respondent's case that the Petitioner was not denied the official records of the results as the same were available to his agents and where the copies ran out, the agents were advised to obtain copies from the Tallying Centre, which they did not. In further response to the Petition, the 1st respondent contended that no polling station in Ganda ward and indeed in Malindi Constituency was either opened late or closed early on account of fear or imminent attacks or physical harm to the election officials or the electorate. The 1st Respondent admitted that there were challenges in the use of the Electronic Voter Identification Devices in some polling stations where after manual registers were used but the integrity of the electoral process was neither violated, vitiated, breached, compromised nor rendered ineffective. That the 1st respondent put in place adequate measures that ensured free, fair and transparent elections.

The 1st respondent averred that all voters who needed assistance were assisted in accordance with the law. It was the 1st respondent's case that nicknames or pet names were not required to be indicated on the ballot paper. What was indicated was a candidate's official name and any candidate who intended to use a particular name on the ballot paper had to undergo a formal name change by way of a deed poll as required by law. The 1st respondent further contended that the petitioner was not prejudiced by the absence of the name "Joseppe" on the ballot paper as no voter complained of not being able to identify the petitioner on the ballot paper. That no voter was turned away for asking for "Joseppe" as the agents also assisted in identifying "Joseppe" as Joseph Kiponda. The 1st respondent further contended that none of the petitioner's agents lodged a complaint with the presiding officers, the security officers who were present or the Returning Officer. Consequently, the 1st Respondent urged the court to dismiss the Petition with costs.

The 2nd respondent also filed his response in opposition to the Petition and the response was supported by his own affidavits and those of three others who were his agents during the election. The 2nd respondent opposed the Petition on the following grounds;

1. That the petitioner had failed to disclose in his petition the results of the election and the manner in which the results were declared.
2. That the petitioner had failed to provide proof that the voting process was marred with irregularities, threats to voters and the petitioner's agents at polling centres, and threats by dissident groups.
3. That the Petitioner had failed to provide proof that the breakdown of the Biometric Voter Register which was all over the County affected him personally in isolation with all the other candidates.
4. That the petitioner had failed to prove that the 2nd respondent failed to adhere to the Electoral code of conduct and that he instigated violence during the elections.
5. That the Petitioner ought to have raised the issue of the name "Joseppe" in accordance with section 74 of the Elections Act and in any event, he did not use the said name in the party nominations as was evidenced by his nomination certificate.
6. That there was nothing contained in the affidavits sworn by the Petitioner and his witnesses to prove that the elections were neither free nor fair or that there were malpractices on illegalities or intimidation of voters during the voting process.

7. That the affidavits of the petitioner's witnesses were full of hearsay and as such, they had no evidentiary value.

The 2nd respondent thus prayed that it be determined that he was duly elected during the elections that were held on 4/3/13 and that the elections were valid, free and fair and ought not be nullified. The 2nd respondent further prayed for the petition to be dismissed with costs.

Before I proceed further, I wish to acknowledge with gratitude, the efforts by Counsel for the parties herein. I am grateful and humbled by the professional manner and the zeal with which counsel conducted themselves and the proceedings. I am particularly impressed by the way counsel and their clients were able to observe the strict timelines despite their busy schedules. The arguments and authorities supplied to this court are evidence of the Advocates in depth research and devotion to these proceedings and they have definitely enriched the court's mind and this judgment. I also wish to extend my gratitude to the court staff and in particular the Executive officer, the clerical officers and the typists who in one way or the other appreciated the urgency of this matter and ensured that the proceedings were concluded within the fixed timelines. Last but not least, I wish to sincerely thank the parties, their witnesses and the people of Ganda Ward at large for their patience during the pendency of these proceedings. I am indebted in you all. Having said that, I wish to revert to the matter at hand.

On 10/5/2013 following the pre-trial conference, the parties agreed to the following issues for determination;

- a. ***Whether Stephen Bahati Mlanda was validly elected as the Ganda Ward County Assembly representative in the general elections held on 4/3/2013;***
- b. ***Whether the Petitioner's constitutional rights were violated by failure to include the name "Joseppe" on the ballot paper;***
- c. ***Whether the elections held on 4/3/2013 relating to the position of County Assembly representative for Ganda ward were free, fair and credible;***
- d. ***Whether the petitioner has discharged the burden of proof placed on him;***
- e. ***What consequential orders, reliefs and or declarations should the court grant based on the issues herein.***

The Petitioner called a total of 12 witnesses who included the petitioner himself. The 1st respondent called a total of 9 witnesses although it had indicated that it would call 10 witnesses. The 2nd respondent called a total of 4 witnesses who included the 2nd respondent.

In the course of the proceedings and on application by the Petitioner, the court ordered for scrutiny and recount of votes in 4 polling stations namely;-

(a) Kijiwetanga Primary School Polling Station(031)

(i)Stream 1

(ii)Stream 2

(iii)Stream 3

(b) Pendukiani Nursery School Polling Station(034)

(i)Stream 1

(c) Takaye Primary School Polling Station(036)

(i)Stream 1

(d) Maziwani Primary School Polling Station (039)

(i)Stream 1

There was a total of 19 polling stations within Ganda Ward. The scrutiny and recount was to be limited to the ascertainment of votes cast for each candidate as compared to the results declared in the respective forms 35. The exercise was presided over by the Executive officer Malindi Law Courts where after the results were forwarded to the Court.

I have carefully considered the evidence on record and appraised myself of the applicable law. I have also given due regard to the parties submissions and authorities relied upon. Article 81 of the Constitution of Kenya enumerates the general principles for the electoral system. The said provision provides as follows;-

***“The electoral system shall comply with the following principles-***

- a. ***Freedom of citizens to exercise their political rights under Article 38;***
- b. ***Not more than two-thirds of the members of elective public bodies shall be of the same gender;***
- c. ***Fair representation of persons with disabilities;***
- d. ***Universal suffrage based on the aspiration for fair representation and equality of vote:***
- e. ***free and fair elections which are;-***
  - i. ***by secret ballot;***
  - ii. ***free from violence, intimidation, improper influence or corruption;***
  - iii. ***Conducted by an independent body;***
  - iv. ***transparent; and***
  - v. ***administered in an impartial, neutral, efficient, accurate and accountable manner.”***

In view of the above general principles and the evidence on record, I wish to address the issues for determination in a different order.

- a. **Whether the Petitioner`s constitutional rights were violated by failure to include the name “Joseppe” on the ballot paper.**

At paragraph 21 of his supporting affidavit, the petitioner stated that he presented a sworn affidavit to the 1st respondent requesting that his name be captured on the ballot paper as Joseph Ngumbao Kiponda (Joseppe) but the request was ignored by the 1st respondent. According to the petitioner, the name “Joseppe” had gained currency with his supporters before and during the campaigns. The petitioner did not state with precision which particular right under the constitution had been infringed. He did not even canvass the issue in his submissions. Where a person alleges infringement of a constitutional right, it is the duty of the claimant to state which right has been infringed, under which particular provision of the constitution and the manner in which the said right has been infringed. In any event, I doubt whether this court would have jurisdiction to determine whether or not a constitutional right has been infringed in view of the provisions of Article 165(3) (b) of the Constitution of Kenya which confers such jurisdiction on the High Court.

Be that as it may, the petitioner admitted, and there is evidence to show that the name “Joseppe” is not on the petitioner`s National Identity card and neither was it on the certificate of nomination issued to the petitioner by his political party. In cross-examination, the petitioner admitted that he had the opportunity to confirm his details to be included on the ballot paper before the elections. Article 193(1) provides that unless disqualified, a person is eligible for election as a member of a county assembly if the person is a registered voter. Section 5 (3) of the Elections Act provides as follows;-

***“Any citizen of Kenya who has obtained the age of eighteen years as evidenced by either a national identity card or a Kenyan passport and whose name is not in the register of voters shall be registered as a voter upon application, in the prescribed manner, to the commission.”***

The above provision implies that the name to be indicated in the register of voters should tally with the name of the voter as appears in the National Identity card or Kenyan passport. Furthermore, Regulation 38(a) of the Elections(General) Regulations, 2012 stipulates that a nomination paper submitted by a political party candidate to the commission shall contain the candidate`s name as it appears in the register of voters. From the evidence on record, it is clear that the name “Joseppe” was not in the petitioner`s National identity card, not in the register of voters, not in the party nomination certificate and as such, the 1st respondent had no business including the name on the ballot paper. The ballot paper can only contain the name of a candidate as appears in the register of voters. It is therefore my finding that the petitioner`s complaint lacks legal basis. I agree with the respondents that if the petitioner wanted the name “Joseppe” to be on the ballot papers, he was required to change his name by way of a deed poll and apply to the 1st respondent to change his name in the register of voters before seeking nomination. The making of a statutory declaration was of no legal consequence.

In any event, it was the duty of the petitioner to notify and educate his supporters with respect to his official name and if he failed to do so, his default cannot be visited on the respondents. The ballot papers contained photographs of the candidates and given the circumstances, a voter would not fail to identify the petitioner. No voter came to testify on behalf of the petitioner to the effect that such voter failed to identify the petitioner on the ballot paper or that he or she was sent away for reason that there was no such name as “Joseppe” on the ballot paper. In the recent case of **Rishad Hamid Ahmed Amana-v-IEBC and 2 others(2013)eKLR**, the court was faced with a similar situation. The court held that the only name that can appear on the ballot paper is the name of the candidate as it appears in the register of voters. Consequently, I find that no prejudice was occasioned to the Petitioner by failure to include his nickname on the ballot paper.

**b) Whether the elections held on 4/3/2013 relating to the position of County Assembly representative for Ganda ward were free, fair and credible**

The petitioner alleged that the voting process was marred with numerous irregularities and malpractices. The petitioner particularly mentioned the following in his petition;

1. Threats to voters and petitioner's agents at polling centres;
2. Would be voters threatened with dire consequences by dissident groups.
3. Unprofessional conduct by IEBC officials.
4. Petitioner was denied official records of the results.
5. Bribing of voters by agents and supporters of the 2nd respondent.
6. Breakdown of bio-metric voter registers.
7. Cases of physical harm.

In cross-examination, the petitioner stated that he did not see any voter being threatened. That he only got the information from his agents. The petitioner`s witness number 3 Amina Omar Abeid stated in her affidavit in support of the Petition that she was the petitioner`s agent at Mkao moto polling station. At paragraph 4 of her affidavit, she stated as thus;-

***“THAT the voting process was going well until 8.00am when the presiding officer intercepted me and said I should not witness and I was even threatened with forceful eviction if I interfered any further”***

This was not really clear but when she was cross-examined, the witness stated that an old woman had gone to vote and mentioned that she wanted to vote for Joseppe. The witness then notified the Presiding officer that the woman wanted to vote for the petitioner but the presiding officer stated that the witness was interfering with the process and asked her to stop. In further cross-examination, the witness stated that she was threatened with eviction.

In his affidavit, the Presiding officer for Mkao moto Primary School polling station one Karisa Jimmy Jackson stated that the petitioner's witness tried to interfere with the election process and he issued a warning to her. The Presiding officer stated that it was his responsibility to maintain order at the polling station. In cross-examination the presiding officer stated that the petitioner's agent was picking calls while in the voting room. He then warned her but did not threaten her. From both the evidence of the petitioner's agent and the presiding officer, I do not see any evidence of a threat against the petitioner's agent. In any event, whatever it was could not affect the election process to the detriment of the petitioner as the voting process went on.

The petitioner's witness number 7, Milton Safari Kahindi stated in his affidavit that voters were intimidated and forced to vote as they were told they must vote. The witness further stated that he was the petitioner's agent at Msabaha football grounds polling station stream 2 and that when he raised concerns with the way the presiding officer was directing voters on how to vote, the presiding officer harassed and intimidated him then called the police who threw him out of the voting room for 45 minutes. In response to the allegations, the presiding officer for the said polling station Waweru Nicholas Barnaba stated in his affidavit that he did not receive any report(s) of voters having been intimidated and denied the allegations. The presiding officer further stated that he had a duty to maintain order at the polling station and could throw out anybody who caused havoc. However, he did not deny nor admit that he threw out the petitioner's agent for 45 minutes.

In cross-examination, the petitioner's agent stated that he did not report the incidents to the police but he reported to the TNA Chief Agent. The Chief Agent did not swear an affidavit to confirm that he had received any complaints. The petitioner did not call any voter to swear an affidavit and attend court to confirm that indeed voters were threatened or intimidated at the polling centres.

The petitioner called One Kafedha Kahindi Thoya who claimed to have been threatened by supporters of the 2nd respondent. In her affidavit, she stated that supporters of the 2nd respondent passed by her house and issued threats to her to the effect that the voting pattern should be "six piece" in favour of ODM candidates. The witness stated that she intended to vote for the petitioner but when she was threatened, she opted to stay indoors for fear of her security and as such, she did not vote. In cross-examination, the witness stated that she did not know who had threatened her because she was inside the house. She further stated that she did not even see the faces of the people who had threatened her. It was also revealed that the witness did not report anywhere that she had been threatened. Her explanation was that she did not report because she was afraid. The witness confirmed that she did not receive any information on threats or physical harm either before or after the voting exercise. The petitioner did not call any witness to confirm that they were indeed assaulted by the 2nd respondent's supporters during the election.

Some of the petitioner's witnesses alleged that voters were being bribed to vote for the 2nd respondent. There was no evidence to indicate that the 2nd respondent was seen bribing prospective voters. The allegations were made against people who were said to be the 2nd respondent's supporters. However, none of the witnesses stated that they saw the alleged supporters with the 2nd respondent either during the campaigns or during the election. It was alleged on behalf of the petitioner that prospective voters were being bought food and given money by a person believed to be the 2nd respondent's supporter and that the 1st respondent's officials were given refreshments at the polling centres by ODM supporters.

In the case of Simon Nyaundi Ogari & Another-v-Hon. Joel Omagwa Onyantha & 2 Others(2008)KLR the court held as follows:

***“Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it is not easy to prove bribery, more especially where it is done in secrecy. In***

***such cases, perhaps bribery may be inferred from some peculiar aspects of the case but when it is alleged that bribery took place publicly and in the presence of many people, the court cannot be satisfied by anything less than the best evidence which is always direct evidence given first hand."***

In the case of **Mohamed Ali Mursal-v-Saudia Mohamed and others-Garissa Election Petition No. 1 of 2013(unreported)** Mutuku J described bribery in the context of an election petition as follows;-

***“Bribery is an electoral offence. It is also a criminal offence in ordinary life. Being such, proof of the same must be by credible evidence and in my view, nothing short of proving this offence beyond reasonable doubt will suffice. There is no distinction as far as I am concerned, and rightly so, between bribery in a criminal case and one in an election petition. Bribery involves offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of the person receiving. Under the Act, bribery is an election offence under section 64 and both the giver and the taker of a bribe in order to influence voting are guilty of this offence upon proof.....”***

PW 12 William Randu Nzai in his affidavit in support of the Petition stated that he went to cast his vote at Kwa Upanga Primary School Polling Station and saw one Furaha Kazungu, a known ODM supporter dishing out money and food to voters while urging them to vote for the ODM candidates only. PW 12 stated that the said Furaha Kazungu was doing so at the polling station. When PW 12 was cross-examined, he stated that he was taking breakfast at a hotel which was about 200 metres away from the polling station when he saw Furaha buying food for prospective voters and giving them Kshs.200/- each thereafter. PW 12's testimony contradicted what he stated in his affidavit. In his affidavit, the witness stated that the buying of food and dishing out of money was done at the polling station but in his testimony in court, he stated that it was done at a hotel which was about 200 metres away from the polling station. If the evidence of PW 12 is anything to go by, then it implies that the alleged bribery was done openly, and as such, there was need to avail cogent evidence in court. PW 12 in cross-examination stated that he reported the incident to the police officers who were at the polling station. However, there was no evidence to show that indeed PW 12 reported the matter to the police. There is also no evidence to show that anybody was ever arrested and or charged with the offence of bribery arising out of the offence in issue.

PW 8 John Nyule Chuye also stated that he went to cast his vote at Kwa Upanga Primary School when he saw one Furaha giving out money and food to voters while urging them to vote in favour of only ODM candidates. At paragraph 6 of his affidavit, PW 8 stated that he reported the incident to the police officers who arrested one of the supporters who were dishing out money but the person was later released under unexplained circumstances. When PW 8 was cross-examined, he stated that he voted quite early but remained at the polling station. He further stated that when he reported the matter to the police, Furaha was arrested. PW 8 later changed his testimony and stated that Furaha ran away but there was another person who was arrested. In further cross-examination, PW 8 stated that he was transporting voters to the polling station and that he had been paid to do so. At some point during his cross-examination, PW 8 stated that he went to the polling station as the petitioner's agent and remained at the polling station until after the votes had been counted. It was not clear what PW 8 had gone to do at the polling station. The witness kept shifting goal posts. There is no way PW 8 could have been at the polling station as an agent and at the same time ferrying voters from elsewhere to the polling station. PW 8's evidence is incredible and cannot be relied upon.

There were also allegations that the 1st respondent's officials and supporters of the 2nd respondent openly campaigned for ODM candidate's at the polling station. It was further alleged that the 1st respondent's officials misled illiterate voters into voting for ODM candidates "6 piece", meaning that the officials misled the illiterate voters into voting for ODM candidates for the 6 posts. One Sada Ali swore an affidavit stating that she was illiterate and voted at Msabaha football grounds. The deponent stated that when she went to vote, she was directed by an IEBC official to vote "6 piece" for ODM candidates although her intention was to vote for the petitioner. The deponent stated in her affidavit that she however insisted on voting for the petitioner after identifying him on the ballot paper where after she directed the IEBC official to mark against the petitioner's name. Sada Ali was not called to testify and as such, her evidence was not tested on cross-examination. It would therefore be difficult for the court to

rely on her affidavit. In any event, there is no evidence to show that such malpractices were reported to any relevant authorities.

Voting was by secret ballot and where an illiterate voter was assisted by the presiding officer of a particular polling station, the evidence on record indicates that such voter would be so assisted in the presence of a few agents as the polling booths could not accommodate all the agents. The 1st respondent's witnesses explained that the agents would agree amongst themselves on who was to witness voter assistance at a given time. The petitioner's agents claimed that they were not allowed to witness voter assistance. The court wonders how they knew that the illiterate voters were being misled to vote "6 piece" for ODM, yet voting was by secret ballot.

The petitioner's agents stated that they reported the electoral malpractices to their chief Agent one Ezra Bidii Kombe. Incidentally, the said Chief Agent did not swear an affidavit to confirm that indeed he received such reports from the agents. There is also no evidence to show that upon receipt of the reports from the polling agents the chief Agent took any steps to remedy the situation. The allegations imply that the respondent breached the Electoral Code of Conduct but there is no evidence to show that the matter was reported to the Electoral Code of Conduct Enforcement Committee, or any other relevant institution.

In the case of **Wilson Mbithi Munguti Kabuti & 5 others-v-Patrick Makau Kingola and Another(2013)eKLR**, the court dealt with similar allegations of bribery and campaigning out of time. The court observed as follows:-

***"The second schedule of the Elections Act specifically provides that any misconduct can and should be reported by any person to the Electoral Code of Conduct Enforcement Committee, which committee will liaise with government security agencies in the constituency and report suspected malpractices. Failure therefore to report the campaigning out of time, alleged bribery and vote buying cannot be remedied by this court unless there is concrete proof."***

With respect, I agree. Issues to do with election malpractices or offences which are indeed election offences attracting criminal sanctions ought to have been reported to the relevant agencies first. This court cannot deal with such allegations in the absence of cogent evidence, which evidence would have been obtained, had the incidents been reported to and investigated by the relevant institutions.

The petitioner alleges that his agents were unlawfully denied entry into the polling stations and some were unlawfully evicted or threatened with eviction. According to page 13 of the Election Agents Manual, in order to enter a polling station, an agent was required to have the following documents:-

- (a) A serially numbered accreditation badge;
- (b) A copy of the letter of appointment from their party or candidate
- (c) A copy of the accreditation letter from the IEBC; and
- (d) A duly signed oath of secrecy.

None of the petitioner's witnesses who claimed to have been unlawfully denied entry into the polling station annexed any documents to their affidavits to show that indeed, they had been accredited to enter the polling stations as election agents, but were nevertheless denied entry. The 1st respondent's witnesses and in particular the Returning officer explained that some agents did not have all the necessary documents but after broad consultations, they were allowed to enter the polling stations and participate in the election exercise. Regulation 62(3) of the Elections(General) Regulations 2012 provides that:-

***"The absence of agents shall not invalidate the proceedings at a polling station."***

Regulation 63(1) provides that it shall be the duty of the presiding officer to keep order at his or her polling station. That being the case, the presiding officer would have the power to evict any unruly

person out of the polling station if it is clear that the person is interfering with the election process.

It is the duty of the petitioner to prove that the elections were not conducted according to law; and not the duty of the respondents to show that indeed the elections were conducted according to law.

As already indicated herein, on 6/8/13 the court ordered a partial scrutiny and recount of votes in 4 polling stations. The scrutiny and recount of the votes was to be limited to the ascertainment of the votes cast for each candidate as compared with the results as declared in the respective forms 35. The following discrepancies were noted.

**(i) Maziwani Primary School Polling Station(039) Stream 1**

Name of candidate	Votes on form 35	Results of scrutiny and recount
1. Joseph N. Kiponda	56	55

**(ii) Takaye Primary School Polling Station(036) Stream 1**

Name of candidate	Votes on form 35	Results of scrutiny and recount
1. David Iha Mitsanze	262	260
2. Emmanuel Bahati Ngala	68	67
3. Peter Ngumbao Mwanyale	64	63
4. Thomas Kingi Kahindi	12	13

**(iii) Pendukani Nursery School Polling Station(034) Stream 1**

Name of candidate	Votes on form 35	Results of scrutiny and recount
1. Thomas Kingi Kahindi	23	24

**(iv) Kijiwetanga Primary School Polling Station(031)**

**Stream 1**

Name of candidate	Votes on form 35	Results of scrutiny and recount
1. Ali Said Masoud	29	28

**Stream 2**

1. Emmanuel Bahati Ngala	105	106
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**Stream 3**

1. Emmanuel Bahati Ngala	79	76
2. Peter Ngumbao Mwanyale	69	68
3. Stephen Bahati Mlanda	68	29
4. Thomas Kingi Kahindi	2	0

From the partial scrutiny and recount of the votes, the aggregate results of the following candidates would change as follows:-

Name of candidate	Votes on form 36	Results of scrutiny and recount
1.Ali Said Masoud	145	144
2.David Iha Mitsanze	925	923
3.Emmanuel Bahati Ngala	755	752
4.Joseph Ngumbao Kiponda	1,255	1,254
5.Peter Ngumbao Mwanyale	747	745
6.Stephen Bahati Mlanda	1,548	1,509

From the partial scrutiny and recount of votes in the 4 polling stations it is clear that there were irregularities in the vote counting process. It is also clear that some forms 35 had alterations some of which were not countersigned and dated. The question to be answered is whether, in view of the foregoing, the elections in issue can be said to have been free, fair and credible so as to be upheld. The petitioner also raised concerns about the failure of the Electronic Voter identification devices which he wrongly referred to as “Biometric voter registers” in his petition. It was not in dispute that the electronic devices failed in almost all the polling stations in the electoral area in issue. In fact it is in the public domain that the electronic devices failed all over the country. The petitioner alleged that the failure of the electronic devices paved way for manipulation of votes in favour of the 2nd respondent. It is clear from the evidence on record that despite the failure of the Electronic voter identification devices, the voting exercise still went on. The Petitioner by himself or through his witnesses did not adduce any evidence to show that there was rigging or he was the only one who was adversely affected by the failure of the electronic devices. There is no evidence to show how and where in particular votes were manipulated to the detriment of the petitioner and in favour of the 2nd respondent or any other candidate for that matter.

The petitioner did not allege, and there is no evidence to show that as a result of the breakdown of the electronic voter identification devices, voting did not take place or that voters were denied the opportunity to vote. It is not enough, in my considered view, for the petitioner to allege that there was a breakdown of the electronic devices; the petitioner must establish, to the satisfaction of the court, that such breakdown denied the citizens the opportunity to vote for candidates of their choice.

In the case of **Raila Odinga-v-IEBC and 3 Others, SC Election Petition No. 5 of 2013**, the Supreme Court held that electronic technology has not yet achieved a level of reliability as far as Kenya`s electoral history is concerned. The court further observed that such technology is yet to be considered a permanent or irreversible foundation for the conduct of the electoral process. The court declined to nullify the presidential election on grounds of failed technological devices.

Section 83 of the Elections Act provides as follows:-

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

In the celebrated case of **Morgan & Others-v-Simpson and Another(1974) 3 All ER 772**, Lord Denning laid down the following principles:-

1. If the election was conducted so badly that it was not substantially in accordance with the law as to election, then the election is vitiated, irrespective of whether the result is affected or not;

2. If the election was conducted substantially in accordance with the law it cannot be vitiated by a breach of the rules or a mistake at the polls, provided that the breach or mistake did not affect the result of the election;
3. If the election was conducted substantially in accordance with the law but there is a breach of the rules or a mistake at the polls which affect the result, then the election is vitiated.

From the foregoing, it is my opinion that the primary consideration in an election dispute is;-

- i. Whether the election was conducted in accordance with the law and to what extent;
- ii. Whether the will of the electorate was affected by irregularities in the conduct of the election.

In the case of **Dickson Daniel Karoba-v-John Ngola Kariuki(2010)eKLR**, the court held that in determining whether non-compliance with or contravention of electoral laws affected the results of an election in a substantial manner, the court has to apply either quantitative or qualitative tests or both depending on the circumstances and facts of each case. The quantitative test is relevant where the numbers are in issue. The qualitative test is used where the quality or standard of an election on the whole is in issue.

In the present case, the numbers appear not to be in issue and as such, the qualitative test would apply. In **Joho-v-Nyange(No.4)(2008) 3 KLR(EP) 500**, the court observed that some errors in elections are nothing more than what is likely in the conduct of human activity. If the errors are not fundamental, they should be excused or ignored. The constitutional requirement is that elections must be conducted in a free and fair manner. In my considered view, this does not necessarily mean that the electoral process must be perfect. Mistakes are bound to occur and what the court has to consider is the extent to which the law was or was not complied with and whether the mistakes tilted the will of the electorate. Where the election was conducted substantially in accordance with the law, the court must strive to give effect to the will of the electorate.

Having analysed the evidence on record together with the results of the partial scrutiny and recount, I find that the election in respect of County Assembly representative for Ganda Ward was conducted substantially in accordance with the law. There were mistakes and errors in the process but it is my considered view that the errors or mistakes did not affect the final result of the election. From the partial scrutiny and recount of votes, the petitioner would have garnered 1,254 votes in aggregate whereas the 2nd respondent would have garnered 1,509 votes. The position would remain the same although the difference in votes between the two would be 255 votes from the initial 293 votes according to the results declared by the 1st respondent. The 2nd respondent still emerges the winner. The people of Ganda spoke clearly despite the errors. Consequently, I find that the elections that were held on 4/3/2013 in respect of County Assembly representative for Ganda ward within Malindi constituency were free, fair and credible.

**(c) Whether the Petitioner has discharged the burden of proof placed on him.**

In an election petition, the presumption is that the elections were properly conducted unless the contrary is proven. The burden of proof therefore, lies with the petitioner as he is the person who seeks to nullify an election. In **Raila Odinga`s** case (Supra), the Supreme Court held that in an election petition, the standard of proof is more than a mere balance of probabilities but less than beyond reasonable doubt. The court further observed that where there are allegations of commission of election offences, the allegations must be proved to the standard required in criminal cases which is beyond reasonable doubt. In Joho`s case(Supra), the court held that election petitions should be proved by cogent, credible and consistent evidence. From my analysis of the evidence on record, it is clear that the petitioner has failed to discharge the legal burden placed on him. He has failed to prove his case to the required standards.

**(d) Whether the 2nd respondent was validly elected as the Ganda ward County Assembly representative in the general elections held on 4/3/2013.**

The petitioner having failed to prove his case to the required standards for reasons already given, I hereby declare that the 2nd respondent, Stephen Bahati Mlanda was validly elected as the Ganda Ward County Assembly Representative in the general elections that were held on 4/3/2013.

**(e)Consequential orders and reliefs.**

Having made the foregoing findings, I make the following orders;-

- i. The Petition is hereby dismissed;
- ii. The Petitioner shall bear the costs of the petition, which costs are hereby capped at Kshs.800,000/- in total, pursuant to Rule 34 of the Elections(Parliamentary and County Elections) Petition Rules, 2013;
- iii. A certificate in accordance with section 86(1) of the Elections Act shall issue;
- iv. The sum of Kshs.100,000/- deposited by the petitioner as security shall be held by the court pending determination of the costs payable either by agreement or taxation.

Dated at Malindi this 13th day of September 2013

**Y.A.SHIKANDA**

**Ag SRM**

***Delivered in open court in the presence of-***

No appearance for the Petitioner

Ms Ndegwa for 1st respondent

Mr Oduor for 2nd respondent

Maro-c/c

**Y.A.SHIKANDA Ag. SRM**

**13/9/13**