



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT KISII

ELECTION PETITION NO. 3 OF 2013

IN THE MATTER OF: ARTICLES 22, 38, 81 & 86 OF THE
CONSTITUTION, 2010.

AND

IN THE MATTER OF: ELECTIONS ACT NO. 24 OF 2011 AND
ELECTIONS (PARLIAMENTARY & COUNTY ELECTION) PETITION
RULES, 2013.

AND

IN THE MATTER OF: THE COUNTY ASSEMBLY
REPRESENTATIVE FOR KIAMOKAMA COUNTY ASSEMBLY
WARD

AND

IN THE MATTER OF: PETITION OF KENNEDY MOSE
NYANGWAYA

BETWEEN

KENNEDY MOSE NYANGWAYA
PETITIONER

VERSUS

THE INDEPENDENT
ELECTORAL

AND BOUNDARIES COMMISSION 1ST
RESPONDENT

MOSES OPIYO AHETE 2ND
RESPONDENT

KENNEDY MICHIRA MAINYA 3RD
RESPONDENT

JUDGMENT

A: PLEADINGS

The petitioner, KENNEDY MOSE NYANGWAYA, instituted the present election petition vide a petition dated 10th April, filed on the even date, against the respondents herein, THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION, MOSES OPIYO AHETE and KENNEDY MICHIRA MAINYA seeking for the following reliefs;

- a. That the Honourable court do order and/or direct scrutiny, recount and re-tallying of the votes so as to establish the validity of the votes cast.
- b. A declaration that the 3rd respondent was not validly elected as the County Assembly Ward Representative for Kiamokama County Assembly Ward.
- c. In the alternative and without prejudice to prayers (a) and (b) above, a declaration to be made that the elections were not conducted as required by law.
- d. An order directing the 1st and 2nd respondents to call for fresh elections in Kiamokama County Assembly Ward.
- e. The costs of the petition be awarded to the petitioner, and;
- f. Such other or further orders as the Honourable court may deem fit, just and expedient to grant in the circumstances of the petition.

The petitioner set out the grounds upon which the petition is grounded and/or founded under paragraphs 8 – 21 thereof; which are:

- i. The 1st and 2nd respondents conducted the election in a way which was completely inconsistent with the provisions of Articles 8, 86 and 88 of the Constitution, 2010 and the principles laid down in the Elections Act No. 24 of 2011 and the rules of Elections (General) Regulations, 2012.
- ii. The 1st and 2nd respondents neglected, refused and/or failed to take any steps and/or measures to ensure that the Election was free, fair and transparent.
- iii. The election was manifestly void
- iv. The 2nd respondent declared the 3rd respondent as the winner of the election knowing that the 3rd respondent did not receive the greatest number of valid votes cast.
- v. The 1st respondent endorsed the illegal declaration of the 3rd respondent as the winner by publishing him as the Kiamokama County Assembly Ward Representative in the Kenya Gazette Notice number 3160, dated 13th March 2013.
- vi. The 2nd respondent declared the 3rd respondent winner of the election without verifying and properly completing form 36 in the presence of the petitioner as the agent contrary to Regulation 79 and 83 of the Elections (General) Regulations, 2012.
- vii. The 2nd respondent wrongfully and unlawfully declined the petitioner's request for a recount of the votes cast.
- viii. The 1st and 2nd respondent accepted and tallied returns from the polling stations in which the votes allegedly cast exceeded the number of the registered voters in those polling stations.
- ix. The 1st and 2nd respondents wrongfully and unlawfully barred the petitioner from entering the polling stations as an agent.
- x. The 2nd respondent returned to the 1st respondent a tally which totally differed with actual votes cast, counted, verified and announced by the Presiding Officers at polling stations where the 3rd respondent's votes were inflated while the petitioner's were diminished.
- xi. The 2nd respondent and/or Presiding Officers at polling stations unlawfully refused to allow the petitioner to sign form 35s in many polling stations and hence the tallied and declared results were from totally unlawful and unauthenticated forms.
- xii. The results declared by the 2nd respondent indicate great inconsistencies between form 35 and 36 in respect of many polling stations in the electoral ward including:

Mogweko Primary School, Nyamasesa D.E.B Primary School, Emeroka Primary School, Mochengo SDA Primary School, Amaiga Tea Buying Centre, Gesicho Primary School, Inkaranyo Tea Buying Centre, Mobembe Primary School, Ibacho Tea Buying Centre, Ibacho Primary School and Mokobokobo Primary

School.

xiii. The elections were marred with breaches, irregularities, illegalities and violation.

xiv. The election in Kiamokama County Assembly Ward was null and Void.

The petitioner, as required by law, in support of the petition filed sworn affidavit in evidence dated 10th April, 2013, filed on the even date alongside the petition and attached a bundle of copies of documents, mainly the statutory forms 35s and 36 in respect of all the polling stations falling under Kiamokama County Assembly Ward and Kenya Gazette Notice in which the 3rd respondent was duly gazetted as the elected Member of the County Assembly for Kiamokama County Assembly Ward.

The petition was further supported by sworn affidavits in evidence sworn and filed on the even date by; METHUSELA MOBISA ONDIMU, KEVAH NYAKUNDI GADINAR, GEOFFREY MAGATI ONWONGA and NATHAN RATEMO ONDARA.

The 1st and 2nd respondents filed their response to the election petition in their answer and/or response dated 2nd May 2013, filed on the 3rd May 2013, wherein they generally and vehemently denied all the averments and assertions contained in the petitioner's filed petition and the sworn affidavits in evidence in support thereof. It was/is their case, given the averments contained in the filed response to the election petition, paragraphs 1 – 32 thereof, that the held elections for County Representative Kiamokama County Assembly Ward, on the 4th March 2013, were free, fair and transparent and held in accordance with the spirit and intention of Article 81 of the Constitution of Kenya, 2010, the Election Act, 2011 and the Election (General) Regulation 2012 (Legal Notice No. 128 of 2013) and maintained that the 3rd respondent KENNEDY MICHIRA MAINYA, was duly elected as the County Representative for Kiamokama County Assembly Ward. They denied any election breaches and/or irregularities allegedly committed by themselves in any of the polling stations falling under Kiamokama County Assembly Ward as alleged and particularized by the petitioner in the filed petition and in the filed sworn affidavits in evidence in support of the filed election petition and proceeded to set out the particulars of such denials in every polling station under paragraphs 1 – 32 of their filed response.

The 1st and 2nd respondents in support of the filed response filed a sworn affidavit in evidence, sworn and filed on the 2nd May 2013 by the 2nd respondent, who was/is the Returning Officer, under whose jurisdiction Kiamokama County Assembly Ward fell and further attached bundle of copies of documents to wit, the statutory forms 35s and 36 relating to all polling stations in issue, and copies of the principal registers of voters. The filed response by the 1st and 2nd respondents was further supported by the sworn affidavits in evidence, filed by the following; LAMECK MOGUSU MOGENI, GEOFFREY ONWONGA MAGATI, and affidavit to withdraw evidence by one METHUSELA MOBISA ONDIMU.

The 3rd respondent filed his answer to the filed petition, in his answer dated 29th April, filed on the even date and averred under paragraph 32 of his filed answer that he was the successful candidate as Member of The County Assembly for Kiamokama County Assembly Ward, which election he won with a huge and overwhelming margin. He, in answer to paragraphs 8, 9, 10, 11 and 12 of the petition averred and replied as follows;

- a. That the 1st and 2nd respondents conducted the elections in total and full compliance with all the provisions of the Constitution and the Elections Act and the rules enacted there-under, including Articles 8, 86 and 88 of the people's Constitution of the Republic of Kenya.
- b. That in view of paragraph (a) above, the election was extremely free, very fair and beyond reproach and hence transparent.
- c. The 3rd respondent avers that the 2nd respondent's declaration of the 3rd respondent as a winner and the endorsement of that victory by the 1st respondent was inevitable and consequential in view of the matters pleaded at paragraphs 3 and 4(a) – (b) above.
- d. The 3rd respondent avers that he won fairly, squarely and in broad daylight in a first-past, the post system of election by a no mean margin of 469 votes as against his closest rival by garnering a

total of 1774 votes. The declaration of the 3rd respondent by the 2nd respondent and the endorsement by the 1st respondent that the 3rd respondent was a winner was therefore legal, regular and an endorsement of the popular will of the good people of Kiamokama County Assembly Ward.

- e. That in further response to paragraph 11 of the petition, the 3rd respondent avers that in a first-post the post system of elections, like the one that was conducted and in which he participated and emerged the winner, neither the Constitution nor the Elections Act and/or the rules enacted hereunder require that a winner gets the “greatest number of valid votes cast, but rather require that a winner gets the number of votes comparative to what all other contenders get is declared a winner. Consequently the petitioner’s petition is grossly and gravely misconceived and premised on a poor understanding of the law and the same deserve to be dismissed with costs.
- f. That paragraph 10 of the petition is a statement devoid of merit, spirit and truth and invited the petitioner to strict proof thereof.

The 3rd respondent in further answer to the petition vide paragraph (5) of the filed answer stated as follows:

- i. The petitioner has pleaded that he was a mere voter and not a candidate nor a chief agent of any candidate. He was and is therefore incapable of alleging that the results were not verified and/or that forms 36 were not completed in his presence.
- ii. That the 3rd respondent was at the tallying centre and no candidate or agent requested for a recount of the votes cast.
- iii. The number of voters who cast their votes never in any polling station exceeded the number of registered voters. In any event, the elections in almost all polling stations were marked by greater voter apathy.
- iv. That if it is true that the petitioner was barred from entering polling stations as an agent as he alleges at paragraph 16 of the petition, then all the allegations that he has pleaded in paragraphs 13, 14, 15 and 18 of the petition fly a mock on his face as white lies and the filed petition founded on lies is a great abuse of the court process and should be dismissed with costs and the petitioner admonished.
- v. That in further answer to paragraphs 16 and 18 of the petition, the 3rd respondent avers that if the petitioner was barred from entering polling stations and/or if the 2nd respondent refused to allow the petitioner to sign form 35 which is denied, then the petitioner was not an authorized person and/or the 3rd petitioner conducted himself in a way contrary to the oath he took as an agent and the 2nd respondent was in law authorized to disallow such a person from the polling stations.

B: ISSUES FOR DETERMINATION

The consolidated issues for determination as framed and submitted by parties to the election petition would be crystallised and/or summarized as follows:

- i. Whether or not the subject held elections were free, fair, transparent and conducted in accordance with the law.
- ii. Whether or not the petitioner has established the legal basis and/or sufficient grounds for recount and scrutiny of the votes cast.
- iii. Whether or not the petitioner has established a case to the required standards provided by law to warrant the nullification of the held elections.
- iv. Whether or not the 3rd respondent was validly elected as the County Assembly Representative for Kiamokama County Assembly Ward.
- v. Who should bear costs of the petition.

C: INTERLOCUTORY APPLICATIONS

The petitioner, at the first instance brought a Notice of Application dated 14th May 2013, filed on the 15th

May 2013 and sought for the following reliefs;

- a. That the honourable court be pleased to summon the chief of Nyaribari Central Location to produce the photocopies of the ballot papers in his custody, the DCIO Kisii Central District to produce the ballot papers which were handed over to him by the in-charge of Ibacho Patrol Base, and the in-charge of Ibacho Patrol Base to produce OB 15/3/13.
- b. That the honourable court be pleased to order and direct the 1st and 2nd respondents to produce all the counterfoils of all the ballot booklets in all the polling stations in Kiamokama County Assembly Ward.
- c. Costs of the application be provided for.

The application was strenuously opposed by the respondents and the court subsequently in its ruling found same to be merited and allowed prayer (a) thereof and consequently summoned the witnesses or the subject persons named in the application. The court disallowed prayers (b) thereof for orders for scrutiny and recount of the votes cast on grounds that the issue on whether or not such an order for scrutiny and recount can be issued, would only be determined by the court upon hearing the evidence to be adduced by all the parties to the petition.

D: EVIDENCE ADDUCED

The petitioner, KENNEDY MOSE NYANGWAYA, in his sworn testimony in examination in chief wholly adopted his sworn affidavit in evidence in corroboration and in support of the filed petition. It was his case that the subject held elections on the 4th March 2013 in respect of Kiamokama County Assembly ward were not conducted in a free, fair and transparent manner and in accordance with the law and the Constitution, 2010. He stated that many anomalies and/or discrepancies were noted in the statutory form 35s in many of the polling stations falling under Kiamokama County Assembly Ward which documents, he maintained are the primary documents and the source of information on the votes cast by the respective candidates, which ultimately are posted onto form 36 by the Returning Officer, during the tallying of the votes cast and as such he stated that the results on the votes cast as indicated on the statutory form 35s were not reflective of the final results tallied by the Returning Officer in form 36. He cited the following instances;

- i. In Mogweko Primary School – Stream II, the total number of votes cast is allegedly not indicated.
- ii. In Mogweko Primary School – Stream I, the total number of votes cast was shown as 325 and the number of the rejected votes reflected as 3 and the total number of votes cast indicated as 352 instead of 322.
- iii. In Mogweko Primary School – Stream II, the 3rd respondent is indicated to have garnered 91 votes and that number in his considered view was allegedly changed from 0 to 9 thus the number 91.
- iv. In Nyamasese DEB Primary School, the total number of votes cast are indicated as 222 instead of 250, a difference of 28 votes.
- v. In Emeroka Primary School, the total number of votes cast as per form 36 is 399 with one ballot paper spoilt, rejected 25 votes and hence the valid cast votes are 374 but what was reflected was 424, which figure was ultimately transferred and captured in form 36 as the total number of valid votes cast.
- vi. In Mochengo DEB Primary School, the total number of votes is 268 but indicated as 208, difference of 60 votes.
- vii. In Amaiga Tea Buying Centre, the total number of votes cast was indicated as 276 but the total number of votes indicated as 271, a difference of 5 votes.
- viii. In Gesicho primary School, as per form 36, the total number of votes cast in favour of all the candidates is indicated as 186 instead of 187, a difference of one (1) vote.
- ix. In Inkarango Tea Buying Centre as per form 35, the total number of votes cast is indicated as 187, which figure is reflected in form 36 but on accumulation of the total votes cast in favour of all the candidates, 186 votes were arrived at, a difference of one (1) vote.
- x. In Mobamba Primary School, form 35 indicates that one Elijah Okemwa, a candidate had garnered 72 votes, but in the final form 36, he is indicated to have garnered 73, a difference of one (1) vote. While form 35 indicates Anyona Ontita to have garnered one (1) vote while in form 36, he is

indicated to have garnered two (2) votes and thus the total number of votes cast in the said polling station indicated as 572, with 9 rejected votes, and hence the total valid votes cast ought to have been 463 but not 453, a difference of one hundred votes.

- xi. In Ibacho Tea Buying centre, form 35 indicates Isaac Obino to have garnered 7 votes but in form 36, he is indicated to have garnered 2 votes, thus a difference of 5 votes and therefore the total number of valid votes ought to have been 428 but not what is indicated as 431, a difference of 3 votes.
- xii. In Ibacho Primary School – Stream II, Isaac Obino, is indicated to have garnered 2 votes while Anyona Ontita 8 votes but they are reflected to have not garnered any votes in form 36.
- xiii. In Makobokobo Primary School, the total number of votes in form 35 is indicated as 391, but indicated as 390 in form 36 a difference of one (1) vote with no signatures appended on the rear thereof.

It was his evidence that, what prompted him, to institute the instant petition was information received from members of the public to the effect that some ballot papers had been collected within Ibacho Market. He had consequently accompanied the member of the public to Ibacho Police Post where on arrival, the in charge of the police post had indeed confirmed the incident and that the collected ballot papers by the members of the public had been reported by the area chief and the collected ballot papers forwarded to the DCIO – Kisii. He, further stated that one member of the public had handed over to him two unmarked ballot papers, which he had kept up to the institution of the present petition on the 10th April 2013.

He, further stated that the other reason, which or that had prompted him to institute the present petition was the fact that, as he had traversed some of the polling stations, he had met members of the public, candidates and party officials, complaining bitterly on bribery claims during the electioneering period, with some candidates' agents barred from entering the counting halls and during the re-tallying of the votes cast.

He, on cross examination by the respondents' counsels, maintained that the elections held on the 4th March 2013 were not conducted in a free and fair manner and in accordance to Articles 8, 86 and 88 of the constitution, 2010. He stated that thirteen (13) candidates had contested for the Kiamokama County Assembly Ward Representative but was not one of them and he has brought the instant petition, in his capacity as a voter, whose rights as enshrined in the Constitution 2010, should be upheld and entitled to a free and a fair election. He, on further cross examination stated that he has brought the instant petition to protect the rights of each individual candidate in the elections held on the 4th March 2013, even though, he could not tell for sure or with certainty as to who would have been validly elected in place of the 3rd respondent and could not also tell as to who would be the winner, if the held elections were nullified, but hastened to add that the candidates rights in any event would have been respected. He, conceded and stated on further cross examination, that he is a teacher by profession and was the chief agent for Kenya National Congress and by extension, the agent for one NYAKUNDI NYAMORI, though he had no evidence to prove, given the absence of the Agents' Accreditation documents and/or a badge.

The petitioner called witnesses including; KEVAH NYAKUNDI GADINAR (PW2), NATHAN MAGORO ONDARA (PW3), METHUSELA MOBISA ONDIMU (PW4), ZABLON MOGAMBI ONTIRI (PW5), SERGEANT RICHARD KIBOR (PW6) and TOM MUTISYA (PW7), who upon the petitioner's application were summoned by the court.

PW2, KEVAH NYAKUNDI GADINAR in evidence in chief adopted the sworn affidavit in evidence and stated that he was/is a voter and had voted at Ibacho Primary School polling station and that he, was an overseer for the Kenya National Congress and by extension one NYAKUNDI NYAMORI during the elections held on 4th March 2013. It was his evidence in chief that as an overall overseer, he had traversed all the polling stations falling under Kiamokama County Assembly Ward wherein in some polling stations had been informed that some candidates' agents had been barred from entering the polling stations by the Presiding Officers on allegations that they had lacked the proper documents for their accreditation as agents and that at some polling stations, Risongoro polling station had found a candidates

poster displayed. He further stated that in all the stations he had visited, he was informed that voters were waiting and were demanding to be bribed before they cast their vote. He, on cross examination by the respondents' counsels maintained that he was an overall overseer for one NYAKUNDI NYAMORI but not a political party and the official badge exhibited was given to him by the said NYAKUNDI NYAMORI, although he was admittedly not issued with any designation or appointment letter by the said Nyakundi Nyamori. He, conceded that in all the polling stations he had visited, he had been informed that agents were chased away and that there were no candidates to bribe the voters which allegation could not be proved for the police officers detailed to keep law and order, to arrest anyone, as there was no tangible evidence on the voter bribery. PW2, on further cross examination by the 3rd respondent's counsel stated that;

“During my sojourning of the polling stations, I noted some several malpractices and discrepancies. I cannot however tell of any one particular candidate who complained of the noted malpractices. I cannot as such zero in to any particular malpractice incident. I could not tell whether the displayed poster had any effect on the voting patterns of the votes cast.”

PW3, NATHAN MAGORO ONDARA, while adopting his sworn affidavit in evidence as his evidence in support of the filed petition, stated that he had woken up on the morning of the 15th March 2013 to find some ballot papers, soaked in mud, dropped outside his hotel. He had informed members of the public of what he had discovered and had subsequently reported the incident to Ibacho Patrol Base, where he was allegedly advised by a police officer on duty, to keep and retain the recovered ballot papers as his area chief had already lodged a similar complaint and that if a further complaint was lodged, then he was to be informed. He produced in evidence a bundle of ballot papers, upon court making a ruling on the 3rd respondent's objection for their production, in corroboration of his evidence. (PW3). He, on cross examination by the respondents' counsels stated that it was the responsibility of the IEBC, the 1st respondent to safely and securely keep the ballot papers. He stated that he could not tell for a fact whether the collected ballot papers were genuine or not or the polling station they related to. He reiterated that he had reported the incident at Ibacho Police Post, where he was advised to keep them, as the area chief had already reported the matter and was even shown some two ballot papers, which had been handed over to the police by the area chief. He denied having marked the collected ballot papers as asserted by the respondents' counsels.

PW4 METHUSELA MOBISA ONDIMU in evidence in chief adopted his sworn affidavit of evidence filed herein as his evidence in support of the filed petition and stated that he had participated during the held elections on the 4th March 2013 as the Deputy Presiding Officer stationed at Gesusu tallying centre with the role of deputizing the Presiding Officer during the tallying of the cast votes and had dutifully performed his duties as assigned in the letter of appointment he exhibited before court.

It was his evidence that the electioneering process on the 4th March 2013 was smoothly conducted and that it was until the 15th March 2013 when he was allegedly called by the Returning Officer, one MOSES AHETE, with instructions that he proceeds to Ibacho Trading Centre and to confirm whether the ballot papers which were allegedly recovered or found within Ibacho market were genuine or not. He had then proceeded to Ibacho Police Post where he had confirmed that indeed the incident had been reported by the area chief and the collected ballot papers already forwarded to the DCIO – Kisii; save for some two ballot papers left behind at the police post by the area chief, which ballot papers he had taken to Masimba IEBC offices for purposes of comparing the serial numbers and the origins and had established that the two ballot papers had originated from Mokobokobo and Ikarango polling stations and had subsequently sworn an affidavit on the 10th April 2013 to that effect in support of the filed petition.

PW4, on cross examination by the respondents' counsels, stated that he had been employed by IEBC during the electioneering period on the 8th March 2013 and was deployed to Gesusu Tallying Centre as the Deputy Presiding Officer with duties to issue election materials i.e. ballot papers, etc. throughout the electioneering period. He further stated that he had sworn and signed three sets of sworn affidavits in evidence dated 10th April 2013, 26th April 2013 and 13th May 2013. He further stated that all the used and unused election materials after the election period were all put into the ballot boxes and transported

back to Gesusu Tallying centre for safe custody, which materials he added were kept at the IEBC warehouse under lock and key and under his watch until same were transported, under his escort to constituency offices situated in Kisii on the 4th March 2013. To the best of his recollection, no election material got lost, or reported to have been lost during and after the election period until he was informed of the incident on the 15th March 2013, long after conclusion of the elections and could not therefore tell how the ballot papers allegedly collected by the roadside got their way to Ibacho Market. He, on further cross examination by the 3rd respondent's counsel, stated that the petitioner, who is his village mate, hailing from Ibacho village, had approached him and shown him copies of form 35s and 36 and had requested him to give him copies of the two ballot papers he had retained. He, further stated that and admitted that, he had at some point in time charged with a case of incitement in a Nairobi Court which case was not related at all to the instant petition, and which case was ultimately withdrawn by his then Member of Parliament and accordingly discharged.

PW5 ZABLON MOGAMBI ONTIRI, in his obedience of the summons issued upon him by the court, following the petitioner's application and testimony stated that he is the area chief of Nyaribari Central, Kiamokama Division in Masaba South and confirmed in evidence that he had received some ballot papers on the 15th March 2013 from one of the members of the public, one SAMUEL OMBUI, which ballot papers were allegedly collected by the roadside. He, had immediately handed over the ballot papers to the in-charge – Ibacho Patrol Base for further investigations. He, on further cross examination by the respondents' counsels maintained that he had received some seven (7) ballot papers allegedly collected from a roadside by members of the public, from one SAMUEL OMBUI which ballot papers he had promptly handed over to Sergeant Richard Kibor of Ibacho Police Patrol Base. He denied the assertions that the petitioner had approached him at any time with a request for him to have copies of the collected ballot papers.

PW6, SERGEANT RICHARD KIBOR, in evidence stated that he is a police officer and the in-charge of Ibacho Police Patrol Base at the time of his testimony. He confirmed that he had on the 15th March 2013 received some ballot papers from the area chief (PW5) which ballot papers were reported to have been collected by members of the public by the road and that under instruction from the OCS Ramasha police station, had forwarded the ballot papers to the DCIO – Kisii, which incident he had entered in the OB entry No. 7 of 15th March 2013, he, on cross examination by the respondents' counsels maintained that he was handed over some seven (7) ballot papers by the area chief (PW5) which ballot papers, under instruction from the OCS – Ramasha, had handed over to the DCIO – Kisii. He denied having been approached by one Methusela or Nathan Ratemo over copies of the collected ballot papers. He, further stated that as the in-charge of Ibacho Police Patrol Base, he had not received any report of an election malpractice throughout the election period, save for the incident when he was handed over some ballot papers by the area chief. He, on cross examination by the petitioners' counsel stated that he had not investigated the matter but had forwarded the collected ballot papers to the DCIO for further action. He reiterated that he was handed over some seven (7) ballot papers and that he had remained in his office throughout the election period.

PW7 TOM MUTISYA, the senior superintendent of police and the in-charge – Kisii Police Division as at the time of trial confirmed receiving some nine (9) ballot papers, from (PW6), on the 15th March 2013 which ballot papers, as he was told, were collected by members of the public, relating to Nyaribari Masaba Constituency, Kiamokama County Assembly Ward. He, on cross examination maintained that the nine ballot papers handed over to him were alleged to have been collected by members of the public and handed over to the area chief (PW5). He further stated that, he had no reason to believe that, the ballot papers handed over to him were used or cast ballot papers which documents he added were not subjected to any examination by the Document Examiner to confirm their authenticity and/or veracity and that he had not commenced any investigations into the matter as there was no formal complaint lodged before him. It was his further evidence that the elections held on the 4th of March 2013 were conducted peacefully with no election malpractice reported. He, on further cross examination by the 3rd respondent stated that he had received a total of nine (9) ballot papers from the in-charge of Ibacho patrol base, which documents in his considered opinion, had been handled by many people and they had already been tampered with and that no amount of investigations would reveal the culprits.

The 1st and 2nd respondent called two witnesses in evidence, RW1 LAMECH MOGUSU MOGENI who during the elections held on 4th March 2013, was the Deputy Returning Officer seconded to Masimba IEBC, whose role other than deputizing the Returning Officer, was to supervise and co-ordinate the smooth running of the elections at Moi High School, Gesusu tallying centre and RW2 MOSES OPIYO AHETE, the Returning Officer for Nyaribari Masaba Constituency under whose jurisdiction Kiamokama County Assembly Ward elections fall, and whose role amongst other administrative roles, were to ensure the smooth running of the election process and to supervise all the presiding officers, their deputies and polling clerks under his command in all the nineteen (19) polling stations falling under Kiamokama County Assembly Ward and the entire Constituency. It was their respective evidence in examination in chief that the election held on the 4th March 2013, in respect of Kiamokama County Assembly Ward was quite successful, in spite of the magnitude of the elective posts contested and the logistical challenges, and was conducted in a free, fair and transparent manner and in accordance with the law and the Constitution 2010. It was their respective testimonies that they did not receive any report or complaint of commission of an election malpractice, either by their officers or the candidates and the agents. They did not also receive any complaint or report on the loss of any election material during and after the held elections. They further stated that each candidate or a political party was entitled to have an agent in each of the polling stations who were expected to sign form 35s upon the declaration of the results by the presiding officers, in acknowledgement of the votes cast and garnered by the respective candidates. They, however, hastened to add that it was not the mandate of IEBC to go looking for agents for purposes of signing of the statutory forms 35s or the daily polling day diaries and there was no law barring the Returning Officer from tallying and declaring the final results, posted onto form 36, notwithstanding the non-signing of the statutory forms 35s, which non-compliance, they argued, did not amount to an electoral malpractice. They further conceded that there were noted mistakes and errors across all the nineteen (19) polling stations captured in forms 35s in respect of the valid votes cast and garnered by respective candidates, which errors or mistakes they argued were insignificant and inconsequential to the held elections and which errors or mistakes were ultimately corrected while posting the final results in form 36 and which errors and mistakes did not disadvantage any of the concerned contesting candidates. They further stated that one METHUSELA ONDIMU, during the held elections on the 4th March 2013 was the Deputy Presiding Officer, seconded to Gesusu tallying centre, in charge of stores and supply of election materials. They on being shown a bundle of ballot papers allegedly collected by members of the public, exhibited and produced in evidence in support of the petition, denied any knowledge of such documents having originated from IEBC, noting that their authenticity was in doubt, though the logos on the face of the ballot papers exhibited and the official rubber stamps affixed therein resembled the IEBC documents. They on cross examination denied the assertions that appointed candidates or political party agents were barred from entering the polling stations. They maintained in their cross examination that only those agents who did not have the requisite accreditation documents were lawfully barred from the polling stations.

RW2, in particular, in evidence produced copies of forms 35s and form 36 relating to all the nineteen polling stations and the polling day daily diaries thereof. He maintained on being cross examined on the produced and exhibited form 35s that the errors noted on the posting of the votes cast in respect of each candidate in forms 35s, were insignificant and did not affect the final results on the votes cast in favour of each particular candidate, which errors in any event, he asserted were eventually corrected before posting the final results in form 36. He, maintained that the petitioner herein was not among the thirteen (13) candidates who had contested for Kiamokama County Assembly Ward Representative nor a chief agent for any of the political parties as alleged. He further stated that if the petitioner's allegations that he was a chief agent for any political party had any truth in it, then it would have been wrong for him to have actively participated in politics when he was a civil servant. He, on being cross examined on the nineteen (19) poll daily diaries produced and exhibited in evidence maintained that the polling day diaries were purely for administrative functions which assisted them in running the elections held and that the candidates and/or political agents had indeed signed the polling day diaries, at the beginning of the elections and at the end of the electioneering exercise.

RW1 and RW2 stated and maintained in their respective evidence in chief and in cross examination that the IEBC during the election had supplied two types of pens to be used during the voting, a red pen for crossing off a voter from the register upon taking the vote and for marking of the vote but not a sharp

pointed blue biro, apparently used in the questionable marked ballot papers exhibited and produced by the petitioner in support of the filed petition. They, in resting their respective adduced testimonies, stated that the 3rd respondent following the election held on the 4th March 2013 was validly elected as the Kiamokama County Assembly Ward Representative, having garnered the highest number of the cast votes with a high margin of win of over 400 votes against the second overall, one NYAKUNDI NYAMORI. RW2, further stated that he was personally known to the 3rd respondent who had worked under him as a clerk, during the referendum elections and added that there was no law barring the 3rd respondent from contesting the elections, in spite of him having previously worked for IEBC

The 3rd respondent, in examination in chief wholly adopted his sworn affidavit in evidence in response to the filed petition and stated that he was among the thirteen (13) candidates who had contested for the Kiamokama County Assembly Ward and had contested under ODM party. He stated that ODM as a party had appointed agents in all the polling stations. He maintained that he was declared winner with the highest number of the cast votes with a winning margin of 419 votes against the second runners up and was consequently validly elected as the County Representative for Kiamokama County Assembly Ward, which election, he asserted, reflected the political will of the good people of Kiamokama County Assembly Ward. He, on cross examination by the petitioner's counsel stated that although some errors were noted in the statutory form 35s in some of the polling stations such errors were however inconsequential and insignificant to have affected the final results of the votes cast in favour of each particular candidate, which noted errors, he further stated did not disadvantage any of the candidates on the votes cast. He, on being shown the bundle of ballot papers produced and exhibited by the petitioner stated that the alleged recovered ballot papers were in fact marked for different candidates and none of them had been marked in his favour. He, on re-examination maintained that he was validly elected as the County Assembly Representative for Kiamokama County Assembly Ward and further that there was no rule or law to bar him from vying for any elective post, having previously worked for IEBC.

The 3rd respondent called five (5) witnesses, RW4 CHARLES OCHOKI, RW5 CHARLES OERI MOGENI, RW6 JOHN MILTON GORI, RW7 GILBERT MONGARE, RW8 JAMES MIROBA OYUGI and RW9 KENNEDY NYAOSI, who all in their examination in chief adopted their respective sworn affidavits in evidence, filed in support of the 3rd respondent's response to the filed petition and who maintained in their respective testimonies that they were the appointed agents for ODM party and by extension the 3rd respondent's and were present and witnessed the elections held on the 4th March 2013 which elections they maintained were conducted in a free, fair and transparent manner.

E: SUBMISSIONS

All the parties through their respective counsels on record, upon the close of the trial of the filed petition, filed written submissions on the raised issues relating to the filed petition and supported their considered positions with cited legal authorities, which I shall be considering shortly during my final determination of the matter.

F: DETERMINATION

I, have carefully and seriously evaluated, analysed and considered the entire filed pleadings by all the parties to the petition i.e. the petition together with all the affidavits in evidence sworn and filed by the petitioner with his witnesses and the bundle of documents attached therewith, notably copies of the statutory forms 35s and 36 in respect of all the polling stations falling under Kiamokama County Assembly Ward, the filed responses by the respondents supported by the filed sworn affidavits in evidence by the respective respondents and their witnesses and the attached bundle of documents namely copies of the statutory form 35s and 36 relating to the held elections as well as the oral adduced evidence and the filed written submissions and the cited legal authorities.

1. It is abundantly and crystal clear, in my considered view that the petitioner's filed petition is substantially premised and/or founded on the following:

- i. On allegations that the marked and unmarked ballot papers reportedly collected by members of the public within Ibacho market, by PW3 NATHAN MAGORO ONDARA, which were subsequently handed over to the area chief Nyaribari Central, Kiamokama Division (PW5) ZABLON MOGAMBI ONTIRI, who had in turn, handed over to the in-charge – Ibacho Patrol Base – PW6, SERGEANT RICHARD KIBOR, who had eventually forwarded same to the OCPD – Kisii Police Division TOM MUTISYA, the senior superintendent of police, were IEBC ballot papers which were used during the held elections and which following their recovery, would have consequently impacted on the validity and/or legality of the held elections.
 - ii. On allegations that the information contained in the statutory form 35s some of which were not signed by the Presiding Officers or their deputies and the agents, on the votes cast in favour of the candidates were not reflective of the final results as tallied by the Returning Officer, in respect of the polling stations falling under Kiamokama County Assembly Ward.
 - iii. On allegations that the party, and/or candidates’ agents were barred from the polling stations, thereby invalidating the held elections.
2. It is on record, given the adduced evidence and admittedly so, that the petitioner herein was not a candidate but has brought the instant petition, to assert his constitutional rights, that he is entitled to a free, fair and transparent elections and to protect or safeguard the rights of each individual candidate during the held elections. It is on record in this regard, that the petitioner, in evidence conceded that he could not tell for sure as to who would have been validly elected in place of the 3rd respondent, if the alleged noted errors on forms 35s were rectified and/or the number of votes to be garnered by each individual candidate.
 3. An electoral process, it cannot be gainsaid or overemphasized, is such an important integral component in every democratic society which process enables the people in democratically electing their representatives in leadership and the manner in which they would wish to be governed. The political rights of the people, in our Kenyan situation are jealously protected under Article 38(1) of the Constitution, 2010, which rights are actualised by the Independent Electoral and Boundaries Commission, created under Article 88(1) of the Constitution, 2010, with the core mandate under Article 86 of the Constitution, 2010 to conduct the elections and to inter-alia ensure the following:
 - i. That whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.
 - ii. The votes cast are counted, tabulated and the results announced promptly by the Presiding Officer at each polling station.
 - iii. The results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer and;
 - iv. Appropriate structures and mechanism to eliminate electoral malpractice are put in place, including the safe keeping of electoral materials.
 4. I, also observe given the foregoing background, that non-compliance of the law relating to an election, per se, is not a reason to declare an election void. Section 83 of the Elections Act No. 24, 2011 states;

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

5. Election petitions, as held in the case of **JOHO – VS – NYANGE & ANOTHER (2008) KLR (EP)** by Justice Maraga, as he then was, are no ordinary suits but disputes in-rem of great public importance. They should not be taken lightly and generalised allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent, credible and consistent evidence. For instance, where allegations of bribery are made, instances of the bribery should be given. This position was restated in the cited case of **MACHAKOS HC. ELECTION PETITION No. 1 OF 2013, RICHARD KALEMBE NDILE & ANOTHER – VS – DR.**

PATRICK MUSIMBA MWEU & 2 OTHERS, where Justice Majanja held thus;

“In cases of allegations of electoral malpractices and other irregularities, the petitioner is not only required to establish that such electoral malpractices and irregularities actually occurred but that they were of such magnitude that they substantially and materially affected the results of the election. The petitioner, should, for instance establish that the number of votes affected by the irregularities was sufficient to change the results of the election or that there were substantial violations of the requirements of the statute that rendered the reliability of the result of the election seriously in doubt. The primary consideration in an election contest is whether the will of the electorate has been affected by the irregularities.”

6. It is now settled law, as held in the afore going cited legal authorities, that an aggrieved party or a petitioner in an election petition in his allegations for nullification of a held election has to discharge the burden of proof, which is higher than the balance of probability in civil jurisprudence but lower than that of beyond reasonable doubt in criminal matters.
7. Turning back to the issue of the alleged collected ballot papers, which in my view formed the ‘cornerstone’ of the petitioner’s case herein, it is evident that the alleged collected ballot papers, allegedly belonging to IEBC, used during the elections held on 4th March 2013, were not subjected to any examination by an expert to ascertain their authenticity as confirmed by the OCPD – Kisii Police Division (PW7) and in the absence of the requisite forensic expert evidence, and given the 1st and 2nd respondents’ denial of the same, do find same mere allegations as it were, as it remains the petitioner’s word against the 1st and 2nd respondents word. A casual closer look on the produced bundle of ballot papers, allegedly collected by members of the public by a roadside, show that, all the marked ballot papers have some striking similarities, some having been marked with a similar sharp pointed blue biro pen, with same impressions. The 1st and 2nd respondents’ contention in this regard that the standard pens used during the election were a pen with black ink and a red pen for marking of the ballot papers and crossing off the voters names in the voters register respectively, in my view has not been challenged in evidence and the only logical conclusion, in my respectful view, to be made, are that the produced ballot papers are but “a bunch of forgeries.”
8. Although an election court in exercising its jurisdiction, may on its own motion or on an application by any party to the petition, order for scrutiny and recount of votes cast, as provided under Section 82(1) of the Election Act, 2011, a petitioner, nonetheless is expected and duty bound under Section 33(1) of the Elections (Parliamentary and County Assembly Elections) Petition Rules, 2013, to inter-alia establish the legal basis and to provide sufficient reasons for such an order for scrutiny and recount of votes to arise. It is not a matter of course as held in the cases of **NAIROBI HC. ELECTION PETITION No. 5 OF 2008, WILLIAM MAINA KAMANDA – VS – MARGARET WANJIRU & TWO OTHERS** and in the recent case of **BUSIA HC. ELECTION PETITION No. 1 OF 2013, PHILIP OGUTU – VS – MICHAEL ARINGO & TWO OTHERS**.

It has not been challenged, given the presented petition that the 3rd respondent was declared the winner, following the held elections, having garnered the highest votes cast, with a margin of 419 votes against the second runners up. The petitioner herein, in this regard, in his own admission in evidence stated that, he could not tell, for sure, as to who amongst the thirteen (13) candidates, who had contested during the held elections, would have been validly elected in place of the 3rd respondent or the number of the votes each candidate would garner, if the anomalies noted in forms 35s were rectified.

The begging six dollar question is therefore; of what purpose would an order for scrutiny and recount serve, when there is a clear winner in an election petition and in a peculiar scenario where none of the thirteen (13) contestants has disputed either the validity of the votes cast or the credibility of the electoral process or the final results of the election?

It is therefore my respectful holding and finding that, the petitioner, given the foregoing scenario and

given the evidence adduced, has failed to meet the threshold in establishing a legal basis and in providing sufficient evidence for an order of scrutiny and recount of votes to arise.

9. The claims of voter bribery, in my considered finding were not proved at all. PW2, in evidence stated in verbatim and I quote:

“In all the polling stations I visited, I found voters shouting and demanding to be bribed for them to cast their votes, but there were no candidates to bribe them. It was difficult, even for the police officers detailed to keep security to arrest anyone as there were no tangible evidence on the voter bribery claims.”

10. With regard to the anomalies admittedly noted in the statutory forms 35s during the posting of the votes cast by the Presiding Officers and the non-signing of the statutory forms 35s by the candidates' agents, it is now settled law, that such anomalies or discrepancies noted being human and transposition errors and the non-signing of forms 35s by the party, candidates and candidates' agents, in law, would not vitiate or invalidate an election, if same, would not ultimately affect the final results of an election. This position was held in the cited case of **MACHAKOS HC. ELECTION PETITION No. 2 OF 2013, THOMAS MALINDA MUSAU & TWO OTHERS – VS – IEBC & TWO OTHERS**, where it was observed that, although it is a mandatory requirement under the Election Regulations for the Presiding Officers, the candidates and/or agents to sign form 35s, the scope of such an obligation is however limited by Regulation 79 (6) (7) of the Election Regulations which provides;

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

I, ultimately find and guided by the afore stated position in law, that the admitted errors noted in forms 35s relating to the votes cast during the held elections were not of such a magnitude as to invalidate the held election.

I further find, in this respect, in any event that no sufficient evidence was placed before court to show that candidates or their appointed agents were barred from entering the polling stations. The petitioner's evidence in this regard and that of (PW2) KEVAH NYAKUNDI GADINER were not corroborated in evidence, which evidence, in my view, bordered on hearsay evidence, which evidence is inadmissible in law. There is no sufficient evidence either before court to show that the petitioner was a chief agent for a political party or candidate during the held elections.

11. The petitioners averments contained under paragraph (17) of the filed petition, that the 2nd respondent returned to the 1st respondent a tally which totally differed with the actual votes cast, counted, verified and announced by the Presiding Officers at polling stations where the 3rd respondent's votes were inflated and while the petitioner's were diminished, when in fact, the petitioner, in evidence was a voter, runs contrary and flies on the face of the entire filed petition and the evidence adduced in support thereof.

12. It is on record and admittedly so, that the petitioner as at the time of the held elections and during the trial of the petition is a teacher by profession. It follows therefore and as submitted by the 3rd respondent's counsel that he is a public servant/officer who by law under Section 43 of the Elections Act 2011 ought not to have engaged himself actively in political activities of any political party or candidate or act as an agent of a political party or a candidate in an election and in by extension in instituting the filed petition. I, consequently recommend to the office of the Director of Public Prosecution to initiate investigations with a view to prosecuting the petitioner for commission of an electoral offence under section 43 of the Election Act, 2011.

13. It is on record that one METHUSELA ONDIMU (PW4) prominently featured during the

proceedings herein and took the ‘centre stage’ as a person who kept on shifting goal posts as evidenced by his swearing of three (3) sets of affidavits, dated 10th April 2013, 26th April 2013 and 13th May 2013, and who having taken judicial note of his conduct, is such an unreliable and untruthful witness whose adduced evidence in my respectful view is of no evidentiary value and cannot be relied upon by the court. It is also in evidence that the said METHUSELA ONDIMU (PW4) during the electioneering period, was under the employ of the 1st respondent, deployed as the Deputy Presiding Officer, seconded to Gesusu Moi High School tallying centre in-charge of stores and supply of election materials to all the polling stations falling under Kiamokama County Assembly Ward. It is therefore curious to note that, as a law abiding citizen and having worked for IEBC, for unexplained reasons, did not at the first instance or the earliest opportunity report the recovery of the alleged ballot papers to IEBC, the 1st respondent for investigations.

It is more telling to note that, he in fact kept some two ballot papers (copies) under his custody until the time of his testimony before court. One would be forgiven, in the prevailing circumstances to suggest that the said METHUSELA ONDIMU had a hand and had played a pivotal role in the “alleged recovery of some ballot papers” by members of the public within Ibacho market. I, would in this regard, recommend to the Director of Public Prosecutions to initiate investigations into the matter with a view to establishing the petitioner’s involvement and that of METHUSELA ONDIMU and NATHAN MAGORO ONDARA (PW3) in the matter for possible prosecution on commission of electoral offences under Section 58 of the Elections Act, 2011.

14.I, for the afore stated reasons find no sufficient evidence or at all to warrant the nullification of the held elections in respect of Kiamokama County Assembly Ward Representative held on the 4th March 2013. The filed petition with due respect lacks merit, is frivolous, vexatious and otherwise an abuse of the due process of the court and same is hereby dismissed with costs to the respondents.

15.Consequently and for the foregoing afore stated reasons, find for a fact that the elections held on the 4th March 2013 in respect of Kiamokama County Assembly Ward Representative was substantially conducted in a free, fair and transparent manner and in accordance with the provisions of the Constitution, 2010 and the Elections Act, 2011 and the rules and regulations made hereunder, which elections, I so hold had reflected the popular political will of the people of Kiamokama County Assembly Ward and the 3rd respondent, KENNEDY MICHIRA MAINYA validly elected.

16.A certificate as to the validity of the elections held and the election of the 3rd respondent, KENNEDY MICHIRA MAINYA as the elected member for Kiamokama County Assembly Ward, be and is hereby issued forthwith, for service upon IEBC, the 1st respondent for further action and for the appropriate notification to the relevant County Assembly Speaker.

17.For avoidance of doubt, I hereby condemn the petitioner to pay the costs of the petition to all the respondents, jointly and/or severally, which costs shall be filed before the court to be assessed in the same manner as costs in civil proceedings and in accordance with the Civil Procedure Act.

Judgment accordingly

DATED, SIGNED and DELIVERED at KISII on this 26th day of September, 2013.

K. SAMBU

PRINCIPAL MAGISTRATE

KISII LAW COURTS

In the presence of;

1. Mr. Momanyi Counsel for the petitioner

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2. Ms Masagwe Counsel for the 1st and 2nd respondent

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3. Mr. Nyamweya Counsel for the 3rd respondent

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K. SAMBU

PRINCIPAL MAGISTRATE

KISII LAW COURTS