



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT KISII
ELECTION PETITION NO. 2 OF 2013

IN THE MATTER OF: ARTICLE 87 OF THE CONSTITUTION 2010

AND

IN THE MATTER OF: ELECTIONS ACT NO 24 OF 2011

AND

IN THE MATTER OF: ELECTION OF THE COUNTY ASSEMBLY
REPRESENTATIVE FOR BOBARACHO COUNTY ASSEMBLY
WARD

AND

IN THE MATTER OF: THE PETITION OF LUCAS ONGAKI

BETWEEN

LUCAS ONGAKIPETITIONER

VERSUS

SAMWEL KENNY NYANGENYA 1ST RESPONDENT

NG'ENY K. ROBERT 2ND RESPONDENT

THE INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION..... 3RD RESPONDENT

JUDGMENT

A: PLEADINGS

The petitioner LUCAS ONGAKI, brought the instant election petition dated 4th April 2013, filed on the 5th April 2013, under the provisions of Articles 22, 81 and 87 of the Constitution, 2010 and sections 39 and 75 of the Elections Act, no. 24 of 2011 and rules 8 and 10 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 and all enabling provisions of the law, against the 1st Respondent

SAMWEL KENNY NYANGENYA, the 2nd Respondent NG'ENY K. ROBERT, and the 3rd Respondent, The Independent Electoral and Boundaries Commission, in their respective capacities, as the declared successful candidate and the County Assembly Ward Representative for Bobaracho County Assembly Ward, the Returning Officer for Nyaribari Chache Constituency, where the Bobaracho County Assembly Ward falls during the held elections and the 3rd Respondent, being the statutory body created and/or established under the provisions of Article 88 of the Constitution, 2010, vested with the constitutional mandate to Inter-alia, conduct, direct and supervise the Presidential, National Assembly, Senate and County Assembly Elections, seeking for the following reliefs;

- a. That the Honourable Court be pleased to order and/or direct scrutiny, recount and re-tallying of votes with a view to establishing the validity of the votes cast.
- b. That a declaration that the 1st respondent herein was not validly elected as the County Assembly Ward Representative for Bobaracho County Assembly Ward, whatsoever and/or however
- c. That a declaration that the petitioner herein received the highest number of valid votes cast and was thereby validly elected as the County Assembly Ward Representative for Bobaracho County Assembly Ward
- d. In the alternative, a declaration be and is hereby made that the election was not held in compliance with the law relating to the conduct of the County Assembly Ward elections and in particular with the provisions of Articles 81 and 86 of the Constitution, 2010.
- e. That an order be and is hereby issued directing the 2nd and 3rd Respondents and/or their successors in office and other relevant public officers to take remedial action to give effect to the declarations no. (b) to (c) above.
- f. That the costs of and incidental to the petition be and are hereby awarded to the petitioner and;
- g. Such other or further orders as the honourable court may deem fit, just and expedient.

The petitioner's case and/or contention, given the averments contained in the filed election petition are inter-alia, that the 2nd and 3rd respondents had purportedly conducted the held elections in a manner substantially inconsistent with the express provisions and principles laid down under Articles 8, 86 and 88 of the Constitution, 2010, Section 39 of the Elections Act no. 24 of 2011 and the provisions of the Elections (General) Regulations, 2012; in that, the 2nd respondent had purportedly declared the 1st respondent winner of the held election without verifying and completing form 36 in the presence of the petitioner and his agents, unlawfully and unjustifiably declining the petitioner's request for a recount of votes cast, unlawfully and unjustifiably in cahoots with his subordinate officers excluding and/or rejecting or chasing away the petitioner's agents from many polling stations including but not limited to Nyanguru Primary School, Kenya Marine Fisheries, Nyanko Primary School and Riabamanyi Primary School polling stations and unlawfully and unjustifiably refusing to issue and allow the petitioner's agents to sign form 35's in respect of many polling stations, unlawfully and unjustifiably refusing, neglecting and/or otherwise failing to fill form 35s in many polling stations, in allowing the 1st respondent's supporters to impersonate deceased voters and in consequently endorsing the illegal declaration of the 1st respondent through the 3rd respondent vide Gazette Notice Number 3160 dated 13th March 2013 as the elected member of Bobaracho County Assembly Ward and which election he averred and maintained was thus manifestly void and proceeded to set out the grounds of the petition and the particulars of the breaches committed by the 2nd and 3rd respondents under paragraphs 8 – 26 of the filed petition.

The petitioner, in support and in buttressing his case, filed an affidavit of evidence sworn by himself on the 4th of April 2013, filed on 5th April 2013 and in further support attached thereto a number of documents, to wit a certificate of nomination issued by his political party, the statutory form 35s and 36 in respect of the electoral ward and a bundle of copy of the Kenya Gazette Notice in issue. The filed election petition was further supported by a number of witnesses, notably; VINNIE K. ONKUNDI, LINET BOSIBORI MOMANYI, EDNA KERUBO NYAKWARO, CALLEN K. NYANGERI, JACKLINE

GIMONDE, ANNA KEMUNTO MAUTIA, HECKINS ARASA NYAKUNDI, DANIEL OSORO ONDUSO and DENIS MATAI NYAKUNDI, who in corroboration of their support of the filed petition, filed their respective sworn affidavits in evidence accompanied by documentary evidence.

The 1st respondent, in his filed response to the petition dated 15th April 2013, filed on the 16th April 2013 vehemently denied the petitioner's complaints and/or allegations alluded to under paragraph 8 – 27 of the filed petition and invited the petitioner to strict proof hereof. He averred and maintained under paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 that the elections held and conducted by the 2nd and 3rd respondents in respect of County Assembly Representative of Bobaracho County Assembly Ward, held on the 4th March 2013 was held and conducted in a free and fair manner consistent with the provisions of Article 86 of the Constitution of Kenya, 2010, the Elections Act No. 24 of 2011 and the Elections Regulations, which elections had culminated to his declaration by the 2nd respondent as the validly elected Member of the County Assembly Bobaracho Ward and which results were sanctioned by the 3rd respondent vide Kenya Gazette Notice No. 3160 dated 13th March 2013. He therefore urged the court to issue a declaration to the effect that he was duly and validly elected as the County Assembly Representative for Bobaracho Ward and to dismiss the petitioner's petition with costs to him. He, in support and corroboration of his filed response to the petition filed a replying affidavit: in evidence dated the 15th April 2013, sworn on the even date, filed on the 16th April, 2013 and attached thereto a bundle of documents, to wit, the statutory forms 35s and 36 in respect of the held election in issue and further supported by witnesses namely; WILFRED OMENGE NKOBE, HENRY NYABUTO DAN, ZABLON INGWANI ORURU, LAWRENCE NYANGAI OCHENGE, VINCENT OMWENGA OBINGO, ANTHONY OUKO ONDIMU, CHARLES ONDIEKI MATUNDURA, ALI MUSTAFHA, ONGERI ALVIN ONGAGA, JAMES OMBOGO BAGWASI, THOMAS MANAS ONCHANGWA, GODFREY MIGIRO MASAKA, and ZACHARIA MOKAYA NYANGAU, who, too as required by law, filed sworn replying affidavits in evidence accompanied by supporting documents thereto.

The 2nd and 3rd respondents in their answer and/or response to the petition dated 22nd April 2013, filed on the even date generally and vehemently denied each and every allegation in the petitioner's petition and the deponed assertions by the witnesses in their filed sworn affidavits in evidence in support and particularly the contents of paragraph 8 – 27 of the filed petition and invited the petitioner to strict proof thereof. They averred and maintained under paragraph 4 – 17 of their filed response that the 1st respondent was legally declared and Gazetted winner of the subject election, and which elections they hastened to add was conducted in accordance with the provisions of the Constitution and provisions of the Law and in a peaceful and transparent environment and further that no breach of the Law or statute was ever committed as alleged. They further averred, on without prejudice basis that the petitioner herein has made wild allegations against them without proof on the issues, questions and complaints laid before the court for determination, which material facts and evidence, if found by the court, in the unlikely event are not fundamental and material as to invalidate the election of the 1st respondent.

They further averred that, the presented petition is without substance in law and in fact which petition they asserted is incurably and fatally defective, embarrassing, ill conceived, misguided, frivolous, vexatious and an abuse of the Honourable Court process warranting its dismissal with costs, and urged the court to make a determination that the 1st respondent was duly elected County Assembly Representative for Bobaracho Ward and that the said election was valid.

The 2nd and 3rd respondents in support of the filed response to the petition filed sworn affidavits in

evidence by witnesses led by one NG'ENY K. ROBERT, the Returning Officer for Nyaribari Chache Constituency, whose jurisdiction the held elections fell, and denied each and every allegation or complaint raised by the petitioner and his witnesses in their respective filed sworn affidavits in evidence in support of the petition and in corroboration of their cases attached therewith copies of the statutory forms 35s and 36 in respect of the held County Assembly Ward election, which considered position was corroborated by the following witnesses, in their respective sworn affidavits in evidence, EVANS MACHUKI MOGANA, FLORENCE OGETO, STEPHEN ONGORI TEYA, BENARD KONGO MOSE, DENDEN MOSIMA MIKURO, DOMINIC NYACHIRO MOTURI, GILBERT ONGWENYI and MAIRURA EDWARD OKEMWA.

B: AGREED ISSUES FOR DETERMINATION.

The agreed issues for determination as filed by the parties would be crystalized and/or summarized as follows;

- i. Whether the General Elections held on the 4th day of March 2013, in respect of Bobaracho County Assembly Ward was conducted in compliance and in accordance with the provisions of Articles 81 and 86 of the Constitution, 2010, the Law and General practice of elections?
- ii. Whether the elections so held by the 2nd and 3rd respondents were free, fair and in a transparent manner and/or whether same were marred with electoral malpractices and/or illegalities which would in effect invalidate the held elections?
- iii. Whether the 1st respondent herein, had garnered the highest number of valid votes cast and/or whether he was validly and duly declared and gazetted as the elected County Assembly Ward Representative for Bobaracho County Assembly Ward.
- iv. Whether the presented petition discloses a reasonable cause of action and/or is competent and/or incompetent.
- v. Who should bear the costs of the presented petition?

C: INTERLOCUTORY APPLICATIONS:

The petitioner at the first instance and prior to the hearing of the election petition brought a notice of motion application dated 26th April 2013, filed on the even date seeking for the following orders; inter-alia,

- i. That the Honourable Court be pleased to grant an order for scrutiny, recount and re-tallying of all the votes cast to and/or in favour of all the candidates who contested for Bobaracho County Assembly Ward, during the General Elections held on the 4th March 2013.
- ii. That consequent to prayer (i) herein before being granted, the results for the scrutiny, recount and re-tallying be pronounced and/or announced prior to (sic) the substantive hearing of the petition and in any event the results of the said exercise be taken into the account by the Honourable Court.

The presented motion was strenuously opposed by the respondents and the court in its ruling thereafter disallowed the application on grounds that same was premature taking note of the fact that the prayers sought were not the only prayers or issues in the filed election petition as contemplated and/or envisaged vide Section 32(2) of the Election Rules and secondly, the petitioner having failed to establish and/or demonstrate a legal basis and/or sufficient reasons thereto to the satisfaction of the court which scenario, as noted by the court would be achievable upon hearing of the main petition, whereupon all parties to the petition would be tested and examined in their respective evidence to de adduced.

D: EVIDENCE ADDUCED:

i. BY THE PETITIONER:

The petitioner in his sworn testimony in evidence in chief wholly adopted the filed sworn affidavit and the bundle documents attached thereto as his evidence in support and corroboration of the filed petition. He, on cross examination stated that he was among the nine candidates who had contested for the Bobaracho County Assembly Ward during the elections held on the 4th March 2013, which elections he conceded were conducted in a free and fair manner save for the instances where he had noted some discrepancies during the tallying of the votes cast, wherein the garnered votes in his favour had been diminished and posted in favour of other competing candidates; as in the cases obtaining at Nyamage, Bobaracho and Jogoo polling stations. He stated that at Bobaracho Secondary School Polling Station, he had garnered a total of 67 votes but during the tallying of the cast votes, at Keumbu tallying centre, he was declared by the Returning Officer to have garnered 17 votes and had consequently lost 50 votes and at Nyamage Polling Station, he had garnered 299 in stream no. 2 as indicated by the filed statutory form 35, but the tallied results showed he had garnered 247. He denied the respondents assertions and/or allegations that he, in company of one Kerosi Ondieki, now the current Assembly Speaker – Kisii County had attempted to disrupt the counting of the votes cast at Jogoo Polling Station. He further on cross examination maintained that he had appointed agents, who however were allegedly not accredited by IEBC, the 3rd respondent and were thus consequently denied access to the polling stations. He reiterated that the votes cast in his favour in some of the polling stations i.e. in Jogoo, Nyamase and Bobaracho Secondary School as declared by the Presiding Officers were altered during the tallying and announcement of the final results by the Returning Officer, the 2nd respondent herein. He called nine (9) PW2 VINNIE K. ONKUNDI, PW3 LINET BOSIBORI MOMANYI, PW4 EDNA KERUBO NYAMWARO, PW5 CALLEN KEMUNTO NYANGENYI, PW6 JACKLINE GIMONDE KEMUMA, PW7 ANNA KEMUNTO MAUTIA, PW8 HECKINS ARASA NYAKUNDI, PW9 DANNIEL OSORO NYANDUSO and PW10 DENNIS MATAI NYAKUNDI, who all in their respective sworn testimonies in evidence in chief adopted their respective sworn affidavits in evidence filed, as their evidence in corroboration of the petitioner's election petition. They all except PW7 ANNA KEMUNTO MAUTIA who in evidence was a polling clerk at Bobaracho Secondary school polling station, stated in their cross examination and re-examination that they were appointed agents, who had been purportedly, assigned the role of overseeing the electoral process in the assigned polling stations falling under Bobaracho County Assembly Ward by their respective political parties. For instance PW2 in evidence alleged to have been appointed by ODM party, PW3 allegedly was appointed by an individual candidate running under ODM party ticket, the petitioner herein, PW4 appointed by FORD Peoples Party, PW5 allegedly an accredited agent for FORD People Party, PW6, appointed as an agent by Safina Party and PW8, 9 and 10 allegedly directly appointed by the petitioner as individual candidate's agents. PW8, PW9 and PW10, in their respective adduced evidence, upon presenting their appointment letters or credentials to the IEBC officials were purportedly chased or turned them away and were therefore denied access to the polling stations and did not as it were witness the voting and the counting exercise and the declaration of the votes cast by the presiding officer. On the other hand, PW2, PW3, PW4, PW5 and PW6 had witnessed the entire electoral process in the voting, counting and declaration of the votes cast by the presiding officers and had allegedly made their personal handwritten notes on the votes cast by each candidate and particularly in favour of the petitioner which results they had handed over to the petitioner upon his request much later after the announcement and declaration of the final results. They alleged in evidence that they were not availed the statutory form 35s for them to append their signatures in acknowledgement and in confirmation of the votes cast and that in some polling stations declared results by the Presiding Officers were not properly posted and tallied in statutory form 36 by the Returning Officer, the 2nd respondent herein.

ii. **BY THE 1ST RESPONDENT:**

The 1st respondent in his evidence in chief stated that he is the incumbent elected County Assembly Representative for Bobaracho County Assembly Ward in the election held on the 4th March 2013, wherein he was among the nine contestants and had emerged the declared winner, having garnered the highest cast votes and was consequently Gazetted as the duly elected County Representative for Bobaracho Assembly Ward, which held elections he maintained was conducted by IEBC, the 3rd respondent herein in a free, fair and transparent manner. It was his evidence that he had appointed agents in the polling stations with instructions to oversee, monitor and to keep a close eye on the election process. He, in examination in chief reiterated that the entire election process held on the 4th March 2013, in respect of Bobaracho County Assembly Ward were conducted in a free and a fair manner with no complaints or any ugly incidents reported save, for an isolated incident reported at Jogoo Polling Station where his close competitor and ally, the petitioner herein in the company of one Kerosi Ondieki had attempted to disrupt the smooth counting of the votes cast, which incident he had formally lodged at Kisii Central Police Station vide OB entry No. 4 of 4th March 2013. He wholly adopted his affidavit in evidence in answer to the petition and the attached bundle of documents thereto in evidence in answer to the filed petition.

He, on cross examination and upon being shown bundle of copies of the statutory form 35s, filed by himself in answer to the filed petition and those filed by IEBC, the 3rd respondent conceded that some of his appointed agents apparently did not sign on the statutory form 35s as opposed to what he had deposed to in his sworn affidavit in answer to the petition. He, on further cross examination conceded that there were apparent noted discrepancies on the statutory form 35s in respect of the votes cast, with a case in point, being Bobaracho Primary School Polling Station, which had two streams, wherein some five (5) votes were not reflected anywhere and could not be accounted for. He maintained that all the statutory form 35s were generated by IEBC, the 3rd respondent who, are in a better position to explain the discrepancies noted. He, reiterated that the election exercise, notwithstanding the noted discrepancies was conducted in a free and fair manner by IEBC, the 3rd respondent, who complied with the law and was thus validly declared as the County Assembly elected representative for Bobaracho County Assembly Ward. He, called five (5) witnesses his appointed agents in some of the polling stations namely; RW2, JAMES OMBOGO BAGWASI an agent at Bobaracho Secondary School, RW3, ONGORI ALVIN ONGAGA, Jogoo Primary School Stream No. II, RW4, ALI MUSTAFHA, Jogoo Primary School Stream No. I, RW5, THOMAS MWAMASI ONCHANGA, Riabamanyi Primary School polling station and RW6, ZABLON INGWANI ORURU, Nyamage Primary School polling station, who in their respective sworn testimonies and evidence in chief adopted their filed affidavit of evidence in reply to the filed petition. They all maintained that they were trained as agents at Keumbu Tallying Centre prior to the Election Day and had witnessed the election process in their respective polling stations which exercise, they all maintained was conducted in a free and fair manner and that the results declared by the Presiding Officers as captured in the statutory form 35s were true results and a reflection of the tallied results by the returning officer in statutory form 36.

They conceded that not all of them had signed the statutory form 35s and further that some of their names were missing from the statutory form 35s

iii. **BY 2ND AND 3RD RESPONDENTS:**

The 2nd and 3rd respondents, in evidence called four (4) witnesses led by the 2nd respondent,

ROBERT K. NG'ENY, who in evidence was/is the Returning Officer for Nyaribari Chache Constituency under whose jurisdiction the Bobaracho County Assembly Ward elections, held on the 4th March 2013 fell.

The 2nd respondent, referred to as RW1 stated in his sworn testimony that his role as the Returning Officer, with the assistance of his Deputy Returning Officer was to inter-alia monitor and to ensure the smooth running of the elections process, to receive any complaints from all the polling stations, if any and/or challenges encountered and ultimately to receive all the results from the Presiding Officers from all the polling stations which results were contained in the statutory form 35s, which results he would then verify before tallying and pronouncing the final tallied results in the presence of the candidates and their chief agents, upon asking them if they had any complaints thereto. He stated that he would then thereafter proceed to cause their ICT personnel to key in the tallied results in form 36. He, in his evidence in chief stated that, he had prior to the Election Day held a consultative seminar with the candidates and their agents, where they were trained and sensitized on their roles during the election period and on the need to observe the Oath of Secrecy and the Electoral Laws and the requirement for them to submit the list of their agents 48 hours prior to the voting day. It was his evidence in chief that overallly the elections held on the 4th March 2013 in respect of Nyaribari Chache Constituency was conducted in accordance with the law and was free and fair notwithstanding the obtaining technical challenges in remitting the results. He commended all IEBC officers who worked under him for doing a commendable job. He wholly adopted his sworn affidavit in evidence in answer to the filed petition and the entire attached documents notably, the statutory form 35s and 36 in support and in corroboration of his evidence and on behalf of the 3rd respondent. He, on cross examination by the 1st respondent's counsel maintained that the elections held in respect of Bobaracho County Assembly Ward, on the 4th March 2013 was conducted in a free and fair manner and the winning candidate, the 1st respondent herein consequently validly declared. He further stated that one ANNE KEMUNTO who was a polling clerk for the IEBC, called by the petitioner as a witness in the petition ought to be investigated for a possible commission of an electoral offence in taking away an election material from the polling station. He on cross examination by the petitioner's counsel, stated that there was no law forbidding anyone from getting access to the duly filled copy of form and that ANNE KEMUNTO MAUTI called as the petitioner's (PW7) was within the law to have requested the Presiding Officer, a copy of the filled form 35. He on further cross examination and upon being shown a number of copies of documents to wit the statutory form 35s and 36 filed by the 1st, 2nd and 3rd respondents and his own sworn affidavit in support of the 3rd respondent's case conceded that there were apparent transposition errors during the keying in of the results in form 36 at the constituency level, in some isolated instances such as in Bobaracho Primary School polling station Stream II where Five (5) votes cast could not be accounted for, Bobaracho Secondary School, where the petitioner was indicated to have garnered 17 votes, instead of his rightful cast votes of 67, to mention but a few. He maintained that the results he declared and announced in respect of Bobaracho County Assembly Ward are the true reflection of the results received by him from the presiding officers, which results he had posted onto form 36.

RW2 BENARD KONGO MOSE in his evidence in chief adopted his sworn affidavit in evidence in corroboration of the 2nd and 3rd respondents' cases and confirmed that he was the Presiding Officer posted to Bobaracho Secondary School by IEBC, the 3rd respondent. It was his evidence that the election process was peaceful throughout the entire process with no complaint raised by the contesting candidates and that the results reflected and posted in form 36 exhibited by the 2nd and 3rd respondents were the true reflection of the results on the votes cast in favour of the candidates. He stated that the petitioner herein had garnered 17 votes and one MARY ANGIMA 67 votes as indicated on the statutory forms 35 and 36. He, on cross examination by the 1st respondent's counsel maintained that the statutory forms 35 in respect of Bobaracho Secondary School polling station had

shown the petitioner having garnered 17 votes and one MARY ANGIMA having garnered 67 votes. He, on being shown the statutory form 35 exhibited by the petitioner in respect of Bobaracho Secondary School polling station denied the contents therein and termed them forgeries. He, on cross examination by the petitioner's counsel maintained that the statutory form 35s exhibited by the 1st respondent and the petitioner are unknown to him and disowned the signature and the handwriting, terming them forgeries. He conceded that some agents did not sign the statutory form 35s which he would normally fill in.

RW3, BENDEN MOSIMA MIKURO, in his evidence in chief adopted his sworn affidavit in evidence filed in support and in corroboration of the 2nd and 3rd respondents' cases and confirmed having been deployed by the 3rd respondent as a presiding officer at Bobaracho Primary School Stream II in the elections held on the 4th March 2013.

He, on cross examination conceded that there were five (5) cast votes which were unaccounted for, which votes, in his own opinion could have been rejected votes, which votes in any event could not have been factored in favour of any candidate. He further conceded that he did however post the five (5) cast votes unaccounted for to the final document form 35. He, on further cross examination denied any knowledge of the statutory form 35 exhibited by the petitioner and the first respondent and termed them forgeries. He stated that the copies of statutory form 35 exhibited by the 2nd and 3rd respondents in their response to the petition are the genuine documents. He confirmed, however that as the Presiding Officer he had the custody of the IEBC official rubber stamp and could not comment as to who might have embossed the IEBC official rubber stamp on the disputed documents. He further stated that the failure to factor the unaccounted for, five (5) cast votes was due to fatigue and vehemently denied bungling the elections held on the 4th March 2013.

RW4, EVANS MACHUKI MOGAKA, in evidence in chief adopted his sworn affidavit in evidence as his evidence in support of the 2nd and 3rd respondents' cases. He, on cross examination owned up to the three (3) sets of form 35s shown to him relating to Nyamage Primary School, wherein he had posted as the Presiding Officer. He conceded there were inaccuracies in form 35s wherein he had posted the total number of votes cast as 452 instead of 453 consequently thereof he had robbed one candidate, Francis Michieka one (1) cast vote.

E: SCRUTINY AND RECOUNT OF VOTES CAST

The court upon the close of trial and upon satisfying itself on its own suo moto ordered for a scrutiny and recount of all the votes cast in all the polling stations falling under Bobaracho County Assembly Electoral Ward, the election in issue, for it to ascertain the validity and authenticity of all the votes cast and the legality or otherwise of the entire electoral process; which exercise as ordered by court was carried out by the Executive Officer of the Court with the assistance of Judicial staff and in the presence of all the parties to the petition and their respective nominated agents, which exercise was carried out from the 5th day of August 2013 running to the 7th day of August 2013 when the exercise was concluded and a report presented to the court by the Executive Officer of the Court on the 8th day of August 2013, which report formed part of the record in these proceedings and which would ultimately assist the court to arrive at an informed decision on the matter. For the record, the results from the scrutiny and recount of votes cast were as follows;

- i. The declared cast votes in favour of the petitioner increased from 2095 to 2148 votes, an increase margin of 53 votes.

- ii. The declared cast votes in favour of the 1st respondent decreased from 2322 to 2309, a decrease margin of 13 votes.
- iii. It established that the petitioner garnered 67 votes at Bobaracho Secondary School as opposed to the 17 votes posted in the statutory form 35 and 36 respectively.
- iv. The results further revealed that there were missing statutory form 35s in a total of seven (7) polling stations namely; Nyosia Primary School, Kegati Primary School Stream no. 2, Kenya Marine Fisheries, Nyanguru Primary School, Nyamage Primary School Stream No. 1, Nyanko Primary School and Nyamemiso polling station.
- v. That the 1st respondent, even after scrutiny and recount of votes was still ahead of the petitioner with the highest votes.

F: SUBMISSIONS

All the parties to the petition, upon the close of the trial, through their respective counsels on record filed written submissions on the raised issues during the trial of the matter i.e. the summary of the oral as well as documentary evidence so adduced and tendered in support and in corroboration of the respective cases, resting with the results of the scrutiny and recount of the votes cast as ordered and directed by court. Parties in buttressing their considered positions in the matter cited several case law, which I would shortly, hereinafter consider in my final determination of the matter.

The petitioner's counsel, during the highlighting of the written submissions; submitted and highlighted the following;

- i. That the petitioner herein, given the myriad and cocktail of the allegations contained in the filed petition has discharged the burden of the settled standard of proof, in an election petition which standard of proof is beyond the balance of probability in civil cases but slightly below that of beyond reasonable doubt in criminal cases, in that the electoral process (voting, counting, filling of the statutory forms, announcement of the results and the preservation of electoral materials) in respect of the election held for Bobaracho County Assembly Ward was thoroughly vitiated and therefore null and void, for failing to comply with Article 81 and 86 of the Constitution, 2010, that prescribes the minimum threshold to be achieved by the electoral body, the 2nd and 3rd respondents herein in conducting an election and the Election Act No. 24 of 2011 and the Election Regulations 2012, Nos. 74, 77, 79, 83 and 87 thereof. He, on this score cited a case in point, Bobaracho Secondary School Polling Station where the petitioner's votes cast votes were indicated to be 17 votes when in fact the actual and legal votes cast, counted and announced at the polling station were 67 which by itself, he further submitted was fraudulent, in the absence of any explanation as to why the petitioner's cast votes were diminished or decreased or swapped in favour of another candidate. He submitted that, an election is not all about numbers or figures, but is all about the validity and veracity of the documents anchoring the results, which documents include the statutory form 35s and 36 and counterfoils, which documents were to be prepared and executed as envisaged under rule 79 of the election regulations. He, at this point, pointed out some instances, which obtained at Jogoo Primary School Stream No. 1 where the statutory form 35 was allegedly executed by the Presiding Officer in the absence of the appointed agents, with no statutory comments made on the absence of the agents and at Nyanguru Primary School wherein the statutory form 35 did not contain the IEBC validation stamp and with no statutory comments made by the presiding officer. He further submitted that the law obtaining under the election law; section 83(1) is that the statutory form 36 has to be signed and dated by the Returning officer, which scenario, admittedly did not obtain in this particular instance as conceded by the Returning Officer (RW1) in his adduced evidence and which non-compliance of the law is fatal to an election

The petitioner's counsel in buttressing his considered position in the highlighted issues herein

before cited the cases of **HASSAN JOHO –VS- NYANKE & ANOTHER, 2008 eKLR, MURGOR – VS – IKONGA, 2008 KLR, WABUGE – VS – LIMO, SIMON OGARI & ANOTHER – VS- HON. JOEL OMAGWA ONYANCHA and OMINGO MAGARA – VS- NYAMWEYA.**

ii. Scrutiny and recount.

The petitioner’s counsel, on this limb submitted that the report on the scrutiny and recount of the votes cast presented before court revealed that a total of seven (7) polling stations did not have the original form 35s, namely; Nyanko, Nyamemiso, Kegati Steam No.2, Nyosia, Kenya Marine Fisheries, Nyamage Stream No.1 and Nyanguru polling stations. He further submitted in the other polling stations i.e. G.I.T. code 013 and Riabamanyi polling station, the statutory form 35s did not have the IEBC validation stamp which omission would in effect invalidate the held elections as held in the cited case of **THOMAS MALINDA – VS- IEBC & TWO OTHERS.**

He further submitted that Regulation 74 relates to a counting agent but not an agent and that the refusal to admit agents to a polling station such as in the instant case, would vitiate the held elections

The petitioner’s counsel, in resting his submissions urged court to place reliance on the cited legal authorities and to invalidate and nullify the elections held.

The 2nd and 3rd respondents’ counsel during the highlighting of the filed submissions, submitted the following;

- i. That the election held on the 4th March 2013, the subject of the present petition was conducted by the 2nd and 3rd respondents in a free and fair manner and according to the law as conceded by all the parties herein including the petitioner save for Bobaracho Secondary School, where an error arose in posting of the petitioner’s cast votes to another candidate which error was not deliberate and which error he further submitted cannot be a legal basis to invalidate the held election.
- ii. That the held election was a tedious exercise and the first of its kind to be undertaken under the new Constitution, 2010, which presented the 2nd and 3rd respondents with teething challenges and that the non-signing of the statutory forms could not invalidate an election, given that non-compliance of the law cannot in itself vitiate an election as held in the case of **HASSAN JOHO – VS – NYANKE**, in an instance where the election was substantially conducted in a free and fair manner.
- iii. That the petitioner in evidence did not prove the breaches allegedly committed on the part of the 2nd and 3rd respondents, as alluded to in the petition which allegations ought to be proved in evidence by cogent, consistent and credible evidence.
- iv. That, the petitioner in his evidence failed to show that his appointed agents were chased away from a polling station and that in any event, regulation no. 74 of the elections regulation require agents’ list to be submitted within 48 hours prior to the Election Day and that the presiding officers acted within the law to have sent away an agent who had not complied with the law. He, on this point, submitted that the petitioner’s agents in any event, were agents from other political parties and could not have been practicable in law for them to be in different polling stations on the same polling day.
- v. That the results of the scrutiny which showed that seven polling stations did not have statutory form 35s in the ballot boxes and the petitioner’s impression that the results in those polling stations could not be ascertained are far-fetched and far from the truth as the results in those polling stations he further submitted were availed by the 2nd and 3rd respondents as required by law and pinned on the sides of the ballot boxes and further that the results contained in the ballot boxes were therefore ascertained and could be compared to the results brought to court. He also submitted that the petitioner’s submission that Nyanguru Primary School Polling Station, upon

- scrutiny was found not to have counterfoils in the ballot boxes was not fatal and which scenario is distinguishable from the cited case of **THOMAS MULINDA & TWO OTHERS – VS – IEBC & TWO OTHERS** wherein 19 polling stations were found to have been missing the counterfoils.
- vi. That the irregularities so found were not massive as to invalidate the held elections and further that the cited cases of **JAMES OMINGO MAGARA – VS – NYAMWEYA** and **SIMON OGARI & ANOTHER – VS – HON. JOEL OMAGWA ONYANCHA** are quite distinguishable given the circumstances obtaining in the present petition. He urged court to make a finding that the subject election held on the 4th March 2013 was conducted in a free and fair manner and in accordance with the law and the present petition ought to be dismissed with costs to the 2nd and 3rd respondents.

The 1st respondent's counsel in highlighting the final written submissions, submitted the following;

- i. That the petitioner in his own admission, has admitted that the held elections were conducted in a free and fair manner and in which case, has a clear winner even after scrutiny and recount of the cast votes as ordered by court on its own suo moto, at the close of trial, the 1st respondent herein, and as such there is nothing or issue left for the court's determination.
- ii. That the posting of the votes cast at Bobaracho Secondary school where the petitioner had lost 50 votes was a mere error, as explained by the Presiding Officer in evidence and which error, in any event was not intended or meant to benefit any candidate. It was not a deliberate error and thus the petitioner has not proved any fraud committed, which acts or omission remained the acts or omissions of the IEBC officials.
- iii. That the missing of counterfoils as in the case of Nyanguru polling station as submitted by the petitioner cannot be a basis for nullification of an election and further submitted that, one, cannot say, for a fact, that a counterfoil was missing in the instant matter as the alleged missing counterfoils could have been misplaced in other election boxes i.e. for the Member of National Assembly, Presidential and other elective posts, taking into account that the scrutiny and recount of the cast votes was done at the tail end of the trial and the IEBC were not therefore accorded a chance to give an explanation, which scrutiny and recount exercise he submitted had been overtaken by events.
- iv. He submitted that no breaches of the law or conduct during the election process has been visited on the winning candidate, the 1st respondent herein and further that no case at all has been made against the 1st respondent.
- v. He submitted that the petitioner has failed to prove the allegations contained in the filed petition and that the petitioner's witnesses were in fact alien and strangers, who could not therefore be expected to have corroborated the petitioner's case.
- vi. That scrutiny and recount has to be narrowed only to the disputed polling stations and in the instant case, to four polling stations but that the court on its own suo moto proceeded to order for scrutiny and recount of the votes cast in all the polling stations against the spirit and letter section 32 of the election rules.
- vii. That the IEBC, the 3rd respondent in the instant case met the threshold envisaged under Article 86 of the Constitution, 2010 in conducting the free and fair elections and submitted that each case, given the listed legal authorities, such as the case of **THOMAS MULINDA & OTHERS – VS – IEBC & TWO OTHERS**, has its unique and peculiar circumstances relating as to when an election could be nullified and urged court to take cognizance of the circumstances obtaining during the elections held on the 4th March 2013, which elections, was one of its kind under the new Constitution, 2010.

He reiterated that the 1st respondent did not misconduct himself or committed any electoral offence during the held elections for any sanctions to be meted against him.

G: DETERMINATION

I have carefully and seriously considered the filed pleadings in the petition and the answers/responses thereto and the accompanying filed sworn affidavits in evidence and the attached bundle of documents, forming part of the records, by all the parties, in support and in corroboration of their respective cases, the oral evidence adduced as well as the filed written submissions on the raised issues for determination by the court.

1. I, wish to observe and note, from the onset, that it cannot be gainsaid and/or overemphasized, that an electoral process is such an important integral aspect and component in every democratic society, which process enable the people in electing their representatives in leadership and the manner they would wish to be governed. This explains why Article 81 of the Constitution, 2010 places lots of importance on the role of the electoral process; which process in our case is being midwifed by IEBC, the 3rd respondent herein, a body and creative of the constitution, which body, is mandated, under Article 86 of the Constitution, 2010, to ensure the following;
 - a. That whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.
 - b. The votes cast are counted, tabulated and the results announced promptly by the Presiding Officer at each polling station.
 - c. The results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer and;
 - d. Appropriate structures and mechanism to eliminate electoral malpractice are put in place, including the safe keeping of electoral materials.
2. It is against the foregoing background that an aggrieved party or a petitioner in an election petition, as submitted by all the parties to the instant petition through their respective counsels on record, has to inter-alia meet the settled threshold or the standard of proof, to the satisfaction of the court, which standard of proof is higher than that of balance of probability but below that of reasonable doubt. The burden of proof lies with the petitioner to prove the allegations seeking for nullification of an election by adducing cogent, credible and consistent evidence thereof. A generalized allegation would not suffice. It is worth of note in this regard that non-compliance with any written law relating to an election per se is not sufficient ground for invalidation of an election. Section 83 of the Elections Act, 2011 states:

“ No election shall be declared to be void by reason of non-compliance with any written law relating to the election, if it appears that the election was conducted in accordance with the principles laid down in the Constitution and other written law or that the non-compliance did not affect the final result of the election.” This position in law was stated in the cited case of **JOHO – VS – NYANGE & ANOTHER**, where it was further held that;

“An election will be nullified if it is not conducted substantially in accordance with the law as to elections. It will also be nullified, even though conducted substantially in accordance with the law as to elections, if the errors or mistakes in conducting it, however trivial are found to have affected the result of the election”.

3. There is a general consensus by all the parties herein, given the evidence adduced, that the subject election held on the 4th March, 2013, was conducted in a peaceful manner, with no incidents of violence reported save for an isolated incident where the petitioner, in company of one Kerosi Ondieki, the current County Assembly Speaker – Kisii County were allegedly reported to have attempted to disrupt the counting of the votes exercise at Jogoo Primary School, which allegations, I do find were not sufficiently proved in evidence with any corroborative evidence thereof. They remain uncorroborated allegations on record.

The main issue then, in my considered view, is whether the electoral malpractices and illegalities noted and found and/or established by the court during the scrutiny and recounting of the cast

votes and the presented report, the non-signing of the statutory form 35s and 36 by the Presiding Officers in some polling stations and the Returning officer and the absence of appointed agents at some polling stations as alleged by the petitioner have been proved in evidence to the settled standard of proof afore stated and as to whether if the allegations found, would be sufficient grounds or reasons to vitiate and to nullify the held elections.

4. I, find no sufficient evidence laid and placed before court, to show that the 2nd and 3rd respondents had impersonated dead persons as voters or that the number of registered voters had exceeded the votes cast in any of the polling stations.
5. I, further find no sufficient evidence or record to show that the petitioner's appointed agents were chased or turned away from any of the polling stations as alleged. It is on record, in this regard, that the alleged appointed agents for the petitioner were in fact agents appointed by other political parties, other than the petitioner's sponsoring party, for instance, PW4, EDNA KEMUNTO NYAMWARO, who in evidence had been appointed by FORD People party, PW5, CALLEN KEMUNTO NYANGENYI, who in evidence had been accredited by FORD People party agent, PW6, JACKLINE GIMONDE KEMUMA, who in evidence, was an appointed agent for Safina Party, PW9, DANIEL OSORO ONDUSO, who after allegedly been chased or turned away from Nyanguru Primary polling station was approached and appointed by one Erick Monda, as his agent at Bobaracho polling station.

These witnesses purportedly appointed by the petitioner as his agents, admittedly on record were indeed agents to other rivaling political parties and could not reasonably be expected to have been the petitioner's independent competent witnesses on the grounds of possible conflict of interest. The evidence adduced with due respect to that extent have no evidentiary value. I, further find that, even if the petitioner's alleged agents were chased away or turned away from the polling stations, that in my view, would have amounted to a procedural anomaly, which would not have fundamentally affected the final results of the election.

6. I am in agreement with the 2nd and 3rd respondents' arguments and bound and guided by the cited legal authorities of **Kisumu Court of Appeal Civil Appeal No. 8 of 2010, JAMES OMINGO MAGARA – VS – MANSON ONYONGO NYAMWEYA & TWO OTHERS** and **JOHO – VS – NYANGE & ANOTHER (2008) KLR (EP)** that the non-signing of the statutory form 35 and as obtaining in the instant case, in some instances and non-compliance of the law, would not per se affect the final result of an election as they are post-election anomalies which could be overlooked or excusable in law.

Regulation 79 (6) (7) of the Elections Regulations states;

“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 sub regulation 2(a). The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under sub regulation (2) shall not by itself invalidate the results announced.”

Although, it is crucial for the agents/candidates to sign the statutory form 35, failure to do so, however does not necessarily nullify an election as held in the cited case of **MACHAKOS HC ELECTION PETITION NO. 2 OF 2013, THOMAS MULINDA MUSAU & TWO OTHERS – VS – IEBC & TWO OTHERS**.

7. There is overwhelming evidence, following the scrutiny and recount of votes cast ordered by the court that the statutory forms 35s were missing in seven (7) polling stations, namely; NYANKO, NYAMEMISO, KEGATI Stream No. 2, NYOSIA, KENYA MARINE FISHERIES, NYAMAGE PRIMARY SCHOOL Stream No. 1 and NYANGURU polling stations.

Additionally, it was established that the counterfoils in respect to Nyanguru Primary School polling station was missing from the ballot box. The IEBC validation official stamp was also

established to have been missing at GIT code no. 014 and RIABAMANYI code 013 polling stations. It was further established that the petitioner's cast votes amounting to 67 votes at Bobaracho Secondary School polling station were inaccurately and/or erroneously posted in favour of a rivaling or competing candidate.

There is no dispute that the 1st respondent, even after the scrutiny and recount of the votes cast remained in the lead.

8. It is a conceded fact that the statutory forms 35s found to have been missing in the aforementioned seven(7) polling stations are the primary documents in an election which documents are used by the Returning Officer in posting the results/information contained therein and tallying same and consequently posting same onto form 36, in declaring the final results of the votes cast in favour of each candidate in an election. The lack or absence of the mandatory form 35s in the afore stated seven (7) polling stations and the lack of counterfoils in Nyaguru polling station in my considered view was fatal to the subject held election as it would have been lawfully difficult to ascertain and verify that the ballot papers contained in the ballot boxes in respect of the said polling stations were indeed the cast votes or not.

I would wish to point out in this regard that the final results, posted onto statutory form 36, given the apparent election irregularities were thus null and void ab initio, consequently rendering the held election invalid.

9. The posting of the petitioner's cast votes amounting to 67 votes garnered at Bobaracho Secondary School, to a competing candidate, to me, with due respect and in the absence of any explanations for such an anomaly by the concerned Presiding Officer, one BENARD KONGO MOSE called in evidence as (RW2) smacked of some conspiracy to defraud and/or deprive the petitioner of his rightly cast votes so as to disadvantage him on the votes cast in relation to the votes cast in favour of the competing candidates.
10. The circumstances obtaining in the instant presented petition, following the results of the scrutiny and recount of votes ordered by court, in my view find relevance in the cited case of **MANSON ONYONYO NYAMWEYA – VS – JAMES OMINGO MAGARA & TWO OTHERS (2009) KLR**, where Justice D. Musinga, as he then was, held thus;

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

11. An electoral process, as rightly submitted by the petitioner's counsel is not a question of numbers or figures or the votes cast in favour of a particular candidate but it is all about the validity of the electoral process and veracity of the entire documents anchoring the final results, and although the 1st respondent emerged the winner with the highest number of votes cast, even after the scrutiny and recount of votes, such results could not be validated in law as same were sourced and anchored on an invalid electoral process as restated in the cited case of **WABUGE – VS – LIMO**.
12. An election petition is an enquiry into the validity, legality or otherwise of an election process and an election court in the exercise of its conferred jurisdiction is mandated to call any evidence, including but not limited to compelling of witnesses who appear to it would have been concerned in the election in issue.

The import of the letter and spirit of Section 33(4) of the Election Petition Rules, 2013, in my view is for expediency, but not intended or meant to curtail, or tie up the court's hands, or shut its eyes into laying its hands or setting its eyes into the wider scope and perspective of an entire electoral process, in so far as the court does not consider extraneous matters in its findings.

I do not think therefore, with this in mind, that the court in ordering for a scrutiny and recount of the votes

cast, at the tail end of the proceedings would have occasioned any party any injustice, prejudice or hardship.

13. I take cognizance and judicial note of the magnitude of the elections undertaken by the 2nd and 3rd respondents on the 4th March 2013 and bearing in mind that it was the first one of its kind to be undertaken under the new Constitution, 2010. This notwithstanding the apparent electoral irregularities and malpractices, found to have been committed were such massive, to be said to have been occasioned by mere human error or fatigue, but with due respect, in my own estimation were occasioned due to inefficiency and lack of accountability on the part of the 2nd and 3rd respondents and the officers working under them and under their directions; which in effect was contrary to the provisions of Article 81(e) of the Constitution, 2010. The flaws were fatal to credible elections and cannot be said to have been representative of the political will of the people of Bobaracho County Assembly Ward.
14. Although, the subject election as noted herein before was substantially held in accordance with the law, the irregularities so found however had vitiated the end result of the election.

Justice L.N. MUTENDE, in **MACHAKOS HC. ELECTION CASE No. 2 of 2013, THOMAS MULINDA MUSAU & TWO OTHERS – VS – IEBC & TWO OTHERS**, in making reference to the decision held in the case of **MORGAN & OTHERS – VS – SIMPSON & ANOTHER (1974) 3 ALL. E.M at page 722**, stated in part;

“Where breaches of the election rules, although trivial, had affected the result, that by itself, was enough to compel the court to declare the elections void, even though it had been conducted substantially in accordance with the election law; it was vitiated – irrespective of whether or not the result of elections had been affected.”

15. The net result is therefore that the 1st respondent, SAMWEL KENNY NYANGENYA, for the afore going reasons and circumstances cannot be said to have been validly elected as the County Assembly Member for Bobaracho County Assembly Ward, whose election was voided in law by the found electoral irregularities aforesaid and consequently hereby proceed to nullify the held election forthwith.
16. Fresh elections are hereby ordered to be held for Bobaracho County Assembly Ward.
17. A certificate, shall, and is hereby issued, forthwith pursuant to the provisions of Section 86(1) of the Elections Act, for service upon the 3rd respondent (IEBC) for appropriate action and for the appropriate notification to the relevant County Assembly Speaker.
18. It is evident that the election irregularities found, leading to the nullification of the subject held elections were solely committed by the 2nd and 3rd respondents, whom I hereby condemn to pay the costs of the entire petition which costs shall be filed to be assessed by the court in the same manner as costs in Civil Proceedings and in accordance with the Civil Procedure Act.
19. I disallow to grant the 1st respondent any costs of the petition as he was in solidarity with the 2nd and 3rd respondents during the trial of the matter and order him to bear own costs.

Judgment accordingly.

DATED, SIGNED and DELIVERED at KISII this 25th day of September, 2013.

K. SAMBU

PRINCIPAL MAGISTRATE.

In the presence of;

1. Mr. Oguttu Mboya.

Counsel for the Petitioner.

2. Mr. Minda

Counsel for the 1st Respondent

3. Mr. Odhiambo

Counsel for the 2nd and 3rd Respondent

4. Mr. Mongare

Court Clerk

K. SAMBU

PRINCIPAL MAGISTRATE