



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE COURT AT MERU
ELECTION PETITION NO. 3 OF 2013

M'ANYIRI HANNINGTON GITAARI PETITIONER

VERSUS

ALPHAXARD KAUMBUTHU CHABARI 1ST RESPONDENT

MR. KENNETH ONDITI 2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 3RD RESPONDENT

JUDGMENT

The petitioner herein filed a petition dated 8th April, 2013 challenging the election or declaration and return of the 1st Respondent by the 2nd and 3rd Respondents as the winner of the election for the position of County Assembly for Igoji West County Ward. The elections were conducted by the 3rd Respondent which is the constitutional body established under Article 88(1) of the constitution and charged with the sole mandate of conducting and supervising referenda and elections to any elective body or office established by the constitution of Kenya or as prescribed by an Act of parliament. The 3rd Respondent had appointed the 2nd Respondent Kenneth Onditi as the returning officer for South Imenti Constituency where Igoji West Ward is located.

The Elections were conducted on 4th March, 2013. The 3rd Respondent prepared the ballot papers for the same elections and in particular for Igoji West county Ward. From the record of proceedings herein and in particular for 13th May, 2013 all the parties agree that when the petitioner submitted copies of photographs to be embossed in the ballot papers as prescribed by the 3rd Respondent, the latter embossed the photograph of a stranger against the name of the petitioner. The elections proceeded and after the elections the votes were counted and the following results were announced:-

(a)	Aphaxard Kaumbuthu Chabari	2,589
(b)	Ezekiel Mutegi Mwambi	1,450
(c)	Gerald Kiambi	60
(d)	Hannington Gitonga Maingi	518
(e)	Humprey Kinto Mwebia	50

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|-----|-----------------------------|-------|
| (f) | Lorine Muthoni Rungoi | 65 |
| (g) | Murithi Eliphias Nkanata | 1,578 |
| (h) | M'Anyiri Hannington Gitaari | 1,474 |

Based on the same results the 3rd Respondent declared the 1st Respondent the duly elected county representative of Igoji West County Ward. In his petition the petitioner cited several breaches, a summary of which are that:-

- (a) The 3rd Respondent embossed a wrong photograph on the ballot paper an act that caused confusion to his supporters and eventually led to his loss of the elections.
- (b) The petitioner was discriminated upon by the 3rd respondent as his photograph was not embossed on the ballot paper.
- (c) The petitioner was prejudiced as voters accused him of duping and misleading them during campaign.
- (d) The petitioner lost the elections due to the fault of the 3rd Respondent.
- (e) That in all round circumstances the elections were not fair and proper.

THE PETITIONER'S CASE

The petition was supported by the affidavits of the petitioner, his witnesses Douglas Mwenda Kiambi, Miriti Kinoti Martin and Ashford Kaburu.

Before highlighting what the witnesses deposed to in their respective affidavits it is instructive to note that when the parties appeared before me on the 13th May, 2013 for pretrial conference they agreed by consent that due to the nature of the allegations in the petition, the matter be disposed of by way of affidavit evidence and submissions. The petitioner in his affidavit in support deposed that on the morning of 4th March, 2013 he realized the anomaly on the ballot papers and called the 2nd Respondent. That the 2nd Respondent assured him that he will handle his complaint. Unsatisfied the petitioner called one Saddi Noor of Independent Electoral and Boundaries Commission (IEBC) office Meru. That the said Saddi Noor saw the 2nd Respondent who informed him that voting should continue and any other orders to be issued by court. The petitioner annexed a letter to IEBC written by his advocate on 7th March, 2013, long after the elections. He learnt the photograph embossed on the ballot paper against his name was that of one Julius Kimathi M'Mugwika, a county assembly contestant from Mutunguu Ward in South Imenti constituency. The petitioner believes his supporters were confused and frustrated as they kept on calling and making enquiries between 4th – 6th March, 2013. The petitioner deposes that he is aware that the 3rd Respondent suspended elections in five wards in Nyanza due to similar mix up of names. Julius Kimathi M'Mugwika swore an affidavit to confirm that the photograph embossed on the ballot paper against the petitioner's name was his though he was a candidate for County Assembly representative in Mitunguu Ward.

Douglas Mwenda Kiambi deposed that he was a registered voter in Igoji West Ward. That on 4th March, 2013 he went to vote at Kiandugu polling station. At the entrance to the polling station he met many people complaining that the photograph of the petitioner was missing. In his affidavit he states that the petitioner is also known as "Muiruri". He confirmed that the photograph embossed against the name of the petitioner was that of a stranger. He sought explanation from the presiding officer to no avail. That he voted in all positions save for the seat of county assembly representative. Miriti Kinoti Martin deposed that during the elections of 4th March, 2013 he was an agent for Alliance party of Kenya. While at Kiandugu Primary School he noted that on the ballot paper was embossed a photograph which was not

of the petitioner though it was against his name. That he saw many voters confused on whom to vote for. Upon making enquiries from the presiding officer he was chased away. He heard people say that the petitioner had withdrawn from the race. He and others had difficulties voting.

Ashford Kaburu deponed that he is a registered voter at Kiandugu polling station. That he noted the anomaly regarding the photograph of the petitioner. His efforts of making enquiries were rebuffed by an uncooperative presiding officer. I noted however that the IEBC acknowledgement slip annexed to his affidavit in support indicate he is registered to vote at Murembu polling station and not Kiandugu polling station.

THE 1ST RESPONDENT'S CASE

The 1st Respondent in a replying affidavit sworn on 25.04.2013 avers that the election for the position of member of county assembly of Igoji West county assembly was conducted in accordance with the provisions of the constitution and all the relevant legal provisions. That no proper complaint was lodged by the petitioner prior to voting and that the complaint made vide this petition is an afterthought. The 1st Respondent substantially associated himself with the averments made in the affidavit of the 2nd Respondent. One Julius Majau Kabuuri swore an affidavit as part of evidence of the 1st respondent. He avers that he was appointed as an agent of the Grand Union Party of Kenya (G.N.U.) That no complaint was raised in the early morning before the commencement of the election. That he saw one Shadrack Mutembei M'Anyiri who alleged he could not read and write being aided on how to vote. That the wife to the petitioner in the company of her mother assisted her to vote at Kiandugu polling station.

THE 2ND AND 3RD RESPONDENTS CASE

The 2nd and 3rd Respondents filed a joint replying affidavit sworn by a Kennedy Onditi on the 13th April, 2013. The 2nd respondent aver that the ballot papers used in conduct of the elections substantially complied with the provisions of the Election Acts 2011 and the Election Act (general) Regulations 2012. That no complaint was received from any candidate prior to the conduct of the elections even though presiding officers had allowed for inspection of the ballot papers by all candidates and/or agents at the polling stations.

The 2nd Respondent avers that the allegations in the affidavits of the petitioner and the witnesses lack any factual basis, are speculative and at best presumptive. That the voters could identify the petitioner through use of party name and symbol, full names of the petitioner or even seek the assistance of the presiding officers regarding the candidate of choice. In paragraph 20 of the replying affidavit by 2nd Respondent he avers that the photographs used in printing of the ballot papers were those submitted by candidates. That in any event the use of photographs of candidates was not a mandatory legal requirement but a measure taken by the 3rd Respondent to augment ease of voting. The 2nd and 3rd Respondents stressed the fact that the petitioner got a substantial amount of votes as an indicator that the failure to have his photograph on the ballot paper did not militate against his identification during the voting exercise.

THE ISSUES FOR DETERMINATION:-

At the pretrial conference the parties did agree on the following issues for determination.

- (a) Whether the petitioner lodged a proper complaint regarding use of a third party's photograph in place of the petitioner's in the ballot papers.
- (b) Whether use of candidate's photographs in ballot papers used during the county assembly representative election was a mandatory legal requirement.
- (c) What is the legal effect of the 2nd and 3rd Respondent's action in using a strangers photograph.

- (d) Whether non compliance by the 2nd and 3rd Respondent's materially affected the outcome of the elections.
- (e) What consequential declarations, reliefs or orders ought the court to grant?
- (f) Who ought to bear costs of this petition?

Before delving into the agreed issues for discussion, it is important to set out the legal position regarding the twin issues of burden of proof and standard of proof in an election petition. The two issues were well discussed in the **Supreme court decision in petitions No. 3, 4 and 5 of 2013 Raila Odinga & others - VS- IEBC & others**. As regards the burden of proof the court stated as follows in paragraphs 195 and 196 of the judgment;

(195) There is apparently a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil case; the legal burden rests on the petitioner, but depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls on the court to determine whether a firm and unanswerable case has been made.

(196) We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law but that such failure of compliance did affect the validity of the elections. It is on that basis that the Respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite at solemniter esse acta; all acts are presumed to have been done rightly and regularly. So the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law”.

On the issue of standard of proof the supreme court at paragraph 203 of the judgment in the Raila Odinga case (supra) held as follows:-

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

The long and short of the decision in Raila Odinga case (Supra) is that the burden rests with the petitioner to show that there was non-conformity with the law on the part of the Respondent in failing to use his photograph on the ballot papers and in the use of a different persons photograph. The petitioner must equally prove that the said non compliance affected the validity of the elections. The threshold of proof in principle is above a balance of probabilities though not as high as beyond reasonable doubt.

Now I turn to deal with the framed issues on the basis of the above standards, the law and the evidence.

(a) Whether the petitioner lodged a proper complaint regarding use of third a party's photograph in the place of the petitioners on the ballot papers.

The petitioner deponed that he duly notified the 2nd Respondent of the anomaly on the morning of the election and that he even contacted one Noor, who promised to deal with the matter. The alleged communication is not documented. The 2nd Respondent does not admit having received the petitioner's complaint. The petitioner annexed a letter allegedly served on the 3rd Respondent after 7th March, 2013. The letter in my view was belated and could not have addressed the issues complained of. Be that it may I have carefully examined the affidavits. I am satisfied that the petitioner indeed raised the issue with the agents of the 3rd respondent. Mr. Noor who is indicated as having promised to deal with the matter has not challenged the averments by the petitioner.

The electoral laws have not adequately addressed the issue regarding inspection of ballot papers. The provision dealing with ballot papers are to be found in Regulation 65(8) of the Election Act (General) Regulations 2012 which provides that:-

“The presiding officer shall before polling commences allow the candidates and agents who are present at the polling stations to inspect the ballot papers provided for use at the polling station and to note the serial numbers therein.”

Clearly from the regulations the only opportunity a candidate or their agents have to inspect a ballot paper and note any irregularity is on the morning of the election. The law is silent on how an aggrieved candidate ought to address any complaints regarding an irregularity in a ballot paper. Simply put, there is no stated means of a lodging a complaint regarding an irregularity on a ballot paper like the one subject of this petition. I therefore find that the petitioner indeed notified a representative of the 3rd respondent of the irregularity on the ballot papers in the time and he cannot be faulted otherwise.

(b) Whether use of candidates photographs in ballot papers used during the County Assembly representative elections was a mandatory legal requirement.

The relevant provision in as far as this issue is concerned is Regulation 68(4) of the Elections Act (General) Regulations, 2012 which provides as follows:

“68(4) Every ballot paper for use at an election shall;

- (a) Contain the name and party symbol of the person validly nominated.***
- (b) Contain a photograph of the candidate where applicable.***
- (c) Be capable of being folded up.***
- (d) Have a serial number or combination of letter and number, printed on the front; and***
- (e) Have attached a counter foil with the same number or combination.”***

Though the petitioner's advocate has submitted that the use of the word “shall” indicates that it is a mandatory legal requirement, the import of the term ‘where applicable’ in regulation 68(4)(b) clearly modifies the mandatory nature of the word shall in regulation 68(4). Regulation 68(4) should be read in tandem with Regulation 68(1)(d) of the regulations which provide that:

“Ballot papers for an election for use at a county assembly member election shall be in form 30 set out in the schedule”

Form 30 in the schedule to the Elections (General) Regulations 2012 aforesaid indicates that the ballot papers for use during elections for county assembly elections shall set out;

- (a) The name of the ward**

- (b) The polling station
- (c) The constituency
- (d) Serial number
- (e) Instructions to the voter
- (f) Party/candidate symbol
- (g) Candidates name; and
- (h) The place where the voter shall append their mark.

A careful comparison with Form 25 in the schedule which form sets out the requirements in a ballot paper for use during presidential election and Form 29 in the schedule used for election of Governor reveal that the 3rd Respondent was not mandated to have photographs of the candidates on ballot papers for election of county assembly representatives.

I ultimately agree with the submissions by the respondents that the 3rd Respondents had a discretion in including photographs of the candidates for position of county assembly representative on the ballot papers. It is not a mandatory requirement in a ballot paper for county assembly representative.

There is however no doubt that the 3rd respondent in its wisdom decided that it was necessary to have photographs of candidates for position of county assembly representatives embossed on the ballot papers. The explanation for the decision can possibly be found in paragraph 15 of the replying affidavit of the 2nd Respondent where he depones in part that it was a **“measure taken by the 3rd Respondent to augment ease of voting”**

Later in this judgment I intend to deal with the issue as what legal effect the action of the 3rd Respondents in using a strangers photograph had on the election of county representative for Igoji West Ward. (It is one of the agreed issues)

(c) What is the legal effect of the 2nd and 3rd Respondents action in using a strangers photograph.

(d) Whether non-compliance by the 2nd and 3rd Respondent materially affected the outcome of the election.

The two issues above in my view are intertwined and I intend to deal with them simultaneously.

It has been submitted on behalf of the petitioner that he was discriminated against. That his rights to equal treatment has been violated. That there has been no explanation why the strangers photograph was embossed on the ballot papers. The petitioner sought to rely on the evidence of his witnesses that his supporters were frustrated. The petitioner further urged the court to note that two candidates shared a name “Hannington”. One was Hannington Gitaari M’Anyiri (petitioner) and Hannington Gitonga Maingi. That identifying a candidate is an intergral part of the democratic election. That the petitioner’s supporters right to choose a candidate of their choice was compromised. The petitioner urges that the playing field was not level.

The respondent on the other hand submitted that because there was no mandatory requirement to have photographs of the candidates for county assembly representative embossed on the ballot papers, the petitioner cannot complain of prejudice or discrimination. That the ballot papers had distinctive features provided in law to facilitate easy and effective identification of the petitioner to the voters. That the witnesses to the petitioner failed to prove to the required standards that the failure to have the photograph

of the petitioner materially affected the outcome of the elections. It was further stressed by the respondents that the petitioner was able to garner 1,474 votes, an indication that he suffered no prejudice on account of the issue of photographs. The 2nd and 3rd Respondents' advocate cited several court decisions from other common wealth jurisdictions including South Africa and Nigeria. The advocate further submitted that the petitioner cannot base his claim on discrimination as there was no law that entitled his photograph to be embossed on the ballot papers. That he has not demonstrated that he is entitled to any legal benefit. Further that even a claim based on legitimate expectation regarding use of his photograph in the ballot paper cannot pass as it is not based on what is required by law.

The 2nd and 3rd Respondents relied on the persuasive decision of **GURCHARAN SINGH -V- NEW DELHI MUNICIPAL CO AIR 1996 BC 1175**, a decision of the supreme court of India where it was held in part that:-

“The guarantee of equality before law is a positive concept and it cannot be enforced by a citizen or a court in a negative manner. To put it in other words, if an illegality and irregularity has been committed in favour of any individual or a group of individuals, the others cannot invoke the jurisdiction of the High Court or of the Supreme Court, that the same irregularity and illegality be committed by the state or an authority which can be held to be state within the meaning of Act 12 of the constitution. So far such petitioners are concerned on the reasoning that they have been denied the benefit to which have been extended to others although in an irregular and illegal manner. Such petitioners can question the validity of orders which are said to have been passed in favour of persons who are not entitled to the same but they cannot claim orders which are not sanctioned by law in their favour or principle of equality before the law.”

“..... Before a claim based on equality clause is upheld it must be established by the petitioners that his claim being just and legal has been denied to him. While it has been extended to others and in this process there has been discrimination.”

On legitimate expectation the 2nd and 3rd Respondents advocate quoted the High court case of **Francis Chacha Ganya and four others -v- Attorney General and others (2013) KLR** in which the court stated as follows:

“.....Secondly, even if that was the position, the mere fact that an illegal action is undertaken and is not challenged does not ipso facto give rise to legitimate expectation to other people who likewise intend to act illegally. Legitimate expectation as phrase indicate must be legitimate and cannot be based on actions which are patently illegal it follows that the concept of legitimate expectation cannot operate against the law.”

The 2nd and 3rd Respondents further sought to rely on the provisions of Section 83 of the Elections Acts, Cap. 24 of which provides;

“No election shall be declared to be void for 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 in that written law or that the non-compliance did not affect the result of the election.”

The 2nd and 3rd Respondent's advocate further cited a decision of the court of appeal in Nigeria **Agbaye -v- Foshola (2008) 6NWL (page 102)** where the said court held in part;

“..... The absence of the said passport photograph in the ballot paper will not be fatal to the election since it is shown or accepted that the other 3 (three) requirements of the provision of Section 45(1) have been fulfilled by the 4th Respondent. Thus it tallies with the common sense that the fulfillment of three out of the four (4) requirements and a fortiori the non-fulfillments of only one out of the 4 requirements amounts to a substantial compliance with the provision of the Section or that non compliance was not substantial enough to warrant the voiding of the election. It is trite that the

non-observance or non-compliance with the electoral rules in order to render the election invalid or contrary to the principle of the Electoral Act must be so great and substantial and must satisfy the court or tribunal that it effected or might have affected the majority or the result of the election”

Some of the many decisions cited by the 2nd and 3rd Respondents’ advocate dealt with issues revolving around malpractices during the electoral process. That is not the case herein. For that reason some of the decisions cited are easily distinguishable. The 2nd and 3rd Respondents’ advocate further distinguished the decision of **Ali Omar and Electoral Commission of Kenya -v- Julius Daraka Mbuji** (2008) 3 KLR page 269 (A decision cited by the petitioner). He pointed out correctly that the decision involved use of a party symbol and not a photograph as in this case and that there was (as still is) an express requirement in law for use of a party symbol in the ballot paper. He further pointed out that the decision was based on the repealed laws.

I have carefully examined the evidence which was by way of dispositions and considered the submissions by all the parties. There is no dispute that the 3rd Respondent made a conscious decision to have photographs of candidates for position of county assembly representative embossed on the ballot papers for the elections of that position. The decision according to the 2nd Respondent was a measure taken to augment ease of voting. In the process a stranger’s photograph was embossed against the name of the petitioner. In a replying affidavit sworn by the 2nd Respondent it was deponed in paragraph 20 that the petitioner had submitted the stranger’s photograph. This position changed on the 13th May 2013 when the advocate for the 2nd and 3rd Respondents conceded that the stranger’s photograph was not submitted by the petitioner. From the evidence on record there is absolutely no explanation either by the 2nd or 3rd Respondents as to how a stranger’s photograph happened on the ballot papers against the name of the petitioner. As it is, the court cannot tell whether it was a deliberate act or one which resulted from an inadvertent mistake on the part of the 3rd respondent.

The decision to have photographs of candidate’s for position of county assembly representative on the ballot papers though not a mandatory requirement is not one that I can decide was illegal. However, even if I were to find it was an illegal act, it cannot help the respondents case that such a decision led to a stranger’s photograph being represented as that of the petitioner. In my view the 3rd respondent had an option or discretion to include photographs of candidates for position of county assembly representative on the ballot papers as they did. The key questions are;

(i) What is the legal effect of using a stranger’s photograph on the ballot paper against name of the petitioner?

(ii) Did that decision materially affect the outcome of the elections?

Article 81(a) of the constitution provides the elements of a free and fair elections and the same include:-

- (i) by secret ballot
- (ii) free from violence intimidation, improper influence or corruption.
- (iii) Conducted by an independent body
- (iv) transparent and
- (v) Administered in an impartial, neutral, efficient, accurate and accountable manner (underline mine)

It was incumbent upon the 3rd Respondent to ensure amongst others that the elections were transparent, efficient, accurate and done in an accountable manner. In the absence of some of these elements the 3rd Respondent cannot be said to have conducted elections in accordance with the principles laid down in the

constitution.

It has been pleaded in the petition and the affidavit of the petitioner that he was discriminated against and that he was denied equal benefit of the law. The advocate for the petitioner specifically submitted that the petitioners rights under Article 27 of the constitution was violated. Article 27 of the constitution provides:-

27 (1) every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

.....

(4) The state shall not discriminate directly or indirectly against any person on any ground including race sex, pregnancy, mental status, health status ethnic or social origin, colour, age, disability,religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any grounds specified or contemplated in clause 4.

Though it has been submitted by the Respondents that the petitioners rights to non-discrimination were not violated because there is no law that entitled his photograph to be embossed on the ballot paper for use in County Assembly election I have examined the evidence as a whole. Having decided that it was necessary to have photographs of candidates for position of county assembly representative be embossed on ballot papers for use in county assembly elections, the 3rd Respondent was constitutionally enjoined to accord equal treatment to all candidates unless good cause be shown why that could not have been possible. In this case there is no explanation why the petitioner's photograph was missing from the ballot paper. The situation is made worse by the lack of explanation as to how a strangers photograph appeared on the ballot paper against the petitioner's name. The principle elements of a free and fair election including transparency, accuracy and accountability were missing in as far as printing of the ballot papers was concerned.

It has been urged that the 3rd Respondent fulfilled other requirements in the ballot paper and so that amounted to a substantial compliance with the requirements in a ballot paper. In my view the situation herein is different from that dealt with in the case of **Agbaye -v- Fashola (Supra)**. In the case herein the 3rd respondent embossed the photograph of a stranger and passed it as that of the petitioner. The petitioner had a constitutional right of entitlement to equal benefit of the law and "level playing field" during the elections of 4th March, 2013. It is not disputed that the decision to have photographs of candidates on ballot papers for position of county assembly ward was made by the 3rd Respondent. In my finding it was not an illegal act as they had a discretion to come to that decision. That decision gave rise to a promise made to the candidates including the petitioner that their photographs would appear on the ballot paper for the position of county assembly ward. It is on the basis of this promise that the candidates submitted their photographs to be embossed on the ballot papers.

Having submitted his passport photographs to the 3rd respondent for embossment on the ballot paper the petitioner had a legitimate expectation that the same will be on the ballot papers to make it easier for his supporters to easily identify him just like it was done for other candidates. The voters on the other hand had a legitimate expectation that during voting they will be able to identify the candidates not only by their names, party symbols (for those who can identify these) but also through their candidate's photographs embossed on the ballot papers. Instead, during the voting the voters were faced with a scenario they had not anticipated. In those circumstances the rights of voters to freely elect a representative of their choice may have been compromised. Whereas I have come to the conclusion that it was not a mandatory requirement to have photographs of candidates for the position of county assembly

ward embossed on the ballot papers, the court will be failing in its duty to ensure the 3rd Respondent embraces the standards and values that have been clearly ordained in the constitution were it to find that it does not matter that a strangers photograph was embossed on the ballot paper and it passed as that of the petitioner. This approach in my view will be inconsistent with the general principles that underlie a free and fair elections as enshrined in Article 81 of the constitution.

I find therefore that the petitioner's rights to non discrimination and entitlement to equal benefit of the law were violated by the 3rd defendant by the manner it treated his candidature on the ballot paper.

Has the issue of photographs materially affected the results of the elections for Igoji West County Assembly?

I have considered the evidence of the petitioner and his witnesses which came by way of dispositions. Indeed the burden is on the petitioner to prove that the irregularity substantially affected the results of the election. Other than the petitioner, two witnesses Douglas Mwenda Kiambi and Kinoti Martin gave crucial depositions. Douglas Mwenda Kiambi deponed that the petitioner is also known by nickname "Muiruri". This is not disputed. In the Kenyan context it is not farfetched to find candidates who are only known to the voters by their nicknames. Faced with a scenario where voters believed they would identify candidates by their photographs it is not difficult to believe that voters like Douglas Mwenda Kiambi may have been confused. The situation could have been made worse by the fact that two of the candidates one of who is the petitioner shared a name "Hannington"

Both Douglas Mwenda Kiambi and Kinoti Martin deponed that they had difficulty voting for the petitioner due to the irregularity. Further the two witnesses deponed that their efforts to seek the help of the presiding officers was frustrated. This evidence is not controverted. I have no reason to disbelieve the evidence of the two witnesses.

I have however discarded the evidence of Ashford Kaburu who deponed that he is a registered voter at Kiandugu polling station yet the acknowledgment slip annexed to his affidavit indicate he is registered to vote at Murembu polling station. I found no explanation for the discrepancy.

Though the respondents pointed out that the petitioner garnered substantial number of votes and so that indicates that the issue of photographs never affected the voters, in my assessment the fact that he got 1,474 votes shows that he was a serious contender who may have done better had the 'playing field been level'.

I have taken judicial notice of the fact that during the campaigns, the candidates do campaign using posters bearing their photographs and some of who would have wished to vote for candidates during the last elections expected to be guided by the photographs of the candidates embossed on the ballot papers even if they may not have known the actual name of the candidate or his/her party symbol. As I have already pointed out it is not uncommon to find voters who may not know the actual name of the candidates or their party symbol. It is therefore crucial that a ballot paper provides accurate information so as to avoid misleading voters.

In the case of **Omar & another -v- Mbuji & another (supra)** the court of appeal expressed itself thus:-

..”In our view, the ballot paper as we have stated is an intergral part of an election. It guides the voter on who is a candidate and his/her party symbol. We cannot, on our part, conceive a more important defect in an election than a ballot paper that instead of guiding voters, misleads them.”

Though the court of appeal in the above quoted case was dealing with a defect regarding a party's symbol which is a mandatory requirement on a ballot paper the crux of the finding in the decision was that a ballot paper being an integral part of an election must not mislead voters.

I have already found that the election for county representative for Igoji West Assembly was not conducted in accordance with the principles laid down in Article 27 and 81(a), of the constitution which

enjoins the 3rd Respondent's to be responsible for promoting free and fair elections. The 3rd respondent is further enjoined to ensure that all parties enjoy equal treatment before the law. It cannot be said that the election was fair when a strangers photograph was represented as that of the petitioner.

I ultimately find that 2nd and 3rd Respondents failed to ensure that all candidates participating in the election for county representative for Igoji West were provided with a level playing ground. Voters were not given an opportunity to see and make informed decisions on whom to vote for.

(e) What are the consequential reliefs/orders that the court ought to make in view of the findings on the issues above?

From the foregoing findings the 1st Respondent cannot be said to have been validly elected as county representative for Igoji West county Ward. This calls for the nullification of the election to give the voters of Igoji West Ward an opportunity to exercise their democratic right to elect a representative of their choice. I accordingly nullify the elections for Igoji West Ward to pave way for fresh election.

A certificate shall issue forthwith pursuant to the provisions of Section 86(1) of the Elections Act.

(f) Who should bear costs of the petition?

Under Section 84 of the Elections Act "An Election court shall award the costs of and incidental to a petition and such costs shall follow the cause"

Rule 34 of the Elections (Parliamentary and county Elections) petition Rules, 2013 has provided the courts power in regard to costs.

In the circumstances of this case it is evident that the 3rd Respondent as the body responsible for preparation, printing and distribution of ballot papers ought to bear costs of the petition. The 3rd Respondent through its advocate admitted that the petitioner was not responsible for the embossment of the strangers photograph on the ballot papers.

The petitioner having succeeded in his petition gets full cost.

The 1st Respondent, the incumbent, defended the petition though no allegations were leveled and proved against him. He therefore gets half costs of the petition as against the 3rd Respondent. The costs awarded should not be exorbitant to unjustly enrich the parties or cause unwarranted dent on the public purse. The issues of contest herein were narrowed down to majorly issues of law.

I have also considered that the petition herein was in respect to county representative elections which cover a less extensive area compared to other elections.

The total costs for each party awarded costs shall be capped at Ksh.400,000/-. The costs shall be taxed and certified by myself.

As I conclude this matter, I would like to thank all the advocates who ably represented their clients' cases in the best way they could.

I also compliment court staff in particular my clerk Mr. Kirimania who assisted in ensuring the matter proceeded smoothly.

Unless otherwise ordered by a superior court the security deposited in court be released to the petitioner.

DATED SIGNED AND DELIVERED THIS 4th DAY OF SEPTEMBER, 2013

D. O. ONYANGO

Ag. SENIOR PRINCIPAL MAGISTRATE