



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

ROBERT BISAKAYA WANYERA.....PETITIONER

VERSUS

- 1. NATHAN OBWANA.....1st RESPONDENT**
2. CALEB .S. GEKONDE.....2nd RESPONDENT
3. THE I.E.B.C.....3rd RESPONDENT
4. LORNA NANJALA KHAEMBA.....4th RESPONDENT

J U D G M E N T

The Petitioner herein filed this suit on 22nd March 2013 against the Respondents seeking the following orders;

- a) That it be ordered that there be a scrutiny and recount of the votes regarded as having been cast for the Member of the County Assembly in Lwandanyi Ward.
- b) A declaration that the 1st Respondent was not validly elected.
- c) A declaration that the Petitioner was validly elected.
- d) In the alternative and without prejudice to the orders sought above that the court be pleased to order that the said County Assembly elections in Lwandanyi Ward be determined and be declared null and void.
- e) In the alternative and without prejudice to the orders sought above an order be issued that a fresh election be held.
- f) That the respondents be condemned to pay the petitioner costs of this petition and matters incidental thereto.
- g) That such other or further orders be made as this Honourable court may deem just.

The parties herein agreed that all affidavits filed in this suit be taken as evidence in chief. The petitioner availed 6 witnesses including himself. The 1st Respondent availed 3 witnesses. The 2nd and 4th Respondents who were both employees of the 3rd Respondent testified.

In his testimony the Petitioner informed court that while at Sirisia tallying centre it was announced that he garnered one vote instead of 271, at Lwandanyi primary school which prompted his protest and walked out from the tallying hall with his supporters. He produced photographs in court to show that he protested though it was not possible to know what was discussed by the parties seen in the photographs produced. He further stated that entries in Forms 35 do not tally with Forms 36 attached to the 2nd respondents' affidavit. He cited polling station code no.58 where Form 36 indicates zero 'O' votes while Form 35 indicate 8 votes and station no.085 where Form 36 indicate zero 'O' votes while Form 35 indicate 11 votes. He also said for station no.060 there was no place for agents to sign as entries on the front page are the same as the back page. Station no.080 no agent is listed on the second page. The space for names and signatures is blank. The Petitioner said that there were alterations on Forms 35 which were not countersigned. Stations mentioned are 73,76,77,78,65,62,61,57,55,54,53 and 80. he stated that results announced is not true reflection of the election.

In cross-examination by 1st Respondent's counsel the petitioner agreed that he never lost any vote in Lwandanyi as Form 36 filed in court indicate that he got 271 votes and that according to Form 36 he lost 19 votes. In further cross-examination by Mr Akenga for the 2nd, 3rd and 4th Respondents the petitioner said that his agent who is PW6 herein was denied entry into Lwandanyi primary school polling station but was allowed after intervention by his party. He testified that it is only Korosiandet where an incident of violence occurred and added that the incident could have affected his votes at the station. He added that registered voters at Korosiandet are 492 and 416 voted. He garnered 100 votes and his agent signed Form 35. He further stated that in station no.080 Kakala primary school no agent is listed neither does it have IEBC stamp and in station no.60 no agent signed. His agent informed him that he got 165 votes but what is indicated is 135 votes.

PW 2 an old lady born in 1926 testified that she was assisted to vote though candidates agents were not called to see the ballot paper before she placed it in the ballot box. She said she does not know whether the right candidate was marked for her. In cross-examination by 1st Respondent's counsel she said that she saw the petitioner's agent at the hall but she never asked him to help her. In further cross-examination by Mr Akenga for the 2nd, 3rd and 4th Respondents she said the voting was okay and that she was not forced to vote for anyone.

PW 3 the chairman Ford-Kenya Lwandanyi Ward testified that he found one Mildred Barasa giving out money at Lwandanyi primary school. He further stated that he found PW 6 had been denied entry to the station and was later allowed upon his intervention. At 1.00pm he found one Mutuli having been injured at Korosiandet and said that some voters left due to violence. On further cross-examination PW3 said that voting went on until votes were counted.

PW 4 the chairman Uwiano initiative testified that he was at the tallying centre. He said one vote was announced for petitioner from Lwandanyi primary school, 8 Tamlega, 11 Khabukoya. Though for Tamlega and Khabukoya he got zero votes as per Form 36 and 271 votes in Lwandanyi. He said that the total tally in Form 36 is different from what was announced at the tallying centre. He confirmed that one Mutuli (PW 5) was injured at Korosiandet and that there was violence at Kakala which forced police to shoot out in the air. He also talked of tension at Tamlega.

PW 5 David Mutuli Makhamari testified that he was beaten by one Mildred Barasa at Korosiandet. He said he reported to the chief and that he voted after being assaulted. He however said he has not reported the incident to the police and has not therefore been issued with a P3 form. He further said that people continued voting after he was beaten and that he does not know whether anyone feared to vote. He further said that Mildred never asked him to vote for the petitioner.

PW6 who was an agent for the petitioner in Lwandanyi primary school polling station confirmed that he was denied entry but was later allowed in. He confirmed that he signed Form 35 for the station because he agreed with the results. While testifying in cross-examination PW6 said that he was initially denied entry because there were other agents of Ford-Kenya one Zablon Masinde and Wycliff .W. Musungu inside. He said Zablon did not have a letter and he was removed. He went in to replace him.

He agreed that the legal requirement is that each party is represented by one agent.

The 1st Respondent testified that he was nominated by Orange Democratic Party and was elected as County Representative Lwandanyi Ward. He said Mildred Barasa was a member of Ford-Kenya party and that she never campaigned for him. He denied any irregularities and said that the process of voting was free and fair and that he was declared the winner after garnering 2527 votes against his closest follower who garnered 2454 votes. On being questioned concerning petitioner's votes in Lwandanyi he said that he believed the petitioner garnered one vote until he saw Form 35. He denied having influenced IEBC officials to express bias or favour towards him in the election and urged court to declare him the winner as he garnered the highest votes. He denied any malpractice on the part of the 2nd Respondent. He however confirmed that the Petitioner stood and walked out of the tallying hall after announcement of votes from Lwandanyi primary school were made. He denied knowledge of any agent having been prevented from escorting ballot boxes.

The 1st Respondent's 2nd witness Hillary Barasa who was also a candidate in the same ward testified that Mildred Barasa who is alleged to have bribed voters at Korosiandet primary school is his mother and that she was a member of Ford-Kenya party not his. He said that the said Mildred never campaigned for him at Korosiandet. He said that PW2, PW4 and PW6 are all related to the petitioner and that they lied if they said they are not.

The 1st Respondent's 3rd witness Paul Odeke who was his agent at Korosiandet denied any incident of violence. He said that there is no time that voting stopped because of any incident. He said the Presiding Officer called all agents to witness any illiterate voters voting. He said that the voting was free and fair.

The 4th Respondent confirmed that she was employed by the 3rd Respondent to preside over elections at Lwandanyi primary school. She confirmed that the Petitioner garnered 271 votes in the station as indicated in Form 35 that was signed by his agent Joseph Mafula Biketi. She denied that Petitioner's agent was denied entry to the polling station and stated that she allowed both the party's agents and candidate's agents inside the polling hall. She also added that illiterate voters were assisted and some agents accompanied ballot boxes to Sirisia tallying centre. In cross-examination the 4th Respondent testified that before PW6 entered the polling hall at Lwandanyi there were already two agents from Ford-Kenya inside. The said PW6 replaced one Zablon Masinde who was already inside. The replacement was after consensus which she initiated. She said that she is the one who marked ballot boxes for illiterate voters and she did that in the presence of agents. She said that the election was free and fair and that voters participated freely without fear.

The 2nd Respondent's who was the Returning Officer Sirisia Constituency testified that entries in Form 35 were captured in Form 36 and that entries in Form 36 is a true reflection of what happened at Lwandanyi ward. He said that he announced the right results for the Petitioner. He further stated that no incident of bribery, violence or denial of entry to a polling station of an agent was reported to him and if there was any such incident information would have reached him. He agreed that there were errors in Form 36 which he attributed to computer which shifted results in station no.58 and 85 giving Petitioner in each zero votes instead of 8 and 11 respectively. He however said that the 1st Respondent would still have remained the winner because he also lost 77 votes due to the error. He admitted that he never signed Form 36 which he filed in court and added that he prepared a verified Form 36 which he never produced in court. He said that he used Form 36 filed in court to announce results. He confirmed that not all ballot boxes brought to court had Form 35 fixed outside and that 2 had 2 broken seals and one had one broken seal.

He attributed the lack of Form 35 outside the box and the broken seal to transport. He however added that it was not possible to interfere with what was in the ballot box. He further testified that votes are counted at the polling station, Form 35 filled and results announced and even if ballot boxes are stuffed with votes later they will not affect the results as Form 35 used to feed Form 36 is already filled. He said that he read results as they streamed in using Form 35 and that Form 35 reflect the true results.

He concluded that election in Lwandanyi ward was free and fair despite omissions and commissions which did not fundamentally change the results announced. He said the will of the people of Lwandanyi ward was expressed in that election and that the 1st Respondent was rightfully declared a winner.

At the close of evidence the Petitioner's counsel filed a formal application for scrutiny and recount. The court granted the prayer sought limited to the contents of ballot boxes to ascertain the entries in Form 35 which were primary source for Form 36. I have perused the report on scrutiny and recount plus the handwritten proceedings of the said process and note as hereunder;

a) 1. Ballot box S/no.195095 polling station code no.61 Kibindoi primary school had no names for Presiding and Deputy Presiding Officer filled – no names and signatures for both. No agent is listed or signed. No IEBC stamp.

2. Ballot box S/no.194765 code 060 Machakha primary school. No agent listed none signed. Form 36 filed in court.

b) Forms 35 with alterations not countersigned.

1. code no.084 – Namubula primary school

2. code no.073 – Lwandanyi youth polytechnic

3. code no.053 – Londo ACK primary school

total votes cast changed from 203 to 201

4. Code 051 – Tulienge primary school votes for 6 candidates altered.

Humphrey Nyongesa 102 initial entry not clear

Hillary Barasa 23 to 13

Jacob Weyomba 4 to 20

Okisegere Ojapai 2 to 4

Peter Webomba 19 to 4 to 2

Nathan Obwana 4 to 20

5. Code 057 Malakisi CPK primary school

total votes cast from 5 to 199

rejected to 5 – initial entry not clear

Nathan to 38 – initial entry not clear

C) Ballot boxes with broken seals

1) S/no.195198 code 076 Makunyu ECD one seal broken S/no.0106920. From observations it could be opened before cutting the other 4 seals.

2) S/no.195764 code 068 Korosiandet primary school seal no.4 had no. hole and seal number 2 was broken.

3) S/no.1950961 code 066 Lwakhakha primary school one seal S/no.1016079 broken

After recount and scrutiny advocates for the Respondents applied to recall a witness to identify 7 ballot boxes marked as unknown because they did not have Form 35 affixed outside nor inside.

They are as follows:

d)	<u>S/no.</u>	<u>Code</u>	<u>Name of station</u>
1)	19258	064	Kabiret primary school
2)	194939	079	Nyamwesi market
3)	195700	075	Lurare primary school
4)	194984	082	Kamugore primary school
5)	195079	055	Nyamwesi primary school
6)	195321	072	Mayekwe primary school
7)	195099	077	Malakisi Health centre

The above ballot boxes were identified using polling day diaries which were produced by the 2nd Respondent as exhibits. I however noted that one polling station code no.064 Kabiret primary school used a diary meant for training. During cross-examination by counsel for the Petitioner it emerged that polling station code no.075 and 064 had different seal numbers at time of close/end of polling from the ones found at time of scrutiny. They are as follows:

e) 1. Code 075 – S/no.195100 Lurare primary school. serial numbers at end of polling 142846,195000,1632927 and 1016147.

at scrutiny 1016083,1051873,0754561 and 1362414.

2. Code 064 – Kabiret primary school. At end of polling 0831564,138,105162,0830263. during scrutiny 0830264,0830263,1386155,0834564 and 1051621.

No counterfoil was found in the ballot box (code 064). From the scrutiny report I noted that there were 7 stations which had votes not counted because advocates disputed them.

They are as follows:

f)	<u>S/no.</u>	<u>Code</u>	<u>Station</u>
1.	195764	068	Korosiandet
			1 vote Robert Bisakaya Wanyera
2.	195148	062	Namubula primary school
			2 disputed votes marked on Robert Bisakaya Wanyera

3. 195259 051 Tulienga primary school
1 dispute vote
mark on Nathan Obwana
4. 19506 066 Lwakhakha
1 disputed vote
mark on Nathan Obwana
5. 195508 071 Kapkara primary school
2 disputed votes
marks on both for Nathan Obwana
6. 19509 054 Sitabicha primary school
1 disputed vote
mark on Nathan Obwana

7. Station not stated on the envelope but has 4 rejected votes

marks on

Dorcas .M. Mbaye -1

Robert Wanyera - 1

Hillary Masinde Barasa - 1

Robert Bisakaya Wanyera -1

I have looked at the said ballot papers and noted that the marking clearly show the intention of the voters. I therefore find that the votes be added to each candidate voted for. I hereby summarize as follows:

- I) Nathan Obwana - 5 votes
- ii) Robert Bisakaya Wanyera - 5 votes
- iii) Dorcas .M. Mbaye - 1 vote
- iv) Hillary Masinde Barasa - 1 vote

After adding the above the votes for petitioner and 1st Respondent add up as hereunder

Petitioner – 2454

1st Respondent – 2598

All counsels filed submissions and highlighted the same. The petitioner's counsel submitted that the petitioner has proved his case as per law required. She listed complaints as follows:

1. Results declared not primary results.
2. Petitioner's agent barred from Lwandanyi primary school polling station.
3. Violence, intimidation and bribery.
4. Contents of ballot boxes interfered with.
5. IEBC failed to conduct election as per Election Act.

She submitted that prayer one of scrutiny and recount has already been granted. She seeks the remaining 5 prayers. She submitted that the document used to announce results are not filed in court. Form 36 is a copy and is not signed. No original Form 35 was produced in court and that there was no compliance with rule 21 of Election rules. She further submitted that Forms 35 had alterations which were not countersigned. And that failure to countersign was a serious omission which ultimately affected the results. She cited ***Kakamega High Court petition no.2 of 2008 Bernard Shinali Masika Vs Dr Bonny Khalwale & others and Election petition no.10 of 2008 William Kabogo Vs George Thuo*** where it was held that failure to sign Form 16A by IEBC officials was unacceptable. She singled out station no.057 which had served alterations which were not countersigned. She also cited ***Eldoret CA No.604 of 2010 Paulina Amana VS Republic*** where it was held that unsigned judgment is a nullity. She argued that it is a signature which validate a document. She listed irregularities as failure to stamp Forms 35, failure to sign Form 36, failure to ensure ballot boxes were properly sealed and failure to comply with rule 21 of Election Rules 2013. She added that failure to comply with section 183 of Election Act affected results. Ms Mumalasi submitted that Article 81 and 86 of the Constitution lays down the principles to guide elections.

She further submitted that there is no transparency and accountability in that the Returning Officer is still keeping the verified Form 36 and there was denial of access to polling station of an agent plus lack of safe keeping of ballot boxes. She also cited stations no.64 and 75 having different serial numbers at the close of polling and during scrutiny. She argued that the boxes may have been opened and sealed. She added that failure to have counterfoil in ballot box for station no.64 is a serious omission/grave irregularity. She cited ***Msa High Court petition no.2/2013 Thomas Malinda Musau & others Vs IEBC and 2 others*** where Justice Mutende held that lack of counterfoil is grave as ballot papers cannot be ascertained and verified. She further submitted that 15 ballot boxes had seals inside which means they had been opened and original Form 35 in station no.61 is not signed by Presiding Officer or deputy and for station number 075 it has no IEBC stamp. She urged the court to declare that results in those stations were not declared as required by law.

She concluded that irregularities in this case went to the core of the Election process and affected results and that the results do not reflect the will of the people of Lwandanyi ward because they were not free, fair, transparent and accurate. Petitioner's counsel urged court to look at the decision of ***Manson Onyango Nyamweya Vs James Omingo Magara & 2 Others (2009) eKLR*** as concern results on scrutiny where Judge Musinga held that a recount perse cannot cure inherent defect and went ahead to nullify the election even though the 1st Respondent had more votes during recount. She added that even if the 1st Respondent had more votes during recount, the election was flawed.

Mr Mokuia for the 1st Respondent submitted that the Petitioner has failed to prove all the allegations in the petition to the required standard. He urged court to look at the agreed issues while determining the petition and confine itself to issues agreed by the parties. He said that evidence is meant to support

pleadings and that the petitioner sued in respect of one polling station Lwandanyi primary school whose result is not disputed. He cited ***Khasakhala Vs Makina and Anor (2008) 1KLR 97 and Michael Njenga Mututho Vs Jayne Njeri & 2 others. Mr Mokua*** submitted that IEBC fully complied with rule 21 of Election Rules. On agent being denied entry to Lwandanyi primary school, he said the agent signed Form 35 and a reasonable explanation was given as to why he had to remain out for 1 ½ hours.

On the issue of bribery Mr Mokua submitted that there is no nexus between Mildred Barasa and the 1st Respondent. On assault he said it was not proved to the required standard. He submitted that illiterate voters were assisted. He cited ***Kisumu High Court Petition No.2 of 2013 William Oduol Vs IEBC & 2 others*** as concern failure to countersign Form 35 and argued that failure to do so is not fatal. He argued that the decision in ***Thomas Malinda Musau*** is not settled law. He said that the Petitioner has not demonstrated how many votes he lost due to lack of IEBC stamp and how the irregularities have affected results. He said that the results in scrutiny agreed with results in Form 35 except for the margin of disputed votes.

He distinguished the case of ***Paulina Amana*** and said that the court was addressing validity of unsigned judgment – judgment signed by one judge and not signed by the other. He said it is wrong to equate Form 35 with a judgment of a court sitting on a criminal appeal. He submitted that the issue of broken seals was satisfactorily explained and no single ballot box was established to have been stuffed. He urged the court not to consider issues arising from polling day diaries as they were meant to identify the 7 ballot boxes marked as unknown. He further submitted that failure to find counterfoil in one ballot box is not fatal as it has not been disowned. He said the results agree with results in the recount. He urged court to interpret regulation 81 of Election Regulations 2013 objectively. On votes disputed during recount he argued that they belong to respective candidates and cited regulation 77(2) of Election Regulations 2013. He concluded that the standard of proof is already set by Election Act and Election rules and they should not be set upon unrealistic expectations.

In his submissions Mr Akenga for the 2nd, 3rd and 4th Respondents cited ***Kitale High Court Petition no.5/2013 John Lodinyo Vs Mark Lomunokol and 2 others***. He submitted that in election petitions the will of the people must prevail and that the courts must understandably be slow to set aside the said will of the people which has been freely and truly exercised. He argued that the Petitioner's initial complaint was that he was denied 270 votes from Lwandanyi primary school and he later changed to say that the 270 votes were taken from other stations and given to him though he could not specify the stations.

On the issue of assault at Korosiandet he said it was not proved as no P3 form was produced in court to prove such a criminal offence. He further stated that the allegation of corruption was not proved as there was no nexus between the person alleged to have been bribing voters and the 1st Respondent. He added that explanation was given for entries in Form 35 and 36 and that the one filed in court was used to announce results. He said that the verified Form 36 was not filed in court as it was not within their reach at the time of filing response. He cited ***section 83 of Elections Act*** which provide that no election shall be declared to be void by reason of non-compliance with any written law if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written law the non-compliance did not affect the results of the election.

As concern scrutiny he submitted that the contents of ballot boxes conformed with Form 35 filed and where there were discrepancies they were minor when the court took votes from candidates during scrutiny. He said the votes in the ballot boxes were for candidates from Lwandanyi ward and that even in stations which were initially marked as unknown the Petitioner was leading. He argued that the irregularities mentioned by the Petitioner are unfounded and do not form part of the petition before court. He added that even if there were any irregularities they were not deliberate in a manner to aid the 1st Respondent. He said that Form 35 are filled separately and the irregularities do not substantially affect results and the will of the people.

He cited the case of ***Morgan Vs Simpson (1974) 3 AIER at 728*** where it was held that if irregularity affected results then court can nullify elections. He prayed that the court do apply both qualitative

and quantitative test in arriving at its decision. Qualitative in the manner that the election was free and fair and quantitative in that the 1st Respondent emerged a winner as exhibited by votes counted. He concluded that this election petition has not been proved. He cited ***Uganda Supreme Court Election petition no.1 of 2006 Rtd Col.Dr. Kizza Bisigye Vs Electoral Commission, Yoweri Kaguta Museveni***. He also pointed out that the Petitioner's counsel has cited authorities of cases decided as a results of 2007 elections which is common knowledge as indicated in Kriegler report that they were flawed.

In reply Ms Mumalasi argued that the authority of ***Thomas Musau*** is a high court decision which has not been repealed. She said that the issue before court is not the number of votes but the process. She said that the fact that the Petitioner has garnered higher votes do not validate the process. She said the authority of ***William Oduol*** talked of alterations in Form 35 but did not talk about missing counterfoils, missing names and signatures of Presiding Officer and Deputy Presiding Officer and agents. She submitted that the petition has been proved to the required standard.

I have carefully considered evidence adduced and submissions by learned counsels. I have also perused and considered authorities cited plus other decisions in election petitions.

It is my considered view that the issues for determination are as hereunder;

- 1) Whether the electoral process in Lwandanyi ward in respect of member of County Assembly was conducted in a free, fair accountable and transparent manner as provided under the constitution of Kenya 2010, Election Act 2011, Election (General) Regulations 2012 and Election (Parliamentary and County Elections) Rules 2013.
- 2) Whether irregularities if any substantially affected the results of election.
- 3) Whether the election should be declared null and void.
- 4) Who should pay costs.

I) Whether the electoral process was carried out in a free, fair, accountable and transparent manner.

The Petitioner herein raised irregularities in the pleadings and others came up during the hearing and in the course of scrutiny and recount of votes. Counsels for the Respondents urged this court to confine itself to issues raised in the pleadings and disregard issues that came up in the hearing and during scrutiny and recount of votes. I however find that it will not be in the interest of justice to close my mind to issues that came up in the hearing if when proved are likely to affect the results of election. I refer to ***Nairobi High Court Election Petition No.3/2008. Dickson Daniel Karaba Vs John Ngata Kariuki & 2 others (2010)*** -where Judge Warsame held that

“you do not need to plead evidence and that you do not need to amend your pleadings if you wish to introduce a particular piece of evidence in satisfaction of your caseit is for the court to decide the weight and relevance of evidence...”

The following allegations of malpractices/irregularities came out both in the pleadings and evidence.

1. voter bribery
2. violence and intimidation
3. locking out of petitioner's agent from polling station
4. alterations of statutory Forms

5. declaration of inaccurate results
6. failure to secure voting materials
7. failure to assist illiterate voters

On allegation of bribery PW3 testified that one Mildred Barasa was giving out money at Korosiandet. Besides that mention by PW3 no other corroborative evidence was adduced. Hillary Barasa who was availed as a witness by the 1st Respondent confirmed that the said Mildred is his mother and that she is a member of Ford-Kenya party a party that nominated the Petitioner herein as per evidence on record; and even if the offence of bribery was to be proved it was unlikely for the 1st Respondent to have tried to use her to influence voters in his favour. In the case of **Joho Vs Nyange and Anor (2008) 3 KLR (EP)** it was held that election petition should be proved by cogent, credible and consistent evidence. For example where there are allegations of bribery made instances of bribery should be given. Though it is settled law that the standard of prove in election petition is higher than balance of probabilities and below reasonable doubt the standard as it relate to election offences is higher. In the instant case no attempts were made to prove offence of bribery. The allegation therefore fails.

On the issue of violence there was mention of shoot out at Kakala polling station by PW4 and assault of PW5 at Korosiandet polling station. One would have expected both incidences to be reported to the police. PW5 said he never reported to police. He therefore had no P3 form nor occurrence reference. If indeed PW5 was assaulted by a person known to him as he said, he would have been expected to report to the police for action to be taken. Failure to do so casts doubt as to whether he was actually assaulted. Apart from PW4 there is no other mention of shoot out at Kakala. From the foregoing I find that the allegation of violence was not proved. No evidence that relate to intimidation was adduced.

PW 6 who informed court that he was the petitioner's agent alleged that he was denied entry to Lwandanyi primary school polling station. **Section 30(1) of Elections Act 2011** provide that a political party may appoint one agent for its candidates at a polling station. **Section 30(2) of the same Act** provide that a candidate nominated by a party may appoint an agent of the candidates choice. PW6 admitted that at the time he was denied entry there were already 2 agents for Ford-Kenya party inside the polling station and that after consultation one Zablon was removed and he replaced him. For the 1 ½ hours he alleged to have been outside there were already 2 other agents who were protecting the interests of Ford-Kenya party and the Petitioner herein. The Petitioner was not therefore prejudiced by the 1 ½ hours delay. The allegation therefore fails.

Irregularities on Forms 35 and 36 arose both in the hearing and during scrutiny and recount of votes. The 3rd Respondent annexed copies of Form 35 and 36 to the affidavit sworn by the 2nd Respondent. The 2nd Respondent testified in court and made no mention of the original Form 35 and 36. It came out clearly in evidence as earlier mentioned that there were alterations in Forms 35 which were not countersigned. Form 35 are primary documents which are used to feed Form 36. The entries in Form 35 are expected to be a true reflection of results of voting in every polling station. Uncertainty in the entries made in Form 35 casts doubt on the result of election from the particular polling station it emanates. This irregularity was meant to be corrected by scrutiny and recount which was ordered by the court at the close of evidence from all parties herein. From the scrutiny and recount report 7 ballot boxes had no

Form 35 but were later identified by use of polling day diaries.

I have had occasion to peruse the original Form 35 found in the ballot boxes and after comparing with the copies filed in court, I noted that entries made are different in polling station no.061 Kibindoi primary school. The original has no IEBC stamp, no name for Presiding and Deputy Presiding Officer, no names or signatures for agents. The copy filed in court has names and signatures of Presiding and Deputy Presiding Officers and is signed by agents. Polling station number 060 Machakha primary school the original has no names or signatures of agents while the copy does not have page 2. Both page 1 and 2 have similar content.

The question that arise is from which Form 35 was it photocopied. The 2nd Respondent never explained to court why he failed to avail the original Form 35 he alleged to have used to announce results in court. Even if the court was to ascertain the contents of Form 35 from the scrutiny and recount of votes, it emerged from the polling day diaries that 2 stations earlier on mentioned had different serial numbers for ballot box seals from those found during scrutiny. After the exercise a doubt still remain as to whether accurate entries were made and announced.

I have also considered presence of seals in 15 ballot boxes listed by the Petitioner's advocate. I have compared the list with the handwritten proceedings of scrutiny and recount and find that in ballot box serial number 195019 code 055 Namwesi Market they are the same serial number recorded in the polling day diary at start of polling. There is therefore no prove that the ballot boxes were opened, seals put inside and sealed again. Presence of seals in the ballot boxes do not point at an irregularity. From the foregoing I find that there is doubt as concern the authenticity and veracity of Forms produced in court by the 2nd Respondent.

I now wish to consider the second issue.

2. Whether the irregularity in Form 35 and 36 substantially affected the results of election.

This court ordered scrutiny and recount of votes due to doubts arising from failure to fill parts of Forms 35, stamp or countersign alterations made on entries. At the end of scrutiny the issue remained unanswered. The whole electoral process is expected to be free, fair and transparent. In *Uganda Supreme Court Election Petition no.25/2005 Joy Kabati Kafula Vs Anija Kawuoya* it was held that an election is a process encompassing several activities from nomination of candidates through to the final declaration of the duly elected candidate. If any one of the activities is flawed through failure to comply with the law, it affects the quality of the electoral process.

In this petition the Forms 35 used to declare results are not authenticated. There is no absolute certainty that the copies produced are genuine reproduction or reflection of the original Forms handed over to IEBC by Presiding Officers from different stations. As concern Form 36 the one produced in court is not signed and the fact that it has errors is admitted by the 2nd Respondent. He said that he prepared a verified Form 36 which he never produced, one wonders why he decided to keep it from the court. Even if the photocopy filed in court was used to announce results as he alleged, as a show of honesty he should have produced both for comparison. Failure to do so added to absence of counterfoils in one polling station and alterations not cured by scrutiny, casts doubt on the results declared. It also portrays lack of transparency on the part of the 2nd Respondent. The above irregularities are fatal and I do find that they fundamentally affected the electoral process and results of election.

3) The next issue is whether the election should be declared null and void.

Despite the fact that the 1st Respondent led by 144 votes after scrutiny and recount the flaws discussed above as earlier stated affected the quality of electoral process and the results.

I therefore find it fair and just to declare results for Lwandanyi ward for member for County Assembly null and void. Certificate to issue as per Section 86(1) of Election Act 2011. I further declare that fresh elections be held.

4) Who is to pay costs.

No illegality or irregularity was proved against the 1st Respondent. There is no proof of contravention of any law by himself or his agents. There is also no proof that the 4th Respondent locked out the Petitioner's agent from Lwandanyi primary school polling station deliberately. There is also no proof that she denied illiterate voters assistance nor did wrong markings for them. PW2 said she never asked for assistance. No wrong was proved against 4th Respondent. In the circumstances I do order the 2nd and 3rd Respondents to bear the costs of this petition.

In conclusion I do thank all Advocates for the efforts they put in to ensure that this case proceeded without delay. I do commend them for punctuality and for agreeing to work beyond ordinary working hours. I also thank my court clerk Gladys Wambany who is not with us today due to bereavement for her commitment to work. My condolences to her and her family for the loss of her father. I also wish to thank the team led by Josphat M'nchebere which participated in scrutiny and recount for portraying diligence and commitment and agents for the parties for proper conduct during scrutiny and recount. To all I say thank you.

Rachel Ngetich

Ag CM

Court

Judgment delivered, dated and signed in open court in the presence of Ms Mumalasi for Petitioner, Mr Mokuu for 1st Respondent and holding brief for Mr Akenga for 2nd, 3rd & 4th Respondents; and Evans court clerk.

Rachel Ngetich

Ag CM

10/9/2013