



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT AT KIMILILI

ELECTION PETITION NO. 01 OF 2013

IN THE MATTER OF: - THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: - ELECTION ACT NO. 24 OF 2011

AND

IN THE MATTER OF: - THE ELECTIONS (GENERAL) REGULATIONS 2012

AND

**IN THE MATTER OF: - THE INDEPENDENT ELECTORAL AND BOUNDANRIES
COMMISSION ACT NO. 9 OF 2011**

AND

**IN THE MATTER OF: - THE NATIONAL GENERAL ELECTIONS HELD ON THE 4TH
MARCH 2013**

AND

**IN THE MATTER OF:- ELECTION FOR COUNTY REPRESENTATIVE IN THE MAENI
WARD, KIMILILI CONSTITUENCY**

BETWEEN

WYCLIFFE TABANI WEPUKHULU-----PETITIONER

AND

FLORENCE FULANO WEKESA -----1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION -----2ND RESPONDENT STANLEY KIPKORE

-----3RD RESPONDENT

JUDGEMENT

1. Following the General Election held on the 4th day of March 2013, under the charge of the **Independent Electoral and Boundaries Commission** (hereinafter the 2nd Respondent), among the candidates who contested for the representation of County Assembly, Maeni, of Kimilili Constituency were, **Wycliffe Tabani Wepukhulu** (herein after *the Petitioner*), and **Florence Fulano Wekesa** (hereinafter, *the 1st respondent*)

The elections were held simultaneously at the same polling stations for other five elective posts, with the same polling officials.

2. After the conclusion of the polling and tallying of the results from the various polling stations, in this case, twelve (12) polling stations, the 3rd respondent who was responsible for the supervision and conduct of the election in the constituency, and to make returns, as the 2nd Respondent's principal officer, hence its agent, declared that the 1st Respondent had garnered one thousand four hundred and forty four (1,444) votes, followed by the *Petitioner* with one thousand three hundred and thirty five (1335) votes.

There were other candidates as follows:-

1. Andrew Rombosia Barasa -54 votes
2. Enock Obwaka Mukanda -425 votes
3. Constant Wolayo Namaswa -130 votes
4. Pius Simiyu Ndumba -625 votes
5. Gabriel Sisule Simiyu - 158votes
6. John Wanambisi -1,299 votes

Accordingly, he declared the 1st Respondent as the candidate duly elected to represent the Maeni Ward in the County Assembly of Bungoma, and the 2nd Respondent caused this returns to be published in the gazette as stipulated by law. The 2nd respondent also issued the 1st respondent with the certificate of results of County Assembly election, 2013. These were facts not in dispute at all.

3. The petitioner's grievance with the results so declared, and the consequential return made, and on a consequence of which he filed this petition was that the election was riddled with a lot of malpractices committed by the 2nd and 3rd Respondents and their agents to the advantage of the 1st respondent.

4. The malpractices and non-compliance which forms the basis of the petitioner's grievances can be recast as follows; That:-

i. There were diverse breaches and violations for the provisions of the Election Act and the elections in general, regulations 2012 and massive electoral malpractices, the elections were not conducted in compliance with the Act and regulations.

ii. The 1st, 2nd respondent's officers and 3rd respondent singularly/jointly and or severally contravened, violated and breached several provisions of the Constitution of Kenya 2010, Elections Act 2011, Election regulation 2011.

iii The petitioner stated that the results for Maeni ward county assembly election as announced, declared and published by 2nd respondent officers and employees and by the 3rd respondent contained widespread instances of manipulation of Forms 35 and 36 and in some instances the votes exceeded the number of registered voters.

iv) The 2nd Respondent and its officers and employees in breach of the Constitution, the Elections Act and the Regulations failed to establish electoral systems which are accurate, secure, verifiable, accountable and/or transparent and declared results which in many instances had no relation to votes cast at the polling stations. Further, the 2nd Respondent's officers and employees developed methods of the election

system which were opaque and intended to manipulate the results of the winning candidate in the course of which your Petitioner's agents were altogether excluded from the electoral process.

v) That a reconciliation between the votes cast in the County Assembly elections of 4th March 2013 and those cast for the other elections at the same ward revealed a huge discrepancy between the votes cast in the county assembly elections and those of the presidential, Gubernatorial, Members of Parliament and Senate.

vi) That upon any reasonable hypothesis other than the existence of actual ballot stuffing, multiple voting or gerrymandering or inflating of the number of votes in the tallying thereof by the 2nd and 3rd Respondent herein or their officers or their condoning of or connivance in the same to the advantage of the 1st Respondent thereby rendering her alleged win invalid, illegal, null and void.

vii) That the 2nd Respondent and its officers and employees employed and relied on a manual tallying system which system was not only illegal and irregular but lacked transparency, accountability and was used and relied on by the 1st Respondent in collusion with the 2nd Respondent's officers and employees to manipulate the electoral process and in particular during the voting, counting, tallying and transmission of election results for Maeni Ward County Assembly Representative.

viii) That the 2nd Respondent Officers and employees took advantage of the 1st Respondent by excluding the Petitioner's agents from several counting and tallying centers and further, by declaring the election results for the County Assembly on unsigned Form 35. The 2nd Respondent's officers and employees also used and relied on a multiplicity of form 35 with variant entries for some of the poll, and further, making alterations and corrections on the said forms without the knowledge or involvement of the Petitioner's agents.

The petitioner therefore prayed:-

a. There be a scrutiny of votes recorded as having been cast in the aforesaid ward elections for county Assembly representative from all polling stations in the election held on 4th March 2013.

b. There be a scrutiny of rejected, void and spoilt papers from all polling stations relating to said elections.

c. There be a scrutiny of the actual voters Registers used at all polling stations within Maeni ward during the said elections.

d. There be a recount of all valid ballot papers cast at the said elections.

e. The said county assembly representative for Maeni ward elections held on 4th March 2013 be determined and declared null and void.

f. It be determined that 1st respondent was not and has not been validly elected as the County Assembly Representative for Maeni ward.

g. The said election of the 1st respondent as the county assembly representative for Maeni ward be determined and declared null and void and a certificate to that effect be issued.

h. Such election offences and electoral malpractices on the part of omission and commission of the 2nd and 3rd respondent as disclosed and found by this honorable court be reported to the Director of public prosecution for appropriate action.

i. The honorable court do find that the 1st respondent has committed serious electoral offences and order her barred from participating in subsequent elections for a period of at least five years or as the court

may deem just and expedient.

j. The respondents jointly and/or singularly be condemned to pay petitioner's cost and the incidentals to this petition.

k. Such further, other and consequential Orders as this honorable court may lawfully make.

He made an affirmation in ten (10) affidavits which accompanied and supported the petition. Only 8 out of 10 witnesses testified.

5. In their reply to the petition, the 1st Respondent filed replying Affidavits on the 29th April 2013, and 2nd and 3rd respondent also filed a response on 26th April 2013.

6. The respondents denied the advance allegations made in the petition and instead contended that the election in which the 3rd Respondent was returned as a member of the County Assembly Ward for Maeni Ward, which is now being contested:-

(i) was held in compliance with the electoral Laws, devoid of any irregularity, and was thus free and fair,

(ii) there were no election malpractices.

(iii) that the election was free and fair devoid of any irregularities.

(iv) there was no manipulation of forms 35 and 36 and at no instance did the number of voters exceed the number of registered voters.

(v) that there were no instances of delays, ballot stuffing , multiple voting, gerrymandering or inflating number of votes.

Each of the replies was supported by an Affidavit which reiterated on the contentions made therein and was in rebuttal of the adverse allegations made by the petitioner against the Respondent.

7. 3rd Respondent swore an Affidavit on his behalf and that of the 2nd Respondent. 1st Respondent also swore the further affidavit already alluded to, (sworn on the 25th day of April, 2013) and all were in rebuttal of the specific adverse claims made by the petitioner or her witnesses allegedly committed.

8. On her part, the 1st Respondent also swore an Affidavit on 25th April, 2013 and supported by five witnesses.

I will revert to this Affidavit in the course of discussing issues framed for determination by this court.

9. Pre-trial conference was conducted. At the pre-trial conference, the issues for determination were generally agreed:-

i. Whether the Maeni Ward County Assembly elections were conducted in accordance with the constitution and the elections Act and Rules and Regulations made there under.

ii. Whether the 1st respondent was validly elected and declared as the winner for the seat of the county Assembly of Maeni East Ward.

iii. Whether the results declared by 2nd respondent reflected the democratic will of the Maeni people.

iv. Whether court should order scrutiny and recount of votes and/or all election materials.

v. Whether the respondents were in breach of any IEBC Act or Elections Act or any Regulations thereof and if so what are the consequences

vi. Whether the respondents were in breach of the Constitution of Kenya 2010 and what are the consequences

vii. Whether the respondents, their agents or employees committed electoral offences and what the consequences are .

It was further agreed that the petitioner was to call ten (10) witnesses.

2nd and 3rd Respondent jointly were to call one (1) witness.

While the 1st Respondent was to call nine (9) witnesses.

Thereafter, parties were to file written submissions. Court was to give any further directions as matter progressed.

Issue No. 1

Whether in the conduct of the County Assembly elections for Maeni East ward, there was non-compliance with the laws and practice regulating the conduct of elections in Kenya?

The right of every eligible citizen to determine who will represent them in government without encumbrance is a basic cornerstone of any democracy and a prerequisite for social cohesion and solidarity.

Elections are indeed an element within the principle of rule of law because they give voice to the political will of the people involved.

The quality of an election is a key ingredient for deepening democratic governance. Elections are the primary inter linkage between representative democracy and political accountability.

High quality elections substantively add value to accountable governance and the realization of citizens becomes a political expectations. Low quality elections are a liability to democracy as they institutionalize undemocratic culture and practice. Actually public confidence in government is established when citizens believe that their will has been freely expressed and honored through genuine elections.

It is out of this cherished recognition that the Constitution of Kenya 2010 entrenches these principles in a number of its articles, and such principle is the right to be represented by a candidate of your choice. This right can only be guaranteed by the electoral body putting in place mechanisms that will enable such a voter to express his wish in a secret ballot. On the other hand where the electoral body breaches this fundamental requirement of the law in the conduct of the elections, such elections cannot be considered to be free and fair and therefore invalid.

14. In the matter before me, the petitioner's case is that there were instances of non-compliance with the laws and rules regarding the electoral process, and that these substantially affected the outcome of the election,

(1) Several agents of the petitioner were banned from the polling stations.

Paragraph 18 of the petition alleges that the 2nd respondent's officers took advantage of the manual tallying system and this to the advantage of the 1st respondent by excluding the petitioner's agents from several counting and polling centre's and further by declaring the county assembly results on unsigned form 35.

The same allegation is repeated in paragraph 28 of the petition

In response, the 3rd Respondent in paragraph 11, 12, 13 and 15 of the replying affidavit denied the allegations, and stated that the petitioner's agents were present in all polling stations and counting centers. Also in the affidavit of **Evans Mumbwani Wasula**, he signed and authenticated results at Kamasielo polling without recording any reservations or reason to refusal.

I have also looked at the written submissions of the parties on this issue.

I have looked at the forms 35 and the proceedings with regard to these issues. The petitioner himself acknowledged that all his agents signed form 35 in all polling stations. Even though they did not agree with the results none expressed dissatisfaction.

I also find that all those who qualified as agents were accorded support and cooperation by 2nd and 3rd respondents upon production of letters to that effect.

As correctly observed in the submissions by 2nd and 3rd Respondents, **Regulation 62(1) (c)** allows only authorized agents to be at the polling station. However under subsection (2), the presiding officer should not allow more than one agent from each candidate of a political party.

Under **subsection 4**, every agent must have an official badge supplied by the commission.

Lastly **under Regulation 62(3)** the absence of agent can not by itself invalidate the proceedings at a polling station and the petitioners agents were present at all centres.

I dismiss that allegation.

(2) That a reconciliation between votes cast in the County Assembly election and those cast for other elections in the same ward revealed huge discrepancy between County assembly, and presidential, gubernatorial, members of parliament and senate.

These allegations were contained in paragraph 14 of the Petition.

The 2nd Respondent in his submission on this said the court did not have jurisdiction to determine or evaluate any other elections but County assembly elections. Nonetheless the petitioner in support of his case did not produce any documentary evidence to support this allegation.

This would have been ascertained by a recount, however the petitioner closed his case without asking for one and later came to ask for recount as after thought.

We have to look at the voters' rights which are their preserve. A voter chooses whom to vote for, no one can decide for them who to vote for however much one is bribed.

In the same breath one can elect not to participate in a certain election but vote in others. The number of votes in each group of elections cannot be used to gauge malpractice

Kakamega Election Petition No.6 of 2013, Justus Gesito vs IEBC & 2 Others page 12Ogola J

"is it possible that a voter chooses to vote in only one elective position say presidential and leaves out the rest? The outcome is that the results of all six position may not tally. The court cannot delve in the results of other positions in doing that court will set a dangerous precedence"

The allegation on discrepancy of results as put forward by the petitioner is totally justifiable without necessarily reading malice. I choose to associate with sentiments of Judge Ogola herein above.

I hereby dismiss the allegation.

(3) The petitioner and his agents were denied access to forms including forms 35 and 36 and were

also not allowed to verify the results.

No single agent of the petitioner swore an affidavit to claim he or she was denied forms 35 and 36. That bare allegation is only found in paragraphs 18 and 25 of the petition, and paragraph 7 of the petitioner's affidavit. No names have been given of any one such agent.

All agents of the petitioner who testified before the court attested to having been present at the polling station and signed the forms 35 though their argument was that the appending of signatures signified presence and not necessarily concurrence with the results.

Regulation 79(1) (2) provides that the presiding officer, the candidate or agents shall sign the declaration in respect of the election. (See also **Regulation 79(2) (b), (3) (4)**).

Regulation 79(6) then provides that the refusal or failure by a candidate or an agent to sign a declaration form under **sub -regulation (4)** or to record the reasons for their refusal to sign as required under that regulation shall not by itself invalidate the results as announced under sub regulation 2(a).

Petitioner has failed to prove that allegation.

(4) The assisted voters were compelled to cast their vote for the 1st respondent and in most instances ballots were marked in favor of 1st respondent against the wishes of the voters.

That was only raised at paragraph 33 of the petitioner's affidavit the petitioner did not substantiate this allegation.

He did not give the name(s) of any one such assisted voter, and that is a blanket assertion.

The procedure for assisted voters is set out under **Regulation 72**. However under **sub regulation (7)**, no person other than the person acting for such assisted voter can be allowed in the compartment where such voter is marking his or her ballot paper.

The petitioner has not satisfied the court that the assisted voters were made to vote for 1st respondents

I dismiss the petitioner's allegation on that point.

(5) On allegations of voter bribery and voter treating.

That claim is in paragraph 15, 19, 20, 21,22, 28, 29,30,31of petition and paragraph 10 of the affidavit in support of the petition.

He says he got this information from **Richard Mang'oli** that the 1st respondent engaged in massive bribery and voter treating in the period preceding elections. On the polling day, Lillian Simiyu was found dishing out money on behalf of the 1st respondent and apprehended by members of public. A list of names of those who had benefitted from the bribery recovered.

7. **Richard Man'goli** in his affidavit says he saw one lady dishing out cash near Namboani Primary school. He also approached her to get some. On seeing him the lady who was later identified as Lillian Simiyu took off. A mob gave chase and caught her and took away what she had and that's when he recovered the list with names with monetary figures besides the names. Each person was getting KShs. 200.

Pius Ndumba also alluded to having witnessed massive voter bribery especially at Kamusinde RC primary school. He saw 2 ladies being given money by one John Kaita on behalf of 1st respondent. The money was in 200/= denomination and they were advised to vote for the 1st respondent. He reported the incident to the Presiding Officer and the police who ejected the person.

There was also an allegation that the 1st respondent jointly with other contestants of other posts prepared traditional alcohol at a strategic home next to a polling station. Also there was an incident where voters were treated to sugar by one Agnes Simiyu on behalf of the 1st respondent.

I have looked at the replying affidavits by the 1st Respondent. She categorically states she did not participate in any bribery neither did any of her agents engage in such malpractice. That she did not have any agents by the names Lillian Simiyu, that the said Lillian swore an affidavit to the effect that on the material day she was nursing her sick father, further that she did not fund any *busaa* for purposes of voter treating at Maeni polling centre. Agnes Simiyu attested before court that she was conducting her normal business of shop keeping and that she has been stationed beside the school for long, her shop was never a conduit for treats.

I have looked critically into these serious allegations and affidavits sworn in support. One thing is clear: the 1st respondent was never at any time found engaging in bribery or malpractice, no one has been charged with malpractice as a result of 4th March elections in Maeni ward. It will be worthy to note that voting is a strictly personal decision especially with the secret ballot system of voting. At the end of the day in secret ballot one can never tell if they really voted for the person who bribed them.

The 2nd and 3rd respondents denied having received any reports of electoral offences committed by the 1st respondent and that it was the petitioner's duty of prove these allegations.

With this I will dismiss the allegation.

(6) The use of manual process in the election of Maeni Ward viz a vis the electronic system prescribed by law.

That is in paragraph 17 that the 2nd respondent and it employees employed and relied on manual tallying system which was not only illegal and irregular but lacked transparency and accountability and in conclusion the officer manipulated the electoral system and particularly during voting, counting, tallying and transmission of elections results.

In response the 2nd respondent told court the petitioner did not seem to understand the technology behind EVID (electronic voter identification) and BVR (biometric voter registration) the BVR information was reduced into writing in poll books.

That the incident was not unique to Maeni but countrywide there was a problem with the BVR kits thus officers resorted to manual voter identification to hasten the process and the petitioner conquered with this.

However the challenges did not undermine the integrity of the exercise . The electronic system was to complement the manual since voting in Kenya is still manual, which includes using transparent boxes

Regulation 59 to 87 of Elections (General) Regulations 2012The regulations particularly regulation 87 underscores the fact that Electronic Results transmission is only for provisional results and the actual final result is in the manual return made in form 35

In the **Raila Odinga Case** the Supreme Court's opinion on this subject was that they took judicial notice that like all technologies the electoral technology was no exception, it's rarely perfect and remains open for improvement. The wisest decision the 2nd respondent would have made was to resort to manual electoral system when the electronic system failed.

I dismiss that allegation as it has not been proved.

(7) That some voters were favored with more than one ballot paper and others cast their votes more than once especially at Kamusinde RC, Kamasielo FYM and Maeni Primary school polling centres.

This allegation was raised in paragraph 35 of the petition, that there was an abnormal turn out of voters in these station contrary to what was actually witnessed.

In response to this paragraph 23 of the replying affidavit stated that there was no instance of anyone voting twice, that the form 35, marked voter register and ballot paper serial and counterfoils all were in agreement evidence that no one voted more than once.

This allegation remains at that it was not substantiated, no evidence was adduced before court in support, no witness came to court to testify that they voted twice. This is a criminal offence whose burden of proof is beyond reasonable doubt.

Without proof I will treat this allegation as hearsay and dismiss it.

(8) Finally the issue of falsified / incorrect voter register which excluded voters who had been duly registered and the total number of votes tallied exceeded number of voters who turned up breaching the principle of one man vote.

That is found at paragraph 23 and 24 of the petition.

In response the 2nd respondent said the voter register was open to public scrutiny after publications for registered voters to confirm their detail. It was therefore beyond the 2nd respondent if the voter showed up on the election date and his/her details were missing in the register. Pursuant to Regulation 27 of the Election (Registration of voters) Regulations 2012

Issue No. 2

In the event that issue No. 1 is answered in the affirmative, whether such non-compliance and discrepancy affected the result in a substantial manner.

The law in this issue in now well settled.

“An election petition is not an action at common law nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those which the statute makes and applies. It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them in consideration of alleged policy because policy in such matter, are those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, the court is put in a straight jacket.”

Those were words in the case of **Jnoti Basu & Others – Vs – DEBI BHASAL& OTHERS (1982) AIR SC, 983**, cited with approval in case of **HON. CLEMENT KUNGU WAIBARA & ANOR – VS – HON. FRNCIS KIGO NJEGA & 4 OTHER (2013) KLR**.

In **Joho – Vs – Njage & ANOR (No. 4) of 2008 3 KLR** (Election Petition) 500, where the court explained that:-

“In determining election petition, the...court is required to put in mind that election petitions are not ordinary suits where a party is enforcing a right that occurs to him as a person. The court has to take cognizance of the fact that an election as a signification of the exercise of the democratic rights of the people to have a person of their choice to represent them....the court has taken account of the fact that Kenya is a democratic state which espouses democratic ideals that recognize that it is only the people who have the right to determine their political leadership, and exercise such determination in free and fair elections, which can be so judged in accordance with the provisions of the constitution, free and fair elections will of necessity be the internationally acceptable standard of what constitutes such free and fair elections. The court will consider whether the complaints made by the petitioner are such that apart from establishing the particular electoral malpractice, or irregularity, impacted as the right of the

voters... to have a person of their choice represents them.....”

That principle has been codified into our laws by dint of section 83 of the Elections Act, 2011 which provides that “No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written law or that the non-compliance did not affect the result of the election.”

That section is in *pari materia* with Section 28 of the repealed National Assembly and Presidential Election Act. Commenting on that section, the majority of court of appeal judges in *Manson Oyonge Nyamweya – Vs – James Omingo Magara & 2 others* said:-

“Section 28 cannot be used to white-wash all manner of sins which may occur during the electoral process and.....parliament did not design that section for the purpose of covering serious abuses of the electoral process.”

Broadly speaking therefore, the overriding objective of the Act **is to promote the right to vote and this requires that the act should be liberally and broadly interpreted so as to provide citizens with every opportunity to vote. The primary duty of the election court is to give effect to the will of the electorate.**

Reasonable compliance as opposed to strict or absolute compliance with the procedures set out in the legislation is the standard when considering electoral matters.

In such cases, the burden of proof lies with the petitioner to prove the assertion in an election petition and the standard of proof is above the balance of probability, though not as high as beyond reasonable doubt:-

(See the Raila Odinga case, Supra, at page 75).

The first non-compliance was by the Deputy presiding officer who did not sign form 35. I hold this did not affect the validity of the results. Actually petitioner in his evidence was clear his grievance was in respect the forms, that his agents in all stations signed the forms and did not record any dissatisfaction neither did they ask for a recount of the votes at the tallying centre's before results were announced.

In the case of *William Kabogo Gitau – Vs – George Thuo & 2 others, C.A No. 126 of 2008*, the court of appeal cited with approval the following passage, in Halsbury's laws of England, 3rd Edition Vol. 14 at paragraph 261, which states:-

“An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates. In the conduct of the election if the tribunal is satisfied that, the election was, notwithstanding those transgression, really and in substance conducted under the existing law, and that the result of the election was not and could not have been affected by those transgressions.”

The second issue is of non-compliance, I noticed the form 35 was altered or cancelled without the presiding officer counter signing the cancellation on alteration.

Whereas the regulations do not specify what ought to be done where there are cancellation and alteration, common sense and good practice dictates that when there is a cancellation or alteration in a statutory form, the same should be counter signed by the concerned official.

Despite that alterations which amounted to about ten votes in total with a margin of 100 plus difference did not affect the election in a substantial manner.

Justice Githinji in his dissenting judgement in the *Danson Oyonge Nyamwaya* case (supra) had then to say:-

“Further he asserted that the mere failure by a presiding officer to sign form 16A was procedural anomaly which did not invalidate the results announced in a polling station.

Agreeing with the appellant, he asserted that the election court should have addressed itself to specific 16As and 17As, without quantifying the gravity of those anomalies. He said the election court should have addressed itself to specific forms 16As and 17As, examined the anomalies and ultimately determined the impact the anomalies had in the overall result of the election.

He asserted that the anomalies in forms 16As and 17As were in counting or rather the reconciliation or tallying process, they were post election anomalies which did not affect the vote.... And the object of recounting was to eliminate any mistake made in the counting of the votes, the anomalies in some forms 16As and 17As were cured by the recounting and scrutiny of the vote which verified that the appellant had won the election.....”

In arriving at this finding, I am alive to the fact that in determining whether non-compliance or a contravention of electoral laws affected the results of an election in a substantive manner, the court should apply quantitative and qualitative tests or both depending on the circumstances and facts of each case.

Quantitative test is relevant where the numbers or figures are in issue, while qualitative test is relevant where the quality or standard of an election on the whole is in issue.

Though I have had difficulty in laying a finger on any specifics in the petitioner's case, I have tried to address the issues as they were brought out. However beyond considering the mathematical exercise, I also considered the grounds raised and if they sufficiently challenge the entire electoral process.

In my final analysis, I find the process was fair, free and transparent. There existed circumstances favourable for a fair election, the votes cast were verifiable, and the alleged irregularities did not affect the election in a substantial manner.

Issue No. 3.

Whether the petitioner was entitled to scrutiny and recount of the votes.

The petitioner prayed for this in his memorandum of prayers. The basis of a scrutiny and recount is laid in Rule 32 and 33 of election Petition Rules 2013. The conditions to be fulfilled are explicitly laid down.

In this case the petitioner asked for scrutiny but failed to lay basis to warrant the court to order one neither did the court on its own motion feel satisfied with the petitioner's case to call for scrutiny

Joho Vs Nyange (2008) 3 KLR EP 188

"Scrutiny will only be ordered when a foundation and basis has been laid"

An application of scrutiny is not a fishing expedition where someone hopes to come up with evidence in support of their claim, the petitioner must satisfy court that indeed there was mass irregularity. In this case we have seen alteration of final tally figure not even the specific votes for each party meaning the agents were satisfied at the tallying level the error was in arithmetic.

Though there were instances where some courts issue scrutiny instantly for cases where the margins were so narrow, the question was "what constitutes a narrow margin?"

On recount, the petitioner alluded that there were tallying errors in form 35 that the number of votes cast could only be established through a recount.

Rule 32 (1) states clearly that in an election petition, where the only prayer is recount or tallying of votes, the petitioner may apply for recount.

In my humble opinion the petition did not meet the threshold of scrutiny and recount, consequently the court did not order the same

Issue No. 4.

What remedies are available to the parties.

Accordingly, I find that the petitioner has not adduced sufficient evidence to discharge the burden that lay on him and to the standard required for election petitions, to cause me to overturn the outcome of the election results for member of County Assembly, Maeni Ward as pleaded by him.

In my humble opinion the petition was based on strong speculations, evidence was not adduced in court in support of which, the burden of proof is high in this case , the petitioner must prove his case beyond reasonable doubt. I therefore dismiss the petition, and order that the petitioner pays costs to the Respondents.

Lastly I am indebted to the advocates for their quite impressive and focused presentation which enabled the court decide the case easily and within the stipulated timeline.

DATED and **DELIVERED** on the 23rd day of September, 2013 at Kimilili.

Hon. Martha. A .Nanzushi

In the presence of:

Mr. Chemwok, counsel for the petitioner.

Mr. Ocharo, counsel for 1st respondent

Mr. Mutubwa, counsel for 2nd & 3rd respondent

Mr. Nyachae, court clerk.