



IN THE COURT OF APPEAL

AT MALINDI

CORAM: OKWENGU, M'INOTI & SICHALE, JJA

CIVIL APPEAL NO. 39 OF 2013

BETWEEN

**KHATIB ABDALLA MWASHETANI ..... APPELLANT**

AND

**GIDEON MWANGANGI WAMBUA.....1<sup>ST</sup> RESPONDENT**

**HASSAN NYANJE CHARO.....2<sup>ND</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL & ...**

**BOUNDARIES COMMISSION .....3<sup>RD</sup> RESPONDENT**

**JUMA MUSA JUMA .....4<sup>TH</sup> RESPONDENT**

*(AN APPEAL FROM THE JUDGMENT, DECREE AND ORDER OF THE HIGH COURT OF KENYA AT MOMBASA (ODUNGA J) DATED 26<sup>TH</sup> SEPTEMBER, 2013*

IN

*H. C. ELECTION PETITION NO.4 OF 2013 CONSOLIDATED WITH*

*ELECTION PETITION NO.9 OF 2013)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

**Introduction**

[1] **Khatib Abdalla Mwashetani** the appellant herein, was among ten contestants who vied for the office of Member of National Assembly for Lunga Lunga Constituency during the general elections that took place on March 4th 2013. He emerged the winner with the majority of votes and was sworn into the office. Two voters from the constituency, **Gideon Mwangangi Wambua & Hassan Nyanje Charo** (hereinafter referred to as 1<sup>st</sup> and 2<sup>nd</sup> respondents), filed Election Petitions No 4 of 2013 and Election Petition No 9 of 2013 respectively, in the High Court at Mombasa challenging the election of the Appellant. The petitions were consolidated, and heard by **Odunga J** who delivered a judgment on the

26th September 2013, allowing the petitions and nullifying the election of the appellant. The appellant being aggrieved brought this appeal seeking to have the judgment of the election court set aside and the petitions dismissed.

[2] **Gideon Mwangangai Wambua** (the 1<sup>st</sup> respondent) filed a cross appeal against the election court's finding that there was no election offence committed, and challenging the order denying the 1<sup>st</sup> respondent costs of the petition. The 1<sup>st</sup> respondent also filed a notice of motion challenging the competence of the appeal and the jurisdiction of this Court to hear the appeal. The 1<sup>st</sup> respondent sought to strike out the appeal on the grounds that it was defective. The 2<sup>nd</sup> respondent also filed a cross appeal against the judgment of the election court challenging the order made for each petitioner to bear their own costs. He also challenged the competence of the appeal, firstly on the grounds that no notice of appeal or record of appeal was served on the Attorney General. Secondly, that the record of appeal was defective as some primary documents were missing, and thirdly that the appeal raised issues of facts rather than law. The Independent Electoral and Boundaries Commission and **Juma Musa Juma** who are the 3<sup>rd</sup> and 4<sup>th</sup> respondents in this appeal supported the appeal and opposed the cross appeals.

### **The Urgency**

[3] Although this Court by virtue of **section 85A** of the Election Act has six months to determine an appeal from an election court, **Article 101 (4) (b)** of the Constitution requires that a by election be held within 90 days from the date of the occurrence of the vacancy. In accordance with this requirement the 3<sup>rd</sup> respondent had scheduled a by election to be held in regard to the Lunga Lunga constituency on 2nd December 2013. This created an urgency in determining the appeal as it was desirable that the appeal be determined before the by election is held. It was with this in mind that this court in the interest of expediency directed that the preliminary issues that had been raised with regard to the competence of the appeal be heard and determined within the appeal.

[4] On the 27<sup>th</sup> November 2013, we gave our decision in which we inter alia allowed the main appeal; reinstated the election of the appellant as member of National Assembly for Lunga Lunga constituency and dismissed the cross appeals. In accordance with **Rule 32(6)** of the Court of Appeal Rules we reserved the reasons for the decision. We now give the reasons for the decision in this judgment.

### **The issues before the Election Court**

[5] In their election petitions the 1<sup>st</sup> and 2<sup>nd</sup> respondents each contended that the appellant was not validly elected as member of the National Assembly for Lunga Lunga Constituency, as the elections conducted on 4<sup>th</sup> March 2013 did not comply with **Article 81(e)** of the Constitution. The 1<sup>st</sup> and 2<sup>nd</sup> respondents each complained that the elections were marred by bribery, undue influence, lack of transparency and inaccuracy. The appellant and the 3<sup>rd</sup> and 4<sup>th</sup> respondents all of whom were named respondents in the two petitions denied these allegations

[6] The issues agreed upon by the parties and modified by the election court as the issues for determination in the consolidated petitions, were as follows:

- a. **Was the election for the position of the Member of National Assembly for the seat of Lunga Lunga constituency held and carried out on the 4<sup>th</sup> March 2013 carried out in a free, fair, transparent, impartial, credible and administered in an accurate and accountable manner?**
- b. **Was the election carried out in compliance or substantial compliance with the principles laid down in the Constitution or other governing written law?**
- c. **If not, did the alleged irregularities and non-compliance as petitioned materially affect the results of the election?**
- d. **Were there any election offences committed by any person in connection with the election which the subject of this petition and if so, by whom?**

- e. Was the 2<sup>nd</sup> respondent validly elected as the Member of the National Assembly for the Constituency?
- f. What order is appropriate for the Court to make in this petition?

### **The Findings of The Election Court**

[7] In his judgment the learned judge after considering affidavits and the evidence on cross examination of 23 witnesses for the petitioners and 27 witnesses for the respondents, and submissions from counsel for the parties, found *inter alia*, that the allegation that TNA agents were locked from various stations was not established; that although the agents were not issued with copies of forms 35 and that there was breach of **Regulation 79** of the Election (General) Regulations 2012, this was a post election anomaly which did not affect the results of the election; that the failure to have party agents accompany ballot boxes during transportation on its own, was not a sufficient ground for nullifying the elections without proof of some other irregularities affecting the results of the election during the transportation; that the failure to transmit the results electronically was not a sufficient basis for invalidating the election; that the appellant was not established to have committed the election offences of treating of voters, undue influence, or bribery contrary to **Sections 62, 63 and 64** of the Elections Act respectively.

[8] The learned judge further held that there was evidence that the appellant improperly influenced the voters in Lunga Lunga constituency to vote for him thereby contravening **Article 81(e)(ii)** of the Constitution with regard to the requirement for free and fair elections; that the conduct of the returning officer of unilaterally amending Form 36s, the entering of incorrect figures in Form 35s, and the numerous inconsistencies in the total number of votes cast with the total number of votes obtained by candidates, vitiated the elections as the elections were substantially not conducted in accordance with the law. Thus the learned judge concluded that the elections conducted in respect to the Lunga Lunga National Assembly constituency were not transparent, free, fair, accountable, or free from improper influence, and nullified the elections. On the issue of costs, the court ruled that the conduct of the petitioners was not deserving of an award of costs in their favour and therefore ordered each party to meet their own costs.

### **The Arguments in Support of the Appeal**

[9] The appellant filed a memorandum of appeal attacking the judgment of the election court on 22 grounds, which were collapsed to two categories by **Mr. Balala** counsel who argued the appeal on behalf of the appellant. The first category was the grounds challenging the learned judge's finding that the appellant improperly influenced the voters, whilst the second category was the grounds challenging the findings concerning the conduct of the returning officers and the presiding officers. **Mr. Balala** contended that having found that the allegation of undue influence was not established, and that the Mwashetani Foundation was a separate charitable entity formed before the 2013 elections, the learned judge erred in law in finding that there was improper influence; that the finding that the development activities undertaken through the appellant's foundation were improper, was wrongly based on the unsupported assumptions on the literacy and poverty levels in the constituency; further that no evidence was produced to prove that the alleged beneficiaries were indeed voters, or that they had voted for the Appellant; and finally that the extent if at all of any influence was also not considered.

[10] Drawing on the definition of undue influence and improper influence from Blacks Law Dictionary, counsel for the appellant argued that undue influence is a category of improper influence, and that the two basically mean the same thing. Counsel noted that although improper influence is used under **Article 81(e)(ii)**, it must be understood in harmony with the other provisions and the *ejusdem generis* rule applied; that except for improper influence that is included as an election offence falling under undue influence in **section 63** of the Elections Act, all the other acts mentioned under **Article 81(e)(ii)** are specific election offences under **Sections 63 to 65** of the Elections Act.

[11] Thus counsel maintained that under Kenya law improper influence and undue influence are the same and therefore the standard of proof in regard to improper influence under **Article 81(e)(ii)** of the

Constitution must be similar to those in relation to other acts in that Article which have been identified as election offences, such as corruption; that the standard of proof must therefore be beyond reasonable doubt; and that in this regard the court having made a finding that there was no proof of undue influence, it followed that improper influence was not established. In the alternative counsel for the appellant argued that if indeed improper influence and undue influence are separate issues, then improper influence was not pleaded, and is a new ground solely created by the election court for setting aside the election; that the court further erred by failing to consider the elements of this new ground; and in failing to define the standard of proof required to establish the said ground.

[12] On the conduct of the returning officer, counsel argued that the petitioners did not plead wrongful tallying nor did they identify any problems in the counting of votes after the election, rather their complaints related to agents being excluded from the electoral exercise and lack of sufficient forms, complaints that were conclusively dealt with by the learned judge; that the amendments to form 36 were well intentioned and did not affect the outcome of the result of the election as the appellant maintained a healthy lead; that under **regulation 83(1)(a) and 86 of the Elections (General) Regulations**, the returning officer was expected in case of a dispute to open the ballot boxes and recount the votes; that in this case notwithstanding the opening of the ballot boxes, there was no allegation of tampering with the ballot boxes after opening; that under **Article 88(4)(e) of the Constitution and Sections 74 of the Elections Act**, the IEBC through the returning officer can determine any dispute with a view to amending or correcting the results of the election prior to the declaration of election results; and that the amendment of Forms 36s to reflect the correct position, was a dispute resolution power undertaken by the returning officer.

[13] On the Form 35s, reference was made to **Regulations 79(7) of Elections (General) Regulations** for the proposition that the absence of the agents or lack of their signature on the documents was not sufficient ground for invalidation of the results. **Mr Balala** maintained that because the form 35s were few, agents were allowed to photocopy the forms; that the forms were correctly filled and duly signed by the agents; that the forms were essentially unchallenged and any issues on the tallying were addressed; that the error in counting were discrepancies which are to be expected when one is conducting an election of such great magnitude as was the case with the elections of 4<sup>th</sup> March 2013; that the order of the judge rejecting the application for scrutiny and recount confirmed that the process was substantially proper; and that the final outcome of the election was not affected by any irregularity as the will of the electorate remained clear on their preferred choice as evidenced by the number of votes.

[14] **Mr. Khagram** for the 3<sup>rd</sup> and 4<sup>th</sup> respondents supporting the appeal submitted that **Rule 92** of the Court of Appeal Rules gives the Respondent a right to lodge a Supplementary Record of Appeal; that if the Attorney General was indeed affected, they would have filed an application; that **Rule 39** of the Elections Petition Rules gives the Attorney General discretion to attend the proceedings as a friend of the court; that the 1<sup>st</sup> respondent had recognized that the AG was not an affected party to the suit and the objection was simply an attempt to prevent the court from determining the Appeal on merit.

[15] Counsel maintained that the appeal was properly before the court on a point of law; that a decision is erroneous in law if it is one that the court could not have arrived at; that under **Article 86** of the Constitution, the returning officer had a constitutional duty to collate the results and therefore the amendment on the forms was not an irregularity; that there was no evidence of any wrongdoing on the part of the returning officer; and that the results of the election remained unaffected.

[16] **Ms. Kiti** who appeared for the Attorney General that submitted the Attorney General participated in the proceedings in the election court as a friend of the court, had not filed any documents in the petition and did not wish to pursue the matter further.

### **Arguments in Response to the Appeal and in Support of the Cross Appeal**

[17] **Mr. Kimani** counsel who appeared for the 1<sup>st</sup> respondent submitted that the appeal was incompetent for three reasons. First, that it was incompetent for lack of service as none of the notices of appeal name the Attorney General for service as required under **Rule 77(1)** of the Court of Appeal Rules.

He maintained that the Attorney General having been made a party by order of the court, he is directly affected by the appeal and is a necessary party. In this regard counsel cited **Ahn vs Openda (1982) KLR 31**; **Ruithibo v Nyingi [1984] 505**; and **Onjula Enterprises Ltd. Vs Sumaria (1986) KLR 651**.

[18] Secondly, counsel argued that the Record of Appeal is incompetent for omission of important material; that the filing of a supplementary record of appeal by the 3<sup>rd</sup> and 4<sup>th</sup> respondents without leave of the court was an abuse of the court process. Further, notwithstanding **Rule 91** of the Court of Appeal Rules, the said supplementary record of appeal is insufficient, as it has not included all the documents.

[19] Thirdly, that the appeal is incompetent as it is based on grounds contravening **Section 85A** of the Elections Act. Counsel identified the finding of the court that there were errors, and the finding that Form 36 was amended, as findings of fact which could not be assailed. As regards the courts finding on improper influence, counsel submitted that **Section 9** of the Elections Offences Act (Repealed) addressed undue influence as an offence; that in **Article 81 (ii)** of the Constitution improper influence was added as an offence under the **Constitution of Kenya, 2010**; that the two concepts are therefore distinct.

[20] On the cross appeal **Mr. Kimani** argued that the court having found that the appellant had endeared himself to the electorate using cheques from the Mwashetani foundation, the elements of bribery were established and the election court should have given directions on the disqualification of the appellant for having committed an election offence; that the order on the issue of costs was insufficient as it was based on an erroneous appreciation of the law, as the court failed to appreciate that the Petitioner stood in the position of a representative party; and therefore the court should allow the cross appeal and award the 1<sup>st</sup> respondent costs.

[21] **Mr. Asige** counsel for the 2<sup>nd</sup> respondent submitted that the appeal is incompetent and should be struck out, for the reason that notice of appeal or Record of appeal was not served on the Attorney General; that some primary documents were missing from the record of appeal; that the Supplementary Record of Appeal filed by the 3<sup>rd</sup> respondent was an attempt to circumvent the rules and is also an admission that the record is defective; further that the supplementary record filed by the 3<sup>rd</sup> respondent cannot constitute part of the appellant's appeal as a respondent cannot file a supplementary record on behalf of an appellant; that the 3<sup>rd</sup> respondent having not filed any cross appeal, his supplementary record of appeal should be struck out.

[22] **Mr. Asige** argued that the only ground capable of appeal under **Section 85A** of the Elections Act is the issue of undue and improper influence. In this regard counsel maintained that the Judge was right in making the distinction between the two.

Drawing from the reasoning of the court in the Judgment, counsel pointed out that while undue influence is an election offence under **Section 63** of the Elections Act, improper influence is a contravention of Article 81 of the Constitution as it makes the election “*unfree*” and unfair which is a breach of **Article 2(4)** of the Constitution. Agreeing with the decision, **Mr Asige** noted that while undue influence is a criminal offence that carries a higher standard of proof had not been established, the constitutional element of improper influence had been proved since the standard is lower than beyond reasonable doubt. On the issue of costs counsel argued that the Superior Court has no discretion in awarding costs as costs follow the event; that there is nothing criminal in bringing the petition by proxy as **Section 87** of the Elections Act anticipates such an event; and that the Petitioner should not be penalized.

### **Preliminary issues**

[23] As already intimated the 1<sup>st</sup> and 2<sup>nd</sup> respondent raised a preliminary objection with regard to the competence of the appeal. It was argued that since there is no competent appeal, the court lacks jurisdiction to hear and determine the appeal, as the same should be struck out. As was stated in the often-quoted case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**:

*A preliminary objection consist of a pure point of law which has been pleaded, or*

***which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose off the suit. Examples are an objection to the jurisdiction of the court ...***

[24] Thus it is desirable that the competence of the appeal be the first issue to be addressed in this appeal. Ideally, this issue ought to have been addressed and determined as a preliminary issue prior to the appeal being argued, as it had the potential of disposing off the appeal if successful. However this was not possible, as already explained, due to the urgent need to determine the appeal before the date scheduled for the by election. Secondly, it was obvious to us that no prejudice would be caused to the respondents as the issues raised could still be effectively addressed during the argument of the main appeal and the cross appeal.

[25] On the first ground upon which the competence of the appeal is questioned, that is the appellant's failure to serve the Hon Attorney General with the notice of appeal, **Rule 77(1)** of the Court of Appeal Rules requires that the appellant serve copies of the notice of appeal on all persons directly affected by the appeal, within 7 days after lodging the notice of appeal. It is apparent from the record of appeal that the Attorney General was not a party in the proceedings before the Learned Judge, but was directed to attend the proceedings pursuant to **Rule 39** of the Elections (Parliamentary and County Election) Petition Rules that states as follows:

***The Attorney General or Director of Public Prosecution or a person appointed by the Attorney General or Director of Public Prosecution as the case may be, may attend the trial of an election petition.***

[26] Therefore, the participation of the Attorney General in the proceedings before the election court, was not as a necessary party to the proceedings but simply as *amicus curie* to assist the court deal with some grey areas in the law. In our view the order for the Attorney General's participation related to the proceedings in the election court only. We note that in a ruling delivered on 23<sup>rd</sup> May 2013 the learned Judge directed the AG to initiate the process of legislative amendment to the Elections Act 2011 with a view to providing reasonable timelines to remove the inconsistency between **Article 87(2)** of the Constitution and **section 76(1)(a)** of the Elections Act. This order is subject of another appeal and therefore we shall not pre-empt that appeal by commenting on the order. Suffice to state that the order does not affect the Attorney General as a party in the petition, nor has the learned Judge made any other order in the judgment, such as would make the participation of the Attorney General in the appeal mandatory, or require the Attorney General to file documents under **Rule 79** of the Court of Appeal Rules.

Hence, the Attorney General is not a party directly affected by the appeal within the meaning of rule 77(1) of the Court of Appeal Rules. To this extent this case is distinguishable from **Ahn v Openda (supra)**; **Ruithibo v Nyingi** (supra); and **Onjula Enterprises Ltd v Sumaria** (Supra), in which the parties who were not served with the notice were directly affected by the appeal. Another distinguishing aspect is that the cases cited were determined before the current constitutional dispensation, which by virtue of **Article 159(d)** of the Constitution does not look favorably on undue regard to technicalities. In addition the failure by the appellant to serve the Attorney General with the notice of appeal has not caused any injustice, as the Attorney General was invited to participate in the appeal but opted not to make any substantive submissions thereby adding no value to the resolution of the issues before the court.

[27] With regard to the defect arising from omissions in the record of appeal, the same is not fatal as the complaint is appropriately addressed under **Rule 92(1) of the Court of Appeal Rules** that states:

***If the respondent is of the opinion that the record of appeal is defective or insufficient for the purposes of his case, he may lodge in the appropriate registry four copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his opinion, required for the proper determination of the appeal.*** (emphasis added)

[28] The 1<sup>st</sup> and 2<sup>nd</sup> respondent had liberty to file a supplementary record of appeal to include the

missing documents if they deemed them crucial for their case. They did not find it necessary to file any supplementary record of appeal. Moreover, the 3<sup>rd</sup> respondent has filed an appropriate supplementary record of appeal that includes the missing documents. The supplementary record of appeal filed by the 3<sup>rd</sup> respondent is not an abuse of the process of the court, as **Rule 92(1) of the Court of Appeal Rules** does not limit the respondent to filing a supplementary record only where he has filed a cross appeal.

[29] We find that the preliminary objection anchored on the failure to serve the Hon Attorney General, and the omissions in the original record of appeal are not based on substantive issues but on undue procedural technicalities. Further, **under Section 3B** of the Appellate Jurisdiction Act, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just expeditious, proportionate and affordable resolutions of appeals. The application of this principle does not operate to uproot established principles and procedures but provide room to the Court to be guided by a broad sense of justice in applying the Court of Appeal Rules. In this case the just, expeditious, proportionate and affordable resolution of the dispute regarding the confirmation of the will of the electorate in Lunga Lunga constituency can only be determined by addressing substantive issues rather than procedural technicalities. For these reasons we overrule the objections anchored on failure to comply with the Court of Appeal Rules.

[30] As regards the ground that the appeal is incompetent as it is based on grounds contravening **section 85A** of the Elections Act, we wish to adopt what this court recently stated in **CA No 36 of 2013, Timamy Issa Abdalla v Swaleh Salim Imu Swaleh & 3 Others** in which similar issues regarding the competence of the appeal arose:

*...this appeal being a first appeal to this court, it is important to keep in mind the principles to be followed in a first appeal as reflected in Peters vs Sunday (1958) EA 424; and Selle vs Associated Motor Boats Company Limited (1968) EA 123, that although the court has jurisdiction to reconsider the evidence, re-evaluate and draw its own conclusion, this jurisdiction must be exercised cautiously. This caution is of greater significance in an appeal such as the one before us where the right of appeal is limited to matters of law only, because the jurisdiction of this court to draw its own conclusions can only apply to conclusions of law. We must therefore be careful to isolate conclusions of law from conclusions of facts, and only interfere if two conditions are met. Firstly that the conclusions are conclusions of law, and secondly, that that the conclusions of law arrived at cannot reasonably be drawn from the findings of the lower court on the facts. That having been said it is evident that in determining whether the election court properly performed its duty, this court must be satisfied that the court acted judiciously and correctly applied the law. The conclusions of law drawn from the facts must also be reasonable and in accordance with the spirit and purpose of the Constitution of Kenya. This calls for examination of the findings of the election court and conclusions on primary facts in totality, taking into account the Constitution and the electoral laws, with a view to determining whether any conclusions of law arising therefrom have been properly arrived at. Thus the objection taken that the appeal is incompetent because the grounds of appeal raise issues of facts, was wrongly brought as a preliminary issue, as there is need to evaluate the conclusions arising from the primary facts.*

[31] In the premises, it would have been premature to determine at the preliminary stage the distinction between issues of law and issues of facts without going into substantive arguments and analysing the basis of the conclusions of law arrived at by the election court. Indeed as stated in **Attorney General v David Marakaru (1960) EA 484**, a decision is erroneous in law if it is one to which no court would reasonably come to. Such a conclusion cannot be made at the preliminary stage. Suffice to state that prima facie the appeal does raise issues of law particularly with regard to interpretation and application of **Article 81(e)(ii) &(v)** of the Constitution. It therefore meets the threshold of **section 85A** of the Elections Act and is properly before us.

## **Substantive Issues**

[32] In our view the main substantive issues that emerge from the appeal and the cross appeal are

as follows:

- i. Whether *improper influence* is distinct from *undue influence*, and if so whether the appellant's conduct amounted to *improper influence* as to justify the conclusion that the elections did not comply with the general principles of free and fair elections as provided under **Article 81(e)(ii)** of the Constitution;
- ii. Whether the findings of fact made by the learned Judge justify a conclusion that the 3<sup>rd</sup> and 4<sup>th</sup> respondent did not substantially administer the election for Lunga Lunga Constituency in a transparent, impartial, neutral, efficient and accurate manner as provided under **Article 81 (e) (iv) &(v)** of the Constitution;
- iii. Whether the findings of fact made by the election court justify a conclusion that the appellant was guilty of bribery contrary to **section 64** of the Elections Act;
- iv. Whether the conclusions in (i), (ii), and (iii) justify a conclusion that the results of the elections did not reflect the will of the electorate in Lunga Lunga Constituency.
- v. Whether the election court erred in denying the petitioners costs, and what order for costs should be made in regard to the appeal and cross appeal.

### **Improper influence**

[33] As we have already noted, the election court rejected the grounds of the petition that the elections of the Member of Parliament for Lunga Lunga Constituency was vitiated by *undue influence*, contrary to **section 63** of the Elections Act. However, the court found that *improper influence* contrary to **Article 81(e) (ii)** of the Constitution was proved, leading ultimately to the nullification of the election of the appellant as Member of Parliament. The petition challenging the election of the appellant was presented under the Elections (Parliamentary and County Elections) Petition Rules, 2013. **Rule 10(1) (e)** of those rules oblige a petitioner to state the grounds upon which a petition is presented, while **rule 10(3)** of the same rules require the petition to be supported by an affidavit sworn by the petitioner containing the grounds on which relief is sought and setting out the facts relied upon by the petitioner.

[34] In his petition, the 1<sup>st</sup> respondent's contended that the election of the appellant was "marred by rampant bribery, undue influence on voters and want of transparency and accountability." The 2<sup>nd</sup> respondent complained in his petition that there was "undue influence, bribery and treating of voters" contrary to the provisions of the Election's Act. This is what the petitioners pleaded and sought to prove by the evidence that they adduced. That is also what the appellant set out to rebut by the evidence that he called on his behalf. In other words neither the 1<sup>st</sup> nor the 2<sup>nd</sup> respondent pleaded *improper influence* as a ground upon which relief was sought, nor was the appellant called upon to rebut such conduct. Thus assuming for the sake of argument that there is a difference between *undue influence* and *improper influence*, the pleadings before the election court sought nullification of the appellant's election on grounds of *undue influence*, not of *improper influence*. Moreover, in the evidence and submissions of the parties the petition was argued on the basis of *undue influence*, and the pleadings were never amended to challenge the appellant's election on grounds of *improper influence*. Thus the election court could not determine the consolidated petitions on the ground of *improper influence*, as that was not an issue before it.

[35] *Improper Influence* is referred to in **Article 81** of the Constitution that prescribes the general principles that must underpin the electoral system in Kenya. Among these principles is free and fair elections that are:

- 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.*

[36] To give full effect to the requirements of **Article 81**, Parliament has enacted various legislation such as the Independent Electoral and Boundaries Commission Act, and the Elections Act 2011, which

among other things, create an elections management body that is independent, neutral, and accountable. These legislations also provide for transparency in the conduct of elections, including procedures for conducting elections by secret ballot, impartiality, neutrality, efficiency, accuracy and accountability in the administration of the elections, as required by the Constitution. In short, the general principles of the electoral system set out in **Article 81** of the Constitution find actualization in the various legislation on the electoral system enacted by Parliament.

[37] Part VI of the Elections Act specifically seeks to ensure that our electoral system is free from violence, intimidation, improper influence or corruption as demanded by **Article 81(e) (ii)** of the Constitution. That part prohibits and declares certain conduct to constitute election offences. The offences created by Part VI include those relating to violation of the secrecy of the ballot, personation, treating of voters, bribery, use of force, use of public resources in election campaigns, etc. Of importance is that **Section 63** of the Elections Act prohibits and criminalizes *undue influence* rather than *improper influence*.

[38] That provision provides as follows:

**63. (1) A person who, directly or indirectly in person or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of—**

**(a) inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election;**

**(b) impeding or preventing the free exercise of the franchise of a voter;**

**(c) inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or**

**(d) impeding or preventing a person from being nominated as a candidate or from being registered as a voter, commits the offence of undue influence.**

**(2) A person who induces, influences or procures any other person to vote in an election knowing that the person is not entitled to vote in that election**

**commits an offence.**

**(3) A person who directly or indirectly by duress or intimidation—**

**(a) impedes, prevents or threatens to impede or prevent a voter from voting; or**

**(b) in any manner influences the result of an election,**

**commits an offence.**

**(4) A person who directly or indirectly by duress, intimidation or otherwise compels or induces any voter who has already voted at an election—**

**(a) to inform that person or any other person of the name of the candidate or political party for which the voter has voted; or**

**(b) to display the ballot paper on which the voter has marked his vote,**

**commits an offence.**

[39] **Section 63** thus addresses situations where a candidate or his agents resort to specified conduct to

induce or impede the free exercise of franchise by a voter. It is certainly not correct, as submitted by Mr Kimani, that undue influence as an election offence is committed only when a person directly or indirectly “*by duress or intimidation*” influences the result of an election. Under **Section 63** undue influence can also arise from fraudulent device, trick or deception for the purpose of inducing or impeding the free electoral choice of the voter.

[40] After careful consideration of the provisions of the Constitution, the Elections Act and the rules made thereunder, the pleadings, the judgement of the election court and the submissions by the parties, we are not convinced that **Article 81(e) (ii)** of the Constitution, read together with the Elections Act, and in particular section 65 thereof constitutes *improper influence* as a distinct and separate ground for nullification of an election, different from *undue influence*. Rather, *improper influence* under **Article 81(e) (ii)** of the Constitution is what is covered under **Section 63** of the Elections Act as *undue influence*. It is in this context that we find merit in **Mr Balala’s** submission that even in terms of definition, **Black’s Law Dictionary (7<sup>th</sup> edition, 1999)** does not offer separate and distinct definitions of *improper influence* and *undue influence*. At page 761 of the dictionary, instead of a presentation of a definition of “*improper influence*” there is cross-reference to the definition of “*undue influence*” on page 1529. Under normal circumstances if a distinction exists in law between *undue influence* and *improper influence*, we would have expected to find two separate and distinct definitions of the different terms.

[41] Mr Kimani’s argument that *improper influence* is a new concept introduced by the Constitution that is a wider concept than *undue influence*, while *undue influence* has always been in the laws of Kenya, may on the face of it appear attractive. Yet, it must be remembered that the repealed Elections Offences Act, Cap 66 Laws of Kenya which previously prohibited *undue influence* in elections also prohibited similar conduct that is prohibited by the Constitution and the Elections Act such as violence, intimidation, treating of voters, bribery, and corruption. Can it then be argued by parity of reasoning that since **Article 81** of the Constitution speaks to an electoral system free of violence, intimidation, treating of voters, bribery, and corruption, these are also new concepts? We do not see anything that suggests that prohibition of treating of voters, bribery, and corruption is a brand new invention of the Constitution of Kenya, 2010. Nor is *improper influence*. We would therefore see the relevant provisions of the Constitution as not necessarily creating new concepts but as provisions more attuned to spur greater impetus in combating the malpractices that have always dogged our elections and to provide a more rigorous enforcement framework and mechanism that lacked in the former Constitution.

[42] Moreover, if it is accepted that *improper influence* is different and separate from *undue influence* under **section 63** of the Elections Act, the natural question that arises is what conduct then constitutes *improper influence*? **Mr Kimani** contends *improper influence* may not necessarily be criminal conduct but nevertheless once proved its consequence is to lead to nullification of the result of an election. It bears repeating that where a person(s) is likely to be exposed to serious prejudice or consequences on account of engaging in conduct that is prohibited, the law has always demanded that the prohibited conduct be spelt out with clarity and precision so that it is known in advance to all and sundry. **Article 81** of the Constitution provides “*general*” principles that are given specificity in legislation such as the Elections Act. We ask ourselves, why should the Legislature provide in detail in the Elections Act for the other general principles found in **Article 81** of the Constitution such as election by secret ballot, freedom from violence, intimidation and corruption, and leave out “*improper influence*” to be regulated as prohibited conduct only under the Constitution? If the constitutional basis of the prohibitions and offences under Part VI of the Elections Act is, as we think it is, **Article 81** of the Constitution, what is the constitutional basis of the prohibition of *undue influence* under **Section 65** of the Elections Act if it is separate, distinct and bears no relation to “*improper influence*” under the Constitution? It is these considerations that convince us that the conduct prohibited in the Elections Act, as *undue influence* is the same conduct that is called *improper influence* in **Article 81 (e) (ii)** of the Constitution.

[43] The election court found, for example, the appellant’s improper influence committed in Lunga Lunga Constituency to have entailed making promises to the electorate and abandoning them mid-stream. In the pertinent part of the judgement the learned judge delivered himself as follows:

**“Elections are meant to be exciting events and it would be a very boring exercise if candidates**

*were not freely allowed to sell their policies. However, in the course of selling their policies the candidates are not permitted to resort to improper methods in seeking such elected posts. In my view political rally platforms are shelves on which parties and candidates display their policies and not their financial prowess. From the evidence on record the (appellant) in his rallies promised to deliver the electorate of Lunga Lunga from their afflictions and on gaining foot at the National Assembly abandoned some of the projects midstream. Although he (appellant) did not expressly admit having abandoned the said projects, in cross-examination he admitted that since the elections he had not supplied any desks to schools. That is clear manifestation that improper influence was employed to secure the votes of the people of Lunga Lunga Constituency.”*

[44] This finding, with due respect sounds more like judicial audit of the appellant’s performance in the National Assembly after a few months in office. It bears little or no relationship at all with the kind of conduct prohibited as *undue influence*. If this is what constitutes the separate and distinct conduct of *improper influence*, we find the idea too general and elastic to be the basis of the drastic consequence of nullification of an election. Moreover, we have serious reservation as to whether it is the province of the learned judge, in determining whether an election was validly held, to delve into the murky question of whether a candidate has *ex post facto* kept his election promises. But even if the judge could legitimately venture into such an audit, in the absence of evidence of the time frame within which the appellant was to honour his pledges to the people of Lunga Lunga, the election court was harshly judging the appellant in a span of six months while he had as much as five years to deliver on his promises.

[45] In addition whether the Member of Parliament keeps his election promises or not is an issue specifically reserved in the Constitution for consideration by the people of Lunga Lunga. In our view this is the reason why, **Article 104** of the Constitution and Part IV of the Elections Act, vest in the voters the power to recall their Member of Parliament midstream, without having to wait for expiry of his full term, should they feel that he has failed them. Judicial officers must respect these constitutional arrangements and give them a chance to evolve and work, stepping in only when the Constitution properly allows them to do so. Therefore judges should not readily arrogate to themselves responsibilities that under the Constitution are reserved for voters or other constitutional institutions.

[46] Given the lack of certainty in the conduct adverted to by the learned judge as *improper influence*, to use the same as the basis of nullification of an election is tantamount to telling the people of Kenya that *improper influence* prohibited by the Constitution, is different from *undue influence* under the Elections Act, and that they can only know what constitutes *improper influence* as and when they see it. We find that for conduct that would have such drastic consequences including nullification of an election, such an approach is inadvisable and contrary to the spirit of the Constitution. In our view every person must know in advance and with clarity what conduct constitutes *improper influence* if it is indeed different from *undue influence*.

[47] The next vexing question is, if truly *improper influence* is different and distinct from *undue influence*, what is the standard of proof required to establish it? From the judgement of the election court, proof of *improper influence* will lead to nullification of the results of an election. Purely from the consequences that flow from the finding that a person is guilty of *improper influence*, we must conclude that improper influence is serious conduct that has attributes akin to those of an election offence. It is now settled beyond peradventure that the standard of proof where an election offence or such kind of conduct is alleged, is proof beyond balance of probabilities. The Supreme Court in **Raila Odinga and Others vs Independent Electoral and Boundaries Commission & 3 Others (Supreme Court Election Petition No 5 OF 2013)** expressed itself as follows on the standard of proof in election petitions:

***“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 question.”***

Even the election court observed that the standard of proof in election petitions “depends on the seriousness of the allegations made,” that allegations in a petition are grave and that the party laying the

allegations is expected to present cogent, consistent and credible evidence.

[48] There is no doubt that the allegations made against the appellant in the petition were serious, not the least because of the consequence of nullification of the election result. The election court found that the evidence adduced did not prove *undue influence*, but the same evidence proved *improper influence*. Granted the seriousness of the allegation of *improper influence*, it is not clear to us what standard of proof the election court used to come to the conclusion that *improper influence* was proved because it did not address itself to the standard of proof required to prove *improper influence*. As was stated in ***R. G Patel vs Lalji Makanji (1957 (EA) 314*** it is important for the court to address its mind to the question of standard of proof and failure to do so may be indicative of the fact that the issue was never considered.

[49] There is no doubt in our minds that the election court did not use the standard of “***above the balance of probability, though not as high as beyond-reasonable-doubt***” referred to by the Supreme Court in *Raila Odinga & Others (supra)* because if it had used that standard, it would have found, just like it did regarding *undue influence*, that the allegation was not proved. That it found the same evidence that it rejected in relation to *undue influence* sufficient to prove *improper influence*, strongly suggests that a lower standard of proof was opted for to prove *improper influence*. This was contrary to the courts observation that the allegations of *improper influence* were grave.

[50] The upshot is that we find the distinction between *improper influence* and *undue influence* adopted by the election court to be a vague distinction without useful difference. The notion of *improper influence* distinct from *undue influence* is too fluid, nebulous and imprecise to found an independent and distinct ground for nullification of the election. It is a notion thoroughly fraught with uncertainties and is capable of tripping and trapping all and sundry. Moreover **Article 81(e) (ii)** of the Constitution must be read together with **section 63** of the Elections Act that operationalizes the general principles for the electoral system. This means that in effect there is no distinction, and whether termed *undue influence* or *improper influence*, the conduct must be established to the standard of above the balance of probability, though not as high as beyond reasonable doubt. In view of the election court’s conclusion that the findings on facts could not prove *undue influence*, it follows that the election court’s conclusion that the same findings revealed *improper influence*, had no legal basis.

### **Conduct of the Returning Officer**

[51] On the issue as to whether the conclusion that the conduct of the Returning Officer was sufficient to vitiate the election, the court found that the Returning Officer committed several irregularities. Under **Regulation 83 (1) (a)** of the Elections (General) Regulations, the Returning Officer is required to:

*tally the results from the polling stations in respect of each candidate, without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a polling station exceeds the number of registered voters in that polling station, the returning officer shall disregard the results of the count of that polling station in the announcement of the election results and make a statement to that effect*

[52] Accuracy is one of the principles that the electoral system must comply with. The obligation to tally involves confirmation of the figures without recounting the ballots. It is anticipated that during the tallying exercise, the Returning Officer shall confirm the validity of the votes. Indeed **Article 86 (c)** of the Constitution places an obligation on the 3<sup>rd</sup> and 4<sup>th</sup> respondents to ensure that the results from the polling stations are “openly and accurately collated and promptly announced.” The Concise Oxford English Dictionary defines “**collate**” as to collect and combine text or information or compare and analyze two or more sources of information. The learned Judge found that the Returning Officer identified errors in two Forms 35s following the recount and this necessitated the changes in Form 36. No doubt the accuracy of Form 35s was crucial, the Forms being the primary tally document in the election, from which detailed results are transposed to Form 36s. Having discovered that there were errors in Form 35s from two polling stations, the correction made on the Form 36 was simply to rectify errors in transposition, to reflect the corrected results as per the corrected Form 35s. This was part of the collation

that the Returning Officer was obligated to do under **Article 86 (c)**. The anomaly was that the errors were discovered after a recount conducted irregularly as the Returning Officer had no mandate to conduct a recount where the votes were not disputed, which was the case with the two polling stations in which the error was discovered. The argument that the amendment was part of a dispute resolution power under **Article 88 (4) (e)** of the Constitution cannot therefore hold. In addition, the correction was done in the absence of the agents and after the declaration of the results. Nonetheless, other than the irregular recount in regard to the two polling stations, there was no evidence of a persistent pattern of irregularities, nor was there any allegation that the opened ballot boxes were tampered with. Thus the action could not invalidate the results, as the irregularity did not affect the results in the two polling stations nor did it affect the election results as a whole. Indeed the appellant was still in the lead in the amended Form 36 just as he was in the lead in the initial Form 36s.

[53] The learned Judge was alive to the fact that isolated irregularities were not sufficient to vitiate the results of the elections. In this regard, the Judge properly directed himself by referring to **Islington West Division Case, Nedhurst vs. Lough and Gasquet [1901] 5 O & H 120, 17 TLR 210, 230;**

*“ An election ought not to be held void by reason of transgressions of the law without any corrupt motive by the Returning Officer or his subordinates in the conduct of the election where the court is satisfied that the election was, notwithstanding these transgressions, an election was really and in substance conducted under the existing election law, and that the result of the election, that is the success of the candidate over the other was not and could not have been affected by those transgressions. If on the other hand the transgressions of the law by the officials being admitted, the court sees that the effect of the transgression was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether these transgressions may not have affected the result, and it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void.”*

[54] The judge’s finding on the irregularities and administrative errors are captured in the following extract of the election court judgment:

*Similarly in this case there were numerous omissions on the part of the commission’s officials such as the fact that the total number of votes cast in many cases did not agree with the votes obtained by individual candidates; the figures contained in at least two form 35s were found to be incorrect on the recount of the votes at the Tallying Centre, a fact which affected the positions of the rest of the candidates apart from the declared winner. I have already mentioned that the record keeping by the commission officials left a lot to be desired. Some of the pages of the diary were left blank without any explanation at all. Taken separately and individually they may not have affected the results of the elections, but taken as a whole one cannot say that the results of the elections reflected the will of the people of Lunga Lunga Constituency. These errors coupled with the decision of the Returning Officer to single handedly in the absence of the candidates or their agents and in the comfort of the former’s office to amend the contents of form 36 after the declaration of the results leave me with no choice but to find that the elections of Lunga Lunga Constituency were not conducted in accordance with the principles stipulated under our Constitution. The legal principle is that if the elections were conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not...*

[55] The question therefore is whether these irregularities or administrative errors that were found established, justify a conclusion that the elections were not conducted substantially in accordance with the elections law or that they affected the results of the elections to the extent of undermining the electoral process.

[56] The following extract of the judgment explains the basis of the conclusion of the learned judge in this regard.

***The totality of what I have stated herein above is that the conduct of the 2<sup>nd</sup> respondent during the period leading to the elections which conduct from the evidence improperly influenced the electors of Lunga Lunga Constituency to vote for him coupled with the shoddy manner in which the officials of the commission carried the election process, it is my view and I so hold that there were transgressions of the law by the respondents severally, which transgressions taken cumulatively leads me to the inescapable conclusion that there is reasonable doubt whether these transgressions may not have affected the results and it is uncertain whether the candidate who has been returned was really being elected by the majority of persons voting in exercise their free will and in accordance with the laws in force relating to elections hence this court is bound to declare the election void and I so declare.***

[57] What appeared to have tilted the balance in arriving at the learned Judge's conclusion is the finding that the appellant improperly influenced the voters, coupled with the many administrative errors that were evident in the electoral process. The learned Judge conceded that taken individually the irregularities or anomalies may not have affected the results of the elections. The learned Judge was in fact in doubt as to whether the irregularities affected the results of the election. It is evident that the Judge was influenced by his earlier conclusion that the appellant had exercised improper influence on the voters. As we have already demonstrated, that conclusion had no legal basis, as the facts established did not prove improper influence. The question now is whether in the absence of improper influence on the voters, the irregularities demonstrated flaws that were sufficient to lead to a conclusion that the elections were not conducted in accordance with the electoral principles.

[58] The trial Judge noted that the irregularities were basically due to the magnitude of the electoral exercise, fatigue, negligence, poor organization and arithmetical errors. There was no finding that any of the irregularities or transgressions was the result of deliberate manipulation or collusion. Apart from the finding on improper influence in respect of which we find that the Judge erred, the Learned Judge did not find any of the candidate guilty of any improper conduct. On the whole, the learned Judge found that the elections were conducted in a transparent and impartial manner and that the electorates were not disenfranchised. As regards the inaccuracies, discrepancies and administrative errors, Section 83(3) of the Election Act provides recognition to the fact that although perfection is the goal in the electoral process, non-compliance with the law resulting in errors and irregularities may be inevitable, hence the provision:

***“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.”***

**Section 83** is in line with the following caution from *Optiz vs Wrzesnewsky [2012] SCC 55*.

***If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election...***

In our view the facts before the learned Judge established that the elections were carried out substantially in accordance with the electoral laws even though there was some non-compliance in certain aspect. The irregularities were however not of such magnitude as to lead to a conclusion that the integrity of the electoral process was undermined. The appellant maintained the lead notwithstanding the irregularity, and thus the will of the electorate in Lunga Lunga Constituency was clear. There is therefore no justification for interfering with the outcome of the electoral process. In the circumstances we come to the conclusion that the elections conducted in Lunga Lunga Constituency were substantially in accordance with the electoral principles as provided in the Constitution and electoral laws, and that the conclusion of the Learned Judge that that the electoral process was not free and fair or that the irregularities substantially affected the elections was not supported by the facts.

## Cross Appeal – Bribery

[59] Regarding the first ground of the cross appeal, namely that the election court erred in finding that bribery was not proved against the appellant, the 1<sup>st</sup> respondent's main ground of complaint is that there was evidence that the Mwashetani Foundation had issued cheques for school fees to some needy students in the Constituency. The learned judge considered at length the evidence adduced to prove bribery and carefully weighed this evidence against the provisions of **section 64** of the Elections Act. He addressed extensively the standard of proof required to prove bribery, quoting several authorities, both local and from other jurisdictions.

[60] The learned judge concluded as follows:

*“The only issue is whether the said cheques were issued with the intention of influencing the outcome of the elections. In my view the mere fact that a candidate in an election carries on with the developments which he had started prior to the electioneering period, does not necessarily amount to bribery unless the said actions are so intertwined with the elections that it is not possible to separate the two events. In this case the evidence is that the Foundation was registered in the year 2010 and it was carrying out activities long before the electioneering period. There was evidence that in certain cases it was the residents of Lunga Lunga Constituency who sought help from the 2<sup>nd</sup> respondent in particular with respect to the assistance to the women groups, building of schools, sinking of wells and supply of desks. In those circumstances, I am not prepared to find that the actions of the 2<sup>nd</sup> respondent amounted to bribery.”*

[61] This being an appeal on points of law, we do not find any misdirection on the law on the part of the learned Judge. We are entirely in agreement with his conclusion in this regard and we shall pay homage to his findings of fact. We accordingly find no merit in this ground of the cross appeal.

[62] On the issue of costs, the learned Judge ordered each party to bear their own costs. The learned Judge was alive to the general rule requiring costs to follow the event. Nonetheless the Judge exercised his discretion and ordered each party to bear their own costs. The Judge gave reasons for departing from the general rule and denying the successful petitioners costs, in particular that the conduct of the petitioners was not deserving of an order for the award of costs. In our view the Learned Judge did not use wrong principles in exercising his discretion nor did he exercise his discretion unjudiciously such as to warrant the intervention of this court. We would dismiss the cross appeal on this ground as well.

## Conclusions and findings

In conclusion we summarise our findings as follows:

### Preliminary Issues

- a. That the Attorney General appeared in the lower court as an *amicus curie* and though it was desirable that he be served with the notice of appeal and record of appeal, he was not a party directly affected by the appeal within the meaning of

Rule 77(1) of the Court of Appeal Rules, and the service of the notice upon the Attorney General, was not mandatory nor has the failure to serve occasioned any injustice.

- b. That some documents were omitted in the record of appeal filed by the appellant but these omissions were corrected through the supplementary record of appeal that was properly filed by the 3<sup>rd</sup> and 4<sup>th</sup> respondents in accordance with Rule 92(1) of the Court of Appeal Rules.
- c. That although there were some technical and procedural omissions, no prejudice or injustices has been caused to any party and the just and expeditious resolution of the dispute concerning the confirmation of the will of the electorate in Lunga Lunga Constituency can only be determined by

addressing substantive issues rather than procedural technicalities.

- d. That the appeal raises issues of law with regard to interpretation of Article 81(e) (ii) & (v) of the Constitution, and therefore meets the threshold of Section 85A of the Elections Act.

### **Substantive Issues**

- a. That **Article 81(e) (ii)** of the Constitution, read together with section 65 of the Elections Act, does not constitute *improper influence* as a distinct and separate ground for nullification of an election, different from *undue influence*, but includes *improper influence* as an election offence of *undue influence* under **section 63** of the Elections Act.
- b. That the burden of proof remained upon the 1<sup>st</sup> and 2<sup>nd</sup> respondents, as petitioners, to establish the particulars of irregularities and contraventions complained of in their petitions, and the complaint of *undue influence* which was pleaded not having been established, the trial Judge was wrong in lowering the standard of proof and finding *improper influence* established.
- c. That the trial Judge having found that the appellant had not committed any offence under **section 63** of the Elections Act and specifically that no offence of *undue influence* was committed by the appellant, the finding that there was *improper influence* lacked legal basis.
- d. That although there were anomalies and irregularities committed by the 4<sup>th</sup> respondent and other agents of the 3<sup>rd</sup> respondent, in the conduct of the elections that taken individually may not have affected the results of the election, the Learned Judge was influenced by his erroneous finding that the appellant improperly influenced the voters, in arriving at the legal conclusion that the elections were not substantially conducted in accordance with the electoral principles and laws and therefore void.
- e. That the trial judge properly exercised his discretion in determining the issue of costs. However, that the order for costs will be reviewed in view of the orders that we propose to make.

### **Final Orders**

It is in the above premises that on 17<sup>th</sup> December 2013 we made the following orders:

- i. That the appeal be and is hereby allowed, the judgment of the election court is set aside, and the order of the trial judge declaring the election of the appellant as Member of the National Assembly of Lunga Lunga constituency void is hereby set aside and substituted with an order dismissing both petitions.
- ii. Consequently, the appellant is hereby declared the validly elected member of the National Assembly of Lunga Lunga Constituency.
- iii. The Certificate issued by the trial Judge under **section 86 (1)** of the Elections Act shall be recalled and a certificate shall issue confirming the election of the appellant as the Member of the National Assembly of Lunga Lunga Constituency.
- iv. The 1<sup>st</sup> and 2<sup>nd</sup> respondent shall bear the costs of the appellant in the election court and the costs in this Court to be assessed by the Court Registrar.
- v. That the cross-appeals be and are hereby dismissed.

***Dated and delivered at Mombasa this 23<sup>rd</sup> day of January, 2014.***

**H. OKWENGU**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

*I certify that this is a  
true copy of the original.*

**DEPUTY REGISTRAR**