REPUBLIC IN KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, MWERA & MUSINGA, JJ.A.

CIVIL APPEAL NO. 229 OF 2013

BETWEEN

MOHAMED ALI MURSAL……..…….....…….APPELLANT

VERSUS

SAADIA MOHAMED……..…….…….....……..…1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....2ND RESPONDENT

AHMED ABDULLAHI MOHAMAD…….....……...…..….3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at

Garissa (Stella Mutuku, J.) dated 5th August, 2013

in

Election Petition No. 1 of 2013

****

JUDGMENT OF THE COURT

The appellant was one of the candidates who contested in the general elections held on 4th March, 2013 for the position of Governor, Wajir County. He had been nominated by the Kenya National Congress Party. The 3rd respondent, who had been nominated to run for the same election by the Orange Democratic Movement Party, was declared the winner. The appellant alleged that the process leading to the said election, the election itself as well as the declaration of the results by the 1st respondent, an official of the 2nd respondent, was not in accordance with the law and he instituted a petition in the High Court of Kenya at Garissa. The appellant raised 8 grounds in the said petition:

(a) Arbitrary transfer of polling stations

The appellant stated that despite having previously gazetted and specified polling stations as required by law, the 2nd respondent arbitrarily and illegally transferred polling stations without prior notification, some on the morning of the election day, thereby denying a

number of his supporters a chance to vote.

(b) Lockingout the appellant's agents

The appellant alleged that the 2nd respondent's presiding officers locked out his agents from polling stations during the voting process in various polling centres within the County.

(c) Undue and improper influence

The appellant alleged that the 2nd respondent's officers freely allowed chiefs to influence the voters at several polling stations. The 2nd respondent was also accused of allowing the deployment of violence, intimidation and lack of order at several polling stations.

(d) Manipulation of voter register

The appellant alleged that the 2nd respondent openly denied voters the right to vote through manipulation of the voter register by encouraging double voting.

(e) Voter bribery

The 3rd respondent was accused of voter bribery at several polling stations.

(f) Mishandling the election

The appellant alleged that members and staff of the 2nd respondent mishandled the election by:

i) *Failing to provide his agents with Forms 35 and in the few cases where the forms were issued, they were not signed by all the agents and the presiding officers as required by law.*

ii) *Failing to provide him with Form 36.*

iii) *Denying him the official results until the 6th day after the election.*

(g) Inaccurate and inconsistent counting and tallying

The appellant alleged that the 1st and 2nd respondents presided over an electoral process that was marred by rampant and serious inconsistency in the number of votes allegedly cast in a number of polling stations. Further, the integrity of the vote count and the tally was highly questionable, the appellant alleged.

(h) Integrity of ballot boxes

The appellant accused the 1st and 2nd respondents of failure to ensure the integrity of ballot boxes in some areas thus opening up opportunities for rigging of the election.

In view of the foregoing, the appellant sought a declaration that the 3rd respondent was not validly elected as Governor, Wajir County, and consequently prayed for an order that a fresh election for the same position be held.

The respondents denied the allegations by the petitioner and contended that the election was free and fair; that it was conducted by secret ballot, free of violence, intimidation, improper influence or corruption. Further, that the election was transparent and was administered in an impartial, neutral, efficient, accurate and accountable manner.

In the said election there were four candidates namely; Mohamed Abdi Mahamud who got 35,269 votes,

Ahamed Abdulahi Mohamed (3rd respondent) who got 40,622 votes, Mohamed Ali Mursal (the appellant), who got 22,919 votes and Maalim Mohamed who garnered 589 votes.

After a full hearing where the trial court considered all the arguments that were raised by parties, the court held that the appellant's case had not been proved to the required standard. The court observed that although there were some irregularities and breaches in the manner in which the election was conducted, the same did not materially affect the election results. Consequently, the petition was dismissed with costs that were capped at a maximum Kshs.2,000,000/= being awarded to the 1st and 2nd respondents and further costs capped at a maximum of Kshs.1,000,000/= awarded to the 3rd respondent.

The appellant was dissatisfied with the said judgment and preferred an appeal to this Court which consists of 8 grounds as follows:

> ***"1) The learned judge erred in law in holding that the standard of proof for bribery, undue influence, forgery as electoral offences was one beyond reasonable doubt despite earlier finding that the law is settled differently.***
>
> ***2) The learned judge erred in law in failing to find that the acknowledged movement of the polling stations contrary to the clear and mandatory provisions of Regulation 7 of the Elections (General Regulations) 2012 affected the election.***
>
> ***3) The learned judge erred in law in misdirecting herself on the taking of judicial notice of clan dynamics in Wajir West County despite the clear and mandatory provisions of Section 63 of the Elections Act that would not allow the taking of such judicial notice.***
>
> ***4) The learned judge alternatively erred in law in failing to find that the actions of the Degodia Council of Elders were tantamount to undue influence within the meaning of the clear and mandatory provisions of Section 63 of the Elections Act.***
>
> ***5) The learned judge erred in law in being inconsistent in the manner of analysis of the evidence on record. For instance, the learned judge doubted the evidence of the petitioner's witness on the presiding officer wearing a T-shirt with party colours while believing the 1st and 2nd respondents' witness on the direction of voters to the moved polling stations without any tangible evidence.***
>
> ***6) The learned judge erred in law in failing to hold that the acknowledged rampant errors, inconsistencies and irregularities in the counting and tallying of votes affected the election.***
>
> ***7) The learned judge erred in law in failing to hold that the election of Governor, Wajir County, was not free and fair in accordance with the Constitution, the Elections Act and the regulations thereunder in view of the evidence tendered before her.***
>
> ***8) The learned judge erred in law in coming to the conclusions and the judgment she came to contrary to the evidence, the law and submissions urged before her."***

The appellant urged this Court to set aside the said judgment and the decree and further, the certificate issued under **Section 86 (1)** of the **Elections Act** be vacated. The Court was urged to substitute therefor an order allowing the election petition filed in the High Court.

Prior to the hearing of the appeal the Court directed parties to file and exchange their respective submissions and each counsel was thereafter given a limited period of time to highlight and/or respond to the submissions.

Mr. Thiga, the appellant's learned counsel, argued grounds 1, 2 and 5 of the appeal singly then combined grounds 3 and 4 as he did with grounds 6, 7 and 8. We shall proceed to determine them in that

same order.

What is the standard of proof for bribery, undue influence, forgery and other electoral offences in election petition? In her judgment, the learned judge delivered herself on the issue as follows:

> ***"The law in respect of the burden and standard of proof in this country in respect of electoral disputes is now settled. Our own Supreme Court has addressed itself on this issue in <u>Raila Odinga</u> case above when it stated:***
>
> ***Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non- compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. All acts are presumed to be done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departure from the prescriptions of the law."***

The learned judge concluded that the standard of proof in such matters is higher than proof on a balance of probabilities and lower than proof beyond reasonable doubt. The judge went on:

> ***"However, where the allegations are in respect of election offences, the standard of proof required is higher. For instance, offences like bribery, forgery and undue influence in my view would attract a higher standard of proof than the one prescribed for electoral disputes. They are offences in the ordinary sense of that word. Forgery or bribery by any other name remains just that and there can be no difference between such an offence in an election petition and in a criminal case."***

Mr. Thiga submitted that the learned judge misdirected herself in the above holding. He singled out the trial court's holding that:

> ***"Undue influence is an electoral offence under Section 63 of the Act and just like the offence of bribery above there must be credible evidence in support."***

The appellant had contended that the Chiefs in the County were canvassing for votes on behalf of the 3rd respondent and their very presence in the polling stations intimidated and/or influenced voters because the Chiefs supply relief food in the area.

Responding to the 1st ground of appeal, **Mr. Oriaro**, learned counsel for the 1st and 2nd respondents, submitted that the standard of proof in election petitions as set out by the Supreme Court in **<u>RAILA ODINGA vs. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS</u>**, **Supreme Court Election Petition No. 5 Of 2013**, is above the ordinary civil standard of balance of probability though not above the bar of beyond any reasonable doubt. He supported the trial court's finding that the standard of proof for bribery, undue influence and forgery, being electoral offences, is higher than proof on a balance of probabilities. **Mr. Issa**, learned counsel for the 3rd respondent, supported the submissions made by Mr. Oriaro regarding the 1st ground of appeal.

In our view, the determination of the first ground of appeal poses no difficulties at all. This is in view of this Court's earlier findings in several similar appeals, even before the advent of the Supreme Court of Kenya which re-emphasized the position as regards the standard of proof in the **Raila Odinga case** (***Supra***). In one of its many decisions on the issue, **<u>CLEMENT KUNGU WAIBARA vs BERNARD CHEGE MBURU & 2 OTHERS</u>, Nairobi Civil Appeal No. 11 of 2011**, this Court stated as follows:

> ***"What is the standard of proof required in a case as one before us? In <u>MULIRO vs. MUSONYE & ANOTHER</u> (2008) 2 KLR 52, and <u>JOSEPH WAFULA KHAOYA VS. ELIAKI M. LUDEKI &</u> <u>LAWRENCE SIFUNA</u> E.P. No. 12 of 1993, it was held by the***

High Court, and we agreed with that view, that the standard of proof is higher than on a balance of probabilities. In Halsbury 's Laws of England, 3rd Edition, page 288 paragraph 513, the learned authors thereof have stated that the standard of proof in election matters is one beyond any reasonable doubt. It means that in England election matters are taken to be on the same plane with criminal matters, or put another way, it is analogous to a criminal trial. The rationale for this is not difficult to discern. Election offences attract serious sanctions and proof of any breach of election laws and procedures has to be clear and without equivocation."

In the **Raila Odinga case (*Supra*)**, the Supreme Court stated that:

"The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable doubt – save that would affect the normal standards where criminal charges linked to an election are in question."

There can be no dispute that bribery, undue influence and forgery are all electoral offences and any person who commits such an offence is liable on conviction to a fine or to imprisonment or to both. The standard of proof in such instances is no doubt beyond reasonable doubt. The threshold cannot be any lower. There is a difference between electoral irregularities (or malpractices) and election offences as defined under **Part VI** of the **Elections Act.**

The standard of proof in respect of electoral irregularities or acts that amount to non-compliance with any written law relating to an election (save those expressly stated under **Part VI** of the **Elections Act**) is higher than on a balance of probability but lower than beyond any reasonable doubt. In our view, the learned judge's finding regarding the standard of proof cannot be assailed. Ground one of the appeal must therefore be dismissed, as we hereby do.

Turning to the second ground of appeal, the appellant, in his affidavit in support of the petition, stated at paragraph 6.b. that:

"I am informed by ADAN ABDI HASSAN, information I verily believe to be true that a number of Gazetted polling stations were changed or transferred without prior notification, some on the morning of the Election Day. Some of these stations are:

i. Haragal West Dam polling station (Code 18, Eldas constituency) to Dela;

ii. Eldas polytechnic polling station to Eldas secondary school

iii. Dela Yare polling station to Dela. The polling done at Chief Salat's house.

iv. Abagmathobe to Tula Tula Madrasa v. Tula Tula Disp to Tula Madrasavi. Jua Kali polling station moved to private residential home.

vii. Bulla Shair polling station moved to private residential home."

The said witness, **Adan Abdi Hassan (PW3),** swore an affidavit on 26th March, 2013 where he reiterated the complaints stated hereinabove. He contended that the transfer of the polling stations affected voting because "it is possible that voters did not find polling stations."

Responding to the appellant's complaint regarding transfer of polling stations, the 1st and 2nd respondents called **Dickson Simiyu Kwanusu**, the returning officer for Eldas constituency in Wajir County. The said witness testified that Haragal Dam West and Elayiere polling stations were placed at Dela trading centre during registration of voters after consultations with the community. He added that registration took place in the two centres and they became polling centres. As such there was no physical movement of the two centres.

Regarding Eldas polytechnic, the witness testified that the polytechnic was not in existence, there is only a Youth Centre and on the polling day the facility was not available because the District Youth Officer who had the key to the centre could not be traced. It was therefore decided that polling be conducted at Eldas Secondary School which is separated from the Youth Centre by a road. That in essence meant that anyone who intended to vote at the youth centre could easily access Eldas Secondary School as it was only a few metres away.

In respect of Abaqmathobe polling station, the returning officer stated that registration had been conducted at the Chief's camp outside the Chief's offices and that during voting the offices could not accommodate the huge number of voters. Consequently, it was decided that polling be conducted at the Madrassa near the Chief's offices. For Tula Tula Health Centre, the facility was being used for health facilities and it was therefore unavailable. It was decided to use the Madrassa across the road.

The witness further testified that in Bulla Shair, Jua Kali and Dela Yare, polling was conducted in commercial buildings and not private residential premises as alleged by the appellant. The buildings were given free of charge to the 2nd respondent (IEBC) by well-wishers.

Regarding the Eldas Jua Kali polling station, registration had been done at the Kenya Power & Lighting Company rented premises. However, the premises became unavailable for polling and it was decided to use other commercial premises rented to the Provincial Administration for storage of relief food which was next to the Kenya Power & Lighting Company premises. Regarding Tula Tula Dam, during registration of voters local elders and other stakeholders had agreed to have the centre placed at Tula Tula Primary School.

The witness further stated that in all the above centres there were big banners with IEBC logos directing voters to the polling centres.

The trial judge, having analysed all the evidence relating to the alleged arbitrary transfer of polling stations, confirmed that all the eight polling stations alleged to have been transferred were gazetted polling stations in Eldas constituency. She found no evidence that Abaqmathobe polling station was one of the stations that had been changed but even if it was, statistics showed that 296 voters had been registered there and 243 of them turned up to vote. The learned trial judge cited **Regulation 64** of the **Elections (General) Regulations, 2012** that gives a presiding officer discretion, after consultation with the returning officer, to transfer voting to another station or public facility in the same constituency and advertise that fact in such a manner as is sufficient to bring it to the notice of the voters. When that is done, the electoral area from which the proceedings are transferred is deemed to be part of the electoral area of the polling stations to which the proceedings are transferred. She concluded that the areas where the proceedings were transferred to were short distances from the gazetted areas; that there were banners giving directions to voters to the new areas; that no voter failed to trace the new areas and there was no evidence that any voter failed to vote because they could not trace the new polling stations.

Regarding the allegation that in some instances voting was done in residential houses, the trial court found that the evidence of the returning officer was to the effect that voting was done at commercial buildings and not residential homes. Most importantly, the learned judge held that the change of the polling stations aforesaid did not affect the outcome of the elections.

We have anxiously considered this ground of appeal. In **MAHAMOUD MUHUMED SIRAT vs. ALI HASSAN ABDIRAHMAN & 2 OTHERS, Election**

Petition No. 15 of 2008 at Nairobi, the court found that the transfer of one polling station in Wajir South constituency "significantly affected the outcome of the elections in that centre". That finding is, however, different from the one that was arrived at by the trial judge herein. In all the eight polling stations complained of, voter turnout ranged from 77.43% to 88.17%. It is significant to note that there was no evidence that anyone was unable to vote because of the last minute change of polling stations. We agree with the evidence of the returning officer for Eldas constituency that what was done was more of administrative changes rather than transfer of polling stations and that in some instances there

had been prior consultations with stakeholders. In any event, **Regulation**

64 (2) of the **Elections (General) Regulations, 2012** permits a presiding officer after consultation with the returning officer to transfer proceedings from one station to another or even to a public facility in the same constituency provided the presiding officer advertises the fact in such manner as is sufficient to bring it to the notice of voters, which was done.

We find no merit in ground 2 of the appeal and hereby dismiss the same.

The appellant also assails the judgment of the High Court on the ground that the learned Judge took judicial notice of the clan dynamics in Wajir West County which, in his view, was against the clear provisions of **Section 63** of the **Elections Act.**

In the alternative, the appellant submitted that the learned Judge erred in failing to find that the actions of the Degodia Council of Elders amounted to undue influence which is outlawed by the said provision of the Elections Act.

In the written submission filed by the firm of Waruhiu, K'Owade & Ng'ang'a on behalf of the appellant, learned counsel faults the learned Judge for not making a finding to the effect that what she referred to as clan dynamics was nothing short of undue influence, which contravened election laws and which should have called for the nullification of the elections in question.

The case of **Mbondo vs Galgalo & Another (2008) [KLR] EP 142** was cited to us for its relevance in this issue. Unfortunately, the said case was not included in the list of authorities for our ease of reference. We have nonetheless on our own endeavored to look for the said legal authority. We have noted that the facts and issues were quite different from the case before us. In the Mbondo case (supra) the appellant had been compelled and coerced to withdraw his nomination by the respondents who were said to have mobilized over 1,000 people to coerce him and also threaten his life.

In this case there was no coercion on the appellant to withdraw his nomination and he did not actually withdraw the same. The issue we have been called upon to determine in those two grounds of appeal is whether the Degodia clan influence in the nominations and ultimate election results can be said to have amounted to undue influence.

Mr. Oriaro, learned counsel for the 1st and 2nd respondents, submitted that in saying that she took judicial notice of the clan dynamics in the region, the learned Judge was only restating the well known facts that were prevailing on the ground. It was his submission that the said fact was well known and accepted and it was undisputed and the learned Judge did not therefore, fall into error in doing so.

Mr. Issa, learned counsel for the 3rd respondent, added his voice to learned counsel for the 1st & 2nd respondents and emphasised that the learned Judge took note of a matter which was of local notoriety and in doing so she did not offend any known provisions of the law. He further submitted that the allegation of undue influence had not been proved and so grounds three and four had not therefore not been proved.

We find ourselves in agreement with learned counsel for the respondents on this issue. We say so because under **Section 60(1)(o) of the Evidence Act,** a court can take judicial notice of *"all matters of general and local notoriety."*

The issue of clan dynamism is one of general and local notoriety in Wajir region and the learned Judge was in order to take judicial notice of the same. What we should be asking ourselves is whether her acknowledging this issue affected her overall findings or overall judgment in the election petition. In what context did she make this observation?

Her comment on the issue was, in our view, obiter as rightly submitted by learned counsel for the respondents. She (at page 1932 Record of Appeal) says … *"one more thing before I stop on this issue"*

i.e after she had already dealt with the issue of *"undue*

influence".

Her comment came after she had already made her findings and had no bearing on the same whatsoever. Indeed, she noted, and rightly so, that the appellant herein had voluntarily taken part in the nominations done by the Degodia clan, just like the 3rd respondent did. He did not protest to IEBC then and he went ahead and offered himself for elections in which he fully participated.

On the issue of clan dynamics, we agree with the observations of the learned Judge and add that it is a phenomenon that traverses the entire North Eastern region and other areas where we still have indigenous people or tribes who have managed to preserve cultural institutions with positive attributes.

It is axiomatic in Kenya regional politics that the candidate who is able to woo the largest clan to his side during elections will always have the upper hand and will more often than not be assured of victory. As the learned Judge opined, it may not be good for democracy but we hasten to note that each and every voter has his individual vote and these clan dynamics notwithstanding, at the end of the day, it is the individual voter who, in his unfettered right to vote, casts that ballot that helps to perpetuate the clan dynamics The clan does not coerce the voters or threaten them in any particular way in a bid to ensure victory to its favoured candidate; nor does it impede or otherwise prevent a voter from voting for a candidate of his own choice.

The voter exercises his constitutional rights of expression and association freely and casts his ballot in favour of the person he deems best. If his mind at the end of the day is influenced by the fact of which clan he belongs to, it is ultimately his individual choice that matters.

It is our finding that the said clan dynamics does not amount to undue influence as contemplated by **Section 63** of the **Elections Act, 2011**. We note that the learned Judge rightly observed that undue influence is an electoral offence and like any other such offence, it calls for proof by way adduction of credible evidence.

Such an offence could only be proved by cogent and reliable evidence to a degree beyond balance of probability but slightly below *"beyond reasonable doubt"* as succinctly affirmed by the Supreme Court in the **Raila Odinga Case** (supra).

In our considered view these two grounds are devoid of merit and they must therefore, fall by the way side.

We move to ground 5 where it was contended that the learned judge was inconsistent in the manner she analysed evidence on record. ***Mr. Thiga*** gave us the example of this contention by stating that whereas the learned judge did not believe the evidence of ***Hassan Mohammed Hassan*** (PW4) that the presiding officer at Athibohole Polling wore a T-shirt with ODM colours while conducting the election, a thing PW4 had eye- witnessed, she relied and believed the evidence of the Returning Officer when he told the court that there were short distances between the gazetted polling stations and the ones where polling proceedings were transferred to on the voting day, with banners giving directions to voters to the new areas. That Returning Officer had not visited any polling stations on the polling day yet his evidence was admitted as reliable. The respondents did not agree with the appellant's stand and said as much.

To begin with, it did not easily appear to us as to what was common about the Athibohole presiding officer wearing an ODM shirt and what was called arbitrary transfer of polling stations at Hargal West Dam, Tula Tula Dam, Eldas Polytechnic and several others that were stated. These are two incidents unrelated in any manner and each supported by separate sets of evidence and therefore analysis thereof cannot be the same.

Starting with the ODM T-shirt issue, ***Hassan Mohammed Hassan*** (PW4) claimed that the presiding

officer wore such a T-shirt while conducting voting. In essence what PW4 was telling the court was that the presiding officer, who is supposed to be a neutral election official, was campaigning for ODM on the election day. His manner of dress would influence voters to vote for ODM – all against the legal regime governing elections and the IEBC regulations on how their officers should not dress on such a day. Yet cross-examined on this claim, PW4 said at different stages of his evidence:

> ***"I did not alert anybody"*** (page 909).
>
> ***"I informed (a) security officer. I cannot recall the name of security officer"*** Page 910).
>
> ***"I did not report to the returning officer of the constituency. I did not report the Presiding Officer for wearing ODM T-shirt"*** (page 911).

Here is a party (TNA) agent, posted to a polling station to look out for and report any election omissions and commissions. He "***saw***" some irregularities, including bribery and wearing of ODM T-shirts. Yet he did not report to any person in authority! Then PW4 changes his evidence on how he got back into Athibohole Polling Station when he was ejected for being troublesome – either he forced his way back or he sneaked back. So the learned judge was left with the impression about PW4's evidence on the incident that:

> ***"What I find incredible is that no evidence that any report was made to the security personnel or to the police. This court doubts that a Presiding Officer can blatantly wear a T-shirt with one party colours at a polling station he was in charge of and get away with it."***

To us, and as the trial Judge held, the witness was unreliable.

Regarding the comparison with the testimony of the returning officer (RW1), he testified that the administrative changes made, not transfers of polling stations:

> ***"…were meant to accommodate voters; that the changes had been agreed with the stakeholders before the election date;"***

Indeed the petitioner (PW3) in cross-examination himself gave the distances between the polling stations that were involved in the said transfers/administrative changes. They ranged between 200m and 500m. The learned judge then on her own, computed the voter turn-out in the affected stations. There was no evidence that voters could not find the "new" polling stations. And with the evidence tendered, she concluded that voters were not disfranchised because of the changes and so the end result was not affected. Part of the evidence tendered on this issue was from the returning officer. It can be safely assumed that he was well acquainted with all the polling stations in his area. This was not challenged, we noted.

Failure by a judicial officer to analyze evidence before determining a given case or issue is a matter of law. (See ***Order 21 Rule 4 of the Civil Procedure Rules*** regarding cases of a civil nature). We have addressed the ground touching on this contention and have concluded that there was no nexus between how the learned judge analysed the issue of wearing an ODM T-shirt and the issue of transfer or changes of polling stations. The learned judge handled each issue as best as she could on the evidence before her. This ground lacks merit or it was misconceived and we dismiss it.

The last grounds numbers 6, 7, 8 were argued together in that there were acknowledged rampant errors, inconsistencies and irregularities in the counting and tallying of votes which affected the election under review; that the election was not free and fair as per the law; and that the conclusion and judgment herein was contrary to the evidence.

Mr. Thiga cited Article 81 of the Constitution setting out the principles to govern an electoral system and an election process that ought to be impartial, neutral, efficient, accurate and accountable. He moved to Article 86 on the method of voting, counting of votes and announcing of the outcome.

Further, we were referred to ***Section 59(1) of the Elections Act 2011***, on the requirement placed on the 2nd respondent's staff (IEBC) to keep accurate, complete and true records when conducting an election.

Counsel urged us to find that Forms 35 and 36 did not comply with the law as some of them were not signed by the presiding officers; others were not stamped and yet others were not signed by agents. He continued that some Forms 35 did not bear the mandatory statutory comments by presiding officers. While noting the specific pages in the record of appeal to highlight these alleged anomalies, ***Mr. Thiga***, contended that forgery was detected by ***Antipas Nyanchwa*** (PW10) on Form 35 of 7 polling stations; Form 36 used in Wajir North Constituency did not have a column for registered voters. It was added that integrity of ballot boxes was not ensured, for example, a vehicle carrying ballot papers in Eldas Constituency, detoured from the main road onto a bush road. Votes must have been doctored. Then we heard that the counting and tallying of the votes was inaccurate and inconsistent, resulting in a flawed vote for governor for Wajir County. In addition to the provisions of law referred to, the appellant cited the cases of

Manson Oyongo Nyamweya vs James Omingo Magara & Others [2009] eKLR, ***Kabogo Gitau vs George Thuo & Others (2010) eKLR*** and ***Bernard Shinali vs Boni Khalwale [2011] eKLR***.

All the above were placed before us to endeavour to show the errors, inconsistencies and irregularities that allegedly marred the subject election. It was said that the learned judge remarked on or acknowledged many of them but fell in error to conclude that on the whole they were not of such a nature as to affect the outcome of the election.

Mr. Oriaro and ***Mr. Issa*** on their part told us that the ***Omingo Magara*** case showed margins in the votes cast, with ***Mr. Magara*** in the lead but there were also aspects of missing ballot boxes, Forms that were not signed and the like. All these put and seen together resulted in that election being nullified.

In the present case no ballot boxes were missing and all the forms were signed –either by the presiding officers or their deputies. There was a large voter turn-out. The petitioner had agents in all polling stations. They accepted and signed for the announced results. The petitioner did not request for recount or fresh tallying at the stations or in his petition to the High Court. The errors, and there were some, affected all the candidates across the board and not particularly the appellant who was ranked number 3, losing by up to 17000 votes to the 3rd respondent.

Under the sub-heading: ***Inaccurate and Inconsistent Counting and Tallying***, the learned judge, appreciating the painstaking effort the petitioner took to demonstrate errors in the tabulation of the results, said:

> ***"To do justice to the allegations he made in respect of the results, I undertook a very elaborate exercise of scrutinizing all the Forms 35 in the entire County."***

And the Judge performed that no mean task: it covered several pages of her judgment at the end of which she found that the petitioner lost by 17,012 votes. She added:

> ***"We should all appreciate that the best way the mathematics would have fallen into place with precision would have been if the recount and scrutiny of all the ballots cast had been ordered. The petitioner did not ask for recount and scrutiny and going by his evidence he was satisfied with that result as captured in Forms 35 except for other anomalies like stamping, signing and making remarks on the forms."***

Indeed, in the scrutiny of Forms 35 the learned judge came across all manner of errors, omissions and anomalies. And in conclusion she delivered herself:

> ***"After a careful consideration of all evidence, it is my finding that the errors exist as highlighted in this judgment. There are errors in the forms, including alterations of the figures without countersigning, unsigned forms, figures that do not agree. Lack of statutory***

declarations; lack of stamps on a few forms; arithmetical errors among others. These are admitted by the respondents and some termed as honest errors. What is the effect on the results of the election?"

To answer that question, the learned judge proceeded to invoke the legal provisions and cite cases. Beginning with ***Section 83 of the Election Act***, it provides that no election shall be declared to be void for non-compliance with any written election law if it appears that the election was conducted in accordance with the principles laid down in the Constitution and the written law or that the non-compliance did not affect the result of the election. She moved to ***Regulation 79(6)*** which provides that failure/refusal by an election agent to sign for the result shall not invalidate the same. The learned judge cited the case of ***Morgan & Others vs Simpson & another [1974] 3 All ER, 722***, ***Mbowe vs Eliufoo [1967] EA 240*** and others. After remarking on some aspects of the present case, for instance, how illiterate voters voted or if voters were denied to vote for a candidate of their choice on one ground or another, the judge pronounced herself:

"My finding on this issue is that the elections for Governor, Wajir County were conducted substantially in accordance with the law."

And then finally:

"On the second issue, it is my finding that the irregularities complained of by the petitioner did not substantially affect the results of the gubernatorial elections of Wajir. The Court too has taken time to painstakingly examine all the Forms 35 and the result is that the errors disclosed, irregularities existing and breaches do not affect the results as to make this Court invalidate the elections or alter the will of the voters of Wajir County."

And if we may add, any errors found and acknowledged by the judge affected all the candidates for governor equally. And having addressed ourselves on the issues raised in this appeal side by side with the record of the High Court, we find no fault in the Judge's conclusion.

Before concluding we may briefly remark on the ***Omingo Magara*** case to illustrate that even where there is a candidate with the majority of votes, his/her election can still be nullified if irregularities and seriousness, omissions featured in that election. ***Mr. Thiga*** urged us to nullify the election of the 3rd respondent who beat the appellant with over 17000 votes. ***Mr. Oriaro*** and ***Mr. Issa*** held a contrary view.

In the ***Omingo Magara*** case, Mr. Magara still maintained the largest number of votes at the end of a recount in the High Court. But there were basic and fundamental irregularities including missing ballot boxes; ballot boxes whose seals had been tampered with; ballot boxes that contained votes for only two candidates while there were a total of seventeen contestants; vital forms that were not duly signed and many more. All those put together saw Mr. Magara's election being nullified even if he had the majority of votes. Majority of votes is not all that goes into whether an election was free, fair and transparent. The weight of other aspects also count and if it turns out that the impact of those other aspects is so substantial as to affect the final result of an election, then despite one's majority votes, that election ought to be nullified. That was the case in Mr. Magara's case. The learned judge here concluded, and we agree, that the anomalies, errors and omissions found did not so much as affect the final outcome of the subject election.

As for the contention that the conclusion and judgment was contrary to the evidence, nothing was placed before us on that account. In our view, the learned Judge in her long decision treated all evidence before her adequately to conclude as she did.

We were invited to consider the foregoing grounds in the light of the law and find if the judgment of learned judge was wanting in a manner that would have us overturn it. We have done so but concluded that the judgment should stand.

In sum, we find that this appeal has no merit and dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 7th day of February, 2014.

W. KARANJA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

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