



IN THE COURT OF APPEAL
AT KISUMU
CIVIL APPEAL NO. 32 OF 2013
(CORAM: KIAGE, MURGOR & KANTAI, JJA)

BETWEEN

CORNEL RASANGA AMOTH.....APPELLANT

AND

WILLIAM ODHIAMBO ODUOL.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

BENSON MUGATSIA.....3RD RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kisumu (Muchelule, J) dated 23rd day of August 2013

in

H.C. ELEC. PET. NO. 2 OF 2013)

JUDGMENT OF THE COURT

On 4th March 2013 the people of Siaya, in exercise of their constitutional rights went to the polls to elect amongst others their Governor for Siaya County.

After the counting and tallying of the votes cast in the gubernatorial elections, the appellant was declared the winner of the elections with the following results:-

Abong'o Malik Obama - 2,792

Cornel Rasanga Amoth	-	142,901
Nellie Okwiri		2,269
Noah Winja Migudo	-	1,258
Thomas Paul M. Okore	-	972
William Odhiambo Oduol	-	133,900

The appellant was declared the duly elected Governor for Siaya County in a Special Issue of the Kenya Gazette Volume CXV-No 45 under Gazette Notice Number 3155 of 13th March 2013.

Being aggrieved by the election results the 1st respondent filed election petition No. 2 of 2013. In the petition the 1st respondent made allegations of fraud, malpractice, irregularities, and breaches during nominations, campaign, voting, counting and tallying.

After hearing the petition and the submissions of the parties, the election court (*Muchelule, J*) made a finding that the elections for the Siaya County gubernatorial seat were not free and fair, and as a consequence nullified the election.

Being aggrieved by the decision of the election court, the appellant filed this appeal. The appellant filed a memorandum of appeal comprising 8 grounds of appeal which may be summarized into four complaints:-

- i. that the election court did not have jurisdiction to deal with allegations of malpractices during the election campaigns;
- ii. that the election court applied the wrong legal principles, and shifted the burden of proof from the 1st respondent to the appellant;
- iii. that the election court should not have relied solely on the recount and was wrong not to order scrutiny, and
- iv. the apportionment of costs.

On the premises the appellant urged this Court to set aside the judgment of the election court delivered on 23rd August 2013.

Prior to the hearing of the appeal, this Court ordered each party to file and serve written submissions, whereupon each party would be provided with a limited period within which to highlight their submissions.

Firstly on the question of whether the election court had jurisdiction to deal with allegations of malpractices during the election campaigns, learned counsel for the appellant Mr. Kopot and Mr. Gumbo, learned counsel for the 2nd and 3rd respondents contended that the election court did not have the jurisdiction to determine acts of fraud, malpractice, irregularity and breach that occur during nominations or election campaigns; that the jurisdiction of that court is limited to acts that occur from polling day onwards, including the voting, counting and tallying and declaration of results. They contended that the Constitution and the Election Act and the Electoral Code of Conduct contemplate that the jurisdiction of such issues lies with the Electoral Commission. As such, counsels concluded that, if the election court did not have jurisdiction to determine campaign malpractice allegations, then the judgment should be set aside. In support of their contention, counsel cited *Diana Kethi Kilonzo & Another vs IEBC & 2 Others* Constitutional Petition No. 359 of 2013 and *Francis Parimei Gitau & 3 Others vs The National Alliance Party* Petition No. 356 and 359 of 2012

In its judgment, the election court found that it had jurisdiction to examine the malpractices and went on to find that there were indeed election malpractices committed by the appellant. In so doing the election court stated thus,

“Once again an election is a process and not an event. Sections 56 to 72 of the Act create election offences. It is clear that some of the offences relate to what happens during voting, but others deal with what happens during campaigns. For instance, under section 67 (1) it is an offence to print, publish, distribute, or post up or cause to be printed published or posted up, any advertisement handbill placard or poster which refers to any election and which does not bear upon its face the name and addresses of the printer and publisher. Under section 67 (1) (g) (iii) it is an offence to create a material disruption with the intention of preventing a political party from holding a public political meeting. It follows that what happens during the campaign is the legitimate business of the court hearing a petition concerning that election.”

The learned judge went on to state thus:-

“In any case, what I have said in the foregoing in relation to what constitutes a free and fair election, and the meaning of section 83, clearly shows that what happens prior to actual voting can affect the integrity of the election and therefore a court dealing with a challenge to that election can deal with issues prior to the voting.”

The appellant having raised a question on the jurisdictional capacity of the election court, we are reminded of the wisdom of Nyarangi JA in *The Lillian ‘S’ case [Owners of Motor Vessels ‘Lillian S’ Vs. Caltex Oil (Kenya) Ltd [1989] KLR1]*:-

“Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law must down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

More recently, in *The Matter of the Interim Independent Electoral Commission [2011] eKLR* the Supreme Court spelt out the limits of a court’s jurisdiction thus:-

“[30] *The Lillian ‘S’ case [Owners of Motor Vessels ‘Lillian S’ Vs. Caltex Oil (Kenya) Ltd [1989] KLR1]* case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the constitution.”

After careful consideration of the Constitution, the Election Act, Elections (Parliamentary and County) Petitions the Rules (the Election Petition rules) and the Code, we are not convinced that the jurisdiction of the election court is limited to only the polling day and thereafter, and excludes the campaign period.

As a starting point, Article 87 of the Constitution stipulates:-

- 1. Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.**
- 2. Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.**
- 3. Service of a petition may be direct or by advertisement in a newspaper with national circulation.**

Article 88 of the Constitution established the Independent Electoral and Boundaries Commission (the Electoral Commission), to be charged with the responsibility of inter alia, conducting and supervising referenda and elections of any elective body or office established by the Constitution, and any other

elections as prescribed by an Act of Parliament. In order to give full effect to the electoral provisions of the Constitution, Parliament enacted the Independent Electoral and Boundaries Commission Act, which among other things, was to create an independent, neutral, and accountable elections management body.

Article 88 (4) (e) of the Constitution, confers on the Electoral Commission the jurisdiction to settle electoral disputes relating to or arising from nominations, and **before** the declaration of results, but expressly precludes the Electoral Commission from determining election petitions and disputes **subsequent** to the declaration of results. There is no dispute that the Electoral Commission is mandated to settle disputes arising from nominations, and as such, we shall not endeavor to delve into this issue.

Article 88 (4) (j) makes provision for the establishment of the Code to govern candidate and parties contesting elections. Specifically, the Code provides that issues for consideration, disputes or complaints, are dealt with under rule 6. More particularly, rule 6 (e), (f) and (g) of the Code requires a petitioner to refer all complaints within the campaign period to the 1st respondent, while rule (n) makes it mandatory for the candidate to submit to the Electoral Commission. The Code also provides that dispute resolution takes effect from the beginning of the campaigns to the polling day and during that period, the Code is the operating law, on dispute resolution. The Code also makes provision for penalties, including fines and the banning of a candidate from the elections which sanctions are accordingly left to the High Court to enforce.

The appellant's contention is that when the Code is read in the light of Article 88 of the Constitution and the Election Act, it is clear that, disputes arising out of the campaign period fall within the sole jurisdiction of the Electoral Commissions, and not the High Court.

When we consider the Constitutional provisions with respect to the High Court, Article 165 (3) (a) of the Constitution stipulates the jurisdiction of the High Court, and provides inter alia that the High Court shall have unlimited original jurisdiction in civil and criminal matters.

Pursuant to Article 88 of the Constitution, Parliament enacted the Elections Act 2011 to provide for the conduct of the elections for Presidential, National Assembly, Senate, county governor and county assemblies, as well as to provide for referenda and election disputes. Under section 2 of the Election Act, the **"election court"** is defined, as the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (a) of the Constitution, while a **"petition"** at section 2 of the Election Act is defined as **"an application to the election court under the Constitution or under the Act"**. In other words, the High Court sits as an election court and has the original jurisdiction to hear and determine election petitions in matters election.

By consent Section 74 (1) of the Elections Act expressly limits the Electoral Commission's competency and jurisdiction over electoral disputes as follows:-

"Pursuant to Article 88 (4) (e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating or arising from nominations, but excluding election petitions and disputes subsequent to the declaration results."

Section 75 of the Election Act stipulates:-

"A question as to the validity of an election of a county governor shall be determined by the High Court within the county or nearest to the county."

When we consider the extent of the jurisdiction of the Electoral Commission, it is conspicuous from the provisions of the Constitution, the Election Act and the Code, that the jurisdiction of the Electoral Commission is specifically designated, and is limited to **"certain matters"** specified in Article 88. Clearly then, the Electoral Commission's jurisdiction is limited to disputes of candidates and parties relating to or arising from nominations, and before the declaration of the results. Election petitions and disputes subsequent to the declaration of results are specifically excluded, from the ambit and remit of the

Electoral Commission.

Turning to the election court, the provisions of the Elections Act and the Elections Rules, are made pursuant to Article 87 (2) of the Constitution. As such the right to approach the election court for the determination of election petitions is provided for under Article 87 (2) and Article 165 (3) (a) of the Constitution as read together with sections 2, section 74 and section 75 of the Elections Act. It is evident that the election court has original jurisdiction to hear and determine any matters brought before it in an election petitions, as a special jurisdiction conferred by the Constitution, through the empowerment of Parliament to enact the requisite laws and regulations. This issue has been considered before in *Nderitu Gachagua vs Thuo and 2 others* [2013] eKLR where this Court stated:-

Indeed, Article 88 (4) (e) grants the 3rd respondent jurisdiction to deal with electoral disputes before the declaration of the results. However, that does not take away the High Court's original and unlimited jurisdiction to deal with any matter brought before it. It does not "exclude" or "limit" the High Court's jurisdiction. So, both the 3rd respondent and the High Court enjoy concurrent jurisdiction over disputes prior to the declaration of the results, and the High Court enjoys exclusive jurisdiction after the declaration of results.

It has been variously stated that elections are a process, and not an event. Bearing that in mind, we consider that it is virtually impossible to demarcate or truncate the election process into different segments, that is to say, the campaign period, the polling day, the post poll period, inter alia, where each segment is considered as separate and distinct from the other. Being a process, the entire election, from the nominations right on to the declaration of the results must be considered as an all-inclusive occurrence, where the designated election activities are interdependent, and interrelated each affecting the other and the eventual outcome.

We agree with the opinion of the Ugandan Supreme court in case of *Joy Kabatsi Kafura vs. Anifa Kawooya & Anor* [Election Petition No. 25 of 2005] (*unreported*) where Mulenga JSC stated:-

"An election is a process encompassing several activities from nomination of candidates through to the final declaration of the duly elected candidate. If any one of the activities is flawed through failure to comply with the applicable law, it affects the quality of the electoral process, and subject to the gravity of the flaw, it is bound to affect the election results. One such activity is the declaration of the results at every polling station. If any declaration is invalid by reason of non-compliance with the applicable law, it affects the quality and the result of the electoral process."

In the instant case, after the appellant was declared the duly elected Governor for Siaya Constituency, the 1st respondent filed the petition on 8th April 2013, seeking inter alia, a declaration that the appellant was not constitutionally, lawfully and validly elected. The petition alleged that during the nomination, campaign and polling day, fraud, malpractice and irregularities were perpetrated against him. Having complied with section 76 (2) of the Election Act, and the Election Petition Rules, the petition was considered duly filed in the election court. Consequently, the petition having been filed **after** the declaration of the results, resulted in the election court acquiring exclusive original jurisdiction to hear and determine all matters appertaining to the election, irrespective of the content or the allegations, whether the complaints concerned the campaign period or the polling day.

Given the opinions we have expressed, we agree with the learned judge that the election court had jurisdiction to hear and determine those matters where disputes arise during the electioneering period. As such, the ground challenging that is without merit and fails.

We next address the question of whether the burden and standard of proof of the allegations of election malpractices during campaigns was sufficiently discharged. *Mr. Kopot* and *Mr. Gumbo* contended that, the election court erred in law by applying the wrong legal principles, and shifting the burden of proof from the 1st respondent to the appellant. Counsel cited *Raila Odinga vs IEBC and 2 others* Supreme Court Presidential No 5 of 2013 and *Mutua Mutisya vs Republic* (2008) eKLR in support of that

contention. Counsel further submitted that the election court erred by not determining what amounted to a material disruption to prevent a political party from holding a meeting, or whether the requirement that the complainant should be a political party, was complied with as there was no complaint filed by a political party.

In considering the burden and standard of proof, it will be important firstly to establish, the nature of the burden of proof, and of the standard of proof, and then whether the 1st respondent discharged his legal burden of proof to the required standard and if so, whether the appellant and the Electoral Commission and 3rd respondents subsequently discharged their evidentiary burden of proof.

Before we do so, it will be important to bear in mind that an appellate court will not ordinarily differ with the findings, on a question of fact, by the trial Judge who had the advantage of hearing and seeing the witnesses. Our role as an appellate court is to review the evidence and to determine whether the conclusions reached, are in accordance with the evidence and the law; although we do this with a caution as aforesaid. See the case of *Peters v Sunday Post*, [1958] EA 424 at p. 429, where it was held:-

“Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellant court which is disposed to come to a different conclusion on the printed evidence would not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witness, could not be sufficient to explain or justify the trial Judge’s conclusion.”

Whether or not there was evidence upon which the learned Judge arrived at a particular conclusion is of course a question of law and in addressing this issue we do not violate Section 85A of the Election Act that limits our jurisdiction to matters of law only. See this Court’s recent ruling in *Bashir Haji Adullahi vs. Adan Mohammed Noors & 3 Others Civil Appeal No. 300 of 2013* (unreported).

In order to determine whether the 1st respondent discharged his legal burden of proof in circumstances where it was alleged that there were electoral fraud, irregularities, malpractices and non-compliance with the constitutional principles, the election court expresses itself as having considered the following incidents or allegations:-

“There are acts that the petitioner complains about which he says happened during the campaigns and which he blames on the 3rd respondent, his agents and supporters, and the general ODM campaign brigade. The brigade he stated included the Honourable James Aggrey Orengo, Hon. Jakoyo Midiwo, Hon Oburu Odinga, and Dr. Christine Ombaka. The petitioner stated that:-

- a. ***the appellant and his group went around the entire Siaya County during the campaigns saying that he was a murderer and a person of ungoverned temperament, who had shot at his wife; that he had consequently been painted in bad light to the voters and had to campaign in the company of his wife and children to try and undo the damage.***
- b. ***They went around the county saying that he was a mole for The National Alliance Party, and the Jubilee Coalition, which was not true, which they knew would alienate him from the voters in the County where TNA and Jubilee were not viewed favourably;***
- c. ***They went around saying (which was not true) that the Petitioner was anti-Raila;***
- d. ***On 29/2/13 the 3rd respondent’s supporter William Ohonde came to Ahindi Gardens in Siaya town where the petitioner had just held a rally and attempted to distribute TNA caps to the petitioner’s supporters but was repulsed;***
- e. ***On 23/2/12 they printed and circulated in Gem, Alego Usonga, and Ugenya Constituencies***

posters of the petitioner's portrait with both HON, Uhuru Kenyatta and HON William Ruto, Jubilee running mates, in effort to show that the petitioner was a TNA mole who was campaigning for Jubilee Coalition;

- f. On 25/1/13 they destroyed and defaced the petitioner's banners and posters at Ajigo market in Bondo Constituency;**
- g. On 22/1/13 they destroyed and defaced the petitioner's banners and posters at Nyamonye market in Bondo Constituency;**
- h. On 28/2/13 the petitioner's campaign rally at Luthehe market in Ugenya Constituency was forced to be cut short when it was intruded by the ODM brigade that included the 3rd respondent;**
- i. On 6/2/13 RAILA had a campaign rally at Siaya Municipal Stadium, where while lifting the hand of the 3rd respondent whom he said was hid preferred candidate, referred to the other candidates, the petitioner included as "wild cats".**

The election court proceeded to find that in certain instances that election malpractices had in fact been perpetrated against the 1st respondent.

It is incumbent upon us to evaluate the evidence in respect of these allegations to determine whether the conclusions reached by the election court were in accordance with the evidence and the law.

We will also be required to determine whether the allegations of election malpractices during campaigns were sufficiently proved. In so doing, we will take cognizance of the guidance on the shifting evidential burden outlined in **Raila Odinga vs IEBC and 2 Others (supra)** on the burden and standard of proof, where the Supreme Court when addressing the issue stated thus,

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

That concept is of course not a novelty although it is the first time it was articulated in the Kenyan context.

In the Nigerian case of **Muhammadu Buhari vs Oleshegun Obasanjo** (2005) CLR 7K the Supreme Court stated:-

"He who asserts is required to prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence could not on the preponderance of the evidence result in the Court giving judgment in favour of the party."

A proper determination of this issue calls upon us to apply these guidelines to the allegations made and the finding of the learned judge in the highlighted incidents.

We will begin with the reference to the 1st respondent as a murderer. In respect of this the election court stated:-

“I know that the burden was on the petitioner to show that these words were spoken, by Midiwo in the campaigns, I however consider that the only person who could have denied the allegation was Midiwo. He was therefore a material witness for the 3rd respondent who was, without explanation, not made to swear an affidavit or called to testify. I find the evidence of PW2 and the petitioner not controverted and I accept it to be true. The 3rd respondent had admitted that Midiwo was supporting him. Under section 67 (1) (m) (ii) of the Election Act it is an offence to publish, repeat or disseminate information with the intention to create hostility or fear to influence the process or outcome of the election.”

From the record, it is clear that the learned judge took into account the testimony of **Mathew Omondi Oluoch**, PW2. PW2 testified that he had heard Jakoyo Midiwo tell the crowd at three different places, Bondo, Wagae and Yala, that ***“the petitioner was a murderer and shot his wife”***. As a result of this the 1st respondent testified that he was forced to thereafter campaign with his wife and family to counter the vicious falsehood. PW2 corroborated this evidence on cross examination when he stated:-

“We campaigned with the family separately after Midiwo alleged that Oduol had murdered his wife”.

The election court concluded that without the testimony of Jakoyo Midiwo or the appellant to rebut this evidence, that the finding of an offence under section 67 (1) (m) (ii) of the Election Act had been established. From our own analysis of the evidence, we are satisfied that the allegations were proved, and that the 1st respondent discharged the requisite burden of proof. As a consequence the burden shifted to the appellant to rebut the allegations which he failed to do. Having considered the evidence, we agree that the election court arrived at the right conclusion on that particular complaint.

On the destruction of the 1st respondent’s campaign materials, the election court stated:-

“I find that that the petitioner’s campaign materials were destroyed by unknown people. In respect of the incident at Ajigo market two suspects were arrested but their case has not been determined. On this issue, I bear in mind the submission by counsel for the 3rd respondent who stated as follows:-

“The petitioner appreciates the term in Kenyan political speak, Siaya was an “ODM zone”, by which we simply (mean) a place where ODM party was the most dominant. It may even be true that the people who destroyed – if they were destroyed- the petitioner’s posters were ODM supporters. But surely, they were not agents of the 3rd respondent.”

“With profound respect to counsel, the dominant contestants for the gubernatorial election were the 3rd respondent and the petitioner. The 3rd respondent was the ODM candidate and from the evidence, the petitioner posed the greatest challenge. All ODM guns as it were, were aimed at him. It follows, and it is reasonable to conclude that, the people who destroyed the campaign materials belonging to the petitioner were followers of ODM.”

From the evidence, the incidents took place at Nyamonde market in Bondo constituency and at Ajige and Mahaya markets in Rarieda constituency. At Nyamonde market, the destruction was witnessed by PW2, he 1st respondent’s banners and posters destroyed. PW2 filed a formal complaint with the police which was captured in the Occurrence Book as OB No. 19/22/2013 at Usenge Police station. At Ajigo market, following reports to the police, the culprits were arrested and charged with destroying campaign materials in the ***Principal Magistrate’s Court at Bondo Criminal Case No. 230 of 2013 Republic vs. Collins Onyango Aketch and Emmanuel Ouma Oyoo***. From the record, the evidence is unequivocal. Posters and banners were destroyed, and two alleged perpetrators were charged with the offence. It is noteworthy that, the election court refrained from concluding that the persons charged were the same persons who destroyed the campaign material seen by PW2, but nevertheless concluded that “unknown persons” who had destroyed the posters, were followers of the Orange Democratic Movement (ODM) party. This is

because, when the learned judge considered the context within which the elections in Siaya county took place, he concluded that in an ODM stronghold, the home county of the Hon. Raila Odinga, where ODM enjoyed “fanatical support” and where the appellant and the 1st respondent were the fiercest rivals in the contest, it followed that, any serious opponent of ODM would be subjected to hostility and dissention. As such, it would be reasonable to conclude that the persons likely to destroy the 1st respondent’s posters were supporters of ODM, and by extension the appellant who was vying for the position of Governor in Siaya under an ODM ticket.

Consequently, we agree with the learned judge that the burden of proof was properly discharged by the 1st respondent, and, the evidential burden thereafter shifted to the appellant. The appellant merely denied the allegations without more, and so on balance, the evidence remained uncontroverted.

The allegation of the 1st respondent’s association with The National Alliance party (TNA) campaigns concerned the printing and circulation of forged campaign posters on 2nd March 2013 that bore the portrait of the 1st respondent as well as the portraits of both the Hon. Uhuru Kenyatta and Hon William Ruto (who were the Jubilee Presidential ticket bearers).

In respect of this the election court stated:-

“The fact that persons were arrested having these posters and that one of them pleaded guilty offers material corroboration to the evidence of the petitioner and PW2. PW2 testified that he knew the vehicles, and the owners and found the vehicles distributing the posters. This evidence was not controverted. I find it proved to my satisfaction that people who were against the candidature of the petitioner forged his portrait on which they superimposed the portraits of Uhuru Kenyatta and William Ruto who were presidential and deputy presidential candidates on a Jubilee Coalition ticket. The Jubilee Coalition main opponent was CORD Coalition whose presidential candidate was Raila. Siaya is Raila’s home county and there was evidence that he had fanatical following here. To be depicted as supporting Jubilee Coalition in Siaya County was something going to affect the petitioner’s candidature. In short I find that the election offence was committed against the petitioner by opponents.”

PW2 produced a sample of the offending poster in court, and testified that when attempting to remove the forged posters from circulation in Siaya, he together with his team identified motor vehicles registration numbers KBK 406T, a Nissan Matatu, KBR 057F and KBU 652T, belonging to Hon. Yinda, the then outgoing Member of Parliament for Alego Usonga Constituency and UAE 398C belonging to Aggrey Onyango an ODM leader distributing these posters. The 1st respondent testified that he could identify the motor vehicles, which belonged to these individuals, as he had previously driven them whilst campaigning for ODM. He also testified that, following the incident he had made a report of the activities to the police. This led to the arrest and charging of the perpetrators with the election offences of forging campaign material contrary to section 67 (1)(n) of the Elections Act in ***Criminal Case No 120 of 2013 at Siaya Republic vs Peter Otieno Awuondah*** and in ***Criminal Case No. 128 at Siaya Republic vs Joseph Oluoch Onyango***. The charges preferred in these two cases corroborated the evidence of the 1st respondent and PW2. In the case against Joseph Oluoch Onyango, the accused pleaded guilty to the charges and was convicted and sentenced to a fine of Kshs. 250,000, in default 3 years imprisonment. Given this evidence, we find that the learned judge rightly concluded that the burden of proof had been substantially discharged by the 1st respondent, and in the absence of any evidence to the contrary from the appellant, that an election offence under the Elections Act had been committed.

Finally, on the invasion of the 1st respondent’s rally at Luthehe market, the election court made a finding that section 67 (1) (g) (iii) of the Elections Act was breached, in that the appellant and his agents had unlawfully invaded and disrupted the 1st respondent’s rally at Luthehe market.

Mr. Kopot contended that 1st respondent did not prove that he was licenced to hold his rally at Luthehe market, yet the court wrongly shifted the burden of proof to the appellant. Mr. Gumbo and Mr. Ochieng,

learned counsel also for the appellant, concurred that allegations were made against certain individuals, and the judgment indicated that ODM and supporters were responsible for the malpractices a conclusion that was unfounded, in the absence of evidence. Counsel complained that not all persons could testify, but as the allegations against Hon. Orenge, Hon. Onyango and Hon. Midiwo, and Aggrey Onyango were of a criminal nature, they should have been made individually liable and culpable. Counsel cited ***Raila Odinga (supra)***.

Mr. Wakla, learned counsel for the 1st respondent submitted that the primary burden was on the 1st respondent to prove the allegations, but once the burden had been discharged to the required standard, the burden shifted to the appellant. The 1st respondent discharged the burden by proving that the rally was invaded by the appellant's agents, which evidence remained essentially uncontroverted. The allegations were further reinforced by a formal letter from the 1st respondent to the police, and copied to the Electoral Commission. It is notable that the Electoral Commission did not challenge this evidence despite notification. In the circumstances the 1st respondent must have been the owner of the rally, counsel submitted.

From the evidence, it is clear that the 1st respondent was addressing a rally when the appellant and his agents arrived at the market and invaded the rally. The market was specifically set up for the 1st respondent's rally, which at the time of the invasion, was being addressed by the 1st respondent. This evidence was further corroborated by the testimonies of PW2 and ***Kevin Odhiambo Dowoso, PW8***, a cameraman, who testified that,

“Rasanga, Oburu Odinga, David Ochieng (Current MP for Ugenya) Ombaka Cimon women rep Siaya), Ndonji (ward Rep for the Ward) also alighted from the vehicle in company of many youths. They surrounded the Luthehe Market. The market is small, Hon Orenge went straight to where petitioner was addressing on the table. A metre to the table he suddenly turned back. They all went and boarded a pick up and stood on it. Our speakers were louder than their (sic). David Ochieng started addressing the rally against petitioner. There were now to parallel rallies at the same market. Petitioner requested for gospel music to play. He asked his rally that for the sake of peace he was going to stop and leave the venue for the ODM leaders. He did not complete his rally.”

The appellant himself who was also at the scene admitted in cross-examination:-

“We found the petitioner's group in the market. I saw the petitioner. The market is not so big. Petitioner was addressing a gathering. We went to the same shade where the Petitioner's Rally was; at the market which was the only venue and which rally could be held. Honourable Orenge demanded to address the rally from a distance. There were this speakers on. The incident took a short time before Petitioner came down from the dais and demanded to leave the venue with his entourage. We were left to continue with the rally. It is true that this is a scene that could have degenerated into a scene. It is true his petitioner and entourage not (sic) left the entourage could have degenerated. My group was not going to let go. ”

It is apparent that neither the appellant nor the 1st respondent were able to produce a licence or an agenda for the rally. But considering that the 1st respondent was addressing a rally, when the ODM leaders invaded was sufficient to prove that an offence had been committed. Consequently, we cannot find fault with the learned judge's finding that the 1st respondent's rally was invaded by the “ODM brigade” which was an offence under section 67 (1) (g) (iii) of the Elections Act.

Having shown that election malpractices were indeed perpetrated against the 1st respondent, it is upon us as of necessity to determine, whether they were proved to the required standard? In ***Raila Odinga (supra)***, the Supreme Court stated,

“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”.

Clearly, the evidence in the highlighted incidents, demonstrated that the malpractices were proved well beyond a balance of probabilities, that is to say, that they fell just short of criminal culpability, where the standard of beyond reasonable doubt would be applicable. Being matters before an election court, we consider that the election offences were proved, the standards met, and probably even exceeded the required threshold. In the incident concerning the forged posters, there is no doubt that criminal culpability was proved, in a criminal case where **Joseph Oluoch Onyango**, the accused pleaded guilty to the charges.

There was the argument that, the persons adversely mentioned, were not provided with an opportunity to respond to the allegations.

Rule 2 (d) of the Election Petition rules, defines **“respondent”** as **“any other person complained of.”**

Rule 15 of the Election petition rules stipulates:-

1. ***A respondent shall at the time of filing a response, to the petition, file an affidavit sworn by a witness whom the Respondent intends to call at the trial, which affidavit shall set out the substance of the evidence.***
4. ***Subject to sub rule (5), a witness shall not give evidence for the Respondent unless an affidavit sworn by the witness, setting out the substance of the evidence, in sufficient copies for the use of the court and the Petitioner, is filed with the response as requires by law.***
5. ***A witness for the respondent who fails to file an affidavit under sub rule (2) and (4) shall not be permitted to give evidence without the leave of the court.***
6. ***The court shall not grant leave under subrule (5), unless sufficient reason is given for the failure to file the affidavit.***

There was the contention that not all persons could be called to testify, and that Hon. Jakoyo Midiwo, Hon Orenge, Hon. Yinda, Aggrey Onyango and Hon. David Ochieng were not given an opportunity to be heard. And that the offences being criminal in nature necessitated that an opportunity be provided to the adversely mentioned persons to defend themselves.

At the outset, from a reading of the petition, the 1st respondent adversely mentioned these individuals. For instance in the petition at Paragraph 2 (e) (iv) it is alleged thus:-

“Similarly on or about 25th January 2013, the Third Respondent and/or his agents, yet again without any provocation, unlawful cause and /or (sic) justification destroyed and defaced the Petitioner’s election materials including the Petitioner’s banner and posters at Ajigo Market in Bondo Constituency. The Petitioner avers that during the incident the Third Respondent was accompanied by Hon. Dr. Oburu Odinga aforesaid, Hon Jakoyo Midiwo (then outgoing MP for Gem Constituency and the ODM candidate for the said seat in the National Assembly for Gem Constituency and now Member of the National Assembly for Gem Constituency, and Dr. Christine Ombaka (then ODM candidate for Siaya CountyWomen representative seat and now the Member of Parliament as Womens Representative for the Siaya County.”

And at Paragraph 2 (e) (vi)

“On 28th February 2013, the Third respondent, again in the company ODM party candidates and leaders namely, Hon. James Aggrey Orenge (then Minister for Lands and

immediate member of parliament for Ugenya-Uholo Constituency and ODM candidate for the Siaya County Senate seat and now Member for the senate representing Siaya County), Dr. Oburu Odinga aforesaid, Dr. Christine Ombaka aforesaid and David Ochieng (the then ODM candidate for Ugenya Constituency and now the member of National Assembly for Ugenya Constituency) among other ODM leaders and politicians and their supporters invaded the Petitioner's campaign rally at the Luthehe Market in Ugenya Constituency. The Petitioner and his supporters were forced to cut short their rally and move away from the said venue to avert a physical confrontation with the Third Respondent and his supporters. The Petitioner has in his custody the video coverage of the said incident and shall seek leave of the Court adduce the same in evidence."

Clearly, the petition provided the appellant with adequate notice that evidence was to be called against these personalities. In accordance with Rule 15, they had an opportunity to file affidavits in response, which they failed to do. Under Rule 15 (5) and (6), they could have sought leave of the court to file affidavits, which they again failed to do. We note from the record that, no application was made seeking leave of the election court to file a response. In our view, having failed to file a response in accordance with the law, these personalities cannot be heard to protest, and say that they were not given an opportunity to be heard. Furthermore, it is evident that the appellant did not call evidence to rebut the allegations against the mentioned individuals. Consequently, the evidence of the 1st respondent, PW2 and PW8 remained uncontroverted and the burden shifted to the appellant, who by remaining silent, failed to discharge the evidential burden, to their detriment.

As to whether the election malpractices and offences affected the outcome of the election in terms of section 83, the learned judge stated thus,

"To sum up the ODM campaign machine ran a dirty campaign during the gubernatorial election in Siaya County. Everything was done to depict the petitioner as a candidate who was running against the grain. The elections were constantly being bombarded with malicious propaganda against him. The propaganda was beyond what was ordinarily expected from opponents in an election campaign. When this was not considered enough, forged posters sprung up late in the campaign showing, falsely, that the petitioner was supporting the Jubilee Candidacy, and not ODM or Raila. From the evidence, the County was basically an ODM and Raila zone. I find that the propaganda that the petitioner was supporting Uhuru and Ruto was not only offensive but, also a blow below the belt, as it were. Taken together with the election offences, as outlined in the foregoing, one cannot say that a fair chance was given to the petitioner to campaign, or that the electors were given a fair chance to pick a candidate of their choice. To put it bluntly, the campaign was not free and fair. The campaign was perverted to the extend (sic) that it fundamentally compromised the integrity of the election."

Section 83 of the Election Act stipulates,

"...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".

In *Raila Odinga Vs IEBC and 2 others* (supra) the Supreme Court 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."

Clearly, from the evidence, election offences were perpetrated against the 1st respondent, which offences we have shown were proved to the requisite standard in an election petition. The learned judge found that,

the malpractices and offences were strategic and designed to impede the 1st respondent's bid to capture the position of Governor of Siaya County. By failing or neglecting to discharge the evidentiary burden of proof that shifted to him, the appellant left the election court with no option but to find, as in the phraseology employed in ***Raila Odinga Vs IEBC and 2 others*** (supra) that, "***an unanswered case had been made***" against the appellant. As such, that this ground has no merit.

The third issue was whether the election court wrongly exercised its discretion in declining to order scrutiny, following the outcome of the recount?

A first application made for scrutiny was by way of the 1st respondent's Notice of motion filed on 10th May 2013 seeking orders, in summary, that the court

- i. ***order for scrutiny and recount of all the votes in the gubernatorial election for Siaya County;***
- ii. ***order for scrutiny and the examination of all election materials used in the polling stations used in all the polling stations in the gubernatorial elections in Siaya County;***
- iii. ***order and direct the Electoral Commission to deliver forthwith all ballot boxes for the gubernatorial elections for the Siaya County elections to the election court for safekeeping.***

The application was supported by the affidavit of the 1st respondent. In his submissions in reply to the application filed on 28th June 2013, the appellant opposed the application for scrutiny stating that neither the petition nor the application for scrutiny, or even the evidence disclosed sufficient cause for the granting of the order. The appellant contended that, the 1st respondent was on a fishing mission, as there was no evidence to support the 1st respondent's prayer for scrutiny, and as such, it lacked merit.

After considering the pleadings and the submissions of the parties, on 3rd July 2013 the election court, declined to make an order for scrutiny, but allowed an order for the partial recount of the votes in respect of all polling stations in Bondo, Gem and Rariada constituencies; Awelo primary school in Alego Usonga constituency; and Nyasanda primary school polling station in Ugunja constituency to ascertain the votes garnered by each of the six candidates.

In his judgment, the learned judge in summarizing the outcome of the recount stated thus,

“The results for the Gem and Rariada constituencies were materially at variance with those declared by the Commission following the elections. The recount showed that in Gem constituency the 3rd respondent had 19,757 votes and the petitioner had 23,248 votes, compared to the declared results which showed that the 3rd respondent had 25,047 votes and the petitioner had 23,301 votes. This showed that the 3rd respondent had 5,290 votes less than the declared results, and the petitioner had 53 votes more than the declared results. In Rariada constituency, the recount showed that the 3rd respondent had 23,314 votes and the petitioner 19,316 votes. The declared results showed that the 3rd respondent had 26,191 votes and the petitioner had 19,285 votes. This showed that the 3rd respondent had 2,837 votes less on recount and the petitioner had 21 votes more. For Bondo constituency the recount showed that the 3rd respondent had 37,183 votes and the petitioner 16,287 votes. The declared results showed that the 3rd respondent had 37,120 votes and the petitioner had 16,593 votes. The recount showed that the 3rd respondent had 306 votes more than what had been declared. Awelo polling station had three streams. The recount showed that the 3rd respondent had a total of 483 votes and the petitioner ad (sic) the petitioner had 1,059 votes. The declared results showed that the 3rd respondent had 486 votes and the petitioner 1,152 votes. For Nyaseda polling station which had two streams, the recount result was 411 votes for the 3rd respondent and 353 votes for the petitioner. The declared results were 415 for the 3rd respondent,

and 355 votes for the petitioner. In total the 3rd respondent garnered 80,254 votes according to the recount for Bondo, Gem and Rarieda constituencies compared to 88,358 votes according to the declared results. The difference was 8,104 votes. If it is considered that the Commission declared that the 3rd respondent had won the election by 9,001 votes, the result reduced the margin between him and the petitioner by 897 votes.”

When the ballot boxes were opened, it was discovered inter alia that;

- i. ***some of the boxes had broken seals,***
- ii. ***some seals had different serialization from those used to seal the boxes and contrary to what was reported in the poll diaries,***
- iii. ***many ballot papers did not have corresponding counterfoils, while the counterfoils for other ballot papers did not correspond in number with the ballot papers.***

The appellant, the Electoral Commission and the 3rd respondent all attempted to explain and minimize the significance of the emerging picture by averring that post poll election malpractices had given rise to recount results that were significantly different from the declared results.

On account of this, the 1st and 2nd respondents in an application dated 16th July 2013, applied for scrutiny and examination of the election materials supported by affidavits sworn by ***Hilda Imbo DW3***, returning officer for Rarieda constituency and ***Juma Mugwanga DW1***, returning officer for Gem constituency alleging inter alia, that unknown persons had broken into the warehouse where the Gem and Rarieda constituency ballot boxes were stored and removed the ballot papers of votes cast for the appellant during the election, and therefore, the contents of the ballot boxes could not be used as the basis for determining the election results. The appellant also filed a Notice of Motion on 14th July 2013, seeking scrutiny of the votes cast in the gubernatorial election in 13 polling stations in Rarieda constituency and Gem constituency, mainly for reasons that the appellant had upon the recount, lost more than three times the number of votes he was declared to have garnered in those constituencies, and that the loss translated into a 50% reduction in the voter turnout at certain polling stations. On 22nd July 2013 the election court dismissed the applications for reasons that, there was no admissible evidence to show that the warehouse had been broken into and the ballot boxes tampered with. As such no basis had been laid, for scrutiny and examination of the election materials.

Mr. Kopot and Mr. Gumbo’s argument was that, despite the errors and cancellation in the Form 35s, the election court, had found them to be in order. Despite this, the learned judge after the recount had opted to rely on the recount results, and disregard the Form 35s, the majority of which had been countersigned by the agents. Counsel submitted that, given the evidence of post poll tampering, the election court should have made an order for scrutiny so as to establish a basis for analysing the discrepancies between the Form 35s and the recount, and that the failure to order for scrutiny undermined the election results. Counsel asserted that the safe custody of the ballot boxes is ultimately the responsibility of the Electoral Commission, but given the human factor involvement, there was the possibility of interference with the election materials.

In his rejoinder, Mr. Wakla submitted that, after declaration of the results, the appellant had affirmed that the overall election results were accurate. Following the recount, the number of used ballot papers in the ballot boxes showed otherwise. Subsequent to the recount, the appellant applied for scrutiny and examination of the election material, when it was discovered that the number of votes garnered by the appellant in the three constituencies had reduced significantly. Counsel concluded that no basis had been established by the appellant to warrant an order for scrutiny.

In declining scrutiny, the learned judge stated thus,

“The other reason I cannot allow the application of the respondents is this:

They seek among other things, that I summon presiding officers for the 28 polling stations, the two returning officers and cause them to give evidence regarding the results in the documents which are the subject of scrutiny. Further, that I should summon the County Elections Coordinator and security officer who were guarding the ballot boxes to be able to know who broke into them and took the ballot papers. To start with there is no admissible evidence before court that the warehouse was broken into and the ballot boxes interfered with. Hilda swore that that she was informed by one Lillian that she had noted that an iron sheet was missing on the side of the warehouse. Hilda did not go to check the warehouse. Lillian did not swear an affidavit to say what she saw. Can this be the basis for summoning the people indicated? In any case, can the court be asked at this time of the petition to identify the people who broke into the warehouse?”

When making an order for scrutiny, the election court is exercising its judicial discretion. *The Court of Appeal in Peter Gichuki King’ara v Independent Electoral and Boundaries Commission & 2 others [2014] eKLR stated thus:-*

“The court in denying the prayer for scrutiny was exercising judicial discretion. Judicial discretion is always exercised judiciously and for reasons which are stated. The aims that should be encapsulated in the reasons given for the refusal to exercise discretion are meant to further the cause of justice, and to prevent the abuse of the court process. Judicial discretion is never exercised capriciously or whimsically. See the cases of; Mbogo & Another V Shah 1968 EA 93 at page 95, Sir Charles Newbold P. held-

“...a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.....”

In Matiba v Moi & 2 Others, 2008 1 KLR 670, where the Court of Appeal reiterated that:-

“The High Court was exercising discretion and the Court of Appeal was not entitled to substitute the Judges’ discretion with its own discretion. It had to be shown that the Judges’ decision was clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision”.

In the instant case therefore, did the learned judge misdirect himself in some matter and as a result arrive at a wrong decision or, misapprehend the law or fail to take into account some relevant matter? To determine this it is incumbent upon us to interrogate the evidence to establish whether a basis was laid for scrutiny, or some ground existed to indicate that there were post poll irregularities.

“Section 82 - (1) An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the Election Court may determine.”

Section 33 (4) of the Elections Petitions Rules stipulates that:-

“Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of-

- a. ***The written statements made by the presiding officers under the provisions of the Act;***
- b. ***The copy of the register used during the elections;***

- c. *The copies of the results of each polling station in which the results of the election are in dispute;*
- d. *The written complaints of the candidates and their representatives*
- e. *The packets of spoilt papers;*
- f. *The marked copy register;*
- g. *The packets of counterfoils of used ballot papers;*
- h. *The packets of counted ballot papers;*
- i. *The packets of rejected ballot papers; and*
- j. *The statements showing the number of rejected ballot papers.”*

In the case of *William Maina Kamanda v Margaret Wanjiru Kariuki & 2 Others* (2008) eKLR, the learned Judge observed that,

“It is now well established that an order of scrutiny can be made at any stage of the hearing before final judgment whether on the court’s own motion or if a basis laid requires so. It can be made if it is prayed in the petition itself – as is the case in this petition – or when there is ground for believing that there were irregularities in the election process or if there was a mistake on the part of the Returning Officer or other election officials.”

And in *Joho –vs- Nyange & another* [2008] 3 KLR (EP) 188-195, the court held:-

“an order for scrutiny can be made when it is prayed for in the petition itself and when reason for it exists. It is not made as a matter of course. It is made when there is ground for believing that there are irregularities in the election process or if there was a mistake on the part of the Returning Officer or other election officials.”

We will begin first by considering whether a sufficient basis for scrutiny had been laid.

According to the appellant the basis of the scrutiny was there was post poll tampering with the election material by either the Electoral Commission, the security firm guarding the materials or the Court registrar when the election material was handed over to the election court.

When we consider the record, *Hilda Imbo DW3*, in her affidavit stated,

“The notable and obvious variations in the ballot boxes can therefore not be explained in any reasonable hypothesis other than the ballot boxes containing the results of Rarieda Constituency were tampered with and the election materials therein altered or manipulated by a third party with a view to changing the total number of the votes in the ballot boxes and in particular it should be noted that;

- a. *The tampering with the materials involved obvious and carelessly executed removal of ballot papers from the ballot boxes hence the substantial reduction in the number of votes in the ballot boxes and the reduction in voter turnout.*
- b. *The removal of the election materials also affected the counterfoils in terms of the numbers which is easily ascertainable from the poll diaries which showed the total number of ballot paper booklets issued to each polling station.*
- c. *The careless execution of the removal of the election materials explains the inconsistency between the number of counterfoils for the ballot papers used vis- a-vis the ballot paper contained in the ballot boxes.*
- d. *The careless execution of the removal of election materials explains the inconsistency in serialization of the ballot papers and the counterfoils which would not have been obvious or apparent to an untrained person handling the ballot boxes.*

- e. *The differences in the seal serialization and the obvious physical tampering with the ballot boxes confirms that the election materials must have been tampered with the ballot boxes confirms that the election material must have been tampered with during storage.*
- f. *The trend clearly exhibited in the recount shows a consistent removal/reduction in the votes of one candidate in all the polling stations where the recount was ordered.*
- g. *It is not possible to vouch for the contents in the ballot boxes in the current state of affairs.”*

The learned Judge so found, and was not prepared to excuse the Electoral Commission for the dereliction of its duty to safeguard the elections material, when he stated thus;

“Having looked at all the decisions, the jurisprudence that emerges from them is that, the votes in the ballot box following an election contain the best primary and controlling evidence of the votes cast by the electorate. The commission has therefore the responsibility to safeguard those votes by making sure that the ballot boxes in which they are contained are scrupulously secured until litigation on them is concluded. The results as declared in the election forms should agree with the votes in the ballot boxes, and when they don’t agree the Commission has to explain the discrepancy. When the Commission is handing over the ballot boxes to court it should reasonably anticipate that scrutiny and recount may be ordered at which time the handling of the election materials may be inquired into. It is the responsibility of the Commission, at the earliest possible opportunity, to indicate to the court hearing the petition any instance of interference or tampering, or suspected interference or tampering, so that appropriate action or inquiry can be undertaken. All the time the Commission should bear in mind that it is the custodian of the results, as declared in the forms and is evidenced by the votes in the ballot boxes. Indeed Article 86 (d) commands the Commission to put in place structures and mechanisms to eliminate election malpractices, including the safe keeping of electoral materials. The Commission cannot seek to denounce the contents of the Forms or the ballot boxes and seek that the court should not rely on any of them without leading evidence to show that they did their best to safeguard them but that a third party tampered with them.”

Article 86 (d) of the Constitution stipulates, that the Independent Electoral and Boundaries Commission shall ensure that appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including the safekeeping of election materials. In effect, the responsibility for the safe custody of the election material is placed squarely upon the Electoral Commission to keep the election material secure, whether before or after the elections.

The election materials were at all times in the custody of the Electoral Commission, and the onus was imposed upon it by no less an authority than the Constitution itself, to effectively secure and accurately account for the election material. Prior to the recount, no evidence was produced by the Electoral Commission to show that by the time the materials were handed over to the Deputy Registrar, they had already been interfered with. DW3, the Electoral Commission returning officer for Rarieda constituency, had made no mention of the break in in her affidavit. In her affidavit, all that DW3 stated was that:-

“On the day of verification of the ballot boxes and before the handover to the custody of this Honourable Court, the warehouse assistant, Lillian, brought to my attention the fact that there was an opening caused by a missing iron sheet on the side of the warehouse, which fact we have since reported to the police for investigations.”

As noted by the learned judge, the said Lillian did not swear an affidavit to this effect nor did she testify. Besides, no report of interference with the election materials was made at any time, to the Deputy Registrar. If the ballot boxes had indeed been tampered with, why then was this not brought to the attention of the election court prior to the recount? And why did the communication of this information have to await an application for scrutiny? Additionally, from the evidence, it was not possible to tell whether the warehouse was actually broken into, when it happened, and who was responsible, and finally, what the sum total of the loss was, if any, that had accrued as a result.

Under Article 86 (d) the Electoral Commission is the constitutionally mandated body charged with the sole responsibility of securing and accounting for all election materials and to prevent, obviate and avoid tampering and interference. Where the integrity of the election materials is questioned, it is upon it to take such steps as are necessary to investigate and account for any existing discrepancies. It cannot turn around and pass blame to its servants or agents for interference with these materials. Invariably, it was incumbent upon the Electoral Commission to convincingly explain how the materials came to be interfered with, and having failed to do so, it is inconceivable that it should now expect the election court to make up for these inadequacies, by ordering an investigation. We agree with the learned judge that without a credible and substantiated report from The Independent Election and Boundaries Commission, it was impossible to find a basis upon which the election court could have ordered scrutiny. Clearly, what was before the court was wholly inadequate, and could not be a basis for an order of scrutiny.

In finding that there was no basis for scrutiny, did the learned judge exercise his discretion judiciously? It is evident that the learned judge in exercising an unfettered discretion took into account the relevant factors, and circumstances of the case. He did not take into account any irrelevant factor and there is absolutely nothing on the record to show that he failed to appreciate the evidence or the law essential to his exercise of discretion.

Although we are fully cognizant of the solitary benefits of scrutiny and would favour its grant over its refusal in appropriate cases, we consider that having regard to the evidence, the learned judge exercised his discretion judiciously, and declined to order scrutiny, as no basis had been laid in the circumstances of this case. As such, we see no reason to interfere with the decision of the learned judge, and as a consequence this ground also fails.

Related to the issue of scrutiny, the appellant contended that the learned judge erred in placing reliance on the partial recount results, instead of on the Form 35s in order to arrive at valid result for the election, as the Form 35s having been countersigned by the agents were the more credible indicator of the final result.

The learned judge took the view that the 1st respondent had in his Petition pleaded for scrutiny and recount and therefore having made the order for partial recount, and obtained an outcome, it would have been imprudent to ignore that outcome. The election court cited **Richard Kalembe Ndile and another vs Patrick Musimba Mweu and another** Election Petition No.1 and 7 of 2013 Machakos), where the High Court made reference to this Court's decision in **James Omingo Magara vs Manson Onyango Nyamwaya and 2 others** in which the High Court, despite a recount which showed the declared winner as having the highest votes, nonetheless, nullified the election because of the irregularities. That in upholding the nullification verdict this Court observed:-

“It is true that on the on the scrutiny and recount of votes, the appellant still had the highest number of votes. But as I have pointed out that was not all the learned judge was to go by though it was an important consideration. I quote the remark of Barry, J in Canadian case of [1997](MPLR R (2d) Nfld SC cited in Dorothy E. Browton vs Jean Hart Kangas & Others suit NC1 98—01-10265, Queens Bench Division Manitoba:-

When in interpreting the legislation relating to an elections, one may reasonably conclude the primary purpose is to ensure that we have a free open and properly conducted democratic elections If there had been irregularities, these should have to be exposed to the view of the general public through the returning officer and through the candidate and agents involved in the recounts.”

In the instant case, based on the drastic reduction in the margin of the results following the recount, and despite that the learned judge's conclusion that the 79 Form 35s ***“should not be disregarded”*** it is difficult to imagine how such a huge difference between the declared margin of 9001 votes and the recount margin of only 897 votes could be ignored. This, coupled with the already established malpractices, could not go unnoticed. Consequently, we agree with the learned judge that having regard to these circumstances, the only conclusion that could reasonably be arrived at was, that the authenticity of the election results was severely and irreparably dented, and that the only recourse was to nullify the

elections of the seat of Governor for Siaya county. The kind of irregularities, malpractices, bullying, mud-slinging, unlawful propaganda and dirty tricks employed in the elections properly attracted the High Court's censure and opprobrium. Nullification of the election was the proper logical and reasonable verdict consistent with the details of a free and fair election. As such, we are not persuaded that the appeal from that judgment is meritorious and we accordingly dismiss it in entirety.

The final issue of costs, Mr. Kopot and Mr. Ochieng submitted that, the judgment did not find the appellant to be at fault. The faults were committed by other persons not called as witnesses. Even having found that there were election malpractices, the election court did not order that investigations be conducted, and therefore there was no reason why the appellant should have been made to pay all the costs. Counsel concluded that the costs should have been apportioned amongst the parties.

We believe that we have said enough regarding the appellant's connection to the persons who campaigned for him, and to whom the election malpractices were currently attributed on the record. There is therefore nothing in the case to cause us to depart from the usual position that costs follow the event. We accordingly order that the appellant shall bear the costs of the 1st respondent in the election court and in this Court, which costs shall be assessed by the respective Court Registrars unless otherwise agreed.

Dated and delivered at KISUMU this 21st day of MARCH, 2014.

P. O. KIAGE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR