



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, MARAGA & MURGOR, J.J.A)**

**CIVIL APPEAL NO. 301 OF 2013**

**BETWEEN**

**KARANJA KABAGE .....APPELLANT**

**AND**

**HON. MR. JOSEPH KIUNA KARIAMBEGU NG'ANG'A ..... 1<sup>ST</sup> RESPONDENT**

**MR. FIDELIS KITILI KIVAYA, RETURNING**

**OFFICER NJORO CONSTITUENCY .....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

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

***(An appeal from the judgment and decree of the High Court of Kenya at Nakuru (Anyara Emukule, J.) dated 11<sup>th</sup> September, 2013***

**in**

**NKR. E.P. NO. 12 OF 2013)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

**Introduction.**

1. In a recent decision made by this Court in **LEDAMA OLEKINA V. SAMUEL KUNTAI TUNAI &**

**9 Others C.A 286 of 2013**, the Court examined **Articles 81** and **86** of the Constitution and stated as follows:-

**“An election is not an election which is not based on universal suffrage, not by secret ballot, not transparent and free from violence, intimidation, improper influence or corruption; one which is not conducted by an independent body with impartiality, neutrality, efficiency, accuracy and accountability; one where the voting method is not simple, accurate, verifiable, secure, accountable and transparent; one where the structures and mechanisms for eliminating electoral malpractices are not put in place. In sum, an election that goes against the grain as set by the Constitution, and is not free and fair, is invalid, without more. The Constitution does not set the standard. It is the standard. The issue is how ordinary mortals can measure up to that lofty level.”**

2. The election dispute before us is as significant for what it challenges as it is for what it does not. The appellant here, does not complain about the independence, impartiality or neutrality of the body charged with the duty of conducting elections; the efficiency, accountability and accuracy in the conduct of the election; the voting method in its transparency, verifiability, accountability or any irregularities and inadequacies in the counting of votes, recording of electoral documents like Forms 35 and 36 or storage of electoral materials like ballot boxes. All these were apparently in accordance with the Constitution and other Electoral laws. What the appellant focuses on are serious allegations which, if proved to the required standard, would amount to quasi-criminal transgressions which may lead to debarment of the person responsible, from participating in any future elections for a given period. Put differently, the appellant asserts that the election was conducted contrary to **Article 81 (e) (ii)** of the **Constitution**, and was thus not free and fair.

3. We open with this introduction because there seems to an interpretational misconception, that although on a qualitative assessment an election proved to the required standard to have been in contravention of **Article 81 (e) (ii)** of the **Constitution**, yet, it still has to be subjected to the scales set under **Section 83** of the **Elections Act 2011** (the Act), which states as follows:

**“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 results of the election.”**

4. **Section 83** was enacted upon the realization that human beings, in the genetic rather than religious sense, must err, make mistakes and omissions. They are not perfect and will not meet the requirements of the Constitutional bar. The Section has therefore been construed to mean “substantial compliance” with the Constitution, electoral laws and procedures - see **JARED ODOYO OKELO V. FREDERICK OTIENO OUTA & 3 Others C.A No. 46 of 2013 (UR)**. An election, therefore, which qualitatively falls short of substantial compliance with the Constitution, is not an election and it matters not whether the result, in quantitative terms, is or is not affected. The Section is not a cure-all prescription and in that sense, it accords with the Constitution.

5. In the **Olekina case**, the Court stated that the Section had pedigree in global jurisprudence and cited the case of **MORGAN V. SIMPSON [1974] 3 All ER 728**, where Lord Denning stated the underlying principle thus:

- ***If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.***
- ***If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election.***
- ***But even though the election was conducted substantially in accordance with the law as to***

***elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated.***

6. It seems to us, therefore, that if we ultimately find in this case that the election offences pleaded were in fact committed, the entire election will be vitiated, the curative part of **Section 83** notwithstanding.

A brief recap of the facts is pertinent.

### **Background.**

7. The appeal arises from the decision of the High Court, Anyara Emukule J. sitting in Nakuru, made on 11<sup>th</sup> September, 2013 in which the learned judge dismissed the appellant’s petition. The petition related to the National Assembly elections for Njoro Constituency of Nakuru County, which was held as part of the general elections in the country on 4<sup>th</sup> March, 2013. The petitioner **Karanja Kabage** (Kabage) at first sought to contest the election through the National Alliance Party (TNA) but he lost to **Joseph Kiuna Kariambegu Ng’ang’a** (Kiuna) in the nomination process. His complaints to the Party machinery that the nominations were not conducted fairly were rejected and he decided to join another party, the United Democratic Party (UDF) which sponsored him.

8. There were six other candidates who contested the National Assembly election in the constituency and the votes they garnered in the election are as follows in tabular form:

<b>CANDIDATE</b>	<b>VOTES GARNERED</b>
1. Joseph Kiuna Kariambegu Ng'ang'a	34,748
2. Charity Gathambi Chepkwony	13,297
3. Karanja Kabage	8,631
4. David Kamau Kuria	4,311
5. Kuria Njau	2,848
6. Patrick Kipngeno Koech	2,615
7. Johnson Mburu Kinyanjui Mwamba	-

Kiuna, who is the 1<sup>st</sup> respondent before us, was declared the winner and is now serving as the National Assembly member for Njoro constituency.

### **The Petition.**

9. Kabage sought to challenge the election of Kiuna on two grounds which he specified and particularized in his petition filed on 10<sup>th</sup> April, 2013. He complained, firstly:-

*“That during the nomination exercise for the National Alliance Party (TNA), the First Respondent (Kiuna) and his agents committed election offences, namely, bribery of voters, use of force and/or violence and use of public resources contrary to the provisions of the Elections Act, 2011”*

Secondly:-

*“That during the campaign period and before voting in the General Elections, the First*

*Respondent (Kiuna) and his agents committed election offences, namely bribery of voters, use of force and/or violence and misuse of public resources contrary to the provisions of the Election Act, 2011.”*

10. It becomes clear at once that the complaints not only straddle the Nomination as well as the Campaign periods but also that Kabage was focusing on three election offences of “**Bribery**” contrary to **Section 64** of the **Elections Act, 2011** (the Act); “**Use of force or violence**” contrary to **Section 65** of the Act; and “**Use of public resources**” contrary to **Section 68** of the Act.

11. The particulars of those offences which Kabage set out to prove were that there was bribery of voters by Kiuna and his agents who gave out money at Jokeria Trading Centre, Jawatho, Industrial Area, Mathangauta, Likia, Mwisho wa Lami, and Tipis areas of the constituency. There was also bribery through supply of iron sheets, chairs, and free water in Piave and tithes in churches.

12. On violence, the particulars were that voters were generally intimidated and threatened with withdrawal of bursaries and other funds; actual violence against Kabage’s supporters at Mau Narok; attack on one **Mary Wanjiku Njenga** by Kiuna; and assault on one **James Boro Gitau** by Kiuna’s agent at Mau Narok on 3<sup>rd</sup> March 2013.

13. On use of public resources, only one incident was cited where at a public rally during the nomination period on 17<sup>th</sup> February, 2013, Kiuna allegedly handed over a cheque of Shs.363,000/= drawn on CDF account to one James Kimani Kibunja, who was the Chairman of Mau Narok Secondary School.

14. All these transgressions, Kabage asserted, were reported to **Fidelis Kitili Kivaya** (“Returning officer”), the 2<sup>nd</sup> Respondent herein, who was the representative of the Independent Electoral and Boundaries Commission (IEBC), the 3<sup>rd</sup> Respondent, and other security agencies two weeks before the election, but very little or nothing was done.

15. Those allegations were denied in sworn affidavits by Kiuna and those identified by Kabage as his agents. Kabage then called 9 witnesses who were cross-examined on their affidavits, while Kiuna called 8 witnesses and IEBC called the Returning officer. The High Court considered the evidence on record and heard all counsel on written and oral submissions before coming to the conclusion, on each allegation, that they were not proved to the satisfaction of the court. We shall consider the reasoning of the court presently.

### **The Appeal**

16. The appeal is premised on 29 grounds, some of which are fairly prolix with several sub-grounds and evidential references, arguments and repetitions contrary to **Rule 86 (1)** of the Court of Appeal Rules. This Court has previously warned counsel and parties against such sloppy drafting which does nothing but cause confusion and obfuscation of the core issues in the dispute. However, it becomes clear from written and oral submissions that Kabage’s major complaints relate to the trial court’s evaluation of the evidence on record.

17. He asserts that the trial court erred in applying the standard of proof of “**the satisfaction of the court**” which it construed to mean “**beyond reasonable doubt**”; that the court completely misapprehended the facts and the law relating to each of the three complaints he made; that several findings of fact were not based on any evidence at all; that the court was biased and prejudiced in its evaluation of the entire evidence; that the court erroneously believed evidence which was untrue, evasive, illogical, uncorroborated and untenable; that the court failed to believe cogent, consistent and credible oral and documentary evidence; that the court erred in its interpretation and application of **Section 83** of the **Elections Act**; that the court erred in failing to find that Kiuna committed election offences and ought to be barred from participating in any future elections; and finally that the order on costs was erroneous as it should not have been left to the taxing officer.

## **Analysis and determination.**

18. Kabage was represented before us, as he was in the High Court, by learned counsel Mr. Mbuthi Gathenji and Mr. Stephen Wandeto who were led by Senior Counsel, Mr. Paul Muite; Kiuna was represented by learned counsel Mr. Jeremy Njenga and Ms Vivianne Wachanga; while the Returning officer and IEBC were represented by learned counsel Ms. Lucy Kambuni. Learned counsel on all sides made lengthy written and oral submissions and cited numerous authorities which we have considered.

19. In view of the frontal attack by Kabage on the evaluation and assessment of evidence by the trial court, we must embark on a close examination of the evidence on record in relation to the three electoral offences which are the sole basis for the petition. In doing so, we shall be guided by the following principles which we have decanted from the various authorities cited on all sides of the argument, and which, in our view, are well rooted in our electoral jurisprudence:

## **20. Guiding principles.**

- Article **164 (3)** of the **Constitution** confers on this court the jurisdiction to hear appeals from the High Court. **Section 85A** of the **Elections Act** provides for appeals from the High Court to this Court and states that they “**shall lie on matters of law only**”. That express statutory provision sets election petition appeals apart from ordinary civil appeals. In ordinary appeals, this Court, on first appeal, is bound to reappraise and re-evaluate the factual evidence on record in the manner of a retrial and to reach its own conclusions in the matter. See **SELLE & ANOTHER V. ASSOCIATED MOTOR BOAT CO LTD & OTHERS [1968] EA 123**. In an election petition appeal, this Court will defer to the trial court’s findings of fact and will not readily disturb them. The findings will be disturbed as a matter of law, however, where they are based on no evidence, or on a misapprehension of the evidence or if the trial court is demonstrably shown to have acted on wrong principles. See **MWANGI V. WAMBUGU [1984] KLR 453** and **MWANASOKONI V. KENYA BUS SERVICES LTD [1985] KLR 931**. It is also a question of law whether, on the evidence on record, the alleged offences were committed. See **MOSES WETANGULA V. MUSIKARI KOMBO [2014] eKLR, C.A No. 43 of 2014**.
- The oft cited reason for respecting the trial court’s findings of fact is that the court would have seen and heard the witnesses and therefore been in a better position than the appellate court to assess the significance of what was said, how it was said and equally important, what was not said. See **HAHN V. SINGH [1985] KLR 716**. Where the trial court’s findings depend on the credibility of the witnesses, the court will also have gauged this through cross-examination and observations on the demeanor of the witnesses. An appellate court will therefore not interfere with the findings of the trial court based on assessment of credibility and demeanor of witnesses, unless it was wrong in principle or had no basis in law. See **TAYAB V. KINANU [1983] KLR 114**.
- As for interference with the exercise of discretion of the trial court, this too is circumscribed and we need only cite what this Court stated in **MBOGO & ANOTHER V. SHAH [1968] EA 93** at page 96, thus:

**“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been misjustice.”**

- The **burden** lies upon the petitioner to prove the allegations made in the petition, and the **standard** of proof is generally to the satisfaction of the court, higher than on a balance of probability but not beyond reasonable doubt. See **Section 107, Evidence Act** and **JOHO V. NYANGE [2008] 3KLR (EP)**.

- Where the allegations amount to commission of election offences, however, they must be proved beyond reasonable doubt. In RAILA ODINGA V. IEBC & 3 Others SCP No 5 of 2013, the Supreme Court stated:

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

- This Court also stated in MOSES WETANGULA V. MUSIKARI KOMBO [2014] eKLR C.A No.43 of 2013, which is relied on by the appellant, thus:

**“There is good reason for this requirement. Election offences are criminal offences. For anyone to be held criminally liable, Article 50(2)(a) of the Constitution requires that the case against such person should be proved beyond reasonable doubt. In election petitions, the law requires the election court to report such person to the IEBC, which may bar such person from contesting in that or future elections. This is besides the sentence that may be meted out to such person if criminal charges are brought against him. It is on account of these dire consequences that the law demands proof beyond reasonable doubt of allegations of commission of election offences.”**

See also JOHO V. NYANGE (supra) on “**cogent, credible and consistent evidence**”.

### **On Bribery.**

21. *Section 64* of the *Elections Act* provides as follows:

**“(1) A candidate who –**

- a. **directly or indirectly in person or by any other person on his behalf gives, lends or agrees to give or lend, or offers, promises or promises to procure or to endeavour to procure any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter or to or for any other person in order to induce any voter –**
  - i. **to vote or refrain from voting for a particular candidate;**
  - ii. **to attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for an political party or candidate;**
  - iii. **corruptly does any such act on account of such voter having voted for or refrained from voting at any election, for a particular candidate; or**
- b. **directly or indirectly, in person or by any other person on his behalf, gives or procures or agrees to give or procure, or offers, promises, or promises to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter –**
  - (i) **to vote for or refrain from voting for a particular candidate; or**
  - (ii) **corruptly does any such act on account of such voter having voted for or refrained from voting;**
- (c) **in any manner unlawfully influences the result of an election;**
- (d) **directly or indirectly, in person or by any other person on his behalf, makes any gift, loan, offer,**

promise, procurement, or agreement to or for any person in order to induce that person to –

i. procure or endeavour to procure the election of any person; or

(ii) procure the vote of any voter at any election;

(e) upon or in consequence of any gift, loan, offer, promise, procurement or agreement, procures or engages, promises or endeavours to procure, the election of any person, or the vote of any voter at an election;

(f) advances, pays or causes to be paid any money to, or to the use of any other person with the intent that such money or any part thereof shall be used in bribery at any election, or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part used in bribery at any election;

(g) being a voter, before or during any election directly or indirectly, in person or by any other person on his behalf receives, agrees or contracts for any money, gift, loan, or valuable consideration, office, place or employment for himself or for any other person, for voting or agreeing to vote or for refraining or agreeing to refrain from voting for a particular candidate at any election;

(h) after any election, directly or indirectly in person or by any other person on his behalf, receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or to refrain from voting for a particular candidate at the election;

(i) directly or indirectly, in person or by any other person on his behalf, on account of and as payment for voting or for having voted or for agreeing or having agreed to vote for any candidate at an election, or an account of and as payment for his having assisted or agreed to assist any candidate at an election, applies to the candidate or to the agent of the candidate for a gift or loan of any money or valuable consideration, or for the promises of the gift or loan of any money or valuable consideration or for any office, place or employment or for the promise of any office, place or employment; or

(j) directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates, gives or procures any office, place or employment to endeavour to procure any office, place or employment, to or for such other person, or gives or lends or agrees to give or lend, or offers or promises to procure or to endeavour to procure any money or valuable consideration to or for any person or to or for such other person on behalf of such other or to or for any person, commits the offence of bribery.

1. Any person who in consequence of that person's acceptance of any consideration votes or refrains from voting commits an offence."

22. Those provisions spell out both the prohibited acts- the *actus reus*, and the intent which constitutes the offence – the *mens rea*- which is the intention to induce a voter to vote or refrain from voting freely. Both elements of the offence must be proved beyond reasonable doubt. We find this passage in Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol.15,Para. 695 relevant:-

**"Due proof of a single act of bribing by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the election. The judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be, such as they can allow in certain conditions in cases of treating or undue influence by agent. For this reasons, clear and unequivocal proof is required before a case of bribery will be held to have been established, suspicion is not sufficient, and the confession of the person alleged**

**to have been bribed is not conclusive.”**

23. As stated earlier, Kabage’s case is that there was rampant bribery by Kiuna and his agents during the nomination and election campaign periods in Jokeria Trading Centre, Jawatho, Industrial Area, Mathangauta, Likia, Mwisho wa Lami, and Tipis centre. Kabage himself did not witness any of those bribery claims. He had reported the claims to the Returning Officer before the nominations and he was asked to provide facts to back up the allegations but he never did. He had no direct evidence that Kiuna bribed anyone. Four of his agents and supporters, however, gave him information and later swore affidavits and testified in court on different incidents of bribery.

24. The first was **Edward Mutura Ngugi** (PW6) who was a farmer in Mwisho wa Lami and Kabage’s polling agent. In his affidavits he swore that there was a rumour going round the constituency that Uhuru Kenyatta had given out money to influence voters to vote for his political party TNA, and each voter was allegedly being given Shs.200/=. On 3<sup>rd</sup> March, 2013, at 6 p.m., Edward received a call from someone telling him that a motor vehicle Reg. No. KAS 575 K belonging to Kiuna had been seen heading towards Mwisho wa Lami from Gatimu and that it was distributing money. He took a lift from another person and caught up with the vehicle as it left Mwisho wa Lami going towards Tipis Centre. A short distance from Mwisho wa Lami, Edward saw one person alight from the vehicle. It moved on to Tipis Centre where it stopped and another man came to the vehicle and was given a parcel in a brown envelope and another brown envelope by one of the occupants in the vehicle. That person was told to make sure the money reached every household in the village. Edward, who stood twenty feet away from the vehicle could not recognize the man in the vehicle or the other man taking the envelope since it was dark at 8.00 p.m. and the man had a hat and a long jacket. Edward then called another person and asked him to follow the man with the envelopes and ensure he did not leave his house as Edward went out to call the Police. He did not manage to get any policeman. He also heard from someone else that money was being distributed by one **Pauline Wambui Waitiki** and her son, **Kinyanjui** at Mwisho wa Lami and so he called another Kabage agent in that area, **James Boro Gitau**, to follow up the information. In a further affidavit, Edward swore that on 12<sup>th</sup> April, 2013, some three people visited him at his farm and enquired whether he was a witness in Kabage’s petition and offered to give him Shs.100,000/= if he withdrew from the case. He refused and reported the incident to Kabage who advised him to report to the police, which he did at Mau Narok Police Station three days later. No one else testified on these events which Edward allegedly witnessed.

25. In cross examination, Edward admitted that the 3<sup>rd</sup> of March was the eve of the general elections and poll agents’ badges had been issued late by the IEBC. He further testified as follows:-

*“The vehicle was KAS 575K. It was known as Mr. Kiuna’s vehicle. It was about 5.30 p.m. I did not recognize the occupants. Mr. Kiuna was not in the vehicle. I followed the vehicle to Tipis Centre. I was on a motor cycle. We overtook the vehicle, and waited for it in Centre at Tipis Centre. I would hear what they were saying – I was about 18 – 20 metres. I could hear what they were saying – Darkness was setting in. They could see me, they thought I was a turn boy. The young man took out an envelope it was badges and a List of Agents and then went again into the car and took out another envelope and handed it over - “ensure that the envelope reaches every house, and do not make any mistake”.*

*The second envelope was a “parcel”, but did not say, what it contained. I was paid an allowance as an agent through Mr. Kabage’s agents. That allowance to me as an agent was not a bribe. I have not been a rumour monger.*

*After that I went to AP Camp, but I did not see any Police Officer. There was no mere rumour. I myself did not see any person being bribed.”*

26. In response to those allegations, Kiuna denied having, directly or indirectly, bribed any voter. He admitted that motor vehicle Reg. No. KAS 575 K, a Toyota double cabin pickup was his but stated that it was allocated to his campaign secretariat based at Njoro. **James Kariuki Kibunja** (DW4), a former military officer and a member of the campaign secretariat, swore an affidavit on which he was cross-

examined and denied that he received any money from Kiuna or anyone else on his behalf, to distribute in the motor vehicle which was allocated to the secretariat for local errands during the campaigns. On the contrary, at 2.00 p.m. on 3<sup>rd</sup> March, 2013, polling agents' documents including their oath of secrecy and appointment letter were released by IEBC and arrangements were made by the campaign secretariat to distribute the material to over 200 of Kiuna's agents around the constituency before the polls the following morning. As there was not enough time to reach each poll agent, the documents were packed in envelopes in bundles for each locality and one key person was identified to distribute them to the other agents in that locality. James and two others went round the entire constituency that afternoon and by the time they reached the last station at Tipis Centre, it was dusk at about 7.00 p.m., but not dark. He later heard the rumour about distribution of money from one of their agents Pauline Wambui Waitiki. They never carried any money, even for the agents, who were paid after the polls.

27. In its evaluation of that evidence, the trial court held as follows;

**“I find that for an offence of bribery to be proven in relation to an election petition, it has to be shown that a bribe was offered and received with an intention to influence a voter to vote for a particular candidate. The evidence on which such a finding can be made has to be conclusive and it is not open for the court to make presumptions without a clear concise basis.....”**

**Having considered the evidence tendered by both witnesses I am inclined to believe DW4's testimony. The same was also corroborated by DW5 who testified that on the said day, she collected her documents, which were in an envelope at Mwisho Wa Lami as instructed by DW4 and the petitioner also acknowledged that his agents were given their documents at around the same time. In light of this evidence, I am unable to presume that the parcels which PW6 saw the First Respondent's agent give to another man contained money which was to be used to bribe voters especially when he did not see the contents thereof.”**

28. We have examined the totality of the evidence ourselves and we find no error in the conclusion arrived at by the trial court. The only issue was whether any money was distributed to any voter in the vehicle allegedly seen and followed by Edward at Tipis Centre. Apart from the contradictions in his own evidence regarding the distance from which he was monitoring the unfolding events, Edward offered no hard evidence on the offence of bribery as by law required. In fact he confessed that he never saw anyone being bribed and we surmise that his suspicions from the beginning still ended up as such. We reject Edward's claim.

29. As stated earlier, Edward passed on the rumour on bribery to Kabage's agent at Mwisho wa Lami, **James Boro Gitau** (PW9), and asked him to monitor **Pauline Wambui Waitiki** (DW9) a polling agent of Kiuna and her son **Kinyanjui**. In his affidavit James says he heard the rumour on bribery from one **Stephen Kamau Muiru** at 7.00 a.m. and on carrying out his investigations found out that a vehicle which was going round distributing money had given some to Pauline. At 8.00 p.m. on 3<sup>rd</sup> March 2013, he saw Pauline give Shs.200/= to a hawker who sells tomatoes 300 metres from Mwisho wa Lami, telling the hawker to take the money and remember who to vote for. He recorded the incident in his cell phone video camera but was confronted by Pauline and her son and another man who demanded that the photo be deleted or he would be killed. As he hesitated, Kinyanjui head-butted him as Pauline threatened him with a panga. He ran off to the police to report the assault. In cross-examination, James said he did not see Kiuna distribute money to anyone or hear his name being mentioned; he did not know the hawker from whom Pauline bought tomatoes; it was at night; he recorded the event in his hidden video camera; he never witnessed any other incident of bribery; he never recorded a statement on bribery at the police station; and he voted the following day without problems.

30. Pauline's recollection of events was totally different. She was a farmer and Director of a Co-operative Society, and during the elections she was the polling agent for Kiuna at Mwisho wa Lami. On 3<sup>rd</sup> March, 2013 she was called by Kibunja (DW4) to go to Mwisho wa Lami and collect her poll agent's documents and she did so at 7.30 p.m. accompanied by her son, Kinyanjui and nephew. On their way

home she bought some tomatoes worth Shs.50/= from one “mama nyanya” but then saw one young man who was following them like a thief. It was James who started demanding money that was allegedly given to her by Kiuna and he tried to rough her up. An argument and commotion ensued attracting passersby. She ran home and called the police who went to the scene. She never gave Shs.200/= to anyone, had no money for bribing and did not see anyone taking pictures.

31. The trial court preferred the evidence of Pauline to that of James, stating:

**“Whereas bribery can be inferred from the surrounding circumstances it is my view that it cannot be presumed in this instance. Firstly he lady to whom the money as given was selling tomatoes and PW9 did not testify whether or not she was given the tomatoes in exchange of the money. There was no evidence that DW5 was seen giving money to any other person so as to lead the court to conclude that she was not buying the tomatoes and I am inclined to believe the testimony of DW5.”**

32. We think the trial court was entitled to choose who to believe between the two witnesses whom it saw testify and was able to assess their credibility. In our view, it was more probable than not that the money given to the hawker was for purchase of tomatoes, as stated by Pauline. There was also no evidence that the unknown tomato seller was a voter. Furthermore, James was threatened and allegedly beaten, which is a different cause of action and he made no mention of bribery or loss of his phone when he reported to the police. The standard of proof was clearly wanting and left room for reasonable doubts. In our view, James was unduly influenced by Edward who had directed him to follow up Pauline as she had allegedly been given campaign money. For those reasons the claim is rejected.

33. The allegation of bribery at Jawatho was narrated by **Stephen Njoroge Gathachi** (PW8). He swore in his affidavit that one **Peter Mwangi** who was campaigning for Kiuna, gave money to voters during nomination and election campaigns. Peter gave some money to five of Stephen’s friends whom he named, and moved from house to house distributing money. Stephen also overheard one **Richard Kahali** bragging how he made money from bribes by giving only part of it to voters. He also stated how one **Soi Paul Wanjohi** would organize groups for night meetings where bribes would be given out. In cross examination, Stephen confessed that much of what he stated in the affidavit was information given to him; he did not know Peter Mwangi but was given his name and later sent him M-pesa money in order to get his full names for purposes of the affidavit; he did not see Richard Kahali bribing but saw Peter Mwangi lining up people and distributing money to them; he did not present any of the named friends who were bribed to testify anywhere; and he never saw Kiuna giving out any money.

34. **Peter Mwangi Muigai** and **Richard Kahali Onger** swore affidavits in response to Stephen’s claims. Peter knew him as a vocal campaigner of Kabage but not his name. In April he saw in his cell phone the name “Stephen Njoroge” having sent some M-pesa Shs.58/= but when he called back, the person hung up. Peter was never an agent of Kiuna’s, either in the nomination or election and was never given money by Kiuna, or anyone else, to distribute as alleged by Stephen. He never gave any money to Stephen’s alleged friends who he discovered were in fact Stephen’s employees. There was no rebuttal to that affidavit. On his part Richard denied having bragged about making money from bribes and also denied receiving any money from Kiuna or anyone else to distribute.

35. The trial court examined that evidence and was of the view that Stephen’s evidence was largely hearsay without support from sources of the information, and where it was direct, it did not establish that Kiuna was responsible.

36. We are of the same view. The threshold of proof could have been attained by supportive evidence from the known friends or employees of Stephen, but no reason was given for failure to call them. The nexus between Peter and Kiuna was thus left in limbo. We may state with **Musinga J.** (as he then was) in **OGARI & ANOTHER V. ONYANCHA & 2 Others** [2008] eKLR thus:

**“Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it is not easy to prove bribery, especially**

**where it is done in secrecy. In such cases, perhaps bribery may be inferred from some peculiar aspects of a case but when it is alleged that the bribery took place publicly and in the presence of many people, the court cannot be satisfied by anything less than the best evidence which is always direct evidence given first hand.”**

That claim is also rejected.

37. The last allegation of bribery was made by **Mary Waringa Mureithi** (PW7) Kabage’s polling agent in Piave. Her affidavit evidence relates to, firstly, one **Daniel Njogu Iribe** whom she alleged, during the nomination and campaign period, took 20 iron sheets and 10 chairs to Natu Primary School in Piave and she sent one **John Ndungu Mbugua** to record the event; Njogu also took 16 iron sheets to Piave Primary School which were received by the Headmaster; and he gave free water from his borehole for 6 hours to people in Piave Centre. Secondly, she swore that Kiuna gave aluminium cooking pots (sufurias) to Ngomongo Women Group in Piave and, on the eve of elections, 3<sup>rd</sup> March, 2013, he visited churches in Piave giving tithes. Cross-examined, Waringa stated that she had stated in her affidavit what she had been told; she did not know whether Njogu was Kiuna’s agent; she did not see Kiuna taking any iron sheets or chairs. There was no mention of the video recording of the bribery incidents by one John Ndungu Mbugua, whom she had allegedly tasked to carry out the sting operation.

38. **Daniel Njogu Iribe** (DW6) responded to those allegations and was cross examined on his affidavit. He was a businessman in Piave who was active in community development and, together with other residents of Piave, they had assisted in the construction of schools, roads, police stations and other projects. He denied, however, that he had taken any iron sheets and chairs to Piave or Natu Primary Schools during the campaign period and produced several affidavits from Piave residents associated with the two schools and letters from the head teachers denying the allegation and confirming that the schools were not assisted by Njogu or other politicians any time during electioneering. The last assistance made to Piave Primary School by Njogu was in October, 2012. He further denied that he was an agent of Kiuna or that he received any money from Kiuna, stating that he was a supporter of TNA and its Presidential candidate. Finally, Njogu admitted that he owned a borehole in Piave but asserted that it was run by his employees and he had no knowledge that anyone drew free water from it. Cross examined, Njogu stuck to the averments made in his affidavit adding that he had a register for water sales and never gave out water for free as it is a business and no one testified that they drew free water from the borehole.

39. On his part, Kiuna swore an affidavit in response denying that Njogu was his agent in his campaigns or at all and further denied having sent him to deliver any iron sheets, chairs or free water. He further denied giving out any pots or sufurias or visiting churches to give tithes as alleged by Waringa. In cross examination, Kiuna maintained that the allegations were baseless and he never sent or authorized anyone to give any bribes on his behalf. He referred to himself as a “hustler”-poor man as opposed to his opponents who were ‘sonko’- rich men, and wondered how a poor man could bribe other poor people. As for the tithing allegation, Kiuna denied that he visited many churches giving out tithes as alleged by Waringa. He admitted that he attended church on 3<sup>rd</sup> March, 2013 and gave his tithe, not a donation. He stated as follows in cross examination:

*“I do give tithing with the little I have. I was looking for votes – I was not looking for votes in church. I go to church to worship and thank my God for his blessings. I normally invite people after worship, those who wish to join me. I do not deny visiting churches.*

*At para 25 of my response. I did attend the church but I did give a tithe, but not donations. Yes, I invited several churches to attend my rally. They constitute my electorate.”*

40. The trial court was once again not impressed by the evidence tendered to prove bribery. In its view, Waringa had no direct evidence to link Kiuna with the offences and merely relied on hearsay. Furthermore, no one was called to testify that they were given water or other material as an incentive to vote in a particular way. Citing the cases of **WILSON MUNGUTI & 5 OTHERS V. PATRICK KING’OLA & ANOTHER** [2013] eKLR and **DR. KIZZA BESIGYE V. MUSEVENI & ANOTHER**, No. 1 of 2001, the court held that a corrupt motive must be proved not only in the mind of

the person being bribed, but also in the mind of the giver; and that the offence of bribery is not proved unless the gift, money or other consideration is given or received by a person who is proved to be a registered voter. The trial court further concluded that there was no proof of widespread bribery leading to the influence of voters who did not exercise their free will and consequently compromising the integrity of the election.

41. We have carefully considered the evidence of Waringa and we are satisfied that it could not on its own withstand the test of the strong rebuttals made against it. The confession that the evidence was based on information which was verifiable but was not verified, leaves the evidence limping. The admission by Kiuna in cross examination that he attended church and gave his tithe during Sunday service on 3<sup>rd</sup> March, 2013, is in our view, no proof that he gave tithes in all churches in Njoro constituency with a view to influencing voters. As correctly submitted by Ms. Kambuni, freedom of conscience, religion and belief are fundamental rights guaranteed under **Article 32** of our **Constitution**. If a tithing rite is a manifestation of that religion, it cannot be curtailed without infringing on the constitutional rights of the individual. It is possible, nevertheless, that the right can be abused for political purposes, where, as in the **Wetangula case**, a gathering of churchmen was deliberately summoned and money was dished out to them with specific direction that they should vote for the money giver. The **Wetangula case** is distinguishable from the case before us. It is all a matter of evidence. In this case we are not satisfied with the evidence adduced in support of the allegation and we reject it. We find no error in principle committed by the trial court in reaching the conclusion it did.

At the end of the day, all the claims made on bribery are for rejection. We so find.

#### **On use of force or violence.**

42. This is easily the most profound of the three complaints made by Kabage. For good measure, Senior Counsel Mr. Muite urged us to look at the historical context in the enactment of the **Elections Act** which created offences, and the dire consequences attendant thereto. The Act, in his view, had its anchorage in the cataclysmic events that befell the country after the 2007/2008 general elections, the two Commissions of Inquiry that followed, and the enactment of the new Constitution of Kenya, 2010. It was therefore imperative that the court takes seriously any allegation of violence in elections since the trust of the people in their governance system is in issue. Mr. Muite criticized the trial court for ignoring that caution which was made in submissions before it.

43. **Section 65** of the Act provides as follows;-

**“A person who, directly or indirectly in person or by any other person on his behalf, inflicts or threatens to inflict injury, damage, harm or loss on or against a person -**

**a. so as to induce or compel that person to support a particular candidate or political party;**

**b. on account of such person having voted or refrained from voting; or**

**(c) in order to induce or compel that person to vote in a particular way or refrain from voting,**

**commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding five years or to both.”**

Once again it is an offence that spells out both the *actus reus* and the *mens rea* and requires proof of both to constitute the offence.

44. Kabage set out to prove two specific incidents of violence for which he blamed Kiuna and his agents. The first, and according to him most serious, was an alleged physical assault by Kiuna on one of Kabage's ardent supporters and political mobiliser, **Mary Wanjiku Njenga**, during the nominations for TNA party. The nominations were due on 18<sup>th</sup> January, 2013, and the assault was on 16<sup>th</sup> January, 2013. The second was an assault on **James Boro Gitau** (PW 9) by a Kiuna agent, **Pauline Wambui Waitiki** on

the eve of elections, 3<sup>rd</sup> March, 2013. Kabage himself was forthright in his evidence that he was only told about these incidents. In cross-examination he stated: -

*“I did not witness, to the best of my recollections any violence. I never got any complaint about violence. I never heard from any voter that he had been bullied. I have no knowledge of such allegations by anybody.”*

45. On the first incident, he complained to his party at the time TNA, which through its internal machinery, looked into the matter and dismissed it. Instead of appealing within the party machinery, he abandoned the Party and defected to UDF on 19<sup>th</sup> January, 2013 after his defeat by Kiuna at the nominations. He nevertheless followed up the matter through the Kenya National Human Rights Commission (KNHRC), the Police in Mau Narok, and the DPP because *“the issue of violence in Njoro constituency is paramount. It was a security issue”*. But, according to him, the security agents did nothing, hence the complaint in the petition.

46. According to her affidavit sworn on 7<sup>th</sup> April, 2013, Wanjiku was a resident of Mau Narok and a Director of a womens' land buying company, Mau Narok Nyakinyua Company Ltd. She attended a political meeting addressed by Kabage at Mau Narok centre on 16<sup>th</sup> January. After the meeting Kabage asked his supporters to escort him on foot towards Elementatia Junction. Along the way they met another political group led by Kiuna. Both groups engaged in verbal exchanges, each praising their candidate. It was at that moment that Kiuna left his group and approached Wanjiku asking her *“Ni weve tena”* meaning *“it is you again”*. Before she could answer, Kiuna slapped her on the left jaw before both of them were pulled back by their respective supporters. She later went to Mau Narok Health centre where she was treated for a painful neck and headache, and also went to Mau Narok police station where she obtained a P3 form. Later she reported the incident to FIDA, IEBC and KNHCR. She said she was surprised that Kiuna attacked her since they never had any disagreement before. In her version of events, Wanjiku was supported by **Susan Wachu Kuria** who stated that *“Kiuna alighted from his vehicle and slapped Wanjiku on her cheek”*. Thereafter she accompanied her to hospital.

47. In his responding affidavit Kiuna swore that he held his campaign rallies at several centres in the constituency on 16<sup>th</sup> January in accordance with a schedule agreed on with IEBC. Mau Narok centre was one of them. There, his supporters were blocked from going further by supporters of Kabage who were chanting *“Kiuna must go”*. He cautioned his supporters to be calm since that could be a trick to disqualify him from the TNA nominations. Suddenly, a commotion ensued between the two sides and Kiuna left his vehicle to calm the situation. The police came in and dispersed the crowds. He later learned that two people, one of them his supporter, Samuel Kinyanjui and Wanjiku, had been slightly injured and he went to record a statement at Narok Police Station. Kiuna denied that he assaulted Wanjiku as alleged since he had his security detail with him and indeed, it was his security detail which prevented her from assaulting him with the campaign placard she held which she was flashing at him. He produced statements recorded at the Police station by several witnesses on the incident including police officers who were at the scene. One of them was **Samuel Kinyanjui** (DW3) who was at the time looking for Kiuna to sign a document he had. When the commotion arose, he was near Kiuna and saw Wanjiku charging towards Kiuna holding a Kabage placard and Kinyanjui joined Kiuna's security who moved in to restrain her. That is when Wanjiku hit him and he sustained an injury which he reported to the police.

48. In her rejoinder, Wanjiku disclosed that she had had a previous disagreement with Kiuna, after all. It revolved around her land buying company which was seeking assistance from Kiuna as the area Member of Parliament in 2008. She led a delegation to Kiuna who promised to assist them with a lawyer to complete their transaction but the lawyer asked for Shs.200,000/=. They went back to him as they had no money and he promised to pay, but never did. Wanjiku and Kiuna later met again in 2012 at a gathering which was consoling a resident of Mau Narok for losing his houses to a whirlwind. Wanjiku spoke in that meeting and castigated Kiuna for his reluctance to assist her land buying company. When she finished, Kiuna called her on the side and asked her why she did not consult privately with him on that issue and why she was fighting him. He then addressed the meeting and promised to discuss the matter with members of the land buying company. Thereafter, he gave Wanjiku another chance to speak

in the meeting and she continued to speak her heart out criticising Kiuna. They did not meet again until the incident on 16<sup>th</sup> January, 2013. She suspected that is why Kiuna slapped her.

The incident took place at about 5.30 pm and at about 7p.m. Wanjiku gave a video recorded interview to a journalist narrating what transpired. Accompanying her was Wachu and another man and they all spoke, condemning Kiuna for slapping Wanjiku. The video was produced in evidence by consent before the trial court and before this Court.

49. Both Wanjiku and Kiuna as well as some of their witnesses were cross examined at length on their affidavits. Wanjiku, amongst other things, denied that the video recording was re-enacted drama meant to seek sympathy; denied that she said in the video that Kabage's group blocked Kiuna's group so that the latter could not pass since the Kabage group never blocked the road; confirmed that she had never been Kiuna's supporter and never went to his meetings as she always supported Kabage; she never spoke to Kiuna one on one at any time; that Kiuna just came out of his vehicle and slapped her as she stood two steps away from him; that there were policemen standing nearby who witnessed the incident; that she informed Kabage about the incident and he took her to Nairobi to meet Harrison Kinyanjui advocate, who sent out demand letters to the DPP and took her to FIDA, IEBC and KNHCR offices in Nairobi but denied she was being used as a political pawn; that she did not report to IEBC offices in Molo; and that she never assaulted Kinyanjui and did not frame Kiuna. Wachu, who was with her at the video recording, was also cross examined and supported Wanjiku in her denial that she did not say that the Kabage group blocked the road for the Kiuna group. She also denied that the police dispersed anyone, and could not tell which group was bigger than the other.

50. Kiuna for his part confirmed that he had referred Wanjiku's Nyakinyua company to a lawyer who charged Shs.200,000/= which Wanjiku wanted to be paid from CDF account but he told her that was unlawful but Wanjiku was angry about it. In this he was supported by John Ndungu Njuguna (DW 8) an Advocate of the High Court who is also the next door neighbour of Wanjiku. He confirmed that the land buying company was referred to him by Kiuna and he took them to another advocate who charged them Shs.200,000/= to complete the transaction. Wanjiku however expected Kiuna to personally pay for the fees, but Njuguna advised her to collect money from the company and pay the advocates. Wanjiku did not have kind words for Kiuna because of that. Kiuna further said in cross-examination that, his group at Mau Narok Centre was about 1000 while Kabage's was about 50-70; that he never made any physical contact with Wanjiku and had no reason to slap her; that the incident was left to the police for investigations but he has never been charged with any offence. That is why he was cleared by IEBC to contest the parliamentary seat after nomination.

51. The truth about what transpired at Mau Narok Centre at about 5.30 pm on 16<sup>th</sup> January, 2013 largely depends on the credibility of those who were present and testified to it. The trial court examined the evidence on both sides and was not impressed by Wanjiku as a witness of truth. The court stated as follows:-

**“I find from the evidence adduced by all the witnesses and the video that they did in fact block the convoy. The only logical consequence of this action was that a commotion was likely to ensue which would result in violence. I therefore believe the first respondent's testimony that he stepped out of his vehicle to try and contain the situation to prevent any violence from occurring.**

**In my opinion, the occurrence of the incident was not proved to the satisfaction of the court. Firstly, I found PW4 not to be a credible or straightforward witness. There was a contradiction between her testimony in court and her interview in the video produced as evidence before the court on material facts as to the occurrence of the assault. I also agree with Mrs. Kambuni that from the narration of the events this court cannot conclusively find that she was assaulted by the first respondent thus holding him liable for the same. She was also not an independent witness as there was evidence of ill feelings against the first respondent because he had refused to settle the legal fees as promised.”**

52. The other complaint on violence was from James (PW9) whose encounter with Pauline (DW5) has been narrated above with respect to bribery. His claim was that he was head-butted by Pauline's son while Pauline threatened him with a panga. He ran to report to the police and obtained a P3 form and went for treatment the following day. When he checked later with the police, he was told Pauline was seeking a reconciliation with him, but he declined the offer. Pauline denied the allegations of assault and particularly that she had a panga. She is the one who went to the police to report the commotion caused by James. She returned to the police later, and was told that James was looking for her to offer his apology and have the matter settled. They met at the police station and Pauline asked him to bring his parents to witness the reconciliation but James never brought them.

53. The trial court weighed the evidence on that incident and stated:

**“I am neither convinced nor persuaded, that PW9 was attacked by DW5 as alleged as the circumstances of the assault were not clear from the evidence adduced. Regardless it is clear that the assault was not occasioned on PW9 on account of his political affiliation or to induce him to vote or refrain from voting in a certain way, for or against a certain candidate or political party. It could only amount to one of those cases of common assault under the Penal Code. It did not bear those ingredients of an election offence.**

**An ingredient of the offence of violence or use of force under the Elections Act is that the force or violence is used against a person to induce or compel the person to vote or refrain from voting in a particular way, for a particular political party or candidate, or on account of the person having voted or refrained from voting in a particular way. It was demonstrated that PW9 was following DW5 in the course of his investigations and confronted her once she had allegedly given the money to the hawker and both started quarreling causing a crowd to gather around. The said act of violence was also not occasioned by the First Respondent's agent with his knowledge, consent or approval as it was spontaneous.”**

54. We have anxiously considered the evidence tendered in proof of violence. We cannot but agree with Mr. Muite that this country has had a long and unhappy history of electoral violence. We also agree that one of the measures taken by Parliament to contain the ogre of violence was the adoption of Reports of two Commissions of Inquiry relating to electoral governance and electoral violence, after the 2007/2008 general elections. The people of Kenya also, in a referendum, gave themselves a robust Constitutional framework and spelt out the requirements for free and fair elections. Parliament further enacted a new Elections Act for effective implementation of the Constitution. It is the duty of the court therefore to ensure that the intentions of Parliament and the people of Kenya are not negated by the lax application of the laws relating to elections.

Having said that, the court cannot jettison time honored and well established principles such as the ones stated earlier in this judgment even as it investigates this offence of utmost gravity. It is still the duty of the person who alleges, to prove beyond reasonable doubt, not only that the act of violence was perpetrated, but also that the intention was to induce or compel the person assaulted to support a particular candidate or party; or because of voting in a particular manner; or to induce or compel the person to vote or refrain from voting in a particular way. Those are the elements of the offence.

55. The trial court weighed the evidence of Wanjiku on the scales of credibility and found it wanting. This, of course, is a function the trial court is more suited to perform than the appellate court which never saw or heard the witnesses. It was particularly damaging that she denied having stated in a video recording that it was Kabage's group that blocked the way for the Kiuna group, thus causing a commotion. Her supporting witness, Wachu, also made the denial. Kabage himself in cross-examination was asked about the video recording and stated thus:

*“I heard the crowd shouting “**Kiuna must go**” and other saying “**Kabage Juu**”. I had left the scene. I did not witness the scuffle if any. I saw the video. I heard Mrs. Njenga say that my supporters blocked the convoy of the 1<sup>st</sup> Respondent. I do not know whether*

*that was the source of the scuffle.”*

We have carefully listened to the video recording ourselves after it was produced with the consent of all counsel, and it is plain that Wanjiku did in fact make that statement. If that was so, then it is clear who the aggressor was and who provoked the commotion which was immediately quelled by police. The motive for such action by the Kabage group was, in our view, less than noble, which explains the gusto with which Kabage took up the matter and the lengths he went to broadcast the incident. Again, in her first affidavit, Wanjiku created the impression that she did not know Kiuna before, and that he simply left his vehicle and slapped her. After the response to the affidavit, she gave what she believed was a plausible reason for the assault by Kiuna, that is, their previous disagreement on financial assistance to her company. If that be so, then those co-existing circumstances would create a reasonable doubt that the intention of the assailant was related to the offence created under the Act. There were also other contradictions and inconsistencies in Wanjiku’s evidence and that of her witness Wachu, which dented their credibility and we cannot, in all the circumstances, find that the electoral offence was committed. It may well be that there was a common assault on Wanjiku, but there is nothing to prevent the police from carrying out investigations on it. We dismiss the claim.

56. As for the alleged assault on James, we agree with the reasoning of the trial court that there is no evidential clarity and further that the nexus between the alleged assault and Kiuna or the intention of the perpetrator, whoever it was, is not explicitly tied to the offence alleged. The claim is for rejection too.

### **On Use of Public Resources.**

57. **Section 68** of the Act, as relevant, provides as follows:-

**“(1) Except as authorised under this Act or any other written law, a candidate, referendum committee or other person shall not use public resources for the purpose of campaigning during an election or a referendum.**

**(2) .....**

**(3) .....**

**(4) .....**

**(5) A person who fails to comply with the provisions of this section commits an offence and is liable on conviction to a fine not exceeding two million shillings or imprisonment for a term not exceeding six years or to both.**

**(6) A member of the Commission or any person designated by the Commission shall have the power to impound or to order the impounding of any state resources that are unlawfully used in an election campaign.**

**(7) A candidate, who after conviction under this section repeats the offence, shall -**

**(a) be disqualified by the Commission and shall not be eligible to participate in the ongoing election and the next election; and**

**(b) be disqualified from holding any public office.”**

This is yet another legal straight jacket tailored to ensure that the citizen exercises free will in deciding who to elect. There can be no argument that the Constituency Development Fund (CDF) is public money provided by Parliament for faster development at the grass roots. They are public resources. The use of it by a candidate or other individual for campaigns during elections constitutes a punishable election offence.

58. In this case, only one incident of use of public resources is cited, but even then, it is sufficient on its own, if proved beyond reasonable doubt, to vitiate the entire election. As stated earlier, the claim was that on 17<sup>th</sup> February, 2013, Kiuna, at a campaign rally, allegedly handed over a cheque for Shs.363, 000 drawn on CDF account to one James Kimani Kibunja, who was the Chairman of Mau Narok Secondary School.

59. As proof of that electoral offence, Kabage was once again forthright in his testimony in court stating:

*“On use of public funds, I was told. I did not myself witness. I did not witness the respondent (Kiuna) bribing anybody”.*

He received the information from two of his supporters one of whom was **James Kimani Kibunja** (PW2) who recorded a statement at Mau Narok Police station on 19<sup>th</sup> February, 2013 and also swore an affidavit in support of the petition on 7<sup>th</sup> April, 2013. Kibunja was the chairman of the Parents and Teachers Association (PTA) of Mau Narok Secondary school, since 2008. According to him as Chairman, he was the coordinator between the Board of Governors (BOG), teachers and parents. A representative of CDF was entitled to attend PTA and BOG meetings since the school was receiving bursary and other project funding from CDF. The practice in channeling assistance to the school was for CDF officers to bring Cheques to the school and give them to the Principal. A member of the PTA or BOG would then be called to receive the Cheque.

60. In his statement to the police made two days after the incident, Kibunja had this to say:-

*“I do very well recall that on Sunday 17/02/2013 I was called by one Mr. Kigiri who informed me that I go for a bursary cheque at Jua Kali where Mr. Joseph Kiuna was holding a political rally.*

*On my arrival I went to him and he handed over a cheque of Kshs.363,000/= and was attached a list of 121 students who were beneficiaries. The cheque was issued to us by Molo C.D.F bursary kitty. The cheque signed dated 14/1/2013.”*

Later, on 7<sup>th</sup> April, 2013, when he went to the offices of Kabage’s Advocates who drew up the supporting affidavit for the petition, an issue arose as to whether he received the cheque from the said Mr. Kigiri as stated in the police statement or from Kiuna. He stated in his affidavit as follows:

*“19. THAT on the 17<sup>th</sup> day of February, 2013 which was on Sunday, I was called by telephone by one Mr. Paul Kigiri who informed that I was required to go for a bursary cheque at Jua Kali at MAU NAROK RADING CENTRE where Honourable Kiuna was holding a political party.*

*20. THAT the said telephone was made when I was in my house at around 11.00 a.m and I was requested to collect the said cheque at the political rally at 2.00 p.m.*

*21. THAT at 2.00 p.m. I went to the place where the rally was being held. I met many people at the rally.*

*22. THAT at the end of the rally I was given the cheque for Kenya Shillings Three Hundred and Sixty Three Thousand (Kshs.363,000/=) in the name of MAU NAROK SECONDARY SCHOOL and the list with names of students. A true copy of the said cheque No. 001443 dated 14<sup>th</sup> January, 2013 is annexed and marked “JKK – 1”.*

*23. THAT the said cheque was issued by MOLO CONSTITUENCY DEVELOPMENT FUND on its bank account with Kenya Commercial Bank, NJORO, NAKURU.*

24. THAT the said list of students which was a forwarding letter for the said cheque was signed Benard Mbugua, project Manager MOLO Constituency Development Fund in the letter head of Republic of Kenya, Constituencies development Fund MOLO CONSTITUENCY.

25. THAT before I was given the said cheque and the list of students, Honourable Kiuna stated the following: -

- i. That he had a cheque for MAU NAROK SECONDARY SCHOOL for Kshs. 363,000/=.
- ii. That the said cheque had an attached copy of the beneficiaries.”

Kibunja then delivered the cheque to a BOG member at 4.30 p.m. and asked him to deliver it to the Principal the following day, Monday. At 2.00 p.m. on Monday, the Principal called him and told him they were required to report at Mau Narok police station to record statements on the cheque, which they did. The statement made by the Principal to the police is not exhibited.

61. The cheque was dated 14<sup>th</sup> January, 2013 and was issued from the Kenya Commercial Bank Account of “Molo Constituency Development fund”. Attached to it was a covering letter dated 23<sup>rd</sup> January, 2013 containing a list of 121 students who were to benefit from the bursary funds. The other supporter who informed Kabage about the cheque was **Peter Ngugi Nyanjui** (PW3). He swore a supporting affidavit on 7th April 2013, stating:

“7. THAT on 17<sup>th</sup> February, 2013, at about 12 noon, I was at my open stall where I sell my cereal at MAU NAROK CENTRE when I saw people passing by and saying they were going for a meeting.

8. THAT afterwards at about 12.30 p.m., I left my business premises with my workers and went to the meeting which was at a place called JUA KALI in MAU NAROK TRADING CENTRE.

9. THAT I found the meeting going on and the aspirant for County Representative was Mr. Irungu was addressing the people.

10. THAT Honourable JOSEPH KIUNA NG’ANG’A spoke and gave his campaign policies and among other things he said he had a cheque for MAU NAROK SECONDARY SCHOOL.

i. He stated that the said cheque was for kshs.363,000/=; and

ii. He asked who would collect the cheque.

11. THAT I saw MR. JAMES KIMANI KIBUNJA go to the tent where Honourable JOSEPH KIUNA NG’ANG’A was addressing the people and he collected the cheque from the member of the National Assembly.

12. THAT the member of the National Assembly said the cheque was for the students of MAU NAROK SECONDARY SCHOOL.”

62. In response to those allegations, Kiuna in his affidavit admitted that he was at Jua Kali in the outskirts of Mau Narok on 7<sup>th</sup> February, 2013 where he had a political meeting to explain his development record in his previous tenure as Member of Parliament, between 2.30pm and 5.30 pm. He vehemently denied that he gave any cheque to Kibunja as alleged, stating thus:

“(b) I did not issue/give any CDF cheque in favour of Mau- Narok Secondary School at the said meeting and I am informed by Paul Kigiri that it is him who issued the said cheque

to James Kimani Kibunja at Mau Narok centre even before he came to our meeting. I rely entirely on the several affidavits by my witness filed herewith annexed also and marked JNK 3 is a statement recorded at the police station by **Peter Njuguna Mwangi** the CDF Assistant Manager.

c. On 19<sup>th</sup> February, 2013 I was summoned by the 2<sup>nd</sup> respondent over this issue as per the annexed summons marked JKN 4. I duly attended his office in Njoro as requested and he questioned me over the said allegations and I gave him my side of the story.

63. The said **Peter Njuguna Mwangi** was the Assistant manager of CDF. He made a statement to the police confirming that he is the one who collected the cheque from the CDF secretary on 8<sup>th</sup> February with a view to delivering it to one of the BOG members. On 13<sup>th</sup> February, he met Paul Kigiri, a member of the BOG and gave him the cheque to deliver to the school. The BOG member, **Peter Mushugia Kigiri** (DW2) also made a statement to the police on 19<sup>th</sup> February, 2013 and confirmed that he received the cheque from Mwangi on 13<sup>th</sup> February in his capacity as BOG member and the CDF committee representative of Mau Division. When he went to deliver the Cheque to the Principal the following day, he was told the Principal was away on official duties for the next two days. So, on 17<sup>th</sup> February, he called the PTA chairman, Kibunja and asked him to meet him at Mau Narok Trading centre to collect the cheque. He stated:

*“At around 2.00 p.m. I met with him at Mau-Narok trading centre and I handed him the cheque for him to hand over the cheque to the principal. I left him and went to a political meeting at Jua Kali.”*

Kigiri subsequently swore an Affidavit on 2<sup>nd</sup> May 2013 confirming the same statement and stating as follows:

*“6. THAT the said cheque was handed over to me in my capacity as a member of CDF Committee representing Youth/Mau–Narok Division and at the same time B.O.G member of the beneficiary school.*

*7. THAT on the following day, I looked for the headmaster so that I could hand over the cheque to him but he was not in the area and I was informed that he was away on official duties.*

*8. THAT on 17<sup>th</sup> February, 2013 at around 11.00 a.m. I called one **James Kimani Kibunja** the P.T.A Chairman of the beneficiary school and informed him to come for the cheque from me sometimes later when he was free so that he could take it to the said school since I was not going to be in Mau-Narok on the following week.*

*9. THAT about 2.00 p.m. he called me and we met at Mau- Narok Centre and I gave him the cheque and thereafter I proceeded to a political rally hosted by the 1<sup>st</sup> respondent at Jua-Kali area which is in the outskirts of Mau-Narok Centre.*

*10. THAT I later received a call from the O.C.S Mau-Narok police station requiring me to record a statement in respect to the said cheque and I recorded and made a copy of the same which is annexed herewith and marked **PMK 2**.*

*11. THAT I am the one who personally gave the said cheque to the said P.T.A chairman at Mau-Narok Centre and the same was never given to him by the 1<sup>st</sup> respondent at the political rally in Jua Kali as alleged.*

*12. THAT I was personally present at the political rally which ended up at about 5.30 p.m. and the actual handover of the cheque did not arise at all.*

13. THAT I am also aware that both the said P.T.A Chairman and the School Principal wrote their statements at Mau- Narok police station in respect to the said cheque.

14. THAT the cheque in question was handed over to the school in the same way and or manner we have been delivering previous CDF cheques to this secondary school and other CDF beneficiaries for so long as I can remember.

15. THAT as the local CDF Committee, we involve ourselves with community development activities e.g. building of schools, Roads, Police station and any other community development activities.”

64. All the witnesses on this matter were cross examined at length on their statements. Kibunja, in part, confirmed that he was a supporter of Kiuna in his first term as a Member of Parliament but had switched camps to support Kabage. On the police statement he said this:

*“I recorded my statement 3 days after the event. My affidavit was done after 2-3 months. The statement is in the hands of Mau Narok Police Station OCS. It was recorded at Mau Narok Police Station. I signed it. I read it over before I signed. I was not told why I was recording the statement.*

*He told me to record statement on the cheque I received at Mau Narok Rally. He told me to specify who gave me the cheque. I had not heard anything about the problems with the cheque. What I say is this, when the OCS called me, I had no issues with the cheque. I told him who had given me the cheque, and I indicated so in my statement.*

*I know who prepared this my affidavit. It was prepared by Gathenji & Co. Advocates. I narrated the information to Mr. Gethenji and another man in Nakuru in an office. I do not know whose office it was. I was told that there was an issue as to who received the cheque from Hon. Kiuna. I was told to say who gave me the cheque.”*

He confirmed that Kigiri was a member of BOG and CDF committee and also a neighbour and friend. He denied that Kigiri told him he had the cheque but that the cheque was to be collected from Kiuna. Later in re examination, he stated that Kigiri told him he had the cheque with him and that he (Kibunja) would collect it from the meeting. He added:

*“There is nothing in the statement that Hon. Kiuna had the cheque. It was the OCS who wrote the statement wrong. I told him that it was incorrect. It is my statement, and it was written that way. I am not lying. It has an error, I do not agree with it, and it ought to be corrected.*

*There is nowhere in my affidavit that says I was given the cheque in person by Hon. Kiuna. Even para. 29 of my affidavit does not say so. It is not there. There is also nowhere in my affidavit and statement that Hon. Kiuna - called and asked me who I was, and whether I was known and the crowd roared back: “We know him” – none of that is my affidavit or the statement.*

*Hon. Kiuna might not know me. We have never interacted much before and in these elections.”*

Further cross examined Kibunja said when he was given the cheque, he was alone. He did not see Peter Ngugi Nyanjui at the rally.

65. Nyanjui, the supporting witness, was in his open-air stall at Mau Narok centre when he saw people going for a rally at Jua Kali and he closed his stall and joined the crowd. When he said his workers joined him, he meant his wife. Like Kibunja, he had supported Kiuna in the previous election but had switched sides to support Kabage in the last elections because he asked Kiuna to assist him with Shs.50,000/= but

Kiuna never did. He never made any statement to the police about the cheque but only talked to Kabage and Kabage did not tell him to report to the police. At the meeting place, he said he stood far from the tent where VIPs sat and where the cheque was given to Kibunja. He never saw Kigiri near or in the tent.

66. Kiuna for his part stated that he was not a signatory to CDF account and was only a patron of CDF before Parliament was dissolved and he ceased to be an MP. CDF cheques were distributed by CDF personnel and he had no right or reason to collect a cheque from CDF offices. He addressed the Jua Kali meeting and talked about the many projects that he had completed in the area but denied that he gave out any cheque or cheque for Shs.363,000/= whose collection and delivery he only came to know about when he was served with the petition. He did not know Kibunja, did not know he was at the rally and never called him on the dais to collect any cheque as alleged. Nyanjui was his chief agent in the previous election but he was entitled to change sides since there are no permanent friends or enemies in politics. He did not see him at the rally. He was summoned by the Returning officer and the Mau Narok Police and he explained his position.

67. Cross examined further, Kiuna said the rally was well attended and he sold his policies to the electorate. He did not meet Kigiri and he could not have seen everybody who attended the rally. Nyanjui, according to him, was a political broker whom he had assisted with Shs.50,000/= in the previous elections, but still deserted him. Kiuna did not waver in his denial that he ever saw the cheque in question and said this was an issue of CDF officials who were not his agents.

68. Lastly Kigiri in cross examination expounded on the issue of collection and delivery of the cheque, stating:

*“On 14/02/2013, I went to the school and found the Principal was on duty in Narok. I gave it to the Chairman on 17.02.2013 some 4 days after I had collected it. I gave it to the Chairman because the Chairman of PTA represents the students.*

*I called the Chairman at about 11.00 a.m. on 17.02.2013. I have his cell phone and informed him that I had a cheque for Mau Narok Secondary School and he would collect the cheque from me when he is free.*

*The Chairman called me at 2.00 p.m. He informed me that he was within Mau Narok Centre and I gave him the cheque at Elementaita Mau Narok Junction. I told him that I was at the junction.”*

After that Kigiri left Kibunja and went to the rally where he mixed with the crowd and never went to the tent reserved for VIPs. He termed Kibunja's claims that he (Kibunja) was summoned by Kiuna to be given a cheque as lies. Cross examined further, he admitted that his home is nearer the school than Kibunja's but he did not give the cheque to the school bursar because the CDF tradition was to deliver cheques to the Principal, who in this case was absent. He denied the suggestion that he was a friend of Kiuna stating that his appointment to CDF was made through recommendation of Village elders.

69. In its assessment of the evidence surrounding this issue, the trial court stated, thus:-

**“The main issue raised by the Petitioner under this allegation was that the cheque was handed over to PW2 at a public meeting with an intention to influence the voters thus constituting misuse of resources. It was submitted by all the Respondents that PW2's testimony about being given the cheque by the First Respondent was an after-thought. During the hearing PW2 clarified that on the conclusion of the meeting he was called to the podium by the First Respondent who handed him the cheque for Kshs.363,000/= and a list of the beneficiaries. However according to Counsel, this statements were neither contained in the Police statement nor in his affidavit sworn in support of the Petition, that the reference to the First Respondent in the Police statement was in relation to the place where the cheque was to be collected and not the person issuing it.**

**It is not denied that CDF Fund constitutes public funds and misuse thereof amounts to an offence under the Elections Act. In my view, misuse thereof would constitute use of the fund for purposes other than it is intended for thus giving the candidate an unfair advantage over his opponents.**

**In the present case, the cheque in question was not issued by the First Respondent but by the project manager of the Constituency Development Fund. Its beneficiaries were the students of Mau Narok Secondary School. It was not demonstrated that they were not entitled to the money hence the same was issued unprocedurally or illegally. In addition, it was not proved to my satisfaction that he in fact handed out the cheque during his rally. I accepted the interpretation that in his statement to the Police PW2 stated that it was given to him by DW2. His evidence over the issue was not clear and convincing and in my view, fell far short of the required standard of proof in an Election Petition. This ground therefore fails.”**

70. We think, on our part, that the determining factor on this issue is the evidence of the two star witnesses - Kibunja and Kigiri- on whether Kiuna did in fact receive, announce and deliver the CDF cheque at the political rally. If he did, he committed the offence. The onus, however, is on Kabage, through Kibunja, to prove that fact beyond doubt. There is something about consistency that speaks to the quality of evidence. We do not find it in Kibunja’s evidence. When the facts were fresh in his mind on 19<sup>th</sup> February, 2013, he told the police that Kigiri gave him the cheque. He confirmed on oath that the statement was read over to him before he signed it. His attempt several months later, not only to provide clarification which suited the petitioner’s claims, but also to deny what he plainly stated in an earlier statement does not endear itself to the truth. The trial court did not find Kibunja credible on this aspect of the matter and we think that assessment was well founded. The evidence of Nyanjui, which was meant to lend support to Kibunja is equally suspect. He never found it necessary to report such a serious electoral transgression to the police although he was the initiator of the information which he gave to Kabage on the day it happened; no one else appears to have seen him at the rally; and his recollection of what transpired there appears to be hazy. Furthermore, he had an obvious axe to grind with Kiuna over their political and financial differences whatever the truth about their opposing stories. He was not an independent witness who would corroborate the evidence of Kibunja, which on its own, we also find wanting. We do not therefore fault the trial court on the finding it made on the issue.

71. We may contrast this case with the recent *Outa Case* (supra) which also involved the use of CDF finances. There was clear evidence in that case that the CDF treasurer confessed that he was also the chief agent for the political party which sponsored the candidate and the treasurer signed the nomination papers for that candidate as supporter number one. The Treasurer openly campaigned for the candidate and gave him five CDF cheques amounting to more than Shs.2.8 million which they, together, distributed to various institutions around the constituency, ten days before the elections and committed the voters to cast votes in the candidate’s favour. The court found that evidence irresistible and nullified the election. We think the evidence adduced here falls far short of proving the election offence of use of public resources. We dismiss it.

72. We may end with a quotation on one treatise on “*Election Laws: Being Commentaries on the Representation of the People Act of India 1951*”, by S.K. Gosh 3<sup>rd</sup> Edn. 1998, at page 153 which was cited with approval in Rtd. Col. Dr. Kizza Besigye v. Electoral Commission of Uganda and Yoweri Kaguta Museveni (Election Petition No. 1 of 2006) thus: -

**“In order to constitute corrupt practice, which entails not only dismissal of the election petition but also other serious consequences like disbarring the candidate concerned from contesting a further election for a period of six years, the allegations must be very strongly and narrowly construed to the very spirit and letter of the law. A person may, due to sympathy or on his own, support the candidature of particular candidate but unless a close and direct nexus is proved between the act of the person and the consent given him by the candidate or his election agent, the same would not amount to a pleading of corrupt practice contemplated by law. It cannot be left to**

**time, chance or conjecture for the court to draw an inference by adopting an involved process of reasoning. The allegation must be so clear and specific that the inference of corrupt practice will irresistibly admit of no doubt or qualm... The charge of corrupt practice will have to be proved by clear and cogent evidence as a charge for criminal offence and it is not open to the court to hold the charge of corrupt practice as proved merely on the preponderance of probabilities but it must be satisfied that evidence is sufficient to prove the charge beyond reasonable doubt.”**

73. Having come to the conclusion on all three allegations that they were not proved to the required standard, it only remains for us to dismiss the appeal in its entirety, and we hereby dismiss it. But an issue was raised by the appellant on the order made by the trial court on costs. The submission was that the court erred in awarding costs to IEBC when there were no complaints raised against it and that the court further erred in failing to cap the costs as required under **Rule 36** of the Election Rules.

74. In response, Ms Kambuni submitted that the petitioner complained to IEBC about the allegations and later came to court and enjoined it in the proceedings. **Section 84** of the Elections Act must therefore apply and the costs should follow the event. As for failure to cap the costs, Mr. Njenga submitted that there was no legal prohibition against it and the trial court made no error.

75. The order for costs made by the trial court was as follows:

**“The costs occasioned by the Petition shall be paid by the Petitioner subject to taxation under Rule 37(1) of the Elections/Parliamentary and County Elections) Petition Rules, 2013”.**

**Section 84** of the Elections Act provides in mandatory tone that:

**“An election court shall award the costs of and incidental to a petition and such costs shall follow the cause”.**

This is a codification of the age old practice where costs follow the event of every litigation unless there are good reasons to depart from that principle. Generally costs are at the discretion of the court, but where there is a statute giving express directions, as in election petitions, it will be difficult for any court to ignore such provision. We find no error in principle in the order made on the party responsible for costs. The argument that there was no complaint against IEBC does not avail the appellant since he joined them in the proceedings and specifically pleaded that they received the alleged complaints and did nothing about them.

76. As for capping, there is no such terminology in Rule 36 which states as follows:

**“36. (1) The court shall, at the conclusion of an election petition, make an order specifying-**

**a. The total amount of costs payable; and**

**(b) the persons by and to whom the costs shall be paid.**

**(2) When making an order under subrule (1), the court may –**

**a. disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the Petitioner or the Respondent; and**

**b. impose the burden of payment on the party who had caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.**

**(3) The abatement of an election petition shall not affect the liability of the Petitioner or of any other person to the payment of costs previously incurred.”**

The Rule is a recent invention tailored to addressing the mischief of runaway costs demanded by winning parties in election petitions. The fear was that the body politic would suffer through such hefty costs and also that legitimate complaints may not be submitted to court for adjudication for fear of exorbitant costs. The election court was therefore given the power to determine the highest costs that in its view would be reasonable even before the registrar embarks on taxation. There may well be a legitimate and fair argument that this is essentially an exercise in the court’s discretion which ought to be judicious, but there is no legal basis provided for the election court to set such limits and therefore the decision is at best arbitrary. To compound matters, there is no requirement that the parties shall address the court before such decision is made. In our view this is a soft belly in the Rules which may call for review.

77. Nevertheless, the Rule is there and until it is revoked, it shall be given effect in the best way the courts can. The trial court simply ignored it and made an order under **Rule 37** for taxation of the costs. This was an error in principle. Accordingly, we set aside the order for taxation and substitute an order under **Rule 36** that the costs payable to the first respondent before the trial court on the one hand, and both the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents on the other, shall not exceed shillings two million and the costs of this appeal shall not exceed shillings 1.5 million for the 1st Respondent and shillings 1.5 million for both 2<sup>nd</sup> and 3rd Respondents.

We so order.

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

**P.N. WAKI**

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**JUDGE OF APPEAL**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

I certify that this is a true

copy of the original.

# **REGISTRAR**