



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT KISUMU**

**Civil Appeal 8 of 2010**

**BETWEEN**

**JAMES OMINGO MAGARA ..... APPELLANT  
AND  
MANSON ONYONGO NYAMWEYA ..... 1<sup>ST</sup> RESPONDENT  
JOSEPH SANG'ANYI OMAMBIA ..... 2<sup>ND</sup> RESPONDENT  
THE INTERIM INDEPENDENT ELECTORAL  
COMMISSION OF KENYA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Kisii (Musinga, J) delivered on the 17<sup>th</sup> December, 2009 and the Certificate of Determination of Election Petition signed and dated 17<sup>th</sup> December 2009*

**In**

**H.C. Election Petition No. 3 of 2008)  
\*\*\*\*\***

**JUDGMENT OF OMOLO, J.A**

In my view the really serious issue raised by this appeal is the scope of **section 28** of the National Assembly and Presidential Elections Act, **Chapter 28** of the Laws of Kenya. That section provides:-

**“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 that written law, or that the non-compliance did not affect the result of the election.”**

On 17<sup>th</sup> December, 2009, Mr. Justice Musinga sitting at the High Court of Kenya at Kisii nullified the election of James Omingo Magara, the appellant herein, as the Member of Parliament for South Mugirango Constituency. The appellant had been declared the winner of that seat by the defunct Electoral Commission of Kenya whose place in these proceedings was taken over by the Interim Independent Electoral Commission of Kenya, the 3<sup>rd</sup> respondent herein. The Electoral Commission of Kenya had declared the appellant the winner of the election held on 27<sup>th</sup> December, 2007; according to the ECK the appellant had garnered the highest number of votes in that election, i.e. 10,204 votes. Manson Onyongo Nyamweya, the 1<sup>st</sup> respondent herein, who was one of the candidates in that contest did not accept that the

appellant had won the seat according to law and he filed an election petition challenging the purported victory of the appellant. The 1<sup>st</sup> respondent had himself been declared by the ECK to have scored 5,758 votes. There were a total of seventeen contestants and the other significant candidate, Ayiema Ibrahim Ochoi, was credited with 5,848 votes, 90 votes more than those of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent's petition challenging the validity of the appellant's election was lodged in the High Court at Nairobi on 18<sup>th</sup> January, 2008; the 1<sup>st</sup> respondent listed numerous complaints against the appellant's election and among such complaints were that:-

***“8 The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents were, pursuant to section 42A (c) of the Constitution of Kenya and section 17A of the National Assembly and Presidential Elections Act, obliged to ensure that the Election was conducted in a transparent, free and fair manner.***

9. ***The 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents conducted the Election in a manner substantially inconsistent with the express provisions of section 42 A (c) of the Constitution of Kenya and section 17A of the National Assembly and Presidential Elections Act.***
10. ***The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents conducted the Election in a manner substantially inconsistent with the principles laid down in the Constitution of Kenya , the National Assembly and Presidential Elections Act and the Election Offences Act.***
11. ***The 2<sup>nd</sup> , 3<sup>rd</sup> and 4<sup>th</sup> Respondents neglected, refused and or otherwise failed to take any measures to ensure that the Election was transparent, free and fair contrary to the express provisions of section 42A (c) of the Constitution of Kenya and section 17A of the National Assembly and Presidential Elections Act.”***

***PARTICULARS OF BREACHES BY THE RESPONDENTS:***

13. ***The 2<sup>nd</sup> Respondent purportedly (sic) declared the 1<sup>st</sup> Respondent as the winner of the Election notwithstanding that the 1<sup>st</sup> Respondent did not receive the greatest number of valid votes contrary to the letter and spirit of section 42A (c) of the Constitution of Kenya, section 17A of the National Assembly and Presidential Elections Act and Regulation 40 (1) (e) of the Presidential and Parliamentary Elections Regulations.***
14. ***The 3<sup>rd</sup> & 4<sup>th</sup> Respondents purportedly endorsed the illegal declaration of the 2<sup>nd</sup> Respondent in (13) above vide Kenya Gazette Special Issue (Volume CIX NO. 103 under Gazette Notice Number 12615) dated 30<sup>th</sup> December, 2007 wherein it purportedly declared the 1<sup>st</sup> Respondent as the elected Member of Parliament for the Constituency.***
15. ***The 2<sup>nd</sup> Respondent purportedly declared the 1<sup>st</sup> Respondent the winner of the Election without completing Form 17A in the presence of the petitioner and his agents contrary to, inter alia, section 17A of the National Assembly and Presidential Elections Act and Regulation 40 (1) (f) and (g) of the Presidential and National Assembly Regulations.***
16. ***The 2<sup>nd</sup> Respondent unlawfully and unjustifiably declined the petitioner's request for a recount of the votes contrary to the express and mandatory provisions of Regulation 37 (1) as read with (2) of the Presidential and National Assembly Elections Regulations.***
17. ***The 2<sup>nd</sup> Respondent purportedly declared the 1<sup>st</sup> Respondent the winner of the Election without acceding to the petitioner's request for a recount contrary to the express and prohibitory terms of Regulation 37 (2) of the Presidential and National Assembly Elections Regulations.”***

These were but some of the allegations raised in the petition in the High Court. For the sake of clarity, let me point out that in the High Court, the 1<sup>st</sup> respondent in the appeal, i.e. Manson was the petitioner while the appellant was

the 1<sup>st</sup> respondent. The other parties referred to in the petition as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents were James Sanganyi Omambia who was the Returning Officer for the Constituency, the Electoral Commission of Kenya and Samuel Mutua Kivuitu who was the then Chairman of the Electoral Commission of Kenya. In the appeal before the Court, Joseph Sang’anyi Omambia , the Returning Officer, remains the 2<sup>nd</sup> respondent while the place of the Electoral Commission of Kenya has been taken over by the Interim Independent Electoral Commission of Kenya who has also become the 3<sup>rd</sup> respondent. Samuel Mutua Kivuitu does not feature in the appeal.

Having fully heard the petition, the learned trial Judge, in a well-considered judgment running to some 103 typed – pages, rejected most of the complaints raised in the petition but as we have seen he upheld some of the complaints and nullified the appellant’s election. In doing so the learned Judge finally declared as follows:-

***“Turning to this petition, considering all the glaring anomalies and taking into account all the incidents of non compliance with mandatory and important provisions of the law as high-lighted herein, I have come to the conclusion that the election was not transparent, free and fair. Consequently it is declared null and void. The first respondent was not validly elected as the Member of Parliament for South Mugirango Constituency. -----”.***

“Transparent, free and fair -----.” Where do those words come from?”

First two of them, “free and fair” are found in **section 42A (c)** of the Kenya Constitution which set out the responsibilities of the then Electoral Commission of Kenya and even the present Interim Independent Electoral Commission of Kenya, the third respondent. That section before its amendment by Act **No. 10 of 2008** had provided:-

**“42A**  
**(a)** -----  
**(b)** -----  
**(c)** ***promoting free and fair elections.***  
**(d)** -----  
**(e)** -----”

After the amendment by Act **No. 10 of 2008**, the provision still remains:-

***“(c) promotion of free and fair elections.”***

The only sin the learned Judge can be said to be guilty of is that he added the word “transparent” to the section but I personally doubt it very much that any Kenyan would quarrel with the idea of an election being “transparent, free and fair.” The Dictionary I have as I draft this judgment, “READERS DIGEST: OXFORD COMPLETE WORD FINDER” defines the word “Transparent” as:-

***“allowing light to pass through so that bodies can be distinctly seen; easily seen through; easily discerned; evident; obvious; easily understood; frank; open. -----“***

These are clearly positive values and though the word “transparent” does not appear in the Constitution, no one would or ought to quarrel with the concept that an election ought to allow light to pass through it easily so that the

processes involved in it can be distinctly seen, easily discerned, evident and so on. **Section 17A** of the National Assembly and Presidential Elections Act, however, expressly uses the word “transparent”:-

***“The Electoral Commission shall have the over-all conduct of elections under this Act and shall give general directions and exercise supervision and control thereof and take the necessary measures to ensure that the elections are transparent, free and fair.”***

It is clear to me from these provisions that in an election petition where the complaints concern the manner in which the body in charge of the electoral process has carried out its mandate – whether that body be the Electoral Commission of Kenya or the Interim Independent Electoral Commission of Kenya - an election court is perfectly entitled to, indeed I would go so far as to say such a court is bound to examine whether the election and its attendant processes were transparent, free and fair. In the present case, Musinga, J rejected all the complaints which were raised against the appellant but still nullified the election because the Electoral Commission of Kenya and its agents or staff had not conducted the election in a transparent free and fair manner .

The appellant complains about this and Mr. Katwa Kigen, the learned counsel for the appellant told us that the purpose of the scrutiny of the votes carried out by the trial court was acceded to by them on the basis that what was to be verified was the actual number of votes secured by each candidate. The 1<sup>st</sup> respondent had alleged in his petition and in his evidence that if the votes were recounted he would be found to have secured more votes than the appellant. A recount was conducted lasting some thirteen days. The votes secured by the 1<sup>st</sup> respondent rose slightly while those secured by the appellant came down a bit. But the appellant still won by some four thousand votes and Mr. Katwa contended before us, as he had done before the Judge, that the results of the voting largely reflected the will of the voters. While Mr. Katwa conceded that there were a few cases of non-compliance with regulations, this did not affect the over-all outcome of the electoral process and hence the learned Judge ought to have applied the provisions of **section 28** of the National Assembly and Presidential Elections Act and dismissed the petition. Mr. Onyinkwa who appeared for the 3<sup>rd</sup> respondent supported Mr. Katwa’s position and submitted that there was no evidence of a deliberate scheme by the ECK to commit the acts found against them by the learned Judge. Mr. Onyinkwa also submitted that even if the acts alleged against ECK were proved it was not shown that the commissions or omissions by that body affected the over-all results of the election and that the results still reflected the will of the constituency’s voters. The 3<sup>rd</sup> respondent, therefore, asked us to apply the provisions of **section 28** and allow the appeal by the appellant.

*What were the learned Judge’s findings?*

They were:-

- (1) That there were a total of 110 polling stations in the Constituency. out of those stations only 107 ballot boxes were brought before the court. Three ballot boxes were missing.

The 3<sup>rd</sup> respondent did not give any or any acceptable explanation for the absence of the three ballot boxes.

- (2) In most of the ballot boxes brought to court the ECK aperture seals were missing , or broken.
- (3) There were three empty ballot boxes.
- (4) One ballot box had its lid open and contained ballot papers for only three candidates, out of the seventeen candidates.

The Judge listed a total of 13 such defaults or discrepancies which he noted after the scrutiny and recount. I did not hear Mr. Katwa or Mr. Onyinkwa specifically challenge these matters which the learned Judge said he found after the scrutiny and recount.

On Forms 16A which was another important aspect of the Judge’s conclusion, listen to the Judge speak:-

***“The scrutiny exercise revealed, inter alia, that in 53 polling stations , the Presiding Officers did not sign Forms 16A. In 54 polling stations Forms 16A were witnessed by a number of agents and in 53 polling stations no agent signed the declaration. In most of these forms no reason was stated by the Presiding Officer for the agents failure and or reason to sign. Of the 53 polling stations where the Presiding officers did not sign forms 16A, I will pick just two of them for illustration purposes. At Marwa polling station No. 027, the name of the Presiding Officer was not indicated, the Presiding Officer did not sign. No agent signed. At Ndonyo Primary School, Polling Station No. 041, the name of the Presiding Officer is not indicated, the Presiding Officer did not sign. No agent signed the form yet 352 people voted there and Kombo David appeared to have garnered 226 votes.”***

It is accordingly not quite correct to say, as Mr. Katwa appeared to contend that only a few such forms were invalid. The Judge found 53 of them and he only picked upon two to illustrate his point.

What then are Forms 16A? They are forms which are to be filled in after the votes at a polling station have been counted by a presiding officer at that station. They (Forms 16A) are provided for in **Regulation 35A (4)** of the National Assembly and Presidential Elections Regulations. That regulation provides:-

***“35A (4). The presiding officer, the candidates or their agents shall then sign the declaration set out in Form 16A which shall state –***

- (a) the name of the polling station;***
- (b) the total number of registered electors for the polling station;***
- (c) the total number of valid votes cast;***
- (d) the number of votes that were rejected; and***
- (e) the number of disputed votes;”***

**Sub-rule (5)** then provides:-

***“The presiding officer shall –***

- (a) immediately announce the results of the voting at the polling station before communicating them to the returning officer;***
- (b) request each of the candidates and in the absence of a candidate, such of his agents then present to append his signature or write down reasons for the refusal to sign the declaration of the results of the count of the votes at that polling station;***
- (c) provide each candidate or agent with a copy of the declaration of the results; and***
- (d) affix a copy of the declaration of the results at the public entrance to the polling station or at any other place convenient and accessible to the public at the polling station.”***

There can be no doubt from these provisions that Form 16A is an important document in the electoral process. It deals with a particular polling station, the number of registered voters in that station, the number of the candidates, the

votes which each one of them has secured in that station, and, for obvious reasons, is to be signed by the presiding officer at that particular station and by the candidates or their agents. If a candidate or his agent refuses to sign, the reason for the refusal should be given and recorded. It is from Forms 16A from all the polling stations in a constituency that the returning officer who is in charge of the whole constituency will carry out a tally of all the votes polled in the constituency and having tallied all the votes from each polling station, enter them on Form 17A and declare the winner of the election in that constituency. A transparent, free and fair electoral process must involve an adherent to this process and such adherence to the process can only be shown by the presiding officer himself signing the form and then inviting the candidates or their agents to sign. The process must be carried out in the presence of the candidates or their agents and if they refuse to sign an explanation for such refusal is to be recorded. I suppose that if a candidate or his agent refuses to sign and gives no reason for the refusal, the presiding officer will simply record the refusal and say that no reason for it has been given. But there is absolutely no reason for a presiding officer not signing Form 16A. As to the importance of signing Form 16A, I can do no better than quote the Judge:-

***“Forms 16A that are not signed by presiding officers raise serious legal questions that may not be resolved by a forensic audit of an election. Examples of such questions are (i) who was in charge of the polling exercise in the station? (ii) who opened the ballot box and supervised the counting of the votes? (iii) who announced the results? (iv) who communicated the results to the Returning Officer? (v) who put the copy of the Form 16A in the ballot box ? (vi) who sealed the ballot box after counting the vote? (vii) who ensured proper accountability for the ballot papers delivered at the station?”***

***These are questions that were raised by the petitioner in his petition and are quite valid.”***

With respect I agree. When the returning officer himself was asked about the Forms 16A which were not signed by presiding officers, his answer was that if he had noticed the lack of signature by the presiding officers, he would have asked them to sign or reject them if the returning officers still refused to sign after being asked to do so. That would have been the logical step to take for it is the signature of the returning officer which would authenticate the documents as having been prepared by the person in charge of the particular polling station.

Similar considerations must apply to Form 17A which is really a tally sheet composed of Forms 16A. The entries that go into Form 17A must come from all the Forms 16A from all polling stations in the Constituency. The learned Judge himself thought that the returning officer himself must personally make all the entries on Form 17A. I would myself doubt the reasonableness of that assertion taking into account the amount of work that would involve and the impatience of the electorate to know the results of the voting. But one thing is clear: Whatever the method used by the returning officer in the preparation of Form 17A that officer is the only person responsible for the correctness or otherwise of the entries made therein. Regulation 40 of the National Assembly and Presidential Elections Regulations provide:-

***“40 (1): Immediately after the results of the poll for all polling stations in a constituency has been***

*received by the returning officer, he shall, in the presence of candidates or their agents present –*

- (a) tally the results from the polling stations for each candidate without recounting the ballots that were not disputed;*
- (b) examine the ballot papers marked ‘rejected’, ‘rejection, objected to’ and ‘disputed’ and confirm or vary the decisions of the presiding officers with regard to the validity of these ballot papers;*
- (c) publicly announce to persons present the total number of valid votes cast for each candidate in case of an election for the President;*
- (d) publicly announce to the persons present the total number of votes cast for each candidate in case of a Parliamentary election for the constituency;*
- (e) publicly declare to the persons present the candidate who has won the parliamentary election for the constituency;*
- (f) complete Form 17A set on in the first schedule in which he shall declare:-*
  - (i) the name of the constituency;*
  - (ii) total number of registered voters;*
  - (iii) votes cast for each polling station;*
  - (iv) number of rejected votes for each candidate;*
  - (v) aggregate number of rejected votes; and*
- (g) sign and date the form and*

*(i) give to any candidate or candidate’s agent present a copy of the form and*

*(ii) deliver to the Electoral Commission the original of Form 16A together with Form 17A and Form 18.*

*(2) -----*

*(3) The decision of the returning officer on the validity or otherwise of a ballot paper or a vote under this Regulation shall be final except in an election petition.”*

Once again, the importance of Form 17A is self-evident from these provisions. The returning officer authenticates its validity and correctness by signing it with regard to Form 17A the learned Judge held against the returning officer (the 2<sup>nd</sup> respondent) as follows:-

*“----- the Returning Officer said that he scrutinized the Form and was satisfied that it was correct before he signed the same . That was far from the truth. Apart from the recorded results in the Form, the Returning Officer failed to indicate very basic but important information like the voter turn-out percentage. He did not also date the Form. He failed to record the names of the candidates and/or counting agents present at the time of filling and signing the same. He did not even declare the results of the petitioner in the Form. The second respondent simply failed in this important task of completion of Form 17A.”*

This is the same returning officer who failed to notice that 53 of Forms 16A had not been signed by the presiding officers. He also admitted that it would have been too tedious for him to transfer the information contained in Form 16A to Form 17A . Fair enough, but taking all these factors into account was it likely that the 2<sup>nd</sup> respondent would have compared the entries on Form 16A against those contained in Form 17A before he signed Form 17A? It is not to be forgotten it was the tallying clerks who transferred the information contained in Forms

16A to Form 17A, the returning officer having found it too tedious for him to do such things. None of the tallying clerks who transferred the information from Forms 16A to Form 17A was called to testify. The returning officer himself did not tell the Judge that he checked the entries in Form 17A against those made in each of the Form 16A and found the entries to be in agreement. So that apart from the fact that he signed Form 17A on some unspecified date the returning officer could not really swear as to the correctness of the entries in Form 17A.

These Forms i.e. Form 16A and Form 17A constitute the written evidence showing, as they do, the figures which a returning officer announces, from where those figures have come and how they have been arrived at. But if the very authenticity of those figures is in issue i.e. where did they come from, who compiled them and how were they arrived at, can one conclude that the electoral process has been transparent, free and fair?

I agree with the assertion in **JOHN FITCH VS. TOM STEPHENSON AND THREE OTHERS [2008] EWHC 501 (OB)** that:-

***“----- the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches. ----- This is because where possible, the courts seek to give effect to the will of the electorate . ----”***

Though I agree with the assertion I must nevertheless ask myself:-

- (1) How is the will of the electorate manifested?
- (2) Is the court simply to look at the figures and say:-

***“A has 25,000 votes and B has 20,000 votes and therefore A has won?”***

That would be very basic, and in my view an unrealistic way of looking at the matter. The court must still ask questions similar to those asked by the learned trial Judge. In which polling stations were those votes cast? Who presided over the poll in the stations? How many voters were registered in that station? How many of them actually voted? How many votes did each candidate get in each polling station?

I agree with the learned Judge that the matter must go beyond simple arithmetic and certain basic questions such as ones listed must be easily answerable. In this appeal those questions were not easily answerable and the party responsible for that position was the 2<sup>nd</sup> respondent for whose actions the Electoral Commission of Kenya was responsible; the present 3<sup>rd</sup> respondent took over the responsibilities of the Electoral Commission of Kenya and hence the failures of the 2<sup>nd</sup> respondent.

Add to the above the missing three ballot boxes whose disappearance the 3<sup>rd</sup> respondent could not explain; the broken seals on some of the ballot boxes and the attempt to burn down the building in which the ballot boxes were kept and it would indeed be unreasonable to conclude that the appellant's 9,832 votes represented the true will of his constituents. No attempt was made to explain who tampered with the ballot box seals and why anyone would want to do

that. Some ballot boxes had only the votes of two of the seventeen candidates and the returning officer offered no explanation as to how that came about. The attempt to burn down the premises where the ballot boxes were kept must mean that a party interested in the affair knew that there was something wrong and that party was clearly interested in preventing the election court from finding out the truth in the matter. As the learned Judge correctly pointed out, it did not matter which party was attempting to burn down the premises and consequently the evidence concerning the election. An election is not a matter solely between the winner and the losers; all the voters in the constituency have a valid interest in it and that is part of the reason why if a particular petitioner wants to withdraw an election petition, the notice of the intention to withdraw is publicly announced so that if any other voter is opposed to the withdrawal, the election court can allow him or her to take over the petition.

Mr. Katwa for the appellant stressed before us that before the trial Judge ordered a recount of the votes, the 1<sup>st</sup> respondent had boasted and maintained that if the ballot boxes were opened and a recount took place, it would be found that he, i.e. the 1<sup>st</sup> respondent, had more votes than the appellant. Mr. Katwa appeared to contend that they had agreed to the recount of the votes so that only the issue of who had more votes than the other would be determined and that was all the learned Judge was required to do.

That contention, even if it had been agreed upon between the parties, could not be correct and an agreement to that effect would not be binding on the Judge. It assumes the position that an election petition is a matter simply between the victor and the loser. It is not. Once a recount is ordered, all the other things must follow; it is not simply a recount. It is a scrutiny and then a recount of the valid votes in the box. The parties to the petition cannot tell the Judge:-

***“We have agreed that all the votes in the ballot boxes, whether valid or not valid, are to be recounted and the party who is found to have more votes than the other shall be the winner.”***

Even if there were to be such an agreement between the parties, the Judge would not be bound to follow it; indeed it would be his duty to reject it. In a recount, only valid ballots are to be recounted by the court. A returning officer's decision as to the validity or otherwise of a ballot paper is final at the stage of tallying the votes. That finality, however, does not extend to an election petition, and the election court is not bound to accept the opinion of a returning officer on the validity or otherwise on any aspect of the electoral process.

It is true that on the scrutiny and recount of the votes, the appellant still had the largest number of votes. But as I have pointed out that was not all the learned Judge was supposed to go by though it was an important consideration to bear in mind. I quote with the Judge the remarks of BARRY, J in the Canadian case of **HARRIS V. RYAN [1997] MPLR (2d) (Nfld.SC)** cited in **DOROTHY E. BROWTON VS. JEAN HART KANGAS & OTHERS**, Suit No CI 98 – 01 – 10265, Queen's Bench Division, Manitoba:-

***“When interpreting legislation relating to elections, one may reasonably conclude the primary purpose is to ensure that we have a free, open and properly conducted democratic elections. If there***

***have been irregularities, these should be exposed to the view of the general public through the returning officer and through the candidates and their agents involved in the recounts.”***

I would respectfully agree. The scrutiny and recount of the votes by the learned Judge disclosed numerous irregularities, among them unsigned and, therefore, unauthenticated Forms 16A, three missing ballot boxes, broken ballot seals and many others set out in the learned Judge’s judgment. In my view these irregularities could not have been cured under **section 28** of the National Assembly and Presidential Election Act. That section cannot be used to cover a situation where even the source of the votes in the ballot boxes cannot be conclusively determined. Again to use that section to cover the disappearance of ballot boxes, irrespective of the number of the ballot papers in the missing boxes, would simply amount to

encouraging vandalism in the electoral process. Our experiences in Kenya following the 2007 elections part of which we are discussing herein, show us that no Kenyan, whether as an individual or as part of an institution, ought to encourage such practices. **Section 28** cannot be used to white-wash all manner of sins which may occur during the electoral process and for my part I have no doubt that Parliament did not design the section for the purpose of covering serious abuses of the electoral process.

Finally before I leave the matter I must commend the learned trial Judge for the very competent and resolute manner in which he handled the election petition. He concluded that the election in Mugirango South Constituency was not conducted in a transparent, free and fair manner. I unreservedly agree with him, and I would myself dismiss the appeal and confirm his orders.

As to the costs of this appeal, though it was the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who were to blame for the deficiencies which resulted in the nullification of the election, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not appeal, though they supported the appellant’s appeal. Accordingly, I would order that the appellant shall pay only to the 1<sup>st</sup> respondent Manson Onyongo Nyamweya costs of the appeal. TUNOI, J.A agrees and those shall be the orders of the Court.

Dated and delivered at Nairobi this 30<sup>th</sup> day of April, 2010.

**R.S.C. OMOLO**

.....  
**JUDGE OF APPEAL**

**JUDGMENT OF TUNOI, J.A**

I have had the advantage of reading in draft form the judgment prepared by Omolo, J.A.

I agree with his decision and the orders proposed by him and I have nothing useful to add.

Dated and delivered at NAIROBI this 30<sup>th</sup> day of April, 2010.

**P.K. TUNOI**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**

**JUDGMENT OF GITHINJI, J.A.**

This is an appeal against the judgment of the Election Court (Musinga, J.) delivered on 17<sup>th</sup> December, 2009 nullifying the election of the appellant as the Member of Parliament for South Mugirango Constituency on the ground that the election was not transparent, free and fair.

The appellant was declared the winner of the parliamentary election for South Mugirango held on 27<sup>th</sup> December, 2007 after garnering 10,204 votes and was gazetted as the winner in the *Kenya Gazette No. 12615* published on 30<sup>th</sup> December, 2007.

There were nineteen candidates in all. The respective votes obtained by seven of the candidates who garnered the highest votes is tabulated below:

<b>1. Magara James Omingo (Appellant)</b>	<b>-</b>	<b>10,204.</b>
<b>2. Ayiema Ibrahim Ochoi</b>	<b>-</b>	<b>5,848.</b>
<b>3. Nyamweya Manson Onyongo</b>		
<b>(Petitioner/Respondent)</b>	<b>-</b>	<b>5,758</b>
<b>4. Minyonga Zablon Rashid</b>	<b>-</b>	<b>4,319</b>
<b>5. Kombo David Ondimu</b>	<b>-</b>	<b>2,027</b>
<b>6. Nyokabi James Jeremiah</b>	<b>-</b>	<b>1,382</b>
<b>7. Okmwa Ezekiah Nyangoya</b>	<b>-</b>	<b>1,253</b>

The petitioner subsequently filed a petition in the Election Court at Kisii alleging against the appellant, inter alia, that he had on the eve of the election hosted and bribed election officials at Awendo Sugarland Hotel; that the appellant through his agents bribed and influenced voters at four specified polling stations; that the appellant's supporters perpetrated terror, violence and intimidation on the petitioner's supporters prior to and during the voting and that the appellant and his supporters prevented many of the petitioner's supporters from voting due to apprehension of violence, bloodshed and lawlessness.

The petitioner alleged as against the Returning Officer (2<sup>nd</sup> respondent), among other things, that he unlawfully

excluded and ejected the petitioner's agents from many polling stations; that he allowed the appellant's supporters to impersonate deceased voters; that he together with **Electoral Commission of Kenya (ECK)** and **Samuel Kivuitu** (4<sup>th</sup> respondent) – Chairman of ECK appointed 24 presiding officers who were related to the appellant.

The petitioner also alleged that the returning officer and the presiding officers breached the electoral law by committing numerous electoral irregularities such as compelling the petitioner's agents to sign blank Forms 16A in which he subsequently filed false election results; declaring the appellant as the winner without completing Forms 17A in the presence of the petitioner and his agents; declaring the petitioner the winner when he had not obtained the greatest number of valid votes, accepting and tallying returns from many polling stations in which the votes allegedly cast exceeded the number of registered voters; returning a tally which grossly differed from the votes actually counted, verified and announced; making, inconsistent entries in Forms 16A and 17A in many polling stations and lastly, by declining a re-count requested by the petitioner.

The reliefs sought in the petition included a declaration that the appellant was not duly elected; a declaration that election was not held in compliance with the law; a declaration that the election was not transparent, free and fair. The petitioner also sought a re-count and scrutiny as alternative reliefs.

In the course of the trial, the appellant, the Returning Officer and Interim Independent Electoral Commission of Kenya (IIEC) as a successor of ECK conceded to prayer for re-counting and scrutiny and consequent thereto the election court granted the two reliefs. The Deputy Registrar of the Court was commissioned to undertake the exercise. The re-count and scrutiny was done for 13 days in the presence of the respective advocates for the parties and their agents. After the completion of the exercise the appellant still emerged the winner with nearly 4,000 votes.

The election court ultimately rejected the allegations of electoral malpractices made against the appellant and also the electoral malpractices made against the Returning Officer and ECK. Nevertheless, the court made a finding that, the Presiding Officers and Returning Officer committed many irregularities in relation to Forms 16A and 17A and also by failing to insert voters register, ballot paper counter foils, a number of Form 16A and some other forms which irregularities compromised the principle of transparent, free and fair election thereby rendering the entire election void.

There are numerous grounds of appeal but the principal grounds of appeal were that, the Judge of election court erred in fact and in law in making a finding that any defect found in Form 16A is adequate to nullify the election; in disregarding **Section 28** of the *National Assembly and Presidential Elections Act (Act)*; and failing to test the election against that section; in nullifying election on grounds that were not pleaded; in failing to quantitatively assess the gravity and extent of the alleged anomalies, and, in relying on generalities; in failing to appreciate that the re-count and scrutiny confirmed that the election was held in accordance with principles laid down in the written law and also to appreciate that the non-compliance with the law did not affect the result of the election.

The law which regulates the *Presidential and Parliamentary Elections* is the Constitution; *The National Assembly*

and Presidential Elections Act and the Presidential and Parliamentary Election Regulations (Regulations) made there under. **Section 42 A (c)** of the Constitution which was operative at the time and which has now been repealed and re-enacted provided that ECK was responsible for promoting free and fair elections. **Section 17A** of the Act requires the Electoral Commission to take necessary measures to “to ensure that the elections are transparent, free and fair”. The Regulations provide an exhaustive procedure for the management of the entire election from nomination to counting and declaration of the results. Regulation 35A in particular stipulates the procedure for counting and **35A (4)** states:

**“The presiding officer, the candidates or their agents shall then sign the declaration set out in Form 16A which shall state:**

- (a) the name of the polling station;**
- (b) the total number of registered electors for the polling station;**
- (c) the total number of valid votes cast;**
- (d) the number of votes cast in favour of each candidate;**
- (e) the number of votes that were rejected; and the number of disputed votes.**

**Regulation 35A (5)** requires the Presiding Officer to immediately announce the results of the voting at the polling station before communicating them to the Returning Officer. **Regulation 39** requires the Presiding Officer to seal the ballot papers and transmit them to the Returning Officer. By **Regulation 40 (1)**, the Returning Officer is required to tally the results, examine ballot papers which are rejected, objected to or disputed and confirm or vary the decisions of Presiding Officers; publicly announce the results; publicly announce the total number of votes cast; publicly declare the candidate who has won and finally complete Form 17A in which he shall declare:

- (i) name of the constituency;**
- (ii) total number of registered voters;**
- (iii) votes cast for each candidate in each polling station;**
- (iv) number of rejected votes for each candidate in each polling station;**
- (v) aggregate number of votes cast in the constituency; and**
- (vi) aggregate number of rejected and sign and date the form.**

It is contended that the anomalies that the election court found relating to Form 16A and 17A were trivial and curable under **Section 28** of the Act which provides:

**“No election shall be declared to be void by reason of a 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 that written law, or that the non-compliance did not affect the result of the election”.**

A similar provision appears in electoral laws of many jurisdictions.

In **Morgan vs. Simpson** [1975] 1 QB 151 Lord Denning, in construing **Section 37 (1)** of the *Representation of People Act 1949* (England) which has similar wording said at page 164.

**“Collating all these cases together, I suggest that the law can be stated in these propositions:**

- 1. 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 .....**
- 2. If the election is so conducted that it was substantially in accordance with the law as to**

**elections, it is not vitiated by breach of the rules or a mistake at the polls .....**

- 3. 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 result is vitiated .....**”.

I would give a similar construction to our **Section 28** of the Act. In a nutshell, **Section 28** of the Act means that irregularities in the conduct of an election will not vitiate the result unless the irregularities either were so serious that the election was not in accordance with principles laid in the law or the irregularities affected the result.

Broadly speaking, the overriding objective of the Act is to promote the right to vote and this requires that the Act should be liberally and broadly interpreted so as to provide citizens with every opportunity to vote. The primary duty of the Election Court is to give effect to the will of the electorate. Reasonable compliance as opposed to strict or absolute compliance with the procedures set out in the legislation is the standard when considering procedural matters. (See **Keefe vs. Pukanich** 2007 NWTSC 90 – relied on by the 1<sup>st</sup> respondent).

In **Fitch vs. Stephenson & three Others** 2008 EWITC 501 QB. The English Court in construing **Section 48 (1)** of *Representation of People Act 1983* (England) also with similar provisions said at paragraphs 43 and 44:

**“These cases clearly establish that the courts will strive to uphold an election as being substantially in accordance with the law, even where there has been serious breaches of the Rules, or of the duties of the election official providing that the result of the election was unaffected by those breaches.**

**The availability of proportionate judicial remedy for rectifying the result and declaring the true result of the election following scrutiny and a recount prevents the necessity to choose between vitiating the entire election and allowing an erroneous result to stand.**

**Thus .... It is inappropriate for the court to declare that an election should be avoided where breaches of the Rules at the counting stage have not, in fact affected the result”.**

In that case, it was contended that failure to count 45.8% of the vote resulted in the election being not conducted substantially in accordance with the law. The petition was dismissed for the reason that failure to count the votes did not affect the result.

Lastly in **Keefe vs. Pukanich** (supra) the court said at page 13:

**“Much of the case law points out that the obligations imposed by election statutes on election officials such as a returning officer, are directory as opposed to mandatory. The difference is that, if mandatory provisions are not complied with then the thing done is invalid or void, while it is sufficient, if a directory enactment is obeyed or fulfilled substantially”.**

In this case, the election court said that failure by a presiding officer to sign Form 16A invalidates the results which may have been announced in respect of a polling station and that it is the signature of the presiding officer that validates and authenticates the result. The court said:

**“A close reading of subsection (4) and 9 of the Regulation 35A implies that failure by a presiding officer to sign Form 16A invalidates the results .....**”.

Firstly, there is no **Rule 9** of **Regulation 35A** of the Act. **Regulation 35A** has only six sub-rules. I think the

election court was erroneously referring to **Rule 35A (4)** and **9** of the *Local Government Elections (Amendment Rules) 2002 – L.N. 171 of 2002*.

Secondly, it is my view that the mere failure by a presiding officer to sign Form 16A is a procedural anomaly which does not invalidate the results announced in a polling station.

Furthermore, the complaint by the appellant that the election court relied on generalities regarding anomalies in Forms 16A and 17A without quantifying the gravity of those anomalies is valid. In my view, the election court should have addressed itself to specific Form 16As and 17As, examined the anomalies and ultimately determine what impact the anomalies had in the overall result of the election.

The election court made a specific finding that the figures as recorded in Forms 16A showed that the appellant had the highest number of votes and that the re-count and scrutiny verified that the appellant won the election by over 4,000. Nevertheless, the court nullified the election mainly because of the anomalies in Forms 16A and 17A. It dismissed all other allegations of electoral malpractices. Those anomalies were in counting or rather in the reconciliation or tallying process. They are post-election anomalies which, in my view, did not affect the vote.

The anomalies in some Form 16As and 17As were in any case cured by the re-counting and scrutiny of the vote which verified that the appellant had won the election for it will be remembered that the object of scrutiny is to ascertain by striking out votes or adding votes which candidate had the majority of lawful votes while the object of re-counting is to eliminate any mistake made in the counting of the votes.

On analysis, I have come to the conclusion that the election was conducted in accordance with principles laid down by the electoral law and that the anomalies found in some Form 16A and 17A were not so pervasive or so serious as to affect the entire election. I am satisfied that those were post-election procedural anomalies and were cured by both scrutiny and counting and by **Section 28** of the Act. I find, indeed that the election court misconstrued **Section 28** of the Act.

On my part, I would for reasons stated, allow the appeal and set aside the judgment of the Election Court dated 17<sup>th</sup> December, 2009 and nullify the consequential certificate.

I would give the costs of the appeal to the appellant as against the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent also to pay costs of the appeal to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of April, 2010.**

**E. M. GITHINJI**

.....  
**JUDGE OF APPEAL**