



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

**AT
MO
MBA
SA
Civil
Appeal 50
of
2006**

ALI OMAR 1ST APPELLANT

**THE ELECTORAL COMMISSION OF KENYA..... 2ND
APPELLANT**

AND

JULIUS DARAKA MBUZI 1ST RESPONDENT

HARRISON GARAMA KOMBE 2ND RESPONDENT

**(Appeal from a judgment and decree of the High Court of Kenya at Mombasa (Khaminwa, J)
dated 10th February, 2006**

in

H.C. Election Petition No. 1 of 2003)

JUDGMENT OF THE COURT

The last National Assembly and Presidential Elections were held on 27th December, 2002. Nominations of candidates for the same elections were carried out on 25th November, 2002. The elections were conducted by the Electoral Commission of Kenya, which is the second appellant in this appeal. It appointed the first appellant, Ali Omar, as the Returning Officer for Magarini Constituency in the Coast Province of Kenya. The first respondent, Julius Daraka Mbuji, the second respondent, Harrison Garama Kombe and five others were duly and validly nominated as parliamentary candidates for the elections for Magarini Constituency. The second appellant prepared the ballot papers for the same elections and particularly in respect of Magarini Constituency parliamentary elections. On 26th December, 2002, the record shows, and it is agreed by all parties to this appeal, that the same ballot

papers in respect of Magarini Constituency indicated that the party symbol assigned to the first respondent, Julius Daraka Mbuji, was a ram which was legally a symbol gazetted for Umma Patriotic Party of Kenya in place of a pot which was the correct symbol designated for his party, Chama Cha Uma Party. The record shows that that mistake necessitated short lived cancellation of the same parliamentary elections for Magarini Constituency. The postponement was announced by the Kenya Broadcasting Corporation radio on its bulletins for 26th December, 2002 evening and the same cancellation was also carried in the Daily Nation issue of 27th December, 2002 and in other news media. Later the same evening of 26th December, 2002, as a result of a letter allegedly written by the first respondent in which he is alleged to have withdrawn from the running for the elections, the second appellant reinstated the parliamentary elections for the same Magarini Constituency and authorized the same to continue. That continuance of the same elections was also announced in the various electronic news media including the Kenya Broadcasting Corporation. There was also a press release to that effect. We shall revert to the same later in this judgment. Suffice it to say at this stage that the elections proceeded and after the elections, the votes were counted and the following results were announced:

- “1. Harrison Garama Kombe (SPK) 5,384**
- 2. David F. Noti (KANU) 3,603**
- 3. Kisivu Willy Mure (NARC) 2,904**
- 4. Yeri Joshua Kahindi (SDP) 846**
- 5. Christopher Kalu Kithi (Ford People) 808**
- 6. Nanuh Harun Joseph (F.P.K) 112**
- 7. Daraka Julius Mbuji (Chama cha Uma) 53”**

Based on the same results, the first appellant declared the second respondent, Harrison Garama Kombe, as the duly elected parliamentary representative for Magarini Constituency in Kenya’s National Assembly. Later, the result was gazetted in Kenya Gazette Notice No. 85 of 3rd January, 2003. The first respondent felt aggrieved and petitioned the superior court at Mombasa in an Election Petition dated 24th January, 2003. In his election petition, the first respondent cited several breaches, a summary of which is that the parliamentary elections for Magarini constituency was not conducted in accordance with the provisions of the National Assembly and Presidential Elections Act Chapter 7 Laws of Kenya and Presidential and Parliamentary Elections Regulations nor in accordance with fundamental principles of law, nor in accordance with the principles of natural justice and fair play in that the ballot papers used in casting the votes during the same elections were defective, null and void as they failed to comply with the Act and with the regulations as they did not indicate the first respondent’s party symbol which was a pot and instead entered a symbol of a ram which was not his party symbol; that as a result and on learning the same, the first and second appellants postponed the parliamentary elections for the constituency and announced the same postponement over the electronic and the print media but later proceeded with the same elections and hence the parliamentary elections process was null and void and of no legal consequence; that due to the resulting confusion, ballot boxes of the parliamentary elections were dispatched to the polling station late and reached the polling stations several hours after the polling had started with the effect that some would-be voters did not cast their votes in respect of the parliamentary elections for the constituency; that there was violence meted out against the first respondent’s agents, supporters and suspected supporters; that the second respondent’s agents and supporters campaigned openly within the precincts of the polling stations; that counting of the ballots was irregular as some ballot boxes were not sealed; that recount was sought but was refused by the first appellant; that results were announced without written confirmation by the first respondent’s agents; that there was no secrecy at the polling booths, that the voters were bribed and intimidated by the second respondent’s agents and/or supporters; that the second respondent committed election offences of cheating in that he or his agents provided food, drinks and refreshments to voters and also alleged that the NARC presidential candidate,

Mwai Kibaki, was his presidential candidate; that the second respondent used provincial administration to threaten voters and to scare away electors from other tribes from participating in the elections; that the second respondent used tricks to woo voters to his camp by saying that within three months of his being elected, he would defect to NARC; that many voters were turned away from voting on account that their names did not appear in the voter's register; and that polling stations in the constituency opened very late when some voters had already left the polling stations and gone home and so voters were not availed an opportunity to vote. As a result of all the above complaints in the petition, the first respondent sought that the parliamentary elections in Magarini Constituency be declared null and void and that the election of the second respondent to the National Assembly be declared null and void. He also pleaded for costs to be paid by the respondents. There were several affidavits filed by witnesses in support of that petition. The two appellants herein and the second respondent opposed the petition and each filed affidavits in opposition. As we have stated, all parties did agree however that a wrong election symbol was used in the ballot papers in respect of the first respondent and that on discovery of the same, the parliamentary elections were postponed and announcement of the same made in both the electronic and the print media. It was also stated by the respondents in that petition that later due to a letter written by the petitioner in that petition, parliamentary election was ordered to continue and did continue but that there were delays in distributing the ballot boxes as a result of the confusion that had ensued.

The above, in summary, were according to the record before us, the pleadings that were before the superior court. That court heard the entire case fully and having heard the same, dismissed the various complaints of violence, bribery, and other irregularities in the petition as it found the same not proved, but allowed the petition on four main grounds which it termed as serious breaches of election regulations. These were, to quote the court:

- “1. Ballot papers were wrong.**
- 2. Wrong ballot papers were used.**
- 3. The 1st and 3rd respondents did not check whether withdrawal of the petitioner's candidature was lawful as it was contrary to regulations.**
- 4. Failure to postpone elections to another future time.”**

The superior court (Khaminwa, J) went further and stated in the same judgment as follows:

“I have already said that in my view on allegations of violence, bribery and other irregularities pleaded were not proved at any degree to warrant the nullification of the petition. However the breaches of regulations and non-compliance with the principle of law were substantial and cannot be brushed aside. The election system must be complied with every time to ensure that the Electoral Commission does not lapse in its constitutional duties. The principle laid down in the election law in Constitution section 44, National Assembly and Presidential Election Act Ca. 7 are to ensure all eligible voters cast their votes freely without intimidation and that the will of majority shall be manifested in the free and fair election. In this case, the conduct of election was not in compliance with these principles and this affected the result.

For these reasons I am convinced that the Parliamentary Election for Magarini Constituency was conducted in breaches of provisions of law concerning the said election and was thereby rendered fatally defective. I declare the same null and void. The petition is allowed and I grant the prayers sought.”

The first and second appellants felt aggrieved by that decision of the superior court and hence this appeal which is premised on four grounds namely:

- “1. The trial Judge erred in law by failing to treat the letter of withdrawal of candidature by 1st respondent to the 2nd appellant as a contract inter-parties as between the 2nd appellant and 1st Respondent.**

2. **The trial Judge erred in law by giving Regulation 15 and 21 of the Presidential and Parliamentary Election Regulation 2002 (L.N 66 of 10th May, 2002) a subsidiary Legislation, a rigid and technical interpretation notwithstanding the saving clause of section 28 of the National Assembly and Presidential Elections Act Cap 7 Laws of Kenya.**
3. **The trial Judge erred in law in failing to find on the weight of the evidence adduced by both sides that the election was conducted in accordance with principles laid down in Cap 7 and that the printing of the wrong symbol of Chama Cha Umma did not affect the results of the election.**
4. **The trial Judge erred in law in finding that the 1st respondent did not admit the authorship of the letter dated 26th December, 2002 through which the 1st respondent withdrew from the parliamentary election race.”**

In his submission before us, Mr. Muniyithya, the learned counsel for the appellants, urged us to treat the letter allegedly written by the first respondent, which was treated as a letter of withdrawal from the race, as not merely a letter of withdrawal but as a letter of resignation governed by the provisions of **section 44(4)** of the Kenya Constitution and that being so, he argued, as the making of the regulation emanates from the Constitution and not from **Chapter 7** of the Laws of Kenya and so that letter dated 26th December, 2002 and purportedly written by the first respondent was, according to Mr. Muniyithya, a resignation under the Constitution which is a right of a candidate and so if we understood him, the first respondent must be treated to have resigned and thus the elections could proceed notwithstanding irregularities that affected his candidacy such as the wrong symbol since he was no longer a candidate. He submitted further that even if it was accepted as a letter of withdrawal, still the first respondent would be estopped from challenging the elections on account of his conduct and that the interpretation the superior court gave to **Regulation 14 and 21** was too rigid as despite the postponement and reinstatement of the parliamentary election which were both announced over the media, the people went and voted and so the cancellation, the wrong symbol and the lateness of the delivery of the ballot boxes to the polling stations did not affect the free and fair elections. Mr. Gikandi, the learned counsel for the second respondent, while supporting the submission of Mr. Muniyithya, added that the petition was defective as the District Officer and the Police Officer Commanding Malindi Police Division who were alleged to have committed certain breaches of the election regulations were not joined as parties and that **section 28** of the National Assembly and Presidential Election **Act Chapter 7** Laws of Kenya, if read together with **section 23(1) (d)** shows that even if there was non-compliance with the regulations, it did not affect the outcome of the election. Lastly, he submitted that his client, the second respondent, should not have been ordered to pay costs together with the two appellants as his client was cleared of any wrong doing. Mr. Mutisya, the learned counsel for the first respondent, on the other hand contended in his submission before us that as ballot papers were defective for having wrong symbol for the party sponsoring the first respondent and the first respondent, the same ballot papers were invalid and could not be used in any election. He relied on **Regulation 5(2) and 21(1) and 28(3) (a)** of the Presidential and Parliamentary Elections Regulations. As to the alleged letter of withdrawal dated 26th December, 2002, his position was that **Regulation 19** was clear that withdrawal could only take effect if it was submitted before nomination and not after nomination. He also maintained that the doctrine of estoppel cannot be pleaded against the law and that **section 32** of the National Assembly and Presidential Elections is a saving clause in respect of all documents.

We have anxiously considered this appeal, bearing in mind at all times that this being a first appeal, we are duty bound to analyze and evaluate afresh the evidence that was adduced in the superior court and come to our own independent conclusion, but accepting that the superior court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for the same. We have also considered the appeal anxiously, aware that this is the last appeal and that being so, the consequences are of grave importance, not only to the parties before us, but also to the country at large as the stability, peace and future of the nation depends to a very large extent on the stability and certainty of its electoral process.

The petition that was before the superior court complained of intimidation of the first respondent's agents and/or supporters; use of violence on the same agents and supporters; campaigning by the second

respondent's supporters within the precincts of the polling station on the election date; non sealing of some ballot boxes; refusal by the appellants to allow recounting; announcing the results without the signature of the first respondent confirming the same; admission of strangers by the appellant to the polling station; bribing of voters by the second respondent's agents and/or supporters; cheating by the second respondent; threats by the local administration; portrait to deceive voters; and deceiving the electorate that immediately after he was elected, he would re-defect to NARC. All these complaints were, according to the record before us, not proved to the standard required in law. Some attempts were made in some witnesses' affidavits to prove the same but the same were not properly proved in the evidence that was offered during the hearing of the petition in the superior court. The learned Judge dismissed each of the allegations and gave what, in our view, were proper reasons for their dismissal. Having dismissed the same allegations, most of which were against the successful candidate who is the first respondent, she found no election offence committed and thus declined to report any to the Speaker of the National Assembly. In our view, she was, with respect, plainly right and the fate of those complaints must rest at that stage, for, in our own independent view, the same were for dismissal.

That leaves three matters for consideration. These are first, whether the ballot papers for the 27th December, 2002 parliamentary elections in Magarini Constituency were legally valid and the effect of their use for the same election and could the same ballot papers be validated by resignation and/or withdrawal of the first respondent who was affected by the mistake on the same ballot papers; second, it being agreed by both parties to this appeal that the same parliamentary election for Magarini Constituency was postponed on 26th December 2002 by the appellants, and the same postponement was widely announced in both the print and electronic media, what was the effect of the same postponement and its announcement upon the entire election which was later ordered to be continued as the continuation was also announced in the print and electronic media? Third, what was the effect of late arrival of the ballot papers at the various polling stations upon the parliamentary elections for Magarini Constituency.

We think the starting point is the Constitution of Kenya. **Section 41** of the Constitution creates the second appellant and states its composition. **Section 42A** states what the Electoral Commission of Kenya is responsible for and states at paragraph (c) as follows:

“42A. The Electoral Commission shall be responsible

for:

(a)

(b)

(c) Promoting free and fair elections.”

It is thus the duty of the second appellant to ensure free and fair elections. We may state here that **section 34(d)** of the Constitution says that a candidate has to be nominated by a political party in the manner prescribed by or under an Act of Parliament. In order that the appellant may ensure free and fair elections, the Parliament on its powers given by the Constitution, enacted the National Assembly and Presidential Election Act Chapter 7 Laws of Kenya. That act states in its preamble that it is an act of Parliament to provide for registration of electors, and holding of elections to the office of the President and to the National Assembly, the conduct of the Electoral Commission and of political parties participating in the election in Kenya and various matters connected with and incidental to the same matters. That act provides for regulations which have to be followed in ensuring free and fair elections. These regulations are Presidential and Parliamentary Elections Regulations which came into effect vide legal Notice No. 227 of 1992. They were amended substantially vide legal Notice No. 172 of 2002. **Regulation 5(1)** provides for party symbol and it states:

“5(1) The Electoral Commission shall, by notice in the Gazette, allot to every political party a distinctive colour and a distinctive symbol for use at elections in accordance with the provisions of these regulations.”

Regulation 28(b) states that the ballot papers for use at a parliamentary election shall be in form 15, and form 15 provides a space for the name of the candidate, the constituency, party symbol and elector's card among other things.

It is to us obvious, and need not be emphasized, that a party symbol is an integral part of the parliamentary elections where more than one candidate presents himself/herself for election. It is, in our view, a way of identifying the candidate with the party that has sponsored him. We take judicial notice of the fact that during the campaigns, in such elections, the parties do campaign for their candidates using the symbol and some of those who would wish to vote for a particular party would vote for it being guided by the symbol even where they may not have known the actual name of the candidate.

In the matter before us, as we have stated, the evidence that was accepted by both parties in their affidavits was that the first respondent was sponsored for the parliamentary elections by Chama Cha Umma. That party's symbol was a pot. In the Kenya Gazette special issue of 18th November, 2002, Vol. CIV, gazette Notice No. 7536, published under the heading 'NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT (Cap 7) Parties Symbol', the symbol for Chama Cha Umma Party, the symbol of a pot on three stones and that was described as its distinctive symbol. There were several other party distinctive symbols published in that gazette including one for Umma Patriotic Party of Kenya which was a ram. The further evidence on record is that in the ballot papers of Magarini Constituency Parliamentary Elections held on 27th December, 2002, the ballot papers prepared indicated that the distinctive symbol for the first respondent's party and which therefore appeared against the first respondent's name in the ballot paper was a ram instead of a pot. Thus, according to the ballot papers for Magarini Constituency for that election, the first respondent was presented as if he was a candidate sponsored by Umma Patriotic Party of Kenya and not as a candidate sponsored, as he was, by Chama Cha Uma Party. The ballot papers prepared by the second appellant, a copy of which was produced as exhibit 7 showed that Daraka Julius Mbuji's party symbol was a ram. Unfortunately, even for the literate voters, there was no way the mistake could be identified as the names of the parties were not appended to the ballot papers. The first appellant realized this mistake when the ballot papers were opened in the evening of 26th December, 2002 and correspondence availed shows that he consulted the second appellant on it. It was then agreed that with such a mistake, the parliamentary elections in Magarini had to be postponed and that was done, but later, the first respondent wrote a letter dated 26th December, 2002. We will not go into whether that letter was written voluntarily or not and whether it was a protest letter or not. We do however, feel that we need to reproduce the contents of the same letter, mainly because we note that a lot was said about that letter and the superior court gave it quite a space. The entire letter was as follows:

“Julius Daraka Mbuji,

P. O. Box 36,

GONGONI.

26-12-02

To the Electoral,

Commission of Kenya,

P. O. Box 45371, Nairobi.

Dear Sir,

RE: RESIGNATION AS A CANDIDATE OF THE

MAGARINI PARLIAMENTARY

This is to let you know that I have resigned as one of the candidates. Therefore the election can be done as it was arranged. Thanks.

Julius Daraka

Signature

ID/NO. 3160231.”

That letter was on that night of 26th/27th December, 2002 faxed to the second respondent and on receipt of it, the second respondent, in a letter under the hand of its Chairman, S.M. Kivuitu, addressed to the first respondent, authorized the election to “***go on with the ballot papers as printed.***” That letter became the basis of reinstating the parliamentary elections in Magarini Constituency which a few hours earlier had been postponed on the basis of the mistake in the ballot papers, resulting from the wrong use of the first respondent’s party symbol. In short, the second appellant and the first appellant treated that letter as a cure to the defect in the ballot papers. But could it have cured the defect in the ballot papers? In other words, could it have been a basis for ignoring the defect? In our view, even if the letter was treated as voluntarily written by the first respondent, it could not be treated as a valid ground for treating the ballot papers as valid with the apparent defect on them and continue the elections on that basis. First, although it says on its face that it was a resignation letter and Mr. Munyithya invites as to treat it as a resignation under the constitution and equate it to resignation from parliament, we do not share that view. In our view, resignation available to the members of parliament is after they are elected to that august house and not before. Secondly, a candidate to an election can only withdraw from being a candidate and cannot resign from being a candidate, as being a candidate is not a position one holds from which he can resign. Although the letter is headed resignation and talks of having resigned as one of the candidates, that is clearly misplaced nomenclature and nothing more. The letter is clearly one of withdrawing from being a candidate, and we find so. That being so, the next question one has to ask is, of what effect is such a letter, written as it was, after nomination. **Regulation 19** as amended by legal notice 172 of 2002 states:

“19. At any time before the close of nominations, but not later, a candidate whose nomination paper has been delivered to the returning officer, may, by notice in writing signed by him and attested by one other person and delivered to the returning officer, withdraw his candidature.”

That letter was written well after the first respondent had been nominated as a candidate and indeed his name appeared in the ballot papers as one of the candidates. Proper interpretation of **Regulation 19**, meant that that letter had no effect upon his candidacy as it was, first, not tendered before the close of nominations and secondly, it was in any case not attested by any other person. Indeed, this point is demonstrated in the fact that despite the letter, the name of the first respondent plus the defective symbol still remained on the ballot papers used for that election and there was no evidence that he was not treated as a candidate as the results also included his name and the votes he garnered. We find it difficult to appreciate why the second appellant felt the resignation of the first respondent could cure the defect in the ballot papers and hence order the continuation of the elections. Perhaps, **Regulation 19** was interpreted as if that regulation deals only with cases where a candidate withdraws his candidacy before he is validly nominated and not after valid nominations. The superior court and this Court were however referred to **section 28** of the National Assembly and Presidential Elections Act and we were urged to accept that non-compliance with the provisions of the regulations could not vitiate the elections. **Section 28** states:

“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.”

In this case, the defect was in the ballot papers in that a party which sponsored a candidate had its symbol missing from the ballot papers and instead another party's symbol was assigned to its candidate. In our view, the ballot paper, as we have stated, is an integral part of the election. It guides the voter on who is a candidate and his/her party's symbol. We cannot, on our part, conceive a more important defect in an election than a ballot paper that, instead of guiding voters, misleads them. Those were the ballot papers used for parliamentary elections for Magarini Constituency. It is obvious, that the election did not comply with the written law. It was not conducted in accordance with the principles laid down in the written law, namely **section 42 A(e)** of the Constitution which enjoins the second appellant to be responsible for promoting free and fair elections, for how can an election be fair if a candidate's party's symbol is misrepresented to the voters? We have no hesitation in finding that the defect here went to the foundation of any election namely, ensuring that the elections are free and fair by providing to all candidates offering themselves for elections and their parties a level playing ground by ensuring that each candidate has his party's symbol which he had been using during the campaign period properly assigned to him for voters to see and thus make informed decision on whom to vote for. We therefore do not agree with Mr. Munyiya and Mr. Gikandi that the omission and/or action in this case could have been ignored. We think **section 28** is dealing with minor non-compliance with law such as opening a polling station a few minutes later than the time scheduled in the regulations and/or rules but it certainly cannot be used to cover up non-compliance with a fundamental part of the written law that would, and did affect, the elections adversely.

We are thus satisfied that the defect in the ballot papers for Magarini Constituency election was a serious one and could not be cured by the first respondent's letter which was in any event of no consequence as it was an attempted withdrawal after nomination and was also not attested by another person as is required by law. Further, that defect could not be cured by the provision of **section 28** of the National Assembly and Presidential Elections Act Cap 7 Laws of Kenya as the defective ballot papers sent out a wrong message to voters and thus told a lie about themselves. It was, to say the least, not valid.

As we have stated above and as the record shows, the second appellant appreciated the magnitude of the confusion that the same invalid ballot papers would create in the voters' mind. It proceeded to postpone the parliamentary elections, presumably to rectify the mistake. That was the most sensible action to take, faced as they were, with ballot papers that did not reflect the truth, at least as to the election symbol of one of the candidate's party. That postponement was announced in both the print and the electronic media. It is not clear as to the exact time the postponement was announced. The first appellant, in his affidavit before the superior court says that the announcement was made on 26th December, 2002 at 3.00 p.m. The first respondent does not mention the time when the announcement was made, but both agree that it was in the afternoon of 26th December, 2002, one day to the elections. The first respondent says that following the postponement, he informed his voters that only the National Assembly elections had been postponed. They all agreed that the announcement to the media was made and that the media in turn announced to all and sundry, that the National Assembly elections for Magarini Constituency had been postponed. The Daily Nation Newspaper issue for Friday 27th December, 2002 was exhibited and at page 4 it was clearly stated, "**Magarini's election for MP is postponed**" and a good coverage given for that item. Later, the elections were ordered to proceed as we have stated. Dickson Ngowa Ziro (PW 3) told the superior court in his affidavit that there was generally very poor turn out due to the announcement by the radio and the T.V that the Magarini Constituency Parliamentary election had been postponed. In his evidence in cross-examination, he said announcement was by radio and that many people had radios in his constituency. Willy Mure Kisivu (PW 6) said in his evidence in chief (affidavit) that the postponement was duly announced in Baraka FM, Kiss FM and KBC radio stations as well as KBC and TV stations on 26th December, 2002 and he heard the same. As a consequence, they were surprised when later in the afternoon of 27th December, 2002 elections proceeded. We have said that common sense demanded that the parliamentary elections in the constituency should have been postponed on account of the ballot papers being defective. We feel that the confusion that ensued after the same postponement demanded that the postponement should have been sustained as, in our view, the announcement of the postponement ensured that all eligible voters for parliamentary elections would not turn up to vote on the polling day having been informed the previous night through the news media that the same elections were postponed. In fact, as the evidence on record shows, even on the polling day, i.e.

27th December, 2002, the newspapers, particularly the Daily Nation of 27th December, 2002 was still showing that the elections were postponed. One has to ask one question and that is – how many people who heard the announcement of the postponement also heard the announcement of the continuation? What about those who could have only heard of the postponement from others but never heard the announcement for the continuation? We feel that the announcement of the postponement added an additional element to the whole confusion such that the postponement and its announcement did seriously affect the continued elections and made it a flawed exercise. It is no wonder that out of **31,813** registered voters in the constituency, only **13,710** voted in the parliamentary elections in that constituency, well under **50%**, turn out.

The third issue which we need to deal with is the late arrival of the ballot boxes to the polling station in respect of parliamentary elections in the constituency. We have already given, as an example of a situation taken care of by **section 28** of the National Assembly and Presidential Elections Act, the late arrival of ballot boxes to a polling station. We however made it clear that that was in respect of lateness for a short time. Here, however, the first respondent says that some polling stations received the ballot boxes at 3.00 p.m., which the first appellant denies, but the first appellant also accepts in his affidavit at paragraphs 19 and 20 that there were delays in delivering ballot boxes to some polling stations and that at one polling station, the boxes were delivered at midday. In our view, the delay, though inordinate, would not have been of any consequence and would have been covered by the provisions of **section 28 of Cap 7** had the same delay not been accompanied by the confused announcements of postponement and reinstatement of the elections on 26th December and 27th December, 2002 respectively. It has to be noted at this point that the announcement of the continuance was made on the polling day, 27th December, 2006 and might not have reached many people. The delay in the arrival of ballot boxes to the polling stations tended to have confirmed the announcement of the postponement and hence more confusion in the parliamentary elections. This is confirmed by the evidence that some voters such as Leonard Chenge Kabombo (PW 2) went to Mwangathi Primary School polling station at 6.30 a.m. but found only Civic and Presidential ballot boxes. He voted but had to go back after 3.30 p.m., when he heard that the parliamentary ballot boxes had arrived, to vote, whereas Dickson Ngowa stated that the ballot boxes for parliamentary elections arrived very late at 3.00 p.m. when most of the voters had left the station. We think that whereas delay based on other causes would have been cured by the provisions of **section 28**, this delay that resulted, as the appellant says, from the confusion on whether to postpone or proceed with the elections and which could have been seen as a confirmation of the postponement announced late on 26th December, 2002 but cancelled in the morning of 27th December, 2002 affected the free and fair elections in the constituency.

We have, on our own as we must do, analyzed the evidence on record afresh in details and having done so, we have come to our own independent conclusion that the petition that was before the superior court was properly allowed. We have no alternative but to dismiss this appeal. It is dismissed. On costs, we observe that all the grounds that were brought in the petition before the superior court against the second respondent were dismissed. The court nonetheless did not specify as to who was to pay costs of the petition which was allowed. All that the superior court ordered was “***The costs of this petition to the petitioner to be taxed***”. Mr. Gikandi now asks us to relieve the second respondent of the burden of paying costs. Mr. Mutisya, however, urges us not to interfere with the decision of the superior court on grounds that even though the petition was allowed on grounds that were all against the appellants, nonetheless the second respondent, knowing that the elections were flawed, willingly participated in the same. Mr. Mutisya’s view is that the second respondent should have withdrawn from the same elections. Only if he had done so, argues Mr. Mutisya, would he not be burdened with costs. In our considered view, even if the second respondent was minded to withdraw because of the irregularities mentioned, he too would have been caught up by the provisions of **Regulation 19** of the National Assembly and Presidential Elections Act and his withdrawal from candidacy would have been of no consequence as he had been validly nominated as a candidate. We think, the superior court, having allowed the petition on grounds that were against the appellants only, it should have made a specific order as to who was to meet the costs of the petition and, we think, the second respondent having been cleared of any ills on his side, should not have been required to meet the costs of the petition.

In view of the foregoing, we order that only the appellants will pay the costs of this appeal and the

costs of the petition in the superior court. Judgment accordingly.

Dated and delivered at Nairobi this 27th day of October, 2006.

E.O. O’KUBASU

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR