



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**OF KISII**

**Election Petition 3 of 2008**

**IN THE MATTER OF: SECTION 44 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE NATIONAL ASSEMBLY AND**

**PRESIDENTIAL ELECTIONS ACT (CHAPTER**

**7 OF THE LAWS OF KENYA) AND THE**

**REGULATIONS MADE THEREUNDER**

**AND**

**IN THE MATTER OF: ELECTION FOR THE SOUTH**

**MUGIRANGO CONSTITUENCY**

**AND**

**IN THE MATTER OF: THE PETITION OF MANSON OYONGO**

**NYAMWEYA**

**BETWEEN**

**MANSON OYONGO NYAMWEYA ..... PETITIONER**

**AND**

**1. JAMES OMINGO MAGARA ..... FIRST RESPONDENT**

**2. JOSEPH SANG'ANYI OMAMBIA ..... SECOND RESPONDENT**

**3. THE INTERIM INDEPENDENT ELECTORAL COMMISSION OF**

**KENYA (as the successor of  
the Electoral Commission of Kenya).....THIRD RESPONDENT**

**JUDGMENT**

The petitioner was one of the 17 candidates in **South Mugirango** Constituency, hereinafter referred to as “**the constituency**” in the parliamentary election held on 27th December, 2007 hereinafter referred to as “**the election**”. The first respondent was also a candidate in the election and was declared as the successful candidate and Member of Parliament elect for the constituency. The second respondent was the Returning officer for the constituency during the election. He was joined in this petition because of his conduct and the conduct of the Presiding Officers appointed by the third respondent and subordinate to him. The third respondent was initially the Electoral Commission of Kenya, hereinafter referred to as “**the E.C.K.**”, a public body established under **section 41** of the **Constitution of Kenya** prior to the enactment of the **Constitution of Kenya (Amendment) Act, 2008**. Prior to enactment of the said Act, **section 42 A** of the **Constitution** stated as follows:

**“The Electoral Commission shall be responsible  
for –**

**(a) the registration of voters and the  
maintenance and revision of the  
register of voters;**

**(b) directing and supervising the Presidential,  
National Assembly and local government  
elections;**

**(c) promoting free and fair elections;**

**(d) promoting voter education throughout**

**Kenya; and**

**(e) such other functions as may be prescribed  
by law.”**

On 29th December, 2008, the **Constitution of Kenya (Amendment) Act, 2008** came into operation. **Section 2** thereof amended the Constitution by repealing the then existing **section 41** and thereby abolishing the **E.C.K.** and replacing it with the **Interim Independent Electoral Commission**, hereinafter referred to as “**the I.I.E.C.**” which became the successor to the **E.C.K.**

**Section 41 (2)** of the **Constitution** states that:  
“**The Interim Independent Electoral  
Commission shall be the successor to the  
Electoral Commission of Kenya established by  
section 41 (now repealed) and subject to the  
Constitution, all rights, duties, obligations,  
assets and liabilities of the Electoral**

**Commission of Kenya existing immediately before the commencement of this section shall be automatically and fully transferred to the Interim Independent Electoral Commission and any reference to the Electoral Commission of Kenya shall, for all purposes, be deemed to be a reference to the Interim Independent Electoral Commission established under this section.”**

On 27th May 2009, the second respondent filed an application seeking, *inter alia*, that the **I.I.E.C.** be substituted as the third respondent in place of the E.C.K. The application was strenuously opposed by the first respondent. After lengthy submissions, a considered ruling was delivered and the application was allowed.

The results of the election as declared by the second and third respondents were as follows:

<b>Name of Candidate</b>	<b>Political</b>	<b>number of party votes</b>
1. Nyokangi James Jeremiah	NDA	1,382
2. Aungo Bwo'nderi Justus	SDP	805
3. Orenge Charles	Agano	168
4. Samson Mauti Sagwe	CCM	33
5. Ayiema Ibrahim Ochoi	New Ford-K	5,848
6. Igendia Naftal Mayoyo	KANU	839
7. Magara James Omingo	ODM	10,204
8. Okengo Ezekiel Onchweri	NARC-K	904
9. Ondora John Joshua	TP	488
10. Minyonga Zablon Rashid	PPK	4,319
11. Kombo David Ondimu	ODM-K	2,027
12. Nyamwenya Manson Oyongo	FORD-P	5,758
13. Bwo'ndara Masta Innocent	KPP	139
14. Nyamwega Benayo M. Ihaji	WCP-K	457
15. Oumo Josiah Omambia	FORD-A	238
16. Okemwa Ezekiel Nyangoya	KENDA	1,253
17. Magara Karen Nyamoita	KADDU	431

The Petitioner alleged that the third respondent failed to conduct the election in a transparent, free and fair manner.

#### **Grounds of the petition**

The petitioner set out the following grounds of the petition:

- The second and third 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 17 A of the National Assembly and Presidential Elections Act.**
- The second and third respondents conducted the election in a manner substantially inconsistent with the principles laid down in the laws of Kenya, including but not limited to the principles laid down in the Constitution of Kenya, the National Assembly and Presidential Elections Act and the Election Offences Act.**

**3. The second and third 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 42 A (c) of the Constitution of Kenya and section 17 A of the National Assembly and Presidential Elections Act.**

In view of the aforesaid acts, the petitioner alleged that the election was manifestly void.

**Particulars of Breaches by the respondents**

I reproduce hereunder the particulars of breaches by various respondents as stated in the petition:

· The second respondent purportedly declared the first respondent as the winner of the election notwithstanding that the first respondent did not receive the greatest number of valid votes contrary to the letter and spirit of **section 42 A (c)** of the **Constitution of Kenya**, **section 17 A** of the National Assembly and Presidential Elections Act and **Regulation 40 (1) (e)** of the Presidential and Parliamentary Elections Regulations.

· The third respondent purportedly endorsed the illegal declaration of the second respondent as stated above vide Kenya Gazette Special Issue (Volume CIX No. 103, under Gazette Notice No. 12615) dated 30th December 2007, wherein it purportedly declared the first respondent as the elected member of parliament for the constituency.

· The second respondent purportedly declared the first respondent the winner of the election without completing Form 17A in the presence of the petitioner and his agents contrary to, *inter alia*, **section 17 A** of the National Assembly and Presidential Elections Act and **Regulation 40 (1) (f) and (g)** of the Presidential and Parliamentary Elections Regulations.

· The second 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.

· The second respondent purportedly declared the first 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 E of the Presidential and National Assembly Elections Regulations.

· The second and third respondents accepted and tallied returns from many polling stations in which the votes allegedly cast exceeded the number of the registered voters in those polling stations, contrary to the express and/or implied provisions of, *inter alia*, **section 42 A** of the **Constitution of Kenya** and **section 17 A** of the National Assembly and Presidential Elections Act.

· The first respondent unlawfully and unjustifiably hosted election officials (including deputy presiding officers and clerks) appointed by the second and fourth respondents at Awendo Sugar Land Hotel on the eve of the election date.

· The first respondent, at Awendo Sugar Land Hotel, unlawfully bribed and/or influenced the election officials referred to hereinabove by giving and/or promising to give them money and gifts contrary to the provisions of, *inter alia*, **section 10 of the Election Offences Act**.

· The first respondent (through his agents at, *inter alia*, Mariwa, Rigena and Ayora polling stations)

unlawfully bribed and/or influenced voters by giving them money contrary to the provisions of, *inter alia*, section 10 of the Election Offences Act.

- The second respondent (through the presiding officers at, *inter alia*, Rigena, Nyabera and Gesonso polling stations) compelled the petitioner's agents to sign a blank form 16A in which he subsequently filled false election results.

- The second respondent and his subordinate officers unlawfully and unjustifiably excluded and/or ejected the petitioner's agents from many polling stations including, but not limited to Rigena polling station contrary to the letter and spirit of **section 42**

**A (c)** of the Constitution of Kenya, **section 17 A** of the National Assembly and Presidential Elections Act and **Regulation 23** of the Presidential and Parliamentary Elections Regulations.

- The second respondent returned to the third respondent a tally which grossly differed with the votes actually counted, verified and announced at many polling stations, in which tally the votes of the first respondent were grossly inflated while those of the petitioner were decreased, contrary to the express provisions of, *inter alia*, **section 17 A** of the National Assembly and Presidential Elections Act and **Regulation 40 (1) (f) (iii)** of the Presidential and Parliamentary Elections Regulations.

- The second respondent and his subordinate officers unlawfully and unjustifiably refused to issue and/or allow the petitioner's agents to sign form 16 A in respect of many polling stations contrary to the provisions of, *inter alia*, **Regulation 35 A (f) (g)** of the Presidential and Parliamentary Elections Regulations.

- The return submitted by the second respondent *prima facie* indicated gross inconsistencies between forms 16 A and 17 A in respect of many polling stations in the constituency including but not limited to **Emesa, Nyabera, Gesonso, Igare, Nyachege, Nyabiosi, Engou, Nyabikondo and Bokimai polling stations**.

- The second respondent and his subordinate officers unlawfully and unjustifiably refused, neglected and/or otherwise failed to affix form 16A in many polling stations and particularly in those polling stations where the petitioner's polling agents were absent and/or unlawfully chased away contrary to the provisions of **Regulation 35 A (5) (d)** of the Presidential and Parliamentary Elections Regulations.

- The first respondent's supporters perpetrated terror, violence and intimidation on the **petitioner's supporters** prior to and during the voting day contrary to the provisions of, *inter alia*, **section 42 A (c)** of the **Constitution** of Kenya, section 17 A of the National Assembly and Presidential Elections Act, paragraph 5 (c) of the Electoral Code of Conduct and section 9 of the Election Offences Act.

- The first respondent and his supporters' conduct stated hereinabove precluded many of the petitioner's supporters from voting due to apprehension of violence, bloodshed and lawlessness to the detriment of the petitioner.

- The second respondent and his subordinate officers allowed the first respondent's supporters to impersonate deceased voters contrary to the provisions of, *inter alia*, **section 7 of the Election Offences Act**.

- Out of 116 presiding officers appointed by the second and third respondents in the constituency, 24 are directly related to the first respondent by marriage and blood while 53 are known staunch

supporters of the first respondent.

The alleged breaches, irregularities, illegalities and violations, vitiated the result, validity and integrity of the election, the petitioner stated. He added that the declared results announced and gazetted by the second and third respondents did not and cannot be deemed to reflect the manner in which the people of the constituency voted.

In view of the foregoing, the petitioner sought the following prayers:

(a) A declaration that the election was not held in compliance with the law relating with the conduct of parliamentary elections and in particular with the provisions of **section 42 A (c)** of the **Constitution of Kenya** and **section 17 A** of the National Assembly and Presidential Elections Act;

(b) A declaration that the election was not transparent, free and fair;

(c) A declaration that the election was void;

(d) A declaration that the first respondent was not duly

elected as the member of parliament for South Mugirango Constituency;

(e) Alternatively, and without prejudice to the foregoing, a declaration that the petitioner was duly elected as the member of parliament for South Mugirango Constituency;

(f) An order directing the second and third Respondents and/or their successors in office and other relevant public officers to take remedial action to give effect to the declarations in (a) to (e) above, including but not limited to holding a by-election in the constituency.

(g) Alternatively and without prejudice to the foregoing, a re-count of the votes cast at the election be ordered;

(h) Alternatively and without prejudice to the foregoing, a scrutiny of the votes cast at the election be ordered;

(i) The first respondent be found guilty of committing election offences, in particular, bribery and undue influence;

(j) The costs of and incidental to this petition be awarded to the petitioner; and

(k) Such other or further orders as this honourable court may deem just and expedient.

### **Evidence tendered**

Pursuant to rule 18 of the **National Assembly Elections (Election petition) Rules**, the parties and their witnesses delivered to court their respective affidavits. The affidavits were read by their respective makers and they form part of the record. The parties and their respective witnesses were cross-examined as by law provided. There were however two witnesses called by the first respondent who were permitted to give evidence without having delivered their respective affidavits to court. Under **rule 18 (5)** of the **Election Petition Rules** the court is empowered to grant such leave.

The petitioner called several witnesses who testified before he gave his evidence. **Janet Boneri Haron, PW1**, stated in her affidavit that she was engaged as a tallying clerk at Nduru Secondary school. She was to assist the Returning Officer on 27th December 2007. Together with **Janet Nyaburi Omabene, PW2**, and **Nancy Kemuma Tengenya**, were sent to Nduru secondary school as tallying clerks and assigned to one **Zephania Onditi** who was introduced to them as their Supervisor. PW1 did not attend any training but the Deputy Returning Officer guided her on how to fill **Form 17 A** with the information obtained from **Forms 16 A**.

On the night of 27th December, 2007 when results started coming in, PW1 was assigned to receive results in Forms 16 A and post them to Form 17 A. After she finalized with Forms 16 A she would hand them over to the Deputy Returning Officer. As the results were arriving, the Returning Officer was announcing them. He did so for about three or four polling stations but there were some discrepancies between the figures that were being announced and those recorded in Forms 16 A. After a short while the Returning Officer stopped announcing the results. By that time many Forms 16 A had been heaped on the tallying table. Several candidates were complaining that their agents had different results from the ones that had been announced and the crowd that had gathered in the tallying hall got agitated and surged forward and grabbed Forms 16 A that were on the table. Some of the forms were scattered on the floor and others got torn while some were carried away by the unruly crowd. By then PW1 and PW2 had not posted some of the results in forms 16A to form 17A.

PW1 further deposed that the Deputy Returning Officer, **Sarah Keraro**, told the crowd that even if they had taken away the Forms 16 A, there was no harm occasioned to the tallying process since the results had been posted in Form 17 A and that the originals were with  
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E.C.K., which was not true. Due to this fracas PW1 and PW2 left the tallying hall for fear of being hurt.

The witness returned to the tallying hall on 28th December, 2007 at about 11.00 a.m. and found the District Elections Coordinator, (hereinafter referred to as the **"DEC"**) Mr. Atika, in-charge of the process. Shortly thereafter the first respondent arrived with his team of supporters who were singing and saying that they wanted the results announced.

In cross-examination, PW1 said that she had been engaged by the DEC as a casual employee. She said that she left the tallying hall at about 5.00 a.m. when the fracas broke out. By that time all the results in Forms 16 A had not been posted to Form 17 A. The witness further alleged that there was no

sufficient security at the tallying table. Although there were police officers in the tallying hall, they did not restrain members of the public who surged forward to the tallying table and grabbed forms 16A. She further stated that she never took any oath of secrecy before she commenced her work as a tallying clerk.

PW2 gave more or less the same evidence as PW1. In her view, the final results that were announced were inaccurate as they did not reflect the correct tally in view of the lost Forms 16 A. She said that the fracas broke out after the arrival of the first respondent together with his supporters.

**Daniel Barongo Mosikini, PW3**, voted at Orwaki primary school polling centre. He was an agent of one of the candidates, **Ibrahim Ochoi**. He went to the said polling station at around 6.00 a.m. and waited until 8.00 a.m. when E.C.K. officials arrived. There were no security personnel and several agents disagreed with the E.C.K. officials over the issue. Polling clerks were also missing and E.C.K. officials employed new ones in place of those who had earlier been recruited and trained. This brought a lot of confusion in the voting process. The witness alleged that the names of the new clerks were read out and included that of one **Abina Miranga**, who was an agent of Ibrahim Ochoi, but the said person declined the offer saying that he had not been trained.

Voting started at about 10.00 a.m. and at around 1.00 p.m. the first respondent and his wife went to the station.

As the voting went on, PW3 saw one **Mongare Omongi**, a teacher at a local private school who impersonated a dead voter by the name **Onyancha Ogendo**. PW3 objected and alerted the E.C.K. clerks. The witness said that he was following the said Mongare Omongi in the queue and that is why he was able to notice him. He grabbed the identity card and the voter's card from Mongare Omongi and told the Presiding Officer that the documents belonged to **Onyancha Ogendo** who had died over a year earlier. The Presiding Officer pulled Mongare Omongi aside, talked to him and thereafter released him. The said person had already voted.

PW3 further stated that there was a lot of shouting, intimidation and hurling of abuses going on from outside, castigating those who were not ODM supporters. After voting ended at about 6.00 p.m., PW3 sneaked out of the polling station because he feared for his life, having been threatened with death for exposing the case of impersonation of a dead voter.

In cross-examination, PW3 said that there was a clerk who was calling out names from a register. He heard the name of Onyancha Ogendo being called out and then he saw Mongare Omongi moving forward to pick out a ballot paper as if he was Onyancha Ogendo. That is when he raised his voice and alerted the E.C.K. clerk that Onyancha Ogendo was dead and the person who had responded was Mongare Omongi. He said that he knew Mongare Omongi very well because he is a close neighbour.

Although the witness said that he was threatened, he did not give the names of the people who threatened him. He alleged that he disappeared from his home for about two weeks, fearing for his life. That notwithstanding, he did not report the incident or the threats to any police station.

**Richard Ochanda Maera, PW4**, stated in his affidavit that prior to the elections he was the chairman of the Chungwa Group, Otendo/Nyansakia ward and in charge of coordinating campaign activities for the first respondent. He was coordinating campaign meetings, strategic and planning activities. He alleged that the first respondent instructed him to convene a meeting on 11th November 2007, at Bistro Restaurant, Rongo, for purposes of articulating party strategies. At that meeting various

strategies were discussed including recruitment of election officials who would be favourable to the first respondent's cause, the witness alleged. A copy of the minutes of the said meeting was annexed to his affidavit. He was further instructed by the first respondent to convene another meeting on 17th November, 2007, at Sugar Land Restaurant, Awendo, for purposes of coordinating campaign activities. At that meeting it was resolved that those present do choose ODM supporters whose names would be submitted as candidates for recruitment as Presiding Officers, Deputy Presiding Officers and Clerks in the elections. The witness further alleged that Mr. Astariko Atika, the DEC, was present in the meeting as well as the first respondent. The first respondent introduced Mr. Atika who trained them on the logistics of the elections. He said that Mr. Atika informed the selected persons that they should submit their applications before closure of the recruitment period so that the process would appear to have been free from manipulation. He also instructed them on how to fill Form 16 A. He further told them that those who would be employed as Presiding Officers and Deputy Presiding Officers would be provided with extra Forms 16A which they were to keep as secret. He also told them that the sets of Form 16 A could be used to alter results in favour of the first respondent in stations where the results would be unfavourable. A copy of the minutes of the meeting was annexed to the affidavit of PW4. The minutes were allegedly signed by the first respondent, PW4 and Shem Ongori, the Secretary of the said campaign group.

The witness went on to state that most of the names that were submitted to the DEC were accepted and 17 of them were appointed to various positions. He gave the names of the 17 persons who were picked. Other names were submitted to the Assistant Returning Officer, Susan Obachi, and some of those people were also recruited as temporary election officials. The witness said that he submitted a list of the names to the said Susan Obachi on instructions of the first respondent. He attached a list of the names to his affidavit. He added that Susan Obachi was a great supporter of the first respondent and she coordinated activities between the Chungwa group campaigners and the DEC.

In cross examination, Mr. Katwa for the first respondent asked PW4 what made him swear his affidavit which seemed to incriminate him and other people mentioned therein, particularly those who were alleged to have attended the two meetings. PW4 responded that he became a Christian after the elections and he realized that some of the things that they were doing during the campaigns were ungodly. He then decided to disclose to the petitioner about the said meetings. He added that he stopped being a supporter of the first respondent in May 2008. He denied Mr. Katwa's suggestion that he fell out with the first respondent because he was not made the chairman of the Constituency Development Fund Committee.

With regards to the minutes of 17th November, 2007, the witness was emphatic that the first respondent signed the same. He also insisted that Mr. Atika attended the said meeting.

Asked by Mr. Onyinkwa for the second and third respondents whether indeed the Presiding Officers were given extra Forms 16 A, the witness said that he did not know whether that was done because he was sick at the time of elections and did not participate in the same. He however believed that the plans they had devised worked well because the first respondent won the election.

As regards the minutes of the meeting of 11th November, 2007, the witness said that the first respondent did not sign the same because he left before the meeting ended at about 1.20 a.m

**Ezekiel Akuma Onduma, PW5**, stated that he was monitoring elections in polling stations within

Nyamarambe Division on behalf of the NDP Party. Counting at Rigena primary school polling centre ended at around 6.30 p.m. During the counting at Nyachenge Youth Polytechnic there was a lot of shouting and chants of ODM slogans by supporters of ODM. He alleged that only one Form 16 A was issued to agents to sign and it was thereafter retained by the Presiding Officer. He went on to state that in the counting hall at Nduru secondary school, ODM supporters were shouting and dancing and had armed themselves with swords and clubs. Security officials who were there did nothing to them. He further alleged that some of the ODM supporters were abusive to tallying clerks and he gave the example of one **Reuben Ongori** who abused one **Mr. Moses Ontiri**, a tallying clerk. The said Mr. Ontiri became infuriated and left the tallying table. He was replaced by one Samwel Oyondi, the Principal of Nduru High School, a close ally of the first respondent. At that time the first respondent, his wife and one Donald Omwoyo Abuta were agitating for the results to be declared. The first respondent complained about some anomalies in Forms 16 A and the witness saw the DEC altering some entries therein. The witness said that the Returning Officer was not in control of the exercise.

**Samwel Mauti Gwako, PW6**, deposed that on 28th December, 2007 as results from various stations were being announced, the petitioner sought to know why there were major discrepancies on the votes counted and those which were being announced. The Returning Officer said he wanted to consult with the DEC and left the counting hall. He did not show up for sometime so the Deputy Returning Officer started to announce the results. An angry crowd of people overwhelmed the Deputy Returning Officer and demanded that she declares the first respondent the winner. At that time the witness saw the first respondent complaining to the DEC that 88 of his votes from Nyabitunwa Bine polling station had been allotted to his sister, Magara Karen Nyamoita, and the DEC made the appropriate changes pursuant to the complaint. The witness alleged that the Returning Officer was not in charge of the goings on because he was asleep and some tallying clerks had been pushed away by the unruly crowd which had taken control of the entire exercise. In his view, the prevailing circumstances presented an excellent opportunity for manipulation and alterations of the figures in the various forms.

In cross examination, the witness said that he did not see the Returning Officer asleep, but had not seen him for quite sometime.

With regard to the complaint made by the petitioner to the Returning Officer, the witness said that the latter did not give any satisfactory answer and he merely went out to consult.

**Peter Mokuia Onchari, PW7**, stated in his affidavit that on 28th December 2007 at about midday the DEC arrived with a contingent of police officers. This was after the halting of the declaration of the results following various complaints that had been raised by some candidates. The Returning Officer called a teacher known as **Moses Ontiri** of Nduru High School to assist in tallying the results. He also alleged that the Principal of Nduru High School, Samwel Oyondi and Mrs. Agnes Omingo Magara were also at the tallying table. He further alleged that the tallying exercise was in the hands of the first respondent's agents and supporters. The witness, who was an agent for one of the Presidential candidates, Mwai Kibaki, is illiterate. He was therefore unable to read and verify some of the contents of his affidavit that had been read out on his behalf. He stated therein that the Returning Officer was asleep and that gave an opportunity to the first respondent and his supporters to take charge of the tallying process and intimidate anyone who was perceived to be a PNU supporter. But in cross examination he said he did not see the Returning Officer asleep.

The petitioner testified as PW8. In his 103 paragraphs affidavit, the petitioner amplified the particulars of breach of various laws and regulations by all the respondents as stated in his petition.

Regarding the allegation that the first respondent caused many of his close relatives and staunch supporters to be appointed as election officials, the petitioner singled out one **Teresia Kiage** whom he said during the nomination process had seconded the first respondent yet she was posted as the Presiding Officer at Gekongo primary school polling centre. He complained to the second respondent about the skewed recruitment of election officials but the Returning Officer did nothing about it. The petitioner also deposed that the second respondent was not qualified to conduct the election as the Returning Officer because he was over 60 years of age, well above the threshold age of qualification for employment as a Returning Officer which is 60 years. The petitioner further contended that **Susan Obachi**, the Assistant Returning Officer, was not qualified for that position because she had no relevant experience at all and she had just been picked because of the influence of the first respondent. The same was alleged of **Sarah Keraro**, the Deputy Returning Officer who was said to be a primary school teacher.

The petitioner alleged that a number of his agents told him of acts of voter bribery and intimidation perpetuated by supporters of the first respondent. However none of the agents were called to verify those allegations.

At the tallying hall, the petitioner and **Zablon Rashid Miyonga**, who was also a candidate, waited up to about 3.00 a.m. of 28th December, 2007 when they demanded that the Returning Officer starts announcing the results from the polling centres that had already brought their results. By that time the petitioner had received most of the results from his agents and had several copies of Forms 16 A. But when the second respondent started announcing the results, the petitioner realized that some were different from the ones he had been given by his agents. Upon so noticing he requested the Returning Officer to comply with the provisions of **Regulation 40 (1) (b)** of the **Presidential and Parliamentary Elections Regulations**. He specifically asked for physical verification of Forms 16 As and ballot boxes from **Nyabine, Marongo, Igare, Kiorina and Rigena** polling stations. The Returning Officer declined to accede to his request and instead stopped the tallying process for sometime. The petitioner went on to state that at around 9.00 a.m. on the 28th December 2007, the counting hall was jammed with ODM supporters who were singing in praise of the first respondent, terming him the next Finance Minister in waiting. He alleged that at around 10.30 a.m. fracas ensued in the tallying hall and in the process the tallying tables were overturned and Forms 16 A and 17 A were strewn all over the place and some were taken away by members of the public who were inside the hall. That is when some of the tallying clerks like PW1 and PW2 were intimidated and left the tallying hall. The second respondent left and returned after sometime accompanied by General Service Personnel, the DEC, the OCPD Gucha Mr. Richard Ngetich and the DCIO Gucha, Mr. Bruno Isiosho. The petitioner said he was forced to sit down and the Deputy Returning Officer began announcing results again. When the petitioner enquired about the source of the results which were being announced the Deputy Returning Officer asserted that she was using other Forms 16A.

The petitioner raised an objection and demanded that his concerns regarding verification of the results announced earlier be dealt with first as well as the issue of the missing Forms 16A. The petitioner said that he approached the Returning Officer, the DEC and the entire security team with a set of Forms 16A bearing the results he was objecting to but the Returning Officer and the security team turned him away. They directed him to make his complaints to the nearest police station. At that time the second respondent had picked other people to replace the tallying clerks who had been intimidated and left the tallying table. The petitioner said that these new tallying clerks included **Samwel Oyondi, Elijah Nyaboga, Tom Mogire and Moses Ontiri** who had been Presiding Officers in various stations and were known supporters of the first respondent.

The petitioner listed 11 polling stations where the Deputy Returning Officer announced results that were different from the results that he had in Forms 16A that had been given to him by his agents. For illustrative purposes, at **Marongo primary school polling centre No. 021**, it was announced that the petitioner had **5 votes** instead of **121 votes** while in **Sae primary school polling station No. 040**, it was announced that the petitioner had scored **nil** whereas form 16A showed that he had **20 votes**.

The petitioner blamed the second respondent for allowing strangers into the tallying hall and the tallying table and said that act contributed to chaos and confusion that reigned at the tallying hall. He referred to **Regulation 40 (2)** which requires the Returning Officer to allow only a given number of people at the tallying centre and these are:

**(a) The Presiding Officers and other election**

**officials on duty;**

**(b) A police officer on duty;**

**(c) A candidate;**

**(d) An agent;**

**(e) Duly accredited election observers;**

**(f) Duly accredited media persons; and**

**(g) A member of the Electoral Commission.**

The rule further provides that a Returning Officer should not admit more than one agent of any candidate to the tallying venue.

The petitioner further stated that having realized that the results that were being announced had been doctored in favour of the first respondent, he protested and demanded a physical verification of the form 16A results that were being announced and the ones that had been presented from the polling stations but the second respondent did not agree to do that verification. The petitioner then left the tallying hall in protest and some other candidates followed him up as well.

To demonstrate that there were instances of several forms 16A in respect of given polling stations that contained different results and were signed by different persons as Presiding Officers for a particular polling centre, the petitioner referred to **Nyango primary school polling centre No. 005**. In that station the Returning Officer (the second respondent) signed form 16A for Presidential results as if he was the Presiding Officer. **Moses Ontiri** was the Presiding Officer for that particular station and he is the one who signed form 16A in respect of Parliamentary results. The same thing happened in respect of **Kiorina primary school polling station No. 071**. The second respondent signed form 16A in respect of the Presidential elections whereas the designated Presiding Officer was **Brian Mangere** who signed one of the forms 16A in respect of parliamentary results but there was also another form 16A in respect of the same station signed by **Esther N. Ongangi** as the Presiding Officer.

The petitioner also referred to the results for **Marongo polling station** which, according to him, was his strongest zone as he grew up there and went to school in the same place. He alleged that the

Presiding Officer in that station was **Onyancha Justin**, a first cousin of the first respondent. Although he had **121 votes**, they were doctored to read **5**. There were two sets of form 16A bearing different results but signed by the same Presiding Officer and different agents. The genuine form 16A had been signed by his agent, **Isaac Orangi**, but form 16A that was used in tallying and which had reduced his votes to 5 had been signed by different agents. However, form 16A in respect of Presidential elections and which reflected the PNU candidate as having got the highest number of votes was not signed by the Presiding Officer.

When the court ordered the ballot boxes opened for recount and scrutiny of the votes, this is one station where the number of votes as found in the ballot box did not agree with the results in form 17A yet the results as reflected in form 16A were in agreement with the actual votes cast. It was verified that the petitioner actually got 121 votes and not 5 votes as shown in form 17A. The petitioner highlighted a few other stations where the results as recorded in forms 16A were different from those that were posted in form 17A. In all those stations he alleged the Presiding Officers were either relatives of the first respondent or his staunch supporters. However, the errors in posting the results affected many other candidates, including the first respondent. There were also many instances where the votes that were recorded in form 17A were higher than those reflected in form 16A. This issue will be dealt with more elaborately at a later stage when I consider the findings of the scrutiny and recount of the ballots. The said exercise was allowed by the court at the request of the petitioner.

The petitioner further alleged that there were at least five double streams polling centres which for all intents and purposes the results thereof ought to have been captured in separate forms 16A. They had two deputy Presiding Officers who took charge of separate streams. These stations were **Tabaka, Nyango, Keburunga, Nyabigena and Nyabitunwa Bine primary schools**. None of those stations presented their results as expected. The petitioner also claimed that in at least five polling stations, the number of valid votes cast as declared in form 17A exceeded the number of registered voters in the said polling stations. He stated their names as **Riosobera, Nyabiosi, Mogumo, Maroo and Nyabera** primary school polling stations. Looking at the results from these stations as reflected in form 17A, that observation appears correct but the number of registered voters as shown in form 16A does not exceed 100% in any of those stations.

The petitioner also referred to Nyaroa primary school polling station No. 099 where the total number of registered voters was given as **246** in form 16A and the number of valid votes cast as **158**. Upon scrutiny it was revealed that forms 1B to 5B were not in the ballot box, the marked copy of the register and the counterfoils as well as form 16A were all missing from the ballot box. The form 16A that was supplied to court is not signed by any agent and no statutory comments were made. With regard to the ballot papers in the box, there was every indication that they had not been counted. This is because they had not been sorted out and were still folded. They were sorted out by the court clerks. The form 16A shows that the first respondent scored **93** votes followed by **Ochoi Ibrahim Ayiema** who had **33** votes and the petitioner scored **13** votes.

The petitioner compared several forms 16As in respect of Presidential returns and form 16As in respect of Parliamentary returns and realized that there were several stations that had no returns in respect of the Parliamentary election but there were returns for Presidential election. Some of those stations are **Nyamonaria, Mariwa, Ndonyo, Sare, Karungu, Ensoko, Maroo, Rangeti and Nyangweta primary schools polling stations**. There were also several forms 16A from various stations that were not signed by the Presiding Officers. There were a few polling centres where the Presiding Officers who signed form 16A in respect of Parliamentary election were different from those who signed form 16A for Presidential election.

Before the petitioner was fully cross examined, a journalist who recorded part of the tallying process and announcement of the final results on VCD gave evidence and the VCD was viewed in court. He is **Robert Ombati Ochoro, PW9**. It was necessary to do so because the evidence so adduced was going to be used in further cross examination of the petitioner. Scrutiny of various documents and recount of the ballots was also done before further cross examination of the petitioner. It was so agreed by counsel for the parties.

**Recount and scrutiny of the contents in the ballot boxes.**

This exercise took a total of 13 days. Some of salient facts that came to the fore are as hereunder:

1. There were 110 polling stations but the ballot boxes that were brought to court were from 107 polling stations. Ballot boxes from **Keburunga primary school, Mesocho primary school and Keburanchogu primary school polling stations** were not available. The DEC explained that there was an incident of fire in the store where they were kept after the elections and it is suspected that they got burnt and/or destroyed as a result of that fire incident.

2. In most of the ballot boxes the E.C.K. aperture seals were either missing or broken.

3. There were four empty ballot boxes.

4. One ballot box had its lid open and contained ballot papers of only three candidates.

5. There were many cases of incorrect posting from form 16A to form 17A. This affected almost all the candidates.

6. After the recount the first petitioner's votes increased from **5,758** to **5,840**. The first respondent's votes decreased from

**0,204** to **9,832**.

7. Out of the 107 polling stations whose ballot boxes were available, **31** of them had no forms 16A.

8. Out of the 107 polling station, 88 had ballot paper counterfoils inside but 19 of them had no such counterfoils.

9. Out of 107 polling stations, only 38 had forms 1B to 5B. But even some of those forms were not complete.

10. Out of the 107 polling stations, in 40 of them the Presiding Officers did not sign forms 16A. In a number of the ballot

boxes, the form 16A therein contained different votes from the ones shown in the forms submitted to the Returning Officer.

11. Out of the 107 polling stations, only 54 of them had forms 16A witnessed by a number of agents. In 53 polling stations no agent had signed and except in very few of them, no reasons were given by the Presiding Officers as to why the agents did not sign.

12. Very few of the available forms 16A had all the required details in terms of **Regulation 35A (4)**.

But even these had various material defects. For example, lack of the Presiding officers' official stamp, absence of the Presiding Officers' statutory comments where such comments were necessary and lack of explanation for absence of agents' signatures.

13. Out of the 107 polling stations, only **25** of them had marked registers. They were missing in **82** polling stations

After finalization of the scrutiny and recount of the ballots, the petitioner was further cross examined. He said the exercise exposed serious flaws on the part of the second and third respondents and/or their agents. He referred to the various acts of omission on the part of many Presiding Officers. He also faulted the second respondent for his failure to conduct the tallying process appropriately.

With regard to the allegation of bribery of voters and election officials, the petitioner admitted that PW4, who was the only witness who had alleged that there was a promise by the first respondent to pay money to some election officials, did not state that any money was actually paid.

Regarding the allegation of intimidation of voters and impersonation of dead voters, the petitioner referred to the evidence of **PW3, Mr. Mosikini**.

On the issue of recruitment of election officials, the petitioner insisted that the DEC did the exercise in a manner that favoured the first respondent. The petitioner was however unable to prove that a big number of the election officials were related to the first respondent.

With regard to the recruitment of the second respondent, the petitioner said that the third respondent should have followed its employment guidelines that expressly stated the age limit of a Returning Officer as 60 years. He insisted that the second respondent was not eligible for appointment as a Returning Officer.

### **The Second Respondent's Evidence.**

The second respondent testified that he was appointed as the Returning Officer for South Mugirango Constituency on 24th October, 2007. He did not apply for the job. He was telephoned by an official of the E.C.K. and requested to take up the job. At the time of appointment he was about 65 years old. He had previously served as a Returning Officer in the 1988 and 2002 elections and as a Deputy Presiding Officer in the 1983 elections. He is a graduate from the University of Dar es salaam.

Regarding employment of election officials, the Returning Officer said the E.C.K. had directed that all available vacancies be advertised and that was done through the office of the DEC. Thereafter many applications were received and those who met the necessary qualifications were appointed to various positions. A list of the successful applicants was forwarded to the Commissioner who was incharge of the Kisii area, **Mr. Jeremiah Matigaro**, for his approval. The list was approved. He denied the allegation that relatives of the first respondent were given favourable treatment in the recruitment exercise. Those who were picked as Presiding Officers and Deputies were trained for three days.

Regarding voting in the constituency, the same was done peacefully and all necessary materials had been supplied to all polling stations. After voting, counting was done at the polling stations and Presiding Officers took forms 16A to the tallying centre which was at Nduru secondary school.

On 28th December, 2007 at about 3.00 a.m. the petitioner and Zablon Rashid Miyonga de manded

that the results so far received be announced and the Returning Officer acceded to their request and started to announce the results. He said that the petitioner and the other candidate started becoming restless when they realized that the results were unfavourable to them. The Returning Officer added that the petitioner demanded physical verification of the results and he responded that he required to see the forms 16A which his agents had given to him so that he could compare the results therein with the ones which he had received from the Presiding Officers. As a result he decided to stop announcement of the results until all the ballot boxes were delivered from the remaining polling station. The Returning Officer decided to report this matter to the DEC. He did so by way of a telephone call.

At around 10.00 a.m. on 28th December, 2007 while tallying was still going on, the petitioner became impatient and again started pressing his verification demands accompanied by Zablon Miyonga and their supporters. He alleged that they tried to grab forms 16A that were being tallied but the Returning Officer alerted the security officers present and all the doors were closed. The security officers started checking and searching all those present and ordered them to surrender all forms 16A and return them to the tallying table. Within a few minutes order was restored and all forms 16A were collected and tallying restarted. At around 11.00 a.m. the DEC accompanied by the OCPD, DCIO and security regional coordinators arrived at the tallying hall. Thereafter tallying proceeded smoothly and at about midnight the Returning Officer announced the final results. He declared the first respondent the winner and issued him with the appropriate certificate.

The Returning Officer annexed to his affidavit copies of all the forms 16A that were handed over to him by various Presiding Officers. It was apparent that a number of the forms are missing. He also annexed to his affidavit form 17A which he signed on the last page. Except for his signature and the name of the constituency, the only other information given on the last page of form 17A is the number of registered voters, **56,013**, and the name of the first respondent and his party, ODM. The Returning Officer did not date the form and neither did he indicate the voter turn out percentage. He indicated results of only six candidates. He did not even declare the results of the petitioner on the form. On the part which is supposed to contain party names, names of candidates and/or counting agents, identity card numbers, signature and date, the only party name shown thereon is ODM and the name of the first respondent, who was not even given an opportunity to sign the same. No explanation was given as to why the names of the other candidates or their counting agents, their respective parties, identity card numbers and signatures were not endorsed on the form. This form 17A was obviously not filed properly.

After the results were announced, ballot boxes were sealed and taken to the E.C.K. offices at Ogembo where they were stored.

When this court made an order that all the ballot boxes and other election material be delivered to court as required under **Rule 19** of the **National Assembly Elections (Election Petition) Rules**, the Returning Officer went to the offices of the third respondent and collected 114 ballot boxes out of the 116 boxes that had been stored there and delivered them to court. After the scrutiny he realized that two other boxes were missing and they were for **Keburunga primary school polling station No. 006** and **Keburanchoгу polling station No. 090**. Some of the boxes that were brought to court had been affected by a fire that broke out in the said store but the contents therein were intact. The Returning Officer also noted with surprise that the ballot box for **Nyamagena Mabiriri polling station** had its lid open and had ballot papers of only three candidates. The ballot box had originally been sealed. The Returning Officer had no explanation as what might have happened to the box. It was an indication that the box had been interfered with. Further, he noticed that some four ballot boxes were empty at the time of scrutiny. He was of the view that the empty ballot boxes related to stations

that had double streams and when polling closed, all the contents of the additional streams were put into one ballot box leaving the four ballot boxes empty. The four polling stations were stated as **Nyabitunwa Bine, Nyango, Keburunga and Mariwa primary school polling stations.**

Regarding the missing forms 16A, marked copies of registers, ballot paper counterfoils and forms 1B to 5B which were supposed to have been put in the respective ballot boxes for each polling station, the Returning Officer was of the view that some Presiding Officers may have put them in the Presidential or Civic ballot boxes. He also opined that strangers and/or unauthorized persons gained access to the store where the ballot boxes were kept and caused damage and/or disappearance of some of the ballot boxes and the contents thereof. Other persons who were involved in putting off the fire that occurred in the premises on 26th August, 2009 and the cleaning up exercise that followed must have interfered with the ballot boxes, he said. They may have occasioned damage and misplacement of some ballot boxes, seals, rivets and other election materials.

In cross examination, the second respondent stated that the only complaint that he received was by the petitioner and it related to recruitment of the election officials. He termed the complaint as a general one. He said he had no knowledge that any of the people recruited were relatives of the first respondent. It was also impossible for him to know who among them was a supporter of the first respondent.

He further stated that all forms 16As were received by himself, and the Deputy and Assistant Returning Officers. They checked the forms to ensure that they were compliant. He however conceded that some of the forms had not been properly filled. Although the Returning Officer had earlier stated all forms 16A had been received and later sent to the E.C.K. headquarters at Nairobi, he conceded that forms 16A in respect of Nyango, Nyabitunwa Bine, Sae, Rigena, Entanda and Ikoba polling stations were not sent to Nairobi together with the other forms 16A. He said those forms may have been missing when he was forwarding the rest to Nairobi. He could not explain how they could have gone missing if indeed they had been delivered to him.

Mr. Omwanza for the petitioner showed the Returning Officer form 16A in respect of **Rangeti polling station No. 087**. In that form the names and votes for the various candidates appear on the reverse side. The form was not signed by any agent. No reason was given for those anomalies. The Presiding Officer was **Zipporah Gesare Okenye** but it does not bear the Presiding Officer's rubber stamp. There is no indication whether there were any disputed votes in that station.

The Returning Officer's reaction regarding that form was that if he had seen it, he would not have accepted it the way it was. He would have asked the Presiding Officer to fill another one under his supervision. He admitted that even though the form was among the ones he had delivered to court, it has serious anomalies.

The Returning Officer was also shown form 16A from **Mariwa polling station** which did not have the name of the Presiding Officer, was not signed and had no name or signature of any agent. Several other forms of a similar nature were also pointed out to him. His explanation was that he had not seen any of those forms and neither did his Assistant or Deputy Returning Officers refer them to him. He admitted that they ought not to have been accepted in the condition they were in.

The Returning Officer was taken to task as to why he signed and stamped as the Presiding officer some forms 16A in respect of Presidential election as if there were no Presiding Officers in those polling stations. He was referred to one such case, **Nyango primary school polling station**. He

explained that he signed form 16A for that polling station at Nairobi after submission of the results. He explained that form 16A from that polling station could not be traced and he was asked by a certain E.C.K. official to sign that particular form. He then telephoned E.C.K. offices at Ogembo and spoke to his clerk, **Onditi Zephanayo**, who gave him the necessary information. He then took form 16A, filled the information, signed and stamped it. He did the same for **Kiorina primary school polling station**. He could not explain what had happened to the forms that had been signed by the Presiding Officers who were in those stations. When Mr. Omwanza showed him a form 16A in respect of Presidential election for Kiorina polling station that had been signed by the Presiding Officer thereat, **Esther Ongangi**, the Returning Officer merely expressed surprise about the same. The Returning Officer said that there was confusion regarding Presidential results and at the direction of Senior E.C.K. Officials he had to fly to Nairobi five times to present the same results.

The petitioner's counsel drew attention of the Returning Officer to these anomalies relating to Presidential results to demonstrate to him that he was either not diligent in handling forms 16A and/or that the forms were deliberately mishandled by several Presiding Officers.

Regarding his appointment as the Returning Officer, the second respondent said that in 2007 he was 65 years old and was not therefore eligible for that appointment since the maximum age was set at 60 years. However, his view was that the age factor did not inhibit his performance as a Returning Officer. He took consolation in the fact that some of the Returning Officers appointed and designated to other constituencies were much older than he was.

Although the Returning Officer's age was not one of the grounds of the petition, I must observe that the E.C.K. violated its employment guidelines by head hunting the second respondent and appointing him as the Returning Officer when he was clearly not eligible for such an appointment. The second respondent was aware of the E.C.K. requirements and had not applied for the job. He ought to have declined the offer. Public institutions should recruit its officers in a transparent manner and in adherence to the set down employment guidelines and/or regulations.

Regarding recruitment of the election officials, the Returning Officer testified that although there was a selection panel, they were not able to interview all the people who applied for the jobs because there were over 3000 applicants. The panel looked at the previous experience of the applicants, particularly those who had worked with E.C.K. before. He said that PW1 and PW2 were recruited by the DEC.

Asked whether he personally filled form 17A after announcing the final results, the Returning Officer answered that it was impossible to do so personally. He used tallying clerks to post the results from forms 16A to form 17A. Upon receipt of forms 16A he would pass on the same to the tally clerks to tally the results and enter them in form 17A. But when he was cross examined by Mr. Katwa for the respondent on the same issue, the Returning Officer stated as follows:

**“I filled form 17A long after I had declared the results. I was not filling form 17A as the results were coming in. I captured the data in form 16A in my own sheet or book.”**

Regarding **Regulation 40 (2)** which sets out the people who ought to be allowed into the tallying hall, the Returning Officer admitted that he allowed ordinary members of the public to get into the hall. He justified that action by saying that this was their election and the hall was very big.

The third respondent called **Astariko Otieno Atika** (the DEC) as a witness. He stated in his affidavit that as the District Elections Coordinator he was in charge of Gucha District which covers Bomachoge, Bobasi and South Mugirango Constituencies. He gave his job description as outlined under the E.C.K. guidelines for recruitment of temporary election officials under which all election officials are given certain electoral functions to perform. Part of his duties included supervision of the electoral process alongside the Returning Officer. Such duties entailed, ensuring the conduct of free and fair election by all election officials, identifying and recruiting personnel for purposes of conducting the election, identifying and confirming availability of polling, counting and tallying centres and display of voter education posters and placards in all public places.

Regarding the allegation that he employed PW1 and PW2 while knowing that they were not trained or qualified for the job of tallying clerks, Mr. Atika stated that all the people who were employed were qualified and merited the appointments given to them. He denied that he deliberately caused to be employed as election officials relatives of the first respondent. He said that if any of the first respondent's relatives were engaged by the E.C.K. it was by sheer coincidence. The selection panel considered, among other things, clan diversity in the constituency and ensured that recruitment was done from all parts of the constituency. The final list of the election officials was forwarded to Commissioner Jeremiah Matigaro for approval. He added that PW1 and PW2 were engaged as casual workers. Such workers are not election officials within the meaning of the employment guidelines aforesaid. PW1 and PW2 did not require to take any oath of secrecy and so **Regulation 10** of the **National Assembly and Presidential Elections Regulations** was not breached. It is only Presiding Officers, Deputy Presiding Officers and Polling Clerks who are required to take an oath of secrecy, he stated.

Regarding the allegation that he attended a meeting hosted by the first respondent on 17th November, 2007 at Awendo Sugar Land Hotel, he denied having ever attended such a meeting. He said that on 17th November, 2007 he was at his office with some officers from the E.C.K. headquarters who were delivering election materials. He annexed to his affidavit a diary of events and an extract of a visitors' book. The latter had an entry dated 17th November 2007 showing that one **David Kilundo** from E.C.K. Nairobi visited the DEC's office for purposes of dispatch of election materials. The DEC added that the process of receiving the said election materials was very tedious and involved Returning Officers, their deputies and Assistants for the three constituencies in the District and it took the whole day and spilled over to 18th November 2007. He termed the allegation of his attendance of the said meeting as scandalous and intended to malign his name and integrity.

Regarding the allegation that he participated in the tallying and announcement of the results, the witness denied having tallied or announced any results but he admitted that he participated in helping and assisting in the electoral process alongside the Returning Officer and his Deputy in line with his call of duty. He responded to a call by the Returning Officer when a security breach occurred at the tallying hall. When he went there he rightfully handled some documents with a view to helping the Returning Officer resolve various complaints that had been raised by some candidates. He denied that he tampered with any form 16A.

On the issue of handling and filling forms 16A by Presiding Officers and their deputies, the DEC said that they had all been trained for three days, although in his view that may not have been sufficient training period.

After the Returning Officer announced the final results he handed over to him copies of forms 16A and 17A together with other election materials. The DEC said that the Returning Officer also left in his

office a working spread sheet which he used in the tallying hall to capture the results as presented to him from the polling centres. The spread sheet which was annexed to his affidavit does not bear the signature of the Returning Officer and neither is there any indication of when and who prepared the same.

In cross examination, the DEC said that after E.C.K. was disbanded in December 2008, he was directed to hand over all the materials in the E.C.K. offices at Ogembo to the District Commissioner, Gucha. The store where the ballot boxes were kept was not opened. A handing over report was prepared and given to the District Commissioner. Later he learnt that there was an attempted arsonist attack that targeted the election materials.

The DEC said that he had the power to handle disputes that arose during the election process but he had no mandate to fill forms 16A and 17A. He added that when he went to the tallying hall in response to the call by the Returning Officer, he helped in resolving some disputes that had been raised by various candidates. He however told the petitioner that the Returning Officer had no power to open any ballot box at the tallying stage.

The DEC reiterated that recruitment of election officials and casual employees was done in a transparent manner.

### The first respondent's evidence

**Shem Ongori, DW3**, who was alleged to have been the secretary of the Chungwa campaign group and who allegedly prepared and signed the minutes of the meetings that were said to have taken place on 11th and 17th November 2007, swore an affidavit and denied having ever attended such meetings. He said that the signature appended against his name in the said minutes was a forgery. As such he had lodged a complaint at Ogembo police station.

He said that he was a deputy presiding officer at **omogwa primary school polling station No. 012** in the 2007 general elections. He applied for the position and was appointed on merit, having previously worked with the E.C.K. The Presiding Officer at Omogwa polling station was **Caleb Obara**. **DW3** admitted that he signed form 16A on behalf of the Presiding Officer. The form bears the name of **Caleb N. Obara** as the Presiding Officer yet the signature thereon is alleged to be that of DW3. However, in cross examination by Mr. Onyinkwa for the second and third respondents, DW3 denied having signed the form 16A annexed to the affidavit of the second respondent. That form appears to be an exact photocopy of the one that DW3 admitted to have signed.

The first respondent stated in his affidavit that he voted at **Orwaki primary school polling centre No. 009**. He denied having influenced employment of his relatives and supporters as election officials so that they could assist him rig the election. He stated that **Zephania Ayiema** and **Okombe Maobe** who were recruited as election officials are his maternal cousins but both of them applied and got the jobs on merit. That notwithstanding, there was no indication that the two were his supporters. He stated that **Teresia Kiage** was not one of the people who seconded him during the nominations as was alleged by the petitioner. He observed that Teresia Kiage was the Presiding Officer at **Gekongo Primary school polling station No.066** and in that station the petitioner scored 94 votes whereas he got only 25 votes. There is therefore no evidence that the Presiding Officer assisted him in any way, he stated.

The first respondent further denied any knowledge of the two meetings alleged to have taken

place on 11th and 17th November 2007. In particular, he denied having appended his signature to the minutes of the meeting of 17th November 2007. He said that the signature appearing against his name on the said minutes is a forgery and he had reported the matter to the Criminal Investigations Department for appropriate investigation. He submitted through his advocates a copy of the said minutes together with his specimen signature. A Forensic Document Examiner attached to the C.I.D. Headquarters, **Antipas Nyanjwa, DW5**, examined the signatures on the said minutes and compared the same with the specimen signatures of the first respondent and found no similarities in the two signatures. In his opinion, the signature on the minute that is alleged to be that of the first respondent is a forgery.

Regarding engagement of the second respondent as the Returning Officer, the first respondent contended that apart from his age, he was qualified in all other aspects. The age factor did not affect the Returning Officer's performance and if constituency were equally affected. As for the Assistant Returning Officer and the Deputy Returning Officer, both met all the requirements for appointment into their respective positions, the first respondent asserted.

Regarding the allegation of voter bribery and intimidation, the first respondent denied that he ever bribed anyone and neither was there sufficient evidence of any intimidation. He observed that the petitioner did not name the agents who gave him the information relating to the aforesaid allegations. He dismissed the evidence of PW3 (**Mosikini Barongo**), saying that voting is normally done on a first come first served basis. Voters' names are not called out as per the register as alleged by PW3. The said witness also did not make a report to any police officer regarding his alleged observations and threats to his life.

The first respondent contended that the Returning Officer performed his duties in accordance with the law and dismissed the petitioner's allegation that he abdicated his responsibilities in the tallying process.

Regarding the results as indicated on forms 16A which the petitioner alleged were doctored in his favour, the first respondent discounted that claim and stated that the Returning Officer announced the results as presented to him from various polling centres. There may have been a few errors but the same were of no consequence since the scrutiny and recount exercise "sanitized the results" and conclusively showed that he was the clear winner, the first respondent contended. In his view, the scrutiny and recount of the votes reflected the will of the voters in South Mugirango. He further stated that if there was any non compliance with the provisions of the **Presidential and Parliamentary Elections Regulations**, that *per se* could not invalidate the election.

As regards the four polling stations whose results were unaccounted for in the recount that is, **Keburunga, Keburancho, Mesocho and Nyamagena Mabariri primary schools polling stations**, the first respondent said that forms 16A in respect of those stations revealed that he had by far more votes than the petitioner and even if those ballot boxes had been available, the overall results would not have changed much.

As regards the petitioner's allegation that in five polling stations voter turn out was more than 100% of the registered voters, the first respondent said that this was untrue. The petitioner used results in form 17A in respect of the five stations in arriving at that conclusion. However, form 17A is completed long after the results have been tallied and announced and any error therein cannot affect the announced results. In any event, the recount showed that the allegation was without any basis.

The first respondent stated that the 2007 election results reflected an established voting pattern in the constituency where voters cast their ballots along clan lines. The petitioner garnered most votes from his Nyaramba clan while himself got majority votes from his Bosinange clan although he also got a significant number of votes across all other clans owing to his credentials in development projects all over the constituency, he opined. The first respondent urged the court to declare that he was validly elected as the member of parliament for South Mugirango constituency in a free and fair election.

In cross examination, the first respondent said that **Teresia Kiage** could not have proposed him during the nomination exercise. He said that he got a direct nomination from ODM headquarters, having been proposed by **Teresia Kwamboka**. He reiterated that he did not attend the alleged meetings of 11th and 17th November 2007 and denied the suggestion by the petitioner's counsel that he appended his signature to the minutes of 17th November, 2007 because he wanted to show those in attendance that he was serious about his promise to pay them additional allowances, that is, over and above what they were to be paid by the E.C.K.

Regarding the voters' registers, ballot counterfoils, forms 1B to 5B and other election documents that were found missing in a number of ballot boxes, the first respondent admitted that they were important documents and were supposed to be in their respective ballot boxes. He was however of the view that the missing documents may have been put in the Presidential or Civic ballot boxes by mistake. In his view, this was an excusable mistake.

The first respondent also called **Superintendent Bruno Isohi Siosho, DW6**, who was the DCIO, Gucha, in 2007 and who was one of the people who accompanied the DEC to the tallying hall at the request of the Returning Officer.

**Kennedy Peter Mochire, DW7**, is a Statistician who holds a Bachelor of Science Degree in statistics and computer science. He was consulted by the first respondent to do an analytical synopsis of data relating to the elections in the constituency. He relied on the following documents: Form 16A, Form 17A, the deputy registrar's report regarding delivery of ballot boxes by the third respondent to court, a provisional parliamentary election results data prepared by the second respondent and a tabulated report and data relating to scrutiny and recount of ballots. The above documents were supplied to him by the first respondent. On the basis of the above documents he made various statistical findings regarding the elections. However, he qualified his findings by stating that he was not in a position to render any opinion on any issue in this matter. He further stated that the accuracy of his report was all dependent on the quality of the documents that were availed to him. I will highlight some of his findings later.

### **Analysis of the evidence and findings on the main grounds of the petition.**

In **MOHAMED JHAZI –VS- SHARIF NASSIR A. TAIB**, Election Petition No. 9 of 1983, it was held that the burden of proof throughout rests on the petitioner and the quality of evidence that is advanced is to be considered with a thoroughness and gravity which is commensurate with the dire consequences that can follow by virtue of the provisions of **section 6** of the **National Assembly and Presidential Elections Act** and **section 35** of the **Constitution**. The standard of proof is slightly higher than the one adopted in civil cases, balance of probabilities, but not as high as in criminal cases which is beyond reasonable doubt. The evidence herein and particularly the petitioner's allegations, must be subjected to the degree of proof as stated hereinabove.

#### **(A) Allegations against the first respondent.**

**1. Hosting of election officials at Bistro Restaurant and**

**Sugar Land Restaurant on the eve of the election**

**date.**

It was alleged by PW4 that on 11th and 17th November 2007 (not on the eve of the election date, 26th December, 2007) the first respondent hosted a group of his campaigners at the aforesaid Restaurants at Rongo and Awendo respectively. There was no allegation that any Presiding Officer or clerk attended any of the said meetings. It was alleged that names of the first respondent's supporters who were to be appointed as Presiding Officers and their deputies were agreed upon. It was further alleged that the DEC was present at the meeting of 17th November 2007. Copies of the alleged minutes of the said meetings were tendered in evidence. The first respondent and the DEC denied having attended the said meetings. Other than PW4, none of the other people who were alleged to have attended any of the two meetings were called as witnesses. The alleged secretary of the campaign group who was said to have taken the said minutes denied having ever attended the meeting or having taken them. The first respondent called a Forensic Document Examiner who told the court that the alleged signature of the first respondent on those minutes was a forgery. The DEC adduced evidence to the effect that on 17th November 2007 he was at his office at Ogembo where he was receiving election materials.

In my view, that allegation was not sufficiently proved and I dismiss the same.

**2. Bribery of election officials and/or promise to give them money.**

In view of what I have stated hereinabove, this allegation must also be rejected because the alleged bribery or promise to pay money to potential election officials was alleged to have taken place at the meeting of 17th November, 2007. I have already held that there is insufficient evidence that the alleged meeting ever took place.

**3. Bribery of voters at Mariwa, Rigena and Ayora polling stations.**

No voter in any of the above polling stations or any other was brought to court to testify that he was bribed. The petitioner did not disclose the name of any agent who may have told him that the first respondent was bribing anyone. This allegation is also dismissed.

**4. Influencing employment of close relatives and staunch supporters as election officials.**

The petitioner alleged that out of 116 Presiding Officers appointed by the second and third respondents in the constituency, 24 of them are directly related to the first respondent by marriage and/or blood while 53 are his known staunch supporters. There was evidence that the third respondent advertised all the positions available and more than 3000 applications were received. The Returning Officer and the DEC testified as to how the recruitment was done. In view of the large number of applicants and shortage of time the recruitment panel was unable to interview all the applicants. They selected those who appeared to have had the required qualifications. The DEC added that they ensured that clan balance was observed in the recruitment. I must state that the recruitment could

have been done better, particularly if the advertisement had been made much earlier.

Although the first respondent admitted that two of his maternal cousins were among those who were recruited as election officials, there was no evidence that their recruitment was influenced by himself.

As regards the first respondent's supporters, whereas there is evidence that a number of them were recruited, there was no sufficient evidence that they had not applied for the jobs or that they were not qualified. It was not shown that the first respondent influenced their recruitment in any way.

#### **5. Perpetration of terror, violence and intimidation to the petitioner's supporters by the first respondent's supporters.**

In the petition it was alleged that the above took place prior to and during the voting day. Firstly, there was no evidence of any violence and intimidation prior to 27th December 2007.

**Daniel Barongo Mosikini, PW3**, alleged that he was intimidated by some of the first respondent's supporters at Orwaki primary school polling centre. However, that witness did not name at least one of the people who intimidated him and neither did he make any report to the Presiding Officer or to the police on the voting day or thereafter.

There was evidence that at the tallying hall the first respondent's supporters were singing, dancing and chanting ODM slogans.

The Returning Officer admitted that he allowed into the tallying hall members of the public and generally supporters of various candidates. That was wrong. The Returning Officer violated the mandatory provisions of **section 40 (2)** of the **Presidential and Parliamentary Elections Regulations**. That notwithstanding, that Act did not amount to intimidation of the petitioner's supporters on the voting day as claimed in the petition. The kind of intimidation that is unacceptable is that which will cause a candidate's supporters to be hindered from exercising their right to vote due to apprehension of violence. That was not demonstrated. In my view therefore this allegation must also fail.

#### **(B) Allegations against the second and third respondents.**

#### **6. Impersonation of deceased voters.**

The only evidence that was adduced in support of that allegation was that of **Daniel Barongo Mosikini, PW3**. The person who allegedly committed that offence was **Mongare Omingi**. He was said to have impersonated a deceased person by the name **Onyancha Ogendo**. The petitioner should have availed to court the Death Certificate of the deceased person or a burial permit. Alternatively, the petitioner ought to have sought witness summons to compel Mongare Omingi to attend court and give evidence. A formal complaint should also have been made to the police to investigate the matter since it is a criminal offence for anyone to impersonate a dead person in an election. See **section 7** of the **Election Offences Act**.

The evidence of PW3 was rather wanting because he was an agent of one of the candidates and he arrived at Orwaki primary school polling centre at about 6.00 a.m. Ordinarily agents are given the first priority to cast their ballots so that they can perform their roles thereafter. It is therefore unbelievable that PW3 was queuing together with the other voters in the station. But even if that was

so, it is not a normal practice to call out voters using the voters' register so as to cast their ballots. Voting is usually on the basis of first come first served. When a particular voter gets into the voting venue, his/her name is checked and ticked against the register. It is unbelievable that PW3 heard a clerk calling out the name of Onyancha Ogendo and saw Mongare Omingi stepping forward to pick a ballot paper and vote as if he was the deceased person. A serious issue as this one ought to have been reported to the police so that it could be investigated properly. And even if for any reason the police were unwilling to investigate the same, the petitioner ought to have conducted his own investigations and adduce better evidence than he did. I am unable to accept that allegation.

#### **7. Ejection of the petitioner's agent from Rigena**

##### **polling station and other polling stations.**

No evidence was adduced to the effect that the petitioner's agents were excluded and/or ejected from Rigena polling station or any other station. This allegation is summarily rejected.

#### **8. Failure to sign forms 16A by Presiding Officers and/or**

##### **agents, failure to affix forms 16A in polling stations.**

Immediately after announcement of the results by a Presiding Officer, he is supposed to request each of the candidates and in the absence of a candidate, such of his agents then present to append his/her signature or write down reasons for the refusal to sign the declaration of the results at the polling station. The Presiding Officer is further required to give each candidate or agent a copy of the declaration, that is form 16A, and then affix a copy thereof at the public entrance to the polling station or at any other place convenient and accessible to the public at the polling station. See **Regulation 35A**. The petitioner alleged that some Presiding Officers unlawfully and unjustifiably refused, neglected and/or otherwise failed to sign and complete forms 16A as required, have them signed by the candidates or their agents and affix copies thereof at public entrances to the polling stations or other convenient and accessible places to the public at the polling station.

There was sufficient evidence that some Presiding officers failed to sign and stamp forms 16A, failed to complete them as required, for example by omitting to state the total number of registered electors, the total number of valid votes cast, the number of rejected votes and the number of disputed votes. Many agents also did not sign forms 16A and no reason was given for such failure and/or refusal. The second and third respondents testified that all the Presiding Officers had been trained for three days and so they knew how they were supposed to fill the forms. No presiding Officer was called by the second and third respondents to testify, particularly in respect of the various stations where the requirements of the above quoted regulation were not complied with. The refusal or failure of a candidate or agent to sign form 16A or to record the reasons for not doing as required cannot by itself invalidate the results as announced by a Presiding Officer. But as far as the other requirements under **Regulation 35** are concerned, failure by a Presiding Officer to comply is a serious breach which requires appropriate explanation by the officer concerned. In fact, it is an election offence for a Presiding Officer, without a reasonable cause, to fail and/or refuse to sign and stamp a form 16A including completing all the parts as required of him under the said regulation. These include the statistical part just above the names of the candidates, reason for refusal and/or failure of a candidate and/or his agent to sign the form and any necessary statutory comments. Such an Officer is liable to imprisonment for a term not exceeding five years, see **section 4 (g) of the Election Offences Act**. Where a Presiding Officer presents to a Returning Officer a form 16A which is neither signed by

that Presiding Officer and/or any of the candidate's agent, that declaration is of no value and cannot be used or authenticate any declared results.

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 illustrative purposes. At **Mariwa 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** appears to have garnered 226 votes.

Why did the Returning Officer and/or his Deputy/Assistant accept such forms" In cross examination, the Returning Officer said that if he had seen such forms he would not have accepted them yet he admitted that these are among the forms that he received, took into account the results thereon to declare the winner and thereafter forwarded to E.C.K. Headquarters at Nairobi. The forms were eventually brought to court. It matters not whether they were received by the Deputy or Assistant Returning Officers, both of them were working under the Returning Officer and none of them opted to testify.

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 incharge 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 votes" **(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.

One of the first respondent's witnesses, **Kennedy Peter Mochire**, who analysed various documents that were given to him by the first respondent in his affidavit at paragraph 20 stated as follows:

**"20. That from the tabulated report and data made for and on behalf of Hon. J.O. Magara following scrutiny and recount I observe:**

**(a) Out of the 110 polling stations 76**

**polling stations had form 16A inside the ballot boxes (69%).**

**(b) Out of the 110 polling stations 89**

**polling stations had ballot paper**

**counterfoils inside the ballot boxes**

**(80.9%).**

(c) Out of the 110 polling station 35 polling stations had forms 1B to 5B. Some were not complete but parts of the said

forms were inside the ballot boxes (31.8%).

(d) Out of 110 polling stations 67 polling stations had forms 16A duly signed by the Presiding Officer (60.9%).

(e) Out of the 110 polling stations 54 polling stations had form 16A duly witnessed by agents (49.09%).

(f) Out of the 110 polling stations 39 polling stations had marked registers. The count of marked names agreed with

he used ballot paper counterfoils (35.4%).”

That the second respondent and officers subordinate to him breached mandatory Election Regulations by mishandling so many forms 16A is not in dispute. It is a fact conceded by all the respondents. What the parties are contesting is the legal effect of such breach. Before I come to a determination of this all important question, I will consider the other allegations that were made by the petitioner.

#### 9. Acceptance of results from polling stations in which

#### votes cast exceeded the number of registered voters.

The petitioner alleged that in five polling stations the voter turn out was more than the number of registered voters in those stations. The petitioner based his contention on results recorded in form 17A. Looking at the results posted in form 17A in respect of those five stations namely, **Riosofera, Nyabiosi, Mogumo, Maroo and Nyabera primary school polling stations**, that allegation appears well founded. However, when we looked at the number of registered voters as indicated on forms 16A, it was clear that in none of those polling stations were there a number of voters that exceeded the registered ones. It was however evident that the results posted in form 17A, in respect of those five polling stations, had been inflated from the actual ones as recorded in form 16A.

#### 10. Variation of results as recorded in forms 16A and 17A.

The second respondent testified that upon receipt of forms 16A, he was noting the figures in a certain sheet of paper and then pass on the forms to the tallying clerks for filling form 17A. That was also the evidence of PW1 and PW2. No other tally clerks were called by the second and third respondents. PW1 and PW2 did the tallying until the time when fracas arose and left in fear. PW1 and PW2 testified that they worked meticulously under the supervision of the Deputy Returning Officer. After they left, the second respondent picked other people who continued with the tallying exercise. Some of them had served as Presiding Officers. It was alleged that they were supporters of the first respondent but that was not proved. What cannot be denied is that there were too many mistakes in completing form 17A. The variation of the results affected almost all the candidates and it cannot be said that only the petitioner was adversely affected.

There were several incidents where results from a particular station in form 16A were used to fill form 17A in respect of a totally different polling station. For example, the results in respect of Nduru

secondary school polling station No. 074 were recorded in form 17A as if they were for Nduru primary school polling station No. 013. The results of Nyabiosi primary school polling station No. 109 were posted in form 17A for another school bearing the same name but a different polling station number, that is, Nyabiosi primary school polling station No. 080. The results for Nyachenge polytechnic polling station No.98 were posted in form 17A to Nyachenge primary school polling station No. 003.

According to the analysis done by **Kennedy Peter Mochire**, all the votes in the 110 polling stations as recorded in forms **16A** were **35,027**, those recorded in form **17A** were **35,052** and those which were **announced** totalled **35,293**. Although the arithmetic difference between the three figures above is not very significant, it shows that there was no due diligence on the part of the second respondent and/or officials subordinate to him.

**11. Refusal of the petitioner's request for a recount**

The evidence that was given by the petitioner regarding this issue does not accord with his allegations in the petition and the relevant law. In the petition, he stated that the second respondent unlawfully and unjustifiably declined his request for a recount of the votes contrary to the provisions of **Regulation 37 (1) and (2)**. The above cited regulation only applies to a candidate or a counting agent who requests for any recount at a polling station. A Presiding Officer is under an obligation to do a recount of the votes so long as the exercise is not done more than twice at the instance of one candidate. There was no evidence that such a request was made at any polling station. The petitioner's evidence was that he made a request for a verification of his votes at the tallying centre but the second respondent did not accede to it. That was after he realized that some of the results that had been announced by the Returning Officer were different from the ones he had been notified of by his agents. Although he was proved right in respect of some stations when the recount was done, the second respondent would not have opened the ballot boxes for purposes of doing a recount at the stage of tallying the results. At that stage, the Returning Officer can only open a ballot box to verify the rejected or spoilt votes upon receipt of a complaint by a candidate.

**12. Allegation that the second respondent declared the**

**first respondent as the winner when he had not**

**received the highest number of votes.**

That allegation was not proved. From the figures as recorded in forms 16A, the first respondent had the highest number of votes. The second respondent had to declare him the winner of the election. His victory could not be challenged in any other way except through an election petition. The third respondent was under an obligation to declare the first respondent the winner and did so vide a Kenya Gazette special issue No.12615.

**13. Declaration of the first respondent as the winner**

**without completing form 17A in the presence of the**

**petitioner and/or his agents.**

Form 17A is supposed to be completed by the Returning Officer after declaration of the winner in a Parliamentary election. **Regulation 40 (1) (f) and (g)** state that the Returning Officer “**shall declare the –**

- (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 votes; and**
- (g) sign and date the form and –**
  - (i) give to any candidate or candidates' agent present a copy of the form; and**
  - (ii) deliver to the Electoral Commission the original of forms 16A together with form 17A and form 18.”**

It is apparent that the Returning Officer abdicated his responsibility by failing to personally complete form 17A after declaration of the winner and in the manner stated hereinabove. He said that it is not possible for a Returning Officer to complete form 17A by himself without delegating the responsibility to other people. He said it is very tedious to do so. However, the above quoted regulation is couched in peremptory terms and does not permit a Returning Officer to do otherwise. But in the event that he chooses to delegate that responsibility to anyone else (which seems to be against the law) the Returning Officer has to ensure that the form is filled correctly and in accordance with the declared results as they appear in forms 16A. In the event of any mistake in completion of form 17A, he cannot shift the blame to anyone else.

In this case the second respondent allowed tally clerks to complete form 17A immediately upon receipt of forms 16A even before he announced the final results. The tally clerks made very many mistakes. That notwithstanding, 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.

**14. Failure to conduct the election in a transparent, free and fair manner contrary to the requirements of the Constitution, National Assembly and Presidential Elections Act and the Regulations made thereunder.**

Free, fair and transparent Presidential, Parliament and Civic elections are fundamental in promoting our nascent democracy. We must all do what we can within the confines of the law to ensure that such elections are conducted in accordance with our election laws. Strict observance of election laws and regulations by the Electoral body, its officials and all the candidates involved in an election engenders public confidence in the election process and the results that come out of such an election. Prior to enactment of the **Constitution of Kenya (Amendment) Act, 2008, section 42 A** of the **Constitution of Kenya** provided as hereunder:

**“The Electoral Commission shall be responsible for :**

- (a) the registration of voters and the maintenance and revision of the register of voters;**
- (b) directing and supervising the Presidential, National Assembly and local government elections;**
- (c) promoting free and fair elections;**
- (d) promoting voter education throughout Kenya; and**
- (e) such other functions as may be prescribed by law.”**

After amendment of the Constitution in 2008, **section 42A** of the **Constitution** was repealed but the aforesaid functions of the disbanded **E.C.K.** were vested upon the **I.I.E.C.** which became the successor to the E.C.K. for all intents and purposes.

**Section 17A** of the **National Assembly and Presidential Elections Act** provides as hereunder:

**“The Electoral Commission shall have the overall 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.”**

**Section 34** of the aforesaid Act gives power to the Electoral body to make regulations generally for the better carrying out of the purposes and provisions of the Act. Under that section the E.C.K. formulated Presidential and Parliamentary Regulations which were revised and approved by Parliament shortly before the 2007 general elections. Those regulations therefore have the force of law and must be complied with as much as possible.

I agree with the petitioner’s counsel that the duty of the second and third respondents to perform their functions independently and impartially is constitutional and mandatory.

In **REPUBLIC –VS- RETURNING OFFICER, KAMUKUNJI CONSTITUENCY AND**

**THE ELECTORAL COMMISSION OF KENYA,**

Misc. Civil Application no. 13 of 2008, the court stated that:

**“The now freely used phrase namely “free and fair elections” has a clear meaning in terms of a democratic audit. Thus, the elections provide an important ingredient of popular election of parliament. For this to be achieved the underlying rules concerning the conduct of an election must provide a level playing ground or better still a high standard of fairness as between parties, candidates and voters.”**

In considering whether the second and third respondents conducted the election in a transparent, free and fair manner, the court must of necessity give appropriate interpretation to the electoral laws and regulations which the two respondents were obliged to adhere to. Such interpretation must be purposive in nature and as will encourage transparency in the electoral process. In **DOROTHY E. BROWTON –VS- JEAN HART KANGAS & OTHERS**, Suit No. CI 98 -01-10265 at the Court of Queen’s bench of Manitoba, the court quoted **Harris –vs- Ryan [1997] M.P.L.R. (2d) (Nfld. S.C.)**, where Barry J. recognized the public interest in interpreting legislation dealing with elections in a purposive fashion to encourage public access and stated as follows at page 201:\

**“When interpreting legislation relating to elections, one may reasonably conclude the primary purpose is to ensure that we have 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.”**

For the purpose of ensuring that Presidential and Parliamentary elections are conducted in a

transparent, free and fair manner, the Presidential and Parliamentary Elections Regulations provide detailed procedures as to how the various processes are to be conducted. They include but not limited to:

**(a) nomination of candidates;**

**(b) preparations for the elections;**

**(c) voting procedure;**

**(d) counting of votes;**

**(e) tallying of votes**

**(f) declaration of results, e.t.c.**

Certain individuals like Returning Officers and Presiding Officers are assigned important roles which they must of necessity perform satisfactorily.

Under **Regulation 35A (4)** a Presiding Officer must sign form 16A for it to be valid and acceptable as a declaration of results in a polling station. A candidate or an agent may fail or refuse to sign the form but the Presiding Officer has to. **Regulation 35A (9)** states that the refusal or failure of a candidate or agent to sign a declaration form or to record the reasons for their refusal to sign shall not by itself invalidate the results announced. A close reading of **sub sections (4) and (9) of Regulation 35A** implies that failure by a Presiding Officer to sign form 16A invalidates the results which may have been announced in respect of a polling station. It is the signature of the Presiding Officer (and not any other person) that validates and authenticates the results announced in a polling station. Where a Returning Officer is given a form 16A that is not signed by a Presiding Officer it would be against the law for the Returning Officer to accept such a declaration and include it in tallying results. Acceptance of such a form by a Returning Officer is tantamount to validating results which the Returning Officer has no idea as to how they were arrived at. Where the law requires a document to be signed by a particular person, if it is not so signed or not signed at all such a document is worthless and ought to be rejected. In **DANIEL TOROITICH ARAP MOI –VS- KENNETH STANLEY N. MATIBA & 2 OTHERS**, Civil Appeal No. 176 of 1993, an Election Petition filed by the respondent was declared incompetent because it had not been signed by the petitioner but by his wife. The respondent had granted to his wife a general power of Attorney. The wife then signed the petition as donee of the said power of Attorney. The Court of Appeal, citing **HALSBURY'S LAWS OF ENGLAND VOL.1, 4th Edition, Pg. 420**, stated that as a general rule, whatever a person has power to do himself he may do so by means of an agent but there are two exceptions to that rule. The first one is where the transaction is required by statute to be evidenced by the signature of the principal himself and the second one is where the competency to do the act arises by virtue of the holding of some public office or by virtue of some power, authority or duty of a personal nature and requiring skill or discretion for its exercise or where a statute imposes on a person a duty which he is not free to delegate.

In this petition there were several forms 16A that were not signed by the Presiding Officers and yet the second respondent accepted them and included the results as shown therein in tallying and computing the final results. For example, in respect of **Maroo polling station No. 085** the form was

not signed by the Presiding Officer and nor was it signed by any agent. **344** people voted in that station. The same applied to **Mariwa** and **Ndonyo polling stations**, just to name a few. All those results were invalid. The Returning Officer had no way of verifying the accuracy of the figures shown on the forms 16A in respect of those polling stations.

The scrutiny exercise also revealed that many Presiding Officers failed to insert into the ballot boxes copies of the marked **voters' register, ballot paper counterfoils, forms 1B, 2B, 3B, 4B and 5B** and even **forms 16A**. All these are vital documents which are required under the election regulations to be put in the ballot box together with the cast ballots at the close of an election. It is those documents which give credence to the integrity of the election. Without those vital documents, the ballots in a box are unverifiable.

Without counterfoils it is not possible to relate the votes found in a ballot box to any particular polling station. The same can also be said of a voters' register. Without such documents it would be possible for an election official on the polling day to stuff a ballot box with authorized ballots. That is why under **Regulation 36** any ballot paper which bears a different serial number from the ballot papers issued at a polling station is deemed as void and cannot be counted.

If the scrutiny showed that the documents in the ballot boxes were substantially non-compliant or that certain statutory documents were not contained therein, a recount of the ballots *per se* cannot cure the inherent defect. The presence of a ballot paper in a ballot box is validated by the counterfoil thereof and the marked voters' register. Without the two there is no telling how it found its way into the ballot box.

Though the respondents admitted that in several ballot boxes the aforesaid documents were missing from the ballot boxes, they said that there was a possibility that they were put in either the Presidential or Civic ballot boxes. However, no Presiding Officer in any of the stations where the said documents were missing from the ballot boxes was called to say that he put them in any other box apart from the parliamentary ones. A proper reading of the Presiding Officer's check list (**Exhibit MON-5A**) that was annexed to the petitioner's affidavit shows that a copy of each of those documents ought to be put in both the Presidential and Parliamentary ballot boxes. There are separate ballot papers for Presidential, Parliamentary and Civic elections and a ballot book for each of the three elections with its own serial numbers. It does not make any sense for a Presiding Officer to take counterfoils for Presidential and/or Parliamentary ballot books and put them in a Civic ballot box or vice versa.

The scrutiny further revealed that there were polling stations where assisted voters, that is, illiterate or disabled voters, were helped to cast their votes by people who had not taken an oath of secrecy as required. At **Bokimai primary school polling station No. 051**, scrutiny revealed that there were **74** assisted voters. In his statutory comments on form 16A, the Presiding Officer noted that the number of assisted voters was fairly high and that a mechanism should be established to take care of such situation. However, no explanation was given as to why no oath of secrecy was taken by the people who helped those assisted voters. To some degree the principle of secrecy was not kept.

All the issues highlighted as herein above reveal that the principle of a transparent, free and fair election was compromised.

One other issue which requires brief comments is the incident of fire at the offices of the third respondent where the ballot boxes were kept after the elections. The second respondent annexed to his affidavit a document prepared by **James Mosei, District Elections Coordinator, Gucha**

**District.** It is headed “**Arsonist attack on I.I.E.C. Ogembo Office.**” The attack occurred on **26th August, 2009** between 1.00 a.m. and 2.30 a.m. The report shows that the attack was made on the North wing of the office in which ballot boxes are kept. Incidentally, the only boxes that were affected are for South Mugirango Constituency. The report states that the fire outbreak was not accidental, it was the work of an arsonist who broke a window pane on one of the windows facing the District Commissioner’s office. The arsonist soaked a piece of cloth in some highly flammable liquid, lit it and dropped it into the room. The report stated that:

**“It is suspected that the attack was politically instigated in order to destroy evidence that might be required in future in a petition case pending in the High Court.”**

The second respondent said that it was only the petitioner who stood to gain by destruction of evidence. I do not agree with him. It could as well have been any of the respondents or even any other candidate in the election.

But the documents were in the custody of the third respondent and they should have been properly secured. No evidence was given as to what security measures had been put in place by the third respondent to guard the ballot boxes. It appears to me that someone knew the condition of the contents therein and was determined to destroy the evidence as rightly observed by Mr. Moseti, the maker of the report.

When the ballot boxes were brought to court many of them did not have their seals intact. It is hard to tell whether in the process of putting off the fire some people might have tampered with the contents in the ballot boxes. Either way, the fact remains that the contents in the ballot boxes, when compared with the forms 16A and 17A that were safe in the hands of the third respondent at Nairobi and which were eventually forwarded to court, reveal that even if as a result of the fire incident some documents were destroyed the election had serious flaws.

#### **Effect of non-compliance with the principles laid down in the written law**

**Section 28** of the **National Assembly and Presidential Elections Act** provides as follows:

**“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.”**

Counsel for the respondents urged this court to find that the incidents of non-compliance with the electoral law and regulations as highlighted herein did not affect the results of the election, particularly so because the recount of the votes confirmed that the first respondent was the clear winner. Although the recount elevated the petitioner’s votes to the second position, he was trailing the first respondent by nearly 4,000 votes.

Mr. Katwa cited, *inter alia*, a British case, **JOHN FITCH –VS- TOM STEPHENSON & THREE OTHERS** in the High Court of Justice, Queen’s Bench Division [2008] EWHC 501 (QB). At page 6 of the said decision the court stated as hereunder:

**“The decided cases, including those which Lord Denning considered in MORGAN –VS- SIMPSON, establish 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.”**

On the other hand the petitioner’s counsel submitted that the election ought to be declared void for reason of non-compliance with the relevant law. He cited a persuasive decision of the High Court of Uganda, MUSINGUZI GARUGA JAMES –VS- AMAMA MBABAZI & THE ELECTORAL COMMISSION, Election Petition No. HCT-05-CV-EPA-0003 of 2001. One of the issues for determination in that election petition was:

**“Whether if there was non-compliance with the provisions and principles of the said Act such non-compliance affected the results in a substantial manner.”**

In determining that issue the court applied both **“quantitative test and qualitative test”**, the nomenclature used by Musoke Kibuka, J. in WINNIE BABIHUGA –VS- MASIKO WINNIE KOMUHANGI AND OTHERS HCT-00-CV-EP-0004-2001.

The quantitative test was said to be the most relevant where numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire election process is questioned and the court has to determine whether or not the election was free and fair.

While I agree that the two tests as aforesaid are important, it must be borne in mind that in auditing an electoral process to determine whether the results as declared in an election ought to be disturbed, the court is not dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. In a democratic election the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official.

Counsel for the respondents submitted that the first respondent won the election so convincingly that it was clear the will of the people of South Mugerango had been demonstrated. They submitted that it would be improper to interfere with the voters’ will. I agree that judicial authority is derived from the people and as much as possible courts should seek to give effect to the will of the electorate. However, in exercising their constitutional duties, courts must at all times act in accordance with the Constitution

and other electoral laws and regulations made thereunder.

In **MUSINGUZI GARUGA JAMES –VS- AMAMA MBABAZI & THE ELECTORAL COMMISSION**(supra), the first respondent was declared the winner with **25,433** votes while the petitioner garnered **12,977** votes. After considering various issues of non-compliance with the relevant electoral law, the court, applying the qualitative test as aforesaid, was satisfied that the non-compliance affected the final results notwithstanding the huge margin of votes between the petitioner and the first respondent.

In **WABUGE –VS- LIMO & ANOTHER** [2008] 1 KLR (EP), the court held that an election would be held to be void if it was conducted so badly that it was not sufficiently in accordance with the laws as to an election. In that petition, scrutiny and recount revealed that **285** votes marked for the petitioner had been rejected by the Returning Officer. It was further observed that the ballot papers had been tampered with.

According to the results that had been declared, the Petitioner had scored **10,196** votes whereas the second respondent, **Michael Wamalwa Kijana**, had garnered **10,789** votes. Even if the **285** votes were added to the petitioner’s declared votes, the second respondent would still have remained ahead of the Petitioner. The court observed that the scrutiny and recount had disclosed some grave and serious anomalies and stated, *inter alia*:

**“This court however cannot shut its eyes to such illegal acts which although the number of ballot papers it involved is small being only 285 cannot affect the result of this election, nevertheless it clearly revealed that the election, despite the assurances of the 1st respondent to the contrary was not conducted in accordance with the law as claimed.”**

The court proceeded to hold as follows:

**“Taking the evidence available to us in this case as a whole and having considered it with anxious minds we are satisfied that the mistakes have been revealed by scrutiny and recount, which were claimed to have been caused by tampering with election documents, affected the result of the election.**

.....  
.....

**or the above reasons we hold that the interest of the situation demands that fresh poll be conducted. We declare the election to be void.”**

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 highlighted 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. A certificate to that effect shall issue forthwith and be served upon the speaker of the National Assembly in terms of **section 30 (1)** of the **National Assembly and Presidential Elections Act**. The third respondent should therefore proceed to conduct a by-election as required under the law. I do not find the first respondent guilty of any election offence. The second and third respondents will bear the petitioner's costs as well as those of the first respondent.

Mr. Omwanza and Mr. Otiso appeared for the petitioner. None of the other parties were represented by two advocates. Considering that the petition was very involving in terms of research, preparation of evidence and presentation of the same, I certify costs for two counsel in respect of the petitioner.

**DATED, SIGNED AND DELIVERED AT KISII THIS 17TH DAY OF DECEMBER, 2009.**

**D. MUSINGA**

**JUDGE.**

**17/12/2009**

Before D. Musinga, J.

Mobisa – cc

Mr. Omwanza and Mr. Otiso for the petitioner

Mr. Katwa for the first respondent

Mr. Nyagwencha HB for Mr. Onyinkwa for the second and third respondents

**Court:** Judgment delivered in open court on 17th day of December, 2009.

**D. MUSINGA**

**JUDGE.**



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