



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**ELECTION PETITION NO. 3 OF 2013**

**ANTHONY LUYUNDI ISAYI ..... PETITIONER**

**V E R S U S**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION ..... 1<sup>ST</sup>  
RESPONDENT**

**RAPHAEL MILIKAU OTAALO ..... 2<sup>ND</sup>  
RESPONDENT**

**J U D G M E N T**

**Introduction**

On the 4.3.2013 Kenyans lined up in polling stations countrywide to vote for their political leaders. There were six elective positions country wide - namely President of the Republic of Kenya, Governor, Senator and women representative for each of the 47 counties, Member of Parliament for each of the 290 constituencies and County Assembly representatives. Lurambi constituency had **61,478** registered voters. **50,570** turned up to cast their votes representing **82.25%** voter turnout. The 2<sup>nd</sup> respondent was declared the winner having garnered **18,999** votes. The petitioner got **526** votes.

**The Petition**

The petition was filed on the 26.3.2013. The prayers being sought are as follows:-

- a. The election was fundamentally flawed, null and void **ab initio**.
- b. The election was not free and fair
- c. The second Respondent RAPHAEL MILIKAU OTAALO was not lawfully elected.
- d. The election result be nullified and the election of RAPHAEL MILIKAU OTAALO be reversed.
- e. The election be undertaken **de novo**
- f. Costs of this Petition be provided for.

The petition is based on the contention that during the election for Lurambi constituency for Member of National Assembly the petitioner's name was wrongly indicated on the ballot papers. The petitioner's correct name is **ANTHONY LUYUNDI ISAYI** but the ballot papers gave his name as **ANTHONY IMBAYI KHATERA**. Due to the anomaly the petitioner contends that he was not presented to the voters and the

election was therefore not free and fair. The election results did not represent the will of the electorate as several voters who intended to vote for the petitioner may have been confused and failed to vote on finding that the petitioner's names were not on the ballot paper. The anomaly was brought to the attention of the Independent Electoral and Boundaries Commission (hereinafter referred to as IEBC) officers who were conducting the elections but they refused to stop or postpone the election.

### **Petitioner's Evidence**

The petitioner testified as PW1. His evidence is that on the voting day he went to Shisasari Primary School polling station number 90 on the morning of 4.3.2013 at about 8.00 a.m. He was issued with a ballot paper and upon checking it he saw the name of **ANTHONY IMBAYI KHATERA** printed against his photograph. The petitioner was vying for the Member of National Assembly on a Ford Kenya party ticket. He alerted the presiding officer about the anomaly and pleaded with him to stop the election immediately. After about 30 minutes the presiding officer gave him the mobile phone number of the returning officer and he called him. The returning officer indicated that he was going to consult before making a decision.

The petitioner went to the tallying center at Rosterman Multipurpose Training Institute where he expected to meet the returning officer. After sometime the returning officer informed him that he had received instructions from Nairobi whereby he was to post corrective notices at every polling station. The petitioner registered his dissatisfaction as to how his complaint had been handled. He went to meet the County Election Coordinator by the name **MR. OKELLO** and he registered his complaint. The coordinator informed the petitioner that calling off the elections was out of question and that the IEBC had corrected the anomaly by posting notices in all polling stations. That was about 2.30 p.m.

It is the petitioner's evidence that he did cast his vote but he did not vote for Member of Parliament since he was not one of the candidates. His two names were omitted from the ballot paper. The ballot paper had his party name, party symbol and his photograph. His party had presented him as the only contestant for Member of Parliament for Lurambi Constituency. He scored dismally because his name was not on the ballot paper. **ANTHONY IMBAYI KHATERA** is the person who proposed him for the nomination and the IEBC swapped his proposer to be the candidate. The petitioner cannot tell how many votes he lost due to the anomaly. According to the petitioner, he could have won the election had the anomaly not occurred. Voters thought that he had dropped off the elections.

The petitioner's further evidence is that he had party agents in all the polling stations who had been trained by the IEBC. His agents called to inform him about the anomaly. He had presented his names to the IEBC and expected the IEBC to present his name as it appeared. The playing field was not level and the 2<sup>nd</sup> respondent did not win fairly. During the campaigns, he traversed the entire constituency conducting his campaigns. He had presented himself as "*Kijana Fresh*". Before the elections he had participated in ODM party nominations with the 2<sup>nd</sup> respondent but lost. It is his evidence that the ODM party nominations were marred by irregularities.

**SYLVIA ATAMBO MUTESHI** testified as **PW2**. She was a registered voter at Ikonyero Primary School polling station No.43. She was also a party agent of the AMANI COALITION. Her evidence is that she went to the polling station at 9.00 a.m. and stayed there upto 2.00 p.m. She voted and saw the ballot paper having the names of the petitioner indicated as **ANTHONY IMBAYI KHATERA**. The petitioner's photograph and party symbol were on the ballot paper. People were indicating that the petitioner's name was not on the ballot paper and they thought that he had withdrawn. The people were saying that the photograph was that of the petitioner. The petitioner was initially in the Orange Democratic Party (ODM) but moved to Ford Kenya. She did not see any posters correcting the petitioner's names.

**JANEPHER MUHENJE ANZIMBO** testified as **PW3**. She was a registered voter at Shisasari Primary School polling station No. 90 and was also a party agent for ODM party. She was deployed outside the polling station. She did cast her vote at about 2.00 p.m. She saw the petitioner's photograph and party symbol on the ballot paper. While at the polling station her relative by the name **MAXIMILLAH MMBONE** who was an old illiterate woman asked for the petitioner's name while inside the polling station. The relative complained that the petitioner's name was not on the ballot paper.

**PW4** was **JANE NYIKULI**. She was a party agent of United Democratic Forum (UDF)/AMANI COALITION. She was registered as a voter at Emulundu Primary School polling station No. 28. She arrived at the polling station at about 6.00 a.m. and voting started at about 6.30 a.m. Some voters who needed to be assisted kept on asking for **LUYUNDI** and the polling clerks advised them to vote for whoever was on the ballot paper. She heard several voters complaining that **LUYUNDI** was not on the ballot paper. According to **PW3** amongst all the candidates for the position of Member of Parliament it was only the petitioner who had the name **ANTHONY**. The petitioner's photograph was at the top of the ballot paper together with his party name and symbol. No one was barred from voting.

### Reply to the Petition by 1<sup>st</sup> Respondent

In its reply to the petition filed on the 16.4.2013, the 1<sup>st</sup> respondent contends that the election for the Member of National Assembly of Lurambi Constituency was free and fair and the results were as follows:-

i. <i>Antony Luyundi</i>	-	<b>526</b>
ii. <i>Atanas Manyala Keya</i>	-	<b>8,645</b>
iii. <i>Inviolata Mbwavi Mwalu</i>	-	<b>1,080</b>
iv. <i>Herbert Ponyochi Kunyobo</i>	-	<b>2,118</b>
v. <i>Raphael Milikau Otaalo</i>	-	<b>18,999</b>
vi. <i>Titus Khamala Mukhwana</i>	-	<b>17,833</b>
vii. <i>Zacharia Musundi</i>	-	<b>333</b>

The 1<sup>st</sup> respondent maintains that it caused the names of all candidates to be gazetted before the elections so that the candidates could have perused and raise any issue relating to the information. It was incumbent upon the petitioner to have counter checked with the Kenya Gazette as well as the 1<sup>st</sup> respondent's website to verify the information. The petitioner was indolent and failed to do so and therefore should not blame the 1<sup>st</sup> respondent. It is stated that when the anomaly was brought to the attention of the 1<sup>st</sup> respondent, it swiftly corrected the anomaly and there was no complaint by voters regarding the knowledge of all the aspirants. There was no complaint whatsoever from the agents and the supporters. The 1<sup>st</sup> respondent maintains that all the candidates' photographs were very clear and the voters could not have been confused. Staff employed by the 1<sup>st</sup> respondent were competent and they dutifully and fairly assisted voters who had any difficulties. It is the 1<sup>st</sup> respondent's position that the petitioner is wholly to blame for his own misfortune, that the alleged mistake did not in any way influence or affect the outcome of the elections and that the petition lacks merit and should be dismissed.

### Evidence by 1<sup>st</sup> Respondent

**GEDION RERIMO BALANG** testified as **DW2**. His evidence is that he was the returning officer for Lurambi constituency. On the 4.3.2013 he was informed of the mixup of names at 10.00 a.m. by the petitioner. He had not noticed the anomaly himself before it was brought to his attention. He decided to consult his bosses in Nairobi and posted corrective posters in all the 98 polling centers. He is the one who printed the posters and hired six motorbikes to distribute the posters. He paid Kshs.1,500/= to each

motorbike operator. On the 12.2.2013 the 1<sup>st</sup> respondent issued a Kenya Gazette Notice where the names of all the candidates were stated. For Lurambi constituency the name given was **ANTHONY KHATERA IMBAYI**. The same names that were appearing in the Kenya Gazette were also appearing on the 1<sup>st</sup> respondent's website. There was no election coordinator by the name **Okello** as alleged by the petitioner. The elections were conducted peacefully and there were no riots in any given polling station. According to DW2 if there are mix-up of names and photographs and the issue is brought to the attention of the IEBC in advance, then the election for that particular area would be cancelled. In the case of Lurambi constituency, had the anomaly been brought to the attention of the IEBC before the voting started, the election could have been cancelled. However, cancellation of the election for Member of Parliament for Lurambi constituency could have caused more problems. In some areas such as Nyabasi West County Assembly Ward in Kuno constituency the elections were postponed. There were other areas where the elections were postponed but the anomaly was brought to the attention of the returning officers before voting started. No complaint was brought to him before the voting started. Posters were placed in all the polling stations and there was no single incident relating to the posters. It is his evidence that the corrective posters were sent to all the polling stations at 10.20 a.m.

### **Reply to the Petition by the 2<sup>nd</sup> Respondent**

The 2<sup>nd</sup> respondent filed his reply to the petition on 10.4.2013. It is indicated in the reply that he was declared the winner having garnered 18,999 votes. The petitioner got 526 votes. The petitioner's photograph, first name and his Ford Kenya Party symbol were clearly displayed on the ballot paper. When the anomaly was detected, notices were immediately posted in all the polling stations correcting the anomaly. No voter was confused by the anomaly. The 2<sup>nd</sup> respondent is an innocent party who won fairly and therefore the petition should be dismissed or if it is allowed then the 2<sup>nd</sup> respondent should be compensated for all the expenses he incurred during the campaigns plus lost salary and allowances for a Member of Parliament.

### **2<sup>nd</sup> Respondent's Evidence**

The 2<sup>nd</sup> respondent, **RAPHAEL MILIKAU OTAALO**, testified as **DW1**. His evidence is that the petitioner has no single allegation against his victory. The anomaly involving the petitioner's name cannot be said to be the cause of his modest performance. The petitioner was sufficiently identified through his photograph, first name and party symbol. The petitioner was with him during the ODM party nominations and DW1 defeated him. The petitioner got about 200 votes while he got over 15,000 votes during the ODM preliminaries. According to DW1, he saw the petitioner's photograph on the ballot paper and also saw posters correcting the petitioner's name. The posters read that the name given as **ANTHONY IMBAYI KHATERA** was the same person as **ANTHONY LUYUNDI ISAYI**. The election was free and fair and represents the Will of the people of Lurambi.

## **SUBMISSIONS**

### **Petitioner's submissions**

Mr. Ingutia, counsel for the petitioner in his submissions contends that the petition raises two questions namely:-

- i. Whether the law relating to the conduct of elections was breached
- ii. Whether the breach of the law affected the results.

According to the petitioner's counsel, if the court finds that indeed the principles laid down in the

relevant laws were breached, then the court does not need to deal with the second question i.e. whether the breach affected the results. Counsel submitted that there is a distinction between the two questions as one might be in breach of the electoral laws without necessarily being in breach of the principles applicable. If the law is breached the court will further find out if the principles were affected. And if the principles were breached then the court does not need to go further and the election results should be nullified. The petitioner does not claim that some written law was breached. The petition is grounded on the fact that important principles relating to the conduct of elections was breached. The principles are provided under **Article 81** of the Constitution and **Section 25 (e)** of the IEBC Act, 2011.

Mr. Ingutia maintains that one of the important tenets of free and fair elections is by way of secret ballot. There are mandatory provisions relating to the content of ballot papers. **Regulation 68** of the Election (General) Regulations provides that the candidate's name, party symbol and photograph must be on the ballot paper. It cannot be one or the other. All of them must be on the ballot paper. The ballot paper should not mislead or confuse the voter. According to the evidence on record the petitioner's name was not on the ballot paper. If the ballot paper misleads or confuses the voter then a conclusion should be made that it does not meet the required standard. It is the ballot paper which is counted as a vote and there is no margin for an error. Counsel further submitted that there is no remedy for a defective ballot paper. If it is found that the ballot papers were defective then the election was not free and fair. Therefore the results become irrelevant as the election was not free and fair.

It was submitted for the petitioner that the 1<sup>st</sup> respondent admitted that the ballot paper had an error and that had the error been brought to its attention in advance, the elections would have been cancelled. The omission by the 1<sup>st</sup> respondent demonstrates some element of negligence that is inexcusable. The petitioner gave his correct details to the 1<sup>st</sup> respondent and it was upon the 1<sup>st</sup> respondent to have captured the same on the ballot paper correctly. The 2<sup>nd</sup> respondent should not be allowed to benefit from an election that was flawed **ab initio**. Counsel contends that a beneficiary of such a process cannot be said to have been validly elected. The alleged posters correcting the petitioner's name are not provided for under the law and were therefore ultra vires. Further, it is submitted that by the time the posters were dispatched the election process was half way done and therefore half the voters did not benefit from those posters.

The petitioner relies on the case of **OMAR & ANOTHER V MBUZI & ANOTHER [2008] (EP) 3 KLR 269**. In that case the High Court (Justice Khaminwa) and the Court of Appeal held that a ballot paper is an integral part of the election and where it is found to be defective then the elections cannot be held to be free and fair. Counsel further relies on the case of **KHAOYA V LUBEKI & ANOTHER (2008) 1 KLR 590**.

### **Submissions by the 1<sup>st</sup> Respondent**

Mr. Gumbo, counsel for the 1<sup>st</sup> respondent maintains that the petition is grounded on the fact that the petitioner's name was not properly stated on the ballot papers and therefore Regulation **68 (4)** of the Election (General) Regulations was breached. There is no evidence that any of the voters was confused or failed to vote. All the witnesses who testified confirmed that they voted and their voting was not influenced by anyone. There were **61,478** registered voters in the constituency and **50,570** did cast their votes representing **82.25%** voter turnout. It can therefore be presumed that every single vote that was intended to be cast was actually cast. Counsel further submits that the petitioner ought to have demonstrated that the error on the petitioner's name affected the results.

Mr. Gumbo contends that for argument's sake if it can be concluded that all those who failed to vote totaling **11,908** were to be given as the number of votes for the petitioner, the petitioner would have

garnered **12,434** votes (including the 526 votes) assuming there was going to be 100% voter turnout. If that were to be the case still that tally would not have surpassed what the winner of the election got. There is no evidence that the petitioner's agents raised issues affecting the election. The forms 35 were signed by party agents including those of the petitioner. There were no complaints that the error of the name was a challenge to the election. The voters who required assistance were indeed assisted. The petitioner would like to upset the results and have a second bite at the cherry. The error was immaterial and thus negligible.

It is submitted further that the petitioner's rights enshrined in Article **38** of the Constitution are rights which accrue both privately to an individual who wants to participate in an election as a candidate (*in persona*) as well as to the general populace in an electoral area who are entitled to participate in elections (*in rem*). The court must weigh the individual right of the petitioner to run for elections as a candidate against the right of the people of Lurambi to have representation in Parliament. According to Mr. Gumbo, **Section 83** of the Elections Act 2011 applies as the error did not affect the results. The mistake was further reduced or mitigated by the fact that polling clerks were allowed to assist voters who had a problem with the details or who could not read on their own. Further the 1<sup>st</sup> respondent posted posters correcting the petitioner's name. The petitioner's photograph, party name and party symbol were on the ballot paper and it was therefore easy for any voter to identify the petitioner. The 1<sup>st</sup> respondent attributes the error to the petitioner's own indolence as the names of all the candidates were gazetted prior to the elections but the petitioner failed to countercheck and call for rectification of the error.

Counsel relies on the Indian case of **MAHEDEO V BABU UDAI PRATAP SINGH & ANOTHER [1966] AIR 824, 1966 SCR (2) 564**. In that case one of the candidate's name in an election was not properly indicated on the ballot box and he alleged that the incorrect printing of his name had materially prejudiced his prospects of securing the votes of all his supporters. The court held that the misprinting of the affected candidate's name on the ballot paper did not render the election of the winner void. Counsel further relies on the case of **ABUBAKAR V YAR'ADUA [2009] ALL FWLR (Pt.457) 1 S.C.** where the court held that the burden of proving that the results of an election were affected by noncompliance of the law is squarely on the petitioner and failure to discharge the burden should lead the court to dismiss the petition. Counsel distinguished the case of **OMAR & ANOTHER V MBUZI** contending that in that case confusion was bound to occur as there was a mixture of the party symbols.

### **Submissions by the 2<sup>nd</sup> respondent**

Mr. Nyaundi, counsel for the 2<sup>nd</sup> respondent submitted that the petition raises two issues namely:-

- i. Whether there has been noncompliance with the law
- ii. Whether if there was noncompliance, it had material effect on the results.

Counsel maintains that it is true there was a mistake on the petitioner's name as indicated on the ballot paper and this is the single ground for the petition as stated in paragraph 6 of the petition and paragraph 7 of the affidavit in support thereof. It is submitted that the petitioner himself acknowledges that he cannot tell how many votes he lost due to the error. The petitioner's three witnesses do confirm through their respective affidavits and evidence in court that they indeed voted and that they saw the petitioner's photograph, party symbol and party name on the ballot paper. The petitioner got **526** votes while the winner got **18,999** votes. The petitioner and the winner vied for the ODM nomination and the petitioner got 236 votes.

Mr. Nyaundi further contends that it is not only enough to claim that the petitioner's name was

erroneously presented to the voters. The burden is on the petitioner to prove that the misprinting of the name or the noncompliance with Regulation 68 (4) had material effect on the results. Counsel distinguished the Ali Omar v Mbuzi (supra) case whereby in that case the party symbol of UMMA party was attributed to that of another party. Further in 2007 the ballot paper did not contain the candidate's photograph and party name. **Section 83** of the Election Act provides for noncompliance with principles laid down in the constitution and in the written law. One cannot distinguish the provisions of that section and it has to be read wholly. Counsel relies on the case of **JOHN KIARIE WAWERU V BETH WAMBUI MUGO & 2 OTHERS [2008] eKLR** where the court held that alleged irregularities must affect the results. Also in the case of **AYUB MWAKESI V MWAKWERE CHIRAU ALI & OTHERS Election Petition No. 8 of 2008 eKLR**, the court explained the meaning of "*what it means to affect the result*". Counsel further relies on the case of **MAHEDEO V BABU UDAI PRATAP SINGH & ANOTHER [1966] AIR 824, 1966 SCR (2) 564** where the court held as follows:-

***"misprinting of the name.....on the ballot papers amounts to noncompliance with r. 22 of the Rules: but the proof of such noncompliance does not necessarily or automatically render the election of the appellant void. To make the said election void, respondent No.1 has to prove the noncompliance in question, and its material effect on the election."***

Mr. Nyaundi further submitted that upon realization of the error, the 1<sup>st</sup> respondent took corrective measures and notices were placed on all polling stations correcting the anomaly. That was the only appropriate step that could have been taken and the election could not have been postponed. The petitioner's right to be a candidate in an election has to be weighed against the rights of other citizens to free, fair and regular elections based on universal suffrage as enshrined in Article 38 of the Constitution. Rights under Article 24 of the Constitution can be limited. **Section 83** which is similar to **Section 28** of the now repealed National Assembly and Presidential Elections Act, (Cap 7) provide for noncompliance with the law. Counsel cited the case of **MORGAN V SIMPSON [1974] 3 ALL ER 722** where the court held that an election could only be declared invalid where there was substantial noncompliance with the law on elections or that there was a breach or irregularity which affected the results. Counsel also relies on the case of **JOHO V NYANGE & ANOTHER [2008] 3KLR (EP) 500** and that of **JOHN FITCH V TOM STEPHENSON & OTHERS [2008] EWHC 501 (QB)**.

### **Issues for determination**

During the pre-trial, counsels for all the parties informed the court that they would agree on the issues for determination. However no issues were agreed upon and separate issues were filed. I do find that this petition raises the following issues:-

1. Whether there was breach of the laws and regulations governing elections.
2. Should the court only deal with issues of breach of the law, if any, and stop at that and not deal with the issue as to whether such breach affected the results or not.
3. Whether if there was any breach the same was so fundamental as to make the election not to have been free and fair.
4. Whether the 2<sup>nd</sup> respondent was lawfully elected or whether his election should be nullified.
5. Who should bear the costs.

### **Whether there was breach of the laws and regulations governing elections.**

The petitioner's contention is quite clear and simple. His position is that he was cleared to vie for the position of Member of Parliament for Lurambi Constituency on a Ford Kenya Party ticket. He presented his details to the 1<sup>st</sup> respondent and expected the 1<sup>st</sup> respondent to correctly capture his

particulars. On the 4.3.2013 the petitioner went to cast his vote at about 8.00 a.m. at Shisasari Primary School polling station only to find that his name as a candidate was not there and instead there was the name of **ANTHONY IMBAYI KHATERA**.

Counsel for the petitioner contends that the ballot paper is indeed the vote which is counted and the anomaly on the ballot paper goes to the root of the election. If the ballot paper is found to have been defective then the election ought to be nullified. The corrective measures undertaken by the 1<sup>st</sup> respondent which involved the placement of posters is not provided under the law and therefore the 2<sup>nd</sup> respondent was not properly elected as the playing field was not level. According to the petitioner, the results do not matter as the election was not free and fair. The court is urged not to go any further than that once it is satisfied that the ballot paper did not correctly pick the petitioner's name.

On the other hand counsels for the respondents maintain that it is true that the ballot paper had an error but the same did not affect the results. The petitioner's photograph, party name and party symbol were on the ballot paper. There was no evidence to prove that voters were confused or they failed to vote. Counsels further maintain that the petitioner has failed to prove that the election was not free and fair yet the burden is upon him to so prove.

Article 81 of the Constitution states as follows:-

**81. The electoral system shall comply with the following principles:-**

- a. freedom of citizens to exercise their political rights under Article 38;**
- b. not more than two-thirds of the members of elective public bodies shall be of the same gender;**
- c. fair representation of persons with disabilities;**
- d. universal suffrage based on the aspiration for fair representation and equality of vote; and**
- e. free and fair elections, which are-**
  - i. by secret ballot;**
  - ii. free from violence, intimidation, improper influence or corruption;**
  - iii. conducted by an independent body;**
  - iv. transparent; and**
  - v. administered in an impartial, neutral, efficient, accurate and accountable manner.**

Section 25 (e) of the IEBC Act No.9 of 2011 mandates the IEBC to conduct free and fair elections and states as follows:-

**25. (e) free and fair elections, which are-**

- i. by secret ballot;**
- ii. free from violence, intimidation, improper influence or corruption;**
- iii. conducted independently;**
- iv. transparent; and**
- v. administered in an impartial, neutral, efficient, accurate and accountable manner.**

Regulation 68 (4) of the Elections (General) Regulations 2012 further states as follows:-

**68. (4) Every ballot paper for use at an election shall-**



- a. contain the name and party symbol of the person validly nominated;**
- b. contain a photograph of the candidate where applicable;**
- c. be capable of being folded up;**
- d. have a serial number, or combination of letter and number, printed on the front; and**
- e. have attached a counterfoil with the same number or combination printed thereon.**

It is not disputed that the ballot paper that was provided by the 1<sup>st</sup> respondent for the elections for Member of Parliament for Lurambi had the name of **ANTHONY IMBAYI KHATERA** instead of **ANTHONY LUYUNDI ISAYI**. It is also not in dispute that the photograph on the ballot paper was that of the petitioner. It is also agreed that the petitioner's sponsoring political party – FORD KENYA and its symbol (a LION) do appear on the ballot paper. The petitioner's party name, symbol and photograph appears at the top of the ballot paper and it is the first one on the ballot paper. It is true that the 1<sup>st</sup> respondent did not capture the petitioner's name correctly. The anomaly went unnoticed until voting started. It is the petitioner himself who discovered the anomaly and it appears all the voters who had voted before the petitioner had not raised any issue. DW2 who was the Returning Officer informed the court that he did not notice the anomaly as he released the ballot papers to the polling stations and it was not until when the petitioner went to him to complain at about 10.00 a.m. when he noted the error. According to DW2 by that time it was too late to postpone the election and after consultation, corrective posters were immediately sent to all the polling stations. It is his evidence that the corrective posters were dispatched to the various polling stations at 10.20 a.m. on the voting date.

Regulation **68 (4)** provides for the requirements of a ballot paper. It is clear from the above that the petitioner's name was not correctly stated on the ballot papers and this was breach of Regulation **68 (4) (a)**. On the above issue I do agree with both the petitioner and the respondents that there was breach of the law as the ballot paper had an error relating to the petitioner's name. The petitioner's name was wrongly captured on the ballot paper.

**Should the court only deal with issues of breach of the law, if any, and stop at that and not deal with the issue as to whether such breach affected the results or not.**

Counsel for the petitioner maintains that there are laid down principles governing free and fair elections and if the court finds that those principles were breached then it should not go any further than that and nullify the election. Counsel vigorously contends that the provisions of **Section 83** of the Election Act in relation to whether the breach affected the results do not apply. The petitioner is not in court contending that the law was breached as provided under **Section 83** but is in court contesting and urging the court to uphold the principles laid down by **Article 81** of the Constitution which is couched in mandatory terms. According to Mr. Ingutia, a breach of the law can be excused but a breach of the principles cannot and there is a distinction between the two. In the case of **Omar & Another v Mbuzi** (supra) there was confusion caused by mixture of party symbols. According to Mr. Ingutia, there would be more confusion where a candidate's name is not on the ballot paper.

For clarity purposes I will state the facts in the Omar & Another v Mbuzi & Another case. In that case the petitioner filed his petition contending that he was sponsored by CHAMA CHA UMMA PARTY to vie for the Magarini Parliamentary seat and the gazetted symbol for that party was a POT on three stones. By mistake the ballot papers for the constituency indicated the symbol of a RAM against the petitioner's name. The ram was indeed the gazetted symbol for UMMA PATRIOTIC PARTY OF KENYA which was different from the Chama Cha Umma Party. Apart from the above facts the elections were announced to have been postponed through the media but later that announcement was cancelled by the then Electoral Commission of Kenya and the elections went on. Out of 31,813 registered voters only 13,710 cast their vote. It was also indicated that the petitioner had withdrawn from the race. The High Court

nullified the election and on appeal, the Court of Appeal upheld that decision. The Court of Appeal held amongst other things as follows-

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

The court went on to state the following:-

***In our view, the ballot paper, as we have stated, is an integral part of the election. It guides the voter on who is a candidate and his/her party’s symbol. We cannot, on our part, conceive a more important defect in an election than a ballot paper that, instead of guiding voters, misleads them.....we are thus satisfied that the defect in the ballot papers for Magarini constituency election was a serious one and could not be cured by the 1<sup>st</sup> respondent’s letter..... Further, that defect could not be cured by the provisions of section 28 of the National Assembly and Presidential Elections Act, Cap 7 Laws of Kenya. (emphasis added)***

**Section 83** of the Elections Act is more or less similar to the provisions of **Section 28** of the repealed National Assembly and Presidential Elections Act. The section allows the court to approve elections as having been properly conducted even where the law was breached. Further the section allows the court to make investigations as to whether the breach or noncompliance with the law did affect the results of the election.

My view is that there are situations where the court can stop at the first limb of that provision. Or to go by Mr. Ingutia’s submissions, at times the court can stop at the breach of the election principles and not go any further. There are instances where the elections are so badly conducted and the law is breached to the extent that the court does not need to consider whether the breaches affected the results or not. For instance where there is bribery and vote buying which is proved before the court, the court does not need to evaluate whether the votes of those who were bribed affected the results. Similarly where the body in charge of conducting the elections postpones the election and again cancels the postponement through announcements which are made shortly before the election leading to confusion of the voters and low voter turnout, the court will nullify the election without considering the results as it was the case in the **Omar v Mbuzi** case. However, in some instances the court is at liberty to go beyond the noncompliance with the law and evaluate the effect of that noncompliance on the election and the results.

The provisions relating to non-cancellation of an election on the basis of noncompliance with the law is an old statement of the law. The English Ballot Act of 1872 had the following provision”-

***“No election shall be declared invalid by reason of a non-compliance with the rules contained in Schedule 1 to this Act, or any mistake in the use of the forms in Schedule 2 to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the results of the elections.”***

**Section 16 (3)** of the Representation of the People Act of England 1949 states as follows

***“No parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections, and that the act or omission did not affect its result.”***

In the **Re KENSINGTON NORTH PARLIAMENTARY ELECTION** case [1960] 2 All ER 150 Justice Streatfeild stated that ***“it is for the court to make up its mind on the evidence as a whole whether there was a substantial compliance with the law as to elections or whether the act or omission affected the results”***. (emphasis added).

The petitioner’s counsel cited the case of **KHAOYA V LUBEKI & ANOTHER** [2008] 1 KLR 590. In that case the court ordered for scrutiny and recount of the votes for the reason that at some polling stations the petitioner’s name did not appear on the ballot papers.

The principles relating to the conduct of elections as contended by the petitioner are provided by the law. It is therefore part and parcel of the law and one cannot distinguish between those principles and the law. The requirement of free and fair elections as provided for under Article 81 of the Constitution are legal principles provided by both the Constitution, the Elections Act and the Election Regulations. An election court is empowered to evaluate whether an election was conducted freely and fairly, whether the election was free from violence, intimidation, improper influence or corruption, whether it was transparent and whether it was administered in an impartial, neutral, efficient, accurate and accountable manner. For the court to do so it will have to interrogate the evidence adduced and may order scrutiny and recount of the votes. By so doing the court will be able to come to an informed conclusion as to whether there was compliance with the law. It follows therefore that the court can find that there was noncompliance with the law or legal principles, as Mr. Ingutia prefers that term, but still uphold the election. Free and fair election is both subjective and objective provision of the law which should be interpreted according to the facts of each case. The court has to analyze the entire election process and make up its mind as to whether the election was free and fair. It is subjective because any election has to comply with certain minimum requirements. It is objective in the sense that where there is non-compliance with the law the court has to evaluate the degree of non-compliance and make its own conclusion as to whether the non-compliance had an effect on the election process and the results.

**Article 81** provides for the elections to be conducted through a secret ballot. That article led to the enactment of Regulation **68 (4)** which deals with the particulars of the ballot paper itself. **Section 2** of the Elections Act defines a ballot paper as follows-

***“Ballot paper means a paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for purposes of electronic voting.”***

The Black’s Law Dictionary (5<sup>th</sup> Edition) defines a ballot as ***“a means, or instrumentality, by which a voter secretly indicates his will or choice so that it may be recorded as being in favour of a certain candidate or against a certain proposition or measure”***.

The law requires that the elections be conducted by way of secret ballot. As per the holding in the **MBUZI** case, the ballot paper should not be one that confuses the electorate. As defined by the Elections Act, a ballot paper enables a voter to make his choice. The question is whether in the current case the voters were not able to make their choices because of the error on the ballot paper. To what extent did the ballot paper confuse the voters"

According to the petitioner once a ballot paper has an error then it should be declared as not complying with the law and therefore the elections should be nullified. It is my view that the court should look at the error on the ballot paper so as to determine whether the error was one which could have confused the voters. Further, evidence has to be adduced as to whether indeed the voters were confused as a result of the error. In the current case the petitioner's photograph, party name and symbol were on the ballot paper as opposed to the Mbuji case where only the party symbol and candidate's name were on the ballot paper. The party symbols were mixed up in the Mbuji case. In the current case the petitioner's first name **ANTHONY** was on the ballot paper. Given that the petitioner's photograph, party name, party symbol and the first name were on the ballot paper, could one who had the intention of voting for the petitioner been confused" I do not think so. The petitioner in paragraph 7 of his affidavit states as follows:-

***THAT I ran a spirited campaign traversing the entire Lurambi constituency campaigning in my true names and marketing my manifesto and ideology to the electorate in those very names it being the case that the names LUYUNDI ISAYI, in particular are widely understood to refer to me and the electorate knew me by all my names, that is to say, ANTHONY LUYUNDI ISAYI.***

Further, the petitioner avers in paragraph 28 of his affidavit the following:-

***THAT the aforesaid election cannot possibly have been fair as I was not presented to the electorate as I should have been and there is no telling how many votes I lost due to the error of the first Respondent.***

From the above, I do find that there was no voter who was confused by the ballot paper. The campaigns conducted by the petitioner enabled the voters to see his face and know his political party. A voter secretly puts his/her mark on the candidate of his/her choice. If a voter finds difficulty in finding the name of the candidate of his choice, the IEBC officials as well as party agents are free to assist such a voter. The evidence by PW2, PW3 and PW4 is pure hearsay. Their evidence is simply that they heard people asking for the petitioner's name. Who are these people" Why didn't they come to testify themselves. The petitioner testified that some of his party agents called him to complain about the anomaly. None of the party agents was called to testify.

The authority of **MAHEDEO V BABU UDAI PRATAP SINGH & ANOTHER** is quite relevant in the current petition. In that case the appellant had been declared as the winner of an election for Legislative Assembly. The appellant's election had been overturned by the High Court and he appealed to the Supreme Court. The 1<sup>st</sup> respondent who was a defeated candidate contended that his name was inaccurately printed on the ballot papers as **UDAI BHAN PRATAP SINGH** though his symbol was correctly shown. His correct name was **UDAI PRATAP SINGH**. The earlier name was his grandfather's name and he contended that the voters thought that it was his grandfather who was contesting and not him. The winner got 17,688 votes while **UDAI PRATAP SINGH** received 10,985 votes. There were four other candidates beside those two. The 1<sup>st</sup> respondent maintained that the misprinting of his name virtually eliminated him from the contest because the constituency did not know that he was standing for election. He stated that the ballot papers were rendered invalid by virtue of the fact that they contravened Regulation **56 (2) (g)** of the rules. The Supreme Court of India upheld the election and declined the 1<sup>st</sup> respondent's contention that the misprinting of his name had locked him out of the race. The court stated the following:-

***"Nevertheless, it cannot be disputed that there has been a printing error in the matter of the name of respondent No.1 on the ballot papers and that has introduced an infirmity in the ballot papers. It is common ground that r.22 requires that the postal ballot paper shall be in such form,***

***and the particulars therein shall be in such language or languages as the Election Commission may direct; and the form quite clearly imposes the obligation on the authorities concerned to print the name of the candidate correctly. But it is also clear that the symbol chosen by respondent No.1 which was a lamp (Deepak) has been correctly shown against the misprinted name; and it would not be unreasonable to take into account the fact that a large majority of voters concentrate on the symbol chosen by the candidate rather than on his name. In fact, some of the evidence adduced in the present case itself shows that the voters looked at the symbol and put their votes. .... We think the irregularity on which respondent No.1 strongly relies loses some of its significance and cannot be treated as anything more than a misdescription of his name. From such misdescription it would be wholly unreasonable to infer that the voters must have come to the conclusion that respondent No.1 was not a candidate at the election at all. (emphasis added)***

Section 100 (1) (d) of the Representation of the People Act 1951 of India states as follows:-

***“Subject to the provisions of sub-section (2), if the Tribunal is of the opinion that the result of the election, in so far as it concerns a returned candidate, has been materially affected by any noncompliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the Tribunal shall declare the election of the returned candidate to be void. (emphasis added).***

It is clear from the above that the noncompliance with the law should not be an end in itself warranting cancellation of an election. The court has to interrogate the nature of the noncompliance with the principles governing elections including the law and make a finding as to whether the said noncompliance materially affected the results. The court should not apply the law mechanically and stop at non-compliance without evaluating the effect of the non-compliance. What could have been the effect of the elections if the petitioner’s name was correctly indicated but the names of one of the other candidate misspelt, for instance instead of **Otaalo**, the winner’s name indicated as **“Otalo”**. Can it be said that the miss-description should automatically affect the results" The court ought to look at the extent of the non-compliance with the law and its effect on the election process and results.

In the case of **MILLER V EVERTON [1895] Vol. LXXII Law Times Report, 838**. The petitioner was a candidate for the election of a councilor. The nomination papers indicated his name as **“Millar”** instead of **“Miller”**. Objection was raised and he was prevented from participating in the election. The respondent was then elected. The petitioner filed the case contending that he ought to have been allowed to participate in the election. The court agreed with the petitioner and held that the petitioner’s surname as spelt did not invalidate his nomination paper. The court stated as follows:-

***“The name as it appeared upon the burgess – roll, and upon the paper, was quite well understood to be the petitioner, and he should have been allowed to go to the election. The election, as conducted was therefore void, and another election must be held.”(emphasis added).***

In the case of **HENRY & OTHERS V ARMITAGE [1883] Vol. XII QB 257** one of the candidates for a town councilor elections was **WILLIAM MOORE SKINNER**. The nomination paper indicated that name as **SKINNER WM MOORE**. The respondent objected to **SKINNER’s** nomination paper as it did not comply with the law which required nomination papers to **“state the surname and other names of the persons nominated”**. Skinner was barred from participating in the election and he filed the petition. The court held that the initials **“WM”** was sufficient to describe Skinner’s Christian name of William. The court stated as follows:-

***“The statute require that the nomination paper shall state the surname and other names of the person nominated; but it does not say how the names are to be spelt. The question is whether when that which is put in writing is in a form which every person would conclude to be a statement of particular name and of no other name, it is a statement of that name within the meaning of the statute”.***

The above authorities do confirm that misstatement of a candidate’s name which automatically breaches the requirement of the law as to the correct printing of candidate’s names on ballot papers does not automatically invalidate the election. Regard has to be sought as to how the misprinting of the name affected the results. It is a maxim of Equity that Equity looks at the substance and not the form. It is stated in Snell’s Equity (29<sup>th</sup> Edition) page 239 that: **“Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance.....another aspect of the maxim is shown by equity’s impatience with mere technicalities”.**

In the Mahedeo case evidence was adduced to show that voters concentrated on the party symbol and not the name. The main question would be whether, a voter exercising his constitutional right to vote secretly, would not be able to identify the candidate whose name has been misspelt. The contentions by the petitioner’s counsel that the misprint of the petitioner’s name invalidates the elections cannot hold. That is tantamount to applying the law in abstract form. The legal principles as to the conduct of elections are part of the law and the courts should not concentrate only at the breaches of the law without looking at its effect on the results if it is claimed that the breaches did not affect the results.

**Whether if there was any breach the same was so fundamental as to make the election not to have been free and fair.**

As held hereinabove, the 1<sup>st</sup> respondent printed ballot papers which did not depict the petitioner’s name correctly. That was a breach of the law relating to the printing of the ballot papers. The petitioner contends that the ballot paper which counts as a vote confused the electorate instead of guiding them. When the petition was initially filed there were no witness statements other than that of the petitioner. During the pre-trial, the petitioner sought leave to include the evidence of other witnesses. The three witnesses who testified were from other political parties and not the petitioner’s Ford Kenya Party. PW2 testified that she was an agent of AMANI COALITION. PW4 was also an agent of that coalition. PW3 was an agent of the ODM political party. A petitioner has to show that where the law is breached the same was so fundamental as to have made the election not to have been free and fair.

The essence of free and fair election is that the candidates have to conduct their campaigns freely without any restrictions. The body conducting the elections must be impartial without favouring any candidate. The atmosphere prevailing during the campaigns and on the election day should be conducive to the candidates and the electors. The electors should exercise their Article 38 constitutional right to vote for a candidate of their choice freely without any intimidation. The campaigns and the voting should be free from electoral malpractices including vote buying, treating and bribery. The body conducting the elections must allow the voters to cast their votes for the candidates of their choices and thereafter each vote must be counted and the results announced in the presence of the agents of the political parties at the polling centres and candidates participating in the elections or their agents at the tallying centre. Subsequently all the votes must be tallied and the results announced whereby the votes garnered by each candidate are made known to the candidates.

The petitioner contends that the election was not free and fair as his name was misprinted. I have

gone through all the forms 35 and I have classified them into two. The first category is where the petitioner's name was corrected on the forms 35 and the second category are those forms 35 where the petitioner's name was not corrected.

**a. Corrected forms 35**

<u>Polling station</u>	<u>Votes garnered</u>
1. Emukaba Primary School (003)	2
2. Ebung'aya Primary School (004)	1
3. Elufafwa Primary School (005)	3
4. Emakusi Nursery School (007)	1
5. J.P.C. Nursery School (009)	0
6. Emachambe Nursery School (013) Stream I	0
7. Shitoto Catholic Social Hall	0
8. New Apostolic Nursery School (016)	2
9. Elwanda KAG Nursery School (018)	1
10. Esokone Primary School (21)	0
11. Emachina Nursery School(022) Stream I	1
12. Emuraka Nursery School (023) Stream I of I	1
13. Ekapwonje Primary School (026)	4
14. Eshirumba Primary School (027)	2
15. Emulundu Primary School (028)	2
16. Mwiya Primary School (030) Stream I	2
17. Mwiya Primary School (030)	3
18. Eshisango primary School (031)	0
19. Isumba Nursery School (033)	0
20. Ebuchinga Primary School (034) Stream I	2
21. Ebuchinga Primary School (034) Stream II	1
22. Ikonyero Primary School (039) Stream I	1
23. Ikonyero Primary School (039) Stream I	2
24. Ebuchira Primary School (042)	1
25. Eshisiru primary school (044)	1
26. Ebuhai Nursery School (045)	2
27. Emusanda Primary School (046)	0
28. Ambani New Apostolic Church Nursery School Stream 1 of 1-	0
29. Iyala Nursery School (048)	0
30. Emiere S.D.A. Nursery School (049)	1
31. Emuhangu Primary School (050)	3
32. Elwaminyi Nursery School (051)	0
33. Baraka Primary School	1
34. Emabanga Nursery School (53) Stream I	1
35. Eshibembe Primary School (054) Stream I	0
36. PAG Nursery School (055) Stream I	0
37. Kakamega Muslim Primary School (057) Stream I	10
38. M.O.P.W. Chilpark (058) Stream 5	7
39. Daisy Special School (063) Stream 1 of 1	6
40. Ebwambwa primary school (064) Stream 2	4
41. Lurambi Primary School (067)	4
42. Kakamega Municipal Social Hall Stream (070) 1 of 1	0

43. S.D.A. Academy Primary School (071)	2
44. Vision Academy Primary School (072)	5
45. Shimalabandu Market (073)	13
46. Overcoming Faith Primary School (075)	3
47. Lwesero Health Center (076)	0
48. U.P.C. Nursery School (077) Stream 1	5
49. Kati Academy Primary School (078)	0
50. Sheywe Secondary School (083) Stream 1	25
51. Sheywe Secondary School (083) Stream 2	25
52. Lyanungu Primary School (085)	2
53. Musaa Primary School (086)	5
54. Bukhulunya Primary School (089)	5
55. Shitaho Primary School (091)	4
56. Amalemba Primary School (094) Stream 1	3
57. Shivakala Primary School (095)	16
58. Hirumbi Primary School (096)	6
59. Kakamega High School Stream 1 (098)	8
60. Kakamega High School Stream 2	8

**b. Uncorrected Forms 35**

**Polling Station**

**Votes garnered**

1. Emusala Primary School (001)	1
2. Indangalasia Primary School (002)	2
3. Elukho Primary School (006)	1
4. Shikoti Mixed Primary School (010) Stream 1	0
5. Shikoti Mixed Primary School (010) Stream 2	3
6. Emasera Primary School (011)	8
7. Emachembe Nursery School (012) Stream 2	3
8. Shitungu Nursery School (014)	0
9. Isanjiro Nursery School (017)	1
10. Eshibeye Primary School (019)	2
11. Eshimichini Primary School (020)	1
12. Eshiangukusi Primary School (024) Stream 1	2
13. Kilimo Primary School (025)	5
14. Matioli Primary School (029)	7
15. Ibinzo Primary School (035) Stream 1 of 1	2
16. Ematetie Primary School (036)	5
17. Eshikhuyu Primary School (037)	2
18. Eshiangboko Church of God School (038)	0
19. Eshiyunzu Primary School (040) Stream 1	4
20. Emurumba Primary School (041)	4
21. Munzeywe Nursery School (043) Stream 1	1
22. Bondeni Primary School (056) Stream 1	6
23. Bondeni Primary School (056) Stream 2	2
24. M.O.P.W. Chilpark (058) Stream 1	2
25. M.O.P.W. Chilpark (058) Stream 2	8
26. M.O.P.W. Chilpark (058) Stream 3	3
27. M.O.P.W. Chilpark (058) Stream 4	4



28. M.O.P.W. Chilpark (058) Stream 6	5
29. Nabongo Primary School (059) Stream 1	5
30. Nabongo Primary School (059) Stream 2	2
31. Kakamega Approved School (060) Stream 1	4
32. Kakamega Primary School (061) Stream 2	4
33. Jamia Mosque Nursery School (062) Stream 1	3
34. Jamia Mosque Nursery School (062) Stream 2	9
35. Jamia Mosque Nursery School (062) Stream 3	9
36. Snr. Chief Mutsembi Pri. School (065) Stream 1 of 1	5
37. Maraba Primary School (066) Stream 1	2
38. Maraba Primary School (066) Stream 2	4
39. Maraba Primary School (066) Stream 3	1
40. Sir Humphrey International T.T.C. (068)	4
41. Sichirayi Market (069) Stream 1	2
42. Sichirayi Market (069) Stream 2	7
43. Kakamega School for the Deaf (074) Stream 1	4
44. Kakamega School for the Deaf (074) Stream 2	4
45. Mwiwala Primary School (079) Stream 2 of 2	9
46. Mwiwala Primary School (079) Stream 1	8
47. Anglican Nursery School (080) Stream 2	5
48. Nyayo Tea Zone Primary School (081)	19
49. Ichina Primary School (082)	4
50. Bukhungu Stadium (084) Stream II	5
51. Matende Primary School (087) Stream 1	9
52. Matende Primary School (087) Stream 2	6
53. Apostolic Faith Nursery School (088) Stream 1	7
54. Apostolic Faith Nursery School (088) Stream 2	2
55. Shisasari Primary School (090)	32
56. Kakamega Township Primary School (092)	17
57. Rosterman Primary School (097)	14

I am alive to the fact that the corrections on the forms 35 could have been done at the end of the voting exercise. However, the results from the two categories of forms 35 gives us a picture to the effect that the petitioner was able to get votes from as many polling stations as possible. It is only in 17 out of the 98 polling stations where the petitioner did not get a single vote. In some polling stations like Sheywe Secondary School (083) the petitioner got 25 votes in stream 1 and 25 votes in stream 2. At Nyayo Tea Zone Primary School polling station (081) the petitioner got 19 votes. At Shisasari Primary School where the petitioner was a registered voter, he got 32 votes. It could be possible that the petitioner's name was corrected when the corrective posters were placed on the polling stations. It is clear from the results that whoever wanted to vote for the petitioner did vote for him. According to PW3 there was a voter by the name MAXIMILLAH MMBONE who asked for the petitioner's name. PW3 testified that the voter was illiterate and it does not make any sense for an illiterate voter to ask for the name of a particular candidate which she cannot read. That evidence is misplaced. The petitioner's picture and party symbol was clearly visible on the ballot paper. Section 83 of the Elections Act 2011 states as follows:-

***“No election shall be declared to be void by reason of non-compliance with any written law relating to the election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”***

An election can be declared to be void if it is conducted in such a manner that it does not comply with the law. Each case has to be determined on its own merit and the court is supposed to analyze the degree of non-compliance. Similarly, even in situations where the court finds that there was non-compliance with the law, the court can uphold the elections where it is satisfied that the non-compliance did not affect the results. Where an election is conducted in such a manner that to a great extent it complies with the law then the court ought not to interfere with the outcome. In the **Re Kensington North Parliamentary Elections [1960] 2 All ER 150** the court stated as follows:-

***“We were told that a number of persons had been interviewed from various polling stations and that some 111 of them had indicated that they had voted: and that there were no marks against their names in the relevant register or elections. We were told that some twenty of such persons were to be called as witnesses. In fact, ten of them were called and it transpired that five out of the ten had not voted at all – a very good reason for no marks being put against their names. Of the remaining five who did not vote, it is, I think, clear from examining the register of voters, that one of them did in fact have his name struck out, together with that of his wife. The clerk had obviously struck them both out together, and the mark rather tailed off when it came to this particular voter, but I think that his name was struck off. In regard to another of the five, the matter was more doubtful, because the name was struck off but the word “stet” was written opposite. There was no mark against the names of the other three, and they did vote. All of those five witnesses who said that they did vote voted only once. There is not a shred of evidence that any of them took advantage of the fact, if, indeed, they knew of the fact, that their names had not been ticked off. It was a breach of r 38(1)(d) of the Parliamentary Elections Rules that, when the ballot papers were delivered to these three witnesses- and possibly to four of them – who in fact recorded their votes, no mark was made against their names in the register of electors. The court has to determine what is the result of that breach.” (emphasis added)***

In the case of **WOODWARD V SARSONS & SADLER [1875] L.R. 10 CP 733** the petitioner proved that there was non-compliance with the election laws. The court framed the issues for the petition and analyzed some of them as follows:-

***“The question raised for decision seem to be, - first, what is the true statement of the rule under which an election may be avoided by the common law of parliament” – secondly, is the present case brought within the rule” – thirdly, whether a breach of the Ballot Act can, as such, be a ground for avoiding an election, - fourthly, can this election be thereby avoided”***

***As to the first, we are of opinion that the true statement is that an election is to be declared void by the common law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i.e. that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as, by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied or supplied with.***

***As to second, i.e. that the election was not really conducted under the subsisting election laws at all, we think though there was an election in the sense of there having been a selection by the***

***will of the constituency, that the question must in like manner be, whether the departure from the prescribed method of election is so great that the tribunal is satisfied, as matter of fact, that the election was not an election under the existing law. It is not enough to say that great mistakes were made in carrying out the election under those laws. It is necessary to be able to say that, either willfully or erroneously, the election was not carried out under those laws, but under some other method.***

***.....that the non-observance of the rules or forms which is to render the election invalid, must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of the voters, or, in other words, the result of the election. It therefore is, as has been said, an enactment ex abundant cautela, declaring that to be the law applicable to elections under the Ballot Act which would have been the law to be applied if this section had not existed. It follows that, for the same reasons which prevent us from holding that this election was void at common law, we must hold that it is not void under the statute.”***

Counsel for the petitioner submits that section 83 of the Election Act does not apply. The petitioner is not contending that there was a breach of the law. His position is that the IEBC breached fundamental principles which deal with the conduct of free and fair elections as enshrined in Article 81 of the Constitution. The petitioner would like the court to uphold those principles and has drawn a distinction between upholding the principles and upholding the law.

Although the ballot paper had an error, the court has to analyze the effect of the error on the elections. The error was detected after elections were underway. I do agree with the returning officer (DW2) that postponing the elections after voters had started casting their votes could have caused more harm to the election process than allowing the vote to continue. No voter had raised the issue before the petitioner detected the mishap. Even the petitioner's own agents had not complained to the IEBC officials about the anomaly. It is clear to me that the misprinting of the petitioner's name was not so fundamental as to affect the exercise of the free Will of the voters to elect a candidate of their own choice. The information provided on the ballot paper was sufficient enough to have enabled voters pick the petitioner. In essence therefore, Section 83 of the Elections Act 2011 does apply whereby the court has to be satisfied as to whether the non-compliance with the principles and the law affected the results or not.

In the case of **FITCH V STEPHENSON & OTHERS [2008] All ER 13 or [2008] EWHC 501 (QB)** the court was dealing with the provisions of Section 48 of the Representation of the People Act, 1983 which is more or less similar to our Section 83 of the Elections Act. The court stated as follows:-

***“In our judgment, the provisions of section 48 are clear and unambiguous; and the decided cases show that the courts should strive to give effect to the will of the electorate and to preserve an election, even if there have been significant breaches of the Rules or of the duties of the officials, provided that the outcome of the election has not been affected.”***

The results of the election show that 82.25% of the voters did cast their votes. There was no incident in any polling station relating to the issue of the petitioner's name. No one testified to the effect that he was not able to cast his vote because he did not see the petitioner's name on the ballot paper. It is not enough for the petitioner to simply state that his name was misspelt and therefore the election should be vitiated. Evidence has to be adduced to prove that the misprinting of the petitioner's name affected the election itself as well as the results.

The principles for the conduct of elections as emphasized by Mr. Ingutia, counsel for the petitioner, do not appear or operate in abstract form. These are provisions contained in Article **81** of the Constitution as well as **Section 25** of the Election Act and Regulation **68(4)** of the Election Regulations. Mr. Ingutia has tried to create a distinction between the provisions of these three legal instruments and call them established principles which are different from the law. According to him the law can be breached but still the election be upheld. But a breach of the principles cannot be tolerated as it leads to automatic cancellation of the election. Once the principles are breached then the court does not need to look at the results. I do find the above argument to be dogmatic and purely mechanical. Those principles are part and parcel of the law and whenever they are breached the court has to evaluate the extent of the breach and may even go further to examine the effect of the breach on the results. The misprinting of the petitioner's name on the ballot paper is not the first misprinting in elections. The authority of **MAHADERO V BABU, MILLER V EVERTON** and that of **HENRY & OTHERS V ARMITAGE (supra)** show that a misprinting of the name falls within the category of non-compliance with the law requiring the names of candidates to be properly indicated on the ballot paper. However, such misprinting cannot vitiate the election. The court will have to be satisfied that the misprinting created confusion amongst the voters and that affected the results. No voter testified that he was unable to cast his vote due to the anomaly. I do not see any distinction between the alleged election principles and the law. Article 81 of the Constitution is part of the law. The Constitution is the backbone of all the laws and the statutes enacted in support of the Constitution are the ribs which are expected to fit into the backbone. The ballot paper is a creation of the Constitution and the Election Act. The ballot paper cannot be held to be a principle which appears on its own and that it should not be equated to the law. The entire ballot paper has to be analyzed and an error on it should be looked at in totality. I do find that the ballot paper provided sufficient information to the voters who intended to vote for the petitioner. There was only one candidate with the name Anthony and his picture, party name and party symbol was on the ballot paper. The absence of the petitioner's middle and last name did not affect the election process and neither did it affect the results. The breach of the law did not make the election not to have been free and fair.

**Whether the 2<sup>nd</sup> respondent was lawfully elected or whether his election should be nullified.**

The petitioner maintains that the 2<sup>nd</sup> respondent was not lawfully elected as the petitioner's name was wrongly indicated on the ballot paper. Two of the prayers in the petition are that the election of the 2<sup>nd</sup> respondent should be reversed as it was not conducted lawfully and it was null and void *ab initio*. The petitioner was expected to adduce evidence to prove that the 2<sup>nd</sup> respondent was not lawfully elected. He came to court with the main ground being that his name was not on the ballot paper. The election could not have been postponed as doing so could have affected the elections of the other positions such as President, Governor, Senator and Women Representative. Had the 1<sup>st</sup> respondent announced that the election for the position of Member of Parliament for Lurambi constituency had been postponed, it is likely that some of the voters who had not cast their votes could have remained at home thinking that the entire election had been postponed. The effect of announcing a postponement of an election could be seen in the Mbuzi case where the turnout was very low. That had an effect on the other elective positions. The turnout for Lurambi constituency was 82.25%. The voters expressed their free will and the 2<sup>nd</sup> respondent emerged the winner.

The 2<sup>nd</sup> respondent got 18,999 votes and won the elections. His closest rival got 17,833 votes while the third candidate got 8,645 votes. None of these candidates have challenged the election. There were no allegations of bribery or election malpractice raised by the petitioner or any of his witnesses. The only dispute is the misprinting of the petitioner's name. The election was free and fair and there is no need to reverse the election of the 2<sup>nd</sup> respondent. The posters which corrected the petitioner's name enabled the voters to confirm that indeed the petitioner's name was on the ballot paper. There was no

announcement by the petitioner or by the IEBC that the petitioner had dropped out of the race. In the end I do find that the election was free and fair and represents the Will of the voters.

### **Final Determination**

The petition was grounded on the fact that the petitioner's name was not on the ballot paper despite the petitioner having been cleared to contest for the position of Member of Parliament for Lurambi constituency. I do find that the petitioner was presented to the voters and those who had intended to vote for him did cast their votes in his favour. The petitioner garnered 526 votes. The contention that voters who wanted to vote for the petitioner were confused as the petitioner's name was not properly indicated on the ballot paper has not been proved. There is no evidence that any single voter could not vote for the petitioner because the petitioner's name was not on the ballot paper. The petitioner's first name, party symbol, party name and the petitioner's photograph provided adequate means of identification and voters were able to identify him. The ballot paper did satisfy the requirements of Regulation **68 (4)** of the Election General Regulation and the election was free and fair. There were no allegations of election malpractices. The petitioner does not claim that the voting, counting and tallying of votes was not properly conducted. None of the other candidates who participated in the election complained or came to court to testify in support of the petitioner.

In the end I do find that the petitioner has not discharged the burden of proving that the ballot paper affected the entire election process. The petitioner got the votes which were due to him. The winner validly garnered the votes which enabled him to be declared the duly elected member of parliament for Lurambi constituency. The petition lacks merit and the same is hereby dismissed.

### **Costs**

The petitioner's name was not properly depicted on the ballot paper. This made the petitioner to file this petition hoping that the court will reverse the election. The petitioner was seeking redress as he had expected the 1<sup>st</sup> respondent to properly indicate his name on the ballot paper. I do find that it will be unfair to burden the petitioner with the costs of this petition. I do order that each party shall meet his own costs.

***Delivered, dated and signed at Kakamega this 4<sup>th</sup> day of September, 2013***

**SAID J. CHITEMBWE**

**J U D G E**



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