



**REPUBLIC OF KENYA**

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

**ELECTION PETITION NO. 3 OF 2013**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE ELECTIONS ACT, 2011: SECTIONS 75; 76(1) (a), (2), (3);77;79;80;82;86  
AND 87**

**AND**

**IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)PETITION  
RULES, 2013; RULES 3(b); 4;5;6(1)(a);8;9;10;11;12;13;21;22;33 & 38**

**AND**

**IN THE MATTER OF:THE ELECTIONS (GENERAL) REGULATIONS, 2012**

**AND**

**IN THE MATTER OF: THE ELECTION FOR NAROK COUNTY GOVERNOR HELD ON 4<sup>TH</sup> DAY OF  
MARCH, 2013**

**BETWEEN**

**LEDAMA OLE KINA .....PETITIONER**

**VERSUS**

- 1. SAMUEL KUNTAI TUNAI**
- 2. ARUASA EVALYN CHEPKIRUI**
- 3. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (I.E.B.C.)**
- 4. DR. MICHAEL K. CHERUIYOT (COUNTY RETURNING OFFICER, NAROK COUNTY)**
- 5. SAMUEL CHACHA (RETURNING OFFICER, EMURUA DIKIRR CONSTITUENCY)**

6. **JOSHUA TULWO** (RETURNING OFFICER, KILGORIS CONSTITUENCY)
7. **JACKTON OKUBASU** (RETURNING OFFICER, NAROK WEST CONSTITUENCY)
8. **MARTIN MALONZA** (RETURNING OFFICER, NAROK SOUTH CONSTITUENCY)
9. **MOHAMMED RAKA** (RETURNING OFFICER, NAROK NORTH CONSTITUENCY)
10. **ISAAC RUTO** (RETURNING OFFICER, NAROK EAST CONSTITUENCY)
11. **THE TRANSITIONAL AUTHORITY.....RESPONDENTS**

## JUDGMENT

### BACKGROUND

Kenya went to the polls on 4<sup>th</sup> March, 2013 to elect its leaders. This petition arises from the dispute arising from the gubernatorial election for Narok County (hereinafter referred to as '*the elections*'). This petition was initially filed by three Petitioners, Joseph Tiampati Ole Musuni, Ledama Ole Kina and Francis Simiren Nkoitoi on 22<sup>nd</sup> March, 2013. Vide a consent dated 26<sup>th</sup> June, 2013, filed in court on 28<sup>th</sup> June, 2013 and adopted as an order of the court on 2<sup>nd</sup> July, 2013, the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners' names were struck out with no orders as to costs leaving the 2<sup>nd</sup> petitioner to proceed with the prosecution of this petition. The 2<sup>nd</sup> Petitioner shall therefore be henceforth referred to as '*the Petitioner*'). The Petitioner, Ledama Ole Kina and the 1<sup>st</sup> Respondent, Samuel Kuntai Tunai, were candidates in the said elections. The 1<sup>st</sup> Respondent was declared the winner by the 4<sup>th</sup> Respondent, Dr. Michael Cheruiyot who was the County Returning Officer for Narok County. The 2<sup>nd</sup> Respondent, Aruasa Evalyn Chepkirui who was the 1<sup>st</sup> Respondent's running mate was declared the Deputy Governor. The 3<sup>rd</sup> Respondent is the Commission established under **Article 88** of the **Constitution of Kenya, 2010** (herein after referred to as '*the Constitution*') with powers to conduct and supervise referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by any Act of Parliament and the Rules and Regulations made thereunder. The 5<sup>th</sup> to 10<sup>th</sup> Respondents, namely, Samuel Chacha, Joshua Tulwo, Jackton O'Kubasu, Martin Malonza, Mohammed Raka and Isaac Ruto respectively were Returning Officers at the constituency level in Narok County and the 11<sup>th</sup> Respondent is the Transition Authority established under **Section 4** of the **Transition to the Devolved Government Act, 2012** and **Section 15** of the sixth schedule of the Constitution with the mandate to facilitate and co-ordinate the transition to devolved governments.

Narok County comprises of six Constituencies namely; Narok North, Narok South, Narok East, Narok West, Emurua Dikirr and Kilgoris and had 651 polling stations. In the said elections, there were seven (7) candidates and the official results that were declared were as shown hereunder:

### Candidate

### Votes

1. Daniel Talengo Kiptunen	20,073
2. Francis Simiren Nkoitoi	20,789
3. John Oloishuro Konchellah	9,207
4. Johnson Parsamet Nchoe	39,100
5. Joseph Tiampati Ole Musuni	55,008

6. Ledama Olekina	4,175
7. Samuel Kuntai Tunai	87,832

**Total** **234,776**

In this petition, the Petitioner is represented by Mr. Kanchory Siatabau and was later joined by Professor Lumumba who made the submissions. The 1<sup>st</sup> Respondent was represented by Mr. Kemboy and Mr. Ole Ntutu, the 2<sup>nd</sup> Respondent by Mr. Havi and the 3<sup>rd</sup> to 10<sup>th</sup> Respondents by Mr. Nani Mungai. The 11<sup>th</sup> Respondent did not appear during proceedings but submissions were filed on 11/9/2013.

The Petitioner disputed the entire results of Narok County Governor election declared on the 6<sup>th</sup> March, 2013. He contested the declaration and return of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as Governor and Deputy Governor respectively, lamenting that the election was not free or fair and termed it a complete and utter sham. As a result he seeks the following orders:

- i. **A declaration that the Election for Narok County Governor held on 4<sup>th</sup> March, 2013 was null and void for not being free, fair and transparent and for lacking credibility.**
- ii. **A declaration that the election for Governor, Narok County held on 4<sup>th</sup> March, 2013 was such that it could not possibly produce credible results or indeed a credible winner and therefore the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not validly elected Governor and Deputy Governor, respectively of Narok County in the election.**
- iii. **That the Declaration of Results for Governor, Narok County made on 6<sup>th</sup> March, 2013 and the certificate issued pursuant thereto and the subsequent Gazettement of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as Governor and Deputy Governor, respectively of Narok County be quashed and nullified.**
- iv. **That a fresh election for Governor Narok County be held.**
- v. **The Respondent bear the costs of the petition.**
- vi. **Such other orders and directions as the honourable court shall deem fit.**

## **EVIDENCE.**

Pursuant to **Rule 12** and **Rule 15** of *the Rules* respectively, the Petitioner and his witness, the 1<sup>st</sup> Respondent and his witness, the 2<sup>nd</sup> and 4<sup>th</sup> to 10<sup>th</sup> Respondents delivered to this court's Deputy Registrar their affidavits. The Petitioner's witness, David Ruto did not testify and therefore his affidavit was expunged from the record. Similarly, the 3<sup>rd</sup> Respondent's witnesses Paul Ledama Shakei, Lepanian Olenkerei, Caroline Ojwaya, Florence Akoth, Joyce Odoola and Veronica Leitich did not testify and their affidavits were expunged from the record. The Petitioner and the Respondents testified as by law provided. I will consider the said depositions together with their testimonies briefly for purposes of highlighting the main issues that were raised.

It was the Petitioner's evidence that the election was not conducted in accordance with the **Constitution**, the **Elections Act** (hereinafter referred to as '*the Act*'), the **Rules** and **Regulations** made thereunder. He complained that his agents were denied access in over thirty (30) polling stations despite the fact that they had all the required documents. He specifically cited Eor Ekule Primary School polling station where he voted. He further alleged that the 4<sup>th</sup> Respondent locked him out together with his agents during the tallying of votes at the County tallying centre thereby the said tally and announcement was not witnessed and verified by them as required by law. He also complained that his results were not streamed live in the media stations and that his names were not in most documents presented by the 3<sup>rd</sup> Respondent. He averred that at Eor Ekule polling station, the 1<sup>st</sup> Respondent's agents were standing next to the polling booth and when voters came in, these agents ran to assist the

voters; that in other polling stations, he witnessed observers from African Union (A.U.) showing voters where to queue since the 3<sup>rd</sup> Respondent's officials had no control of their duty. He stated that the voting process at Eor Ekule which had about 1,700 registered voters and only two streams went on until after 2:00 pm yet other polling stations with more than two streams like Masikonde had finished the voting process earlier. He alleged that the tallying of the votes from polling stations to constituencies' tallying centres was not in tandem with the results compiled and announced by the County Returning Officer. For example, the results for Sintakara Primary School polling station, Oletukat Primary School polling station and Oloikarere Primary School in constituency form 36 (Exhibit 4) differed from those in County form 36 (Exhibit 2); that in Moshoro Primary School polling station and Entashata Primary School polling station, the results entered are similar. He averred that in Narok East Constituency, the results for women representative were recorded instead of that for the Governor. Another allegation made by the Petitioner was that there was no breakdown of the total votes for Kilgoris and Narok West in the County form 36, therefore he could not verify the number of votes he garnered in the said constituencies. He further stated that the County form 36 was signed by only two agents, that of TNA and URP; that the 4<sup>th</sup> Respondent allowed the TNA agent to attest that the election was free and fair yet there was no candidate for gubernatorial seat from the TNA party. The Petitioner also cited serious discrepancies with regard to voter turnout. He alleged that in Narok South Constituency, at Siana Primary School Polling Station, the voter turnout was over 100% whereby the registered voters as per form 35 was 625 and the votes cast as per the same form was 682. At Iladoru Primary School Polling Station, the registered voters were 511 but the votes cast were 786. The Petitioner also alleged that statutory documents and/or forms were altered without being countersigned or justified. He lamented that even with the said discrepancies, the 4<sup>th</sup> Respondent went ahead and declared the 1<sup>st</sup> Respondent as the duly elected Governor of Narok County. The Petitioner repeatedly denied knowing what he garnered in the elections on who won the elections because of the malpractices he pointed out.

Against the 1<sup>st</sup> Respondent, it was alleged that he manipulated the recruitment of the 3<sup>rd</sup> Respondent's agents/officers and that some of the agents/officers of the 3<sup>rd</sup> Respondent participated in the 1<sup>st</sup> Respondent campaigns and were compromised to skew the elections in favour of the 1<sup>st</sup> Respondent thereby undermining the integrity of the whole election process. The foregoing matters were said to have been reported to the 4<sup>th</sup> Respondent and the Chairman of the 3<sup>rd</sup> Respondent who took no action. As a result, the Petitioner contended that the election was not free and fair and that the declaration of the 1<sup>st</sup> Respondent as the winner of the said election was therefore not justified.

### **3<sup>rd</sup> to 10<sup>th</sup> Respondents' case**

**The 10<sup>th</sup> Respondent, Mr. Isaac Ruto Kiplagat** (DW1) who was the Returning Officer for Narok East Constituency testified that his job description included co-ordination of election activities i.e. preparing election material, equipment and vehicles and ensuring deployment plan. He stated that he also had a role of tallying votes at the constituency level. Mr Ruto stated that he is the one who recruited the personnel for the purposes of conducting the general elections in the constituency after advertisement and shortlisting of applicants by the 3<sup>rd</sup> Respondent. He denied that the recruitment was influenced by the 1<sup>st</sup> Respondent and the allegation that the 3<sup>rd</sup> Respondent's officers had been in the 1<sup>st</sup> Respondent's campaign trail. He stated that prior to the election, candidates were to submit a list of the names of their agents who were to be trained but no such list was submitted to him by the Petitioner. He stated that at the Constituency tallying centre (Eor Ekule), the presiding officers brought ballot boxes from polling stations together with forms 35 that were filled at the polling stations and signed by the presiding officers, deputy presiding officers and agents. The forms 35 were then received by the tallying agents who checked the forms if correctly signed, then forwarded to him to announce the results. He testified that after he made the final announcement of the results, he and his team checked the accuracy of the transposition of results from forms 35 to constituency form 36 in soft copy. They then got an

aggregate result which he announced as the final result. The results were then tabulated and printed out. He confirmed that the ballot boxes he received were sealed and recorded in the polling diary. The results were then taken to the county returning officer in soft and hard copy. He acknowledged the error of swapping the results for Moshoro Primary School Polling Station with Entashata Nursery School Polling Station and that of Oloikarere Primary School Polling Station with Sintakara Primary School Polling Station and explained that the error occurred due to pasting the results in two different cells. However, he stated that they were human errors and were not meant to favour or deprive any candidate. He confirmed that the results for Narok East in the county form 36 (Exhibit 2) do not tally with the results in the constituency form 36 since the results for women representative for Narok East had been entered as the results for Governor Narok East. He attributed the latter error to human error arising due to the fact that it was the first time Kenya was trying six elections which was tiresome considering that it had to be done within three (3) days.

**The 8<sup>th</sup> Respondent, Martin Malonza Mule** (DW2) who was the Returning Officer for Narok South testified that he did not receive a list of agents from the Petitioner. He also stated that he did not receive any complaint of exclusion of the Petitioner's agents from any polling station within Narok South Constituency. He stated that he was charged with inter alia, the responsibility of tallying results from polling stations within his constituency and announcing them. He denied the Petitioner's allegation that he had been compromised by the 1<sup>st</sup> Respondent. He specifically denied being driven to the 1<sup>st</sup> Respondent's residence, being drunk on the election date, being in private discussions with the 1<sup>st</sup> Respondent and disappearing with one Olesengen and the 1<sup>st</sup> Respondent into Royal Hotel, Narok. He explained that at some point, he took a one and a half hour break to take medication and rest and left his deputy, Paul Busienei in charge for the time that he was away. On cross-examination, he stated that the registered number of voters was 511 and the votes cast were 786. He however, during re-examination indicated that the said error has been explained at paragraph 17 of his affidavit that the error of posting results which was higher than the registered voters was only a human error and not ill intentioned. He affirmed that there is no other error other than that in Iladoru Primary School Polling Station.

**The 5<sup>th</sup> Respondent, Chacha N. Samuel** (DW3) who was the returning officer for Emurua Dikirr Constituency denied receiving any information on ejection of any of the Petitioner's agents from polling stations and explained that an agent needed to have a party appointment letter and oath of secrecy from the 3<sup>rd</sup> Respondent to be allowed into the polling centre. He explained that the procedure for assisting illiterate voters was the duty of the deputy presiding officer and that in the process of giving such assistance any agent would be called to witness the marking of the ballot papers but not all agents would be called as witnesses as that would lead to crowding. He also denied receiving a list of the Petitioner's agents. He testified that after tallying and announcing the results on 5<sup>th</sup> March, 2013, he took the election material to the constituency office where he kept them under lock and key. On 6<sup>th</sup> March, 2013, he took the said material to the county tallying centre at Narok. He denied doctoring the results and affirmed that by the time he took the material to the constituency office, he had announced all the results. He also denied being compromised by the 1<sup>st</sup> Respondent to rig the election in his favour and the allegation that the 1<sup>st</sup> Respondent manipulated the recruitment of the presiding officers and deputy presiding officers. He confirmed that form 35 for Kabolecho polling station had not been signed by any agent and explained that the agents could not be forced to sign the forms if they did not want to. He further stated that he did not receive any complaint that the presiding officers denied agents the chance to sign forms 35. He acknowledged that there were a number of cancellations and alterations in forms 35 including those for Lelechonik Primary School Polling Station, Chemurin Primary School Polling Station, Chepkoiyet Primary School Polling Station and Lelagoin Primary School Polling Station.

**The 6<sup>th</sup> Respondent, Mr. Joshua R. K. Tulwo** (DW4) who was the returning officer for Kilgoris Constituency, testified that he was not given any information that there were any agents that were

harassed. With regard to the allegation of replacement of clerks in the course of elections. He stated that there was no such replacement rather he only added another competent clerk in Gorofa polling station since Gorofa had no clerk who had participated in voter registration. He denied having received any reports on distribution of sugar, tealeaves and money or witnessing any act of bribery. On cross-examination, he acknowledged cancellations and alterations with no countersigning or explanation in Empurker primary school polling station, Enentekeny primary school polling station and Angata Barrikoi primary school polling station. He explained that he received forms 35 from polling stations and used them to compile constituency form 36 which he took to the County Returning Officer at Narok. He acknowledged that County Form 36 (P. Exhibit 2) is incomplete for lacking a breakdown of Kilgoris constituency results.

**The 9<sup>th</sup> Respondent, Mohamed Gonjobe Raka** (DW5) was the returning officer for Narok North; he admitted that there was an error in the transposition of results from form 35 for Topoti primary school to form 36 for constituency i.e. the clerk skipped a cell. He stated that he was not aware of any other error in Narok North Constituency. With regard to the allegation in (Exhibit 6 (b)) that he issued certificates to Members of County Assembly that were later withdrawn, Mr. Raka denied it. He also stated that the government vehicle broke down weeks before election and he had to use a private vehicle assigned to that Constituency during the elections. He further denied leaving the tallying centre, or drinking alcohol, or that the hiring of the presiding officers and deputy presiding officers were manipulated by the 1<sup>st</sup> Respondent nor was he compromised by the 1<sup>st</sup> Respondent. He also denied that the Petitioner's agents were denied the chance to witness elections or tallying nor did he receive any such complaint from the Petitioner. As regards voters without biometrics, he stated that a constituency that has no register for voter without biometrics would refer to the green book which contains all details of the voters but and there would be photographs.

**The 4<sup>th</sup> Respondent, Dr. Michael K. Cheruiyot** (DW6) was the County Returning Officer. In his testimony, he acknowledged that the results for Oletukat primary school in P. Exhibit 2 are not same as those submitted to him by Isaac Ruto. He admitted that the tallying team at the county level made a mistake of transferring the women representative results into the cell for Governor in Oletukat primary school. He added that due to that error, the county form 36 did not contain the results for governor for Narok East Constituency. He however, denied that the said error affected the outcome because he did not use the county form 36 to announce the results. He stated that as the results were being received from the constituency returning officers, he announced and tallied them in a separate sheet of paper. He also acknowledged that the county form 36 did not contain a breakdown of Narok West and Kilgoris results and attributed this to the fact that the excel sheet used in the said constituencies, by the Returning Officers were not compatible with the one used at the county tallying centre. He denied that the Petitioner gave him a list of his agents nor did he receive any complaint about his agents being denied access to the polling stations. He further denied being compromised by the 1<sup>st</sup> Respondent. He also did not receive any complaint of voter bribery. He stated that on 6<sup>th</sup> March, 2013 as he was tallying, the Petitioner stormed into the tallying centre with the media and a few of his supporters and intimidated the tallying clerks demanding that the tallying process to be stopped.

**The 7<sup>th</sup> Respondent, Mr. Jackton O'Kubasu** (DW7) who was the returning officer for Narok West like all other returning officers denied being compromised by the 1<sup>st</sup> Respondent. With regard to allegation of over 100% voter turnout in Siana Boarding Primary School Polling Station, he explained that he gave the presiding officer by the name David Nkanai instructions to allow voters whose names appeared in the green book but not in the polls book, to vote. He indicated further that the number of registered voters as per the green book was 709 therefore it could not be said that voter turnout was over 100%.

**The 2<sup>nd</sup> Respondent, Evalyn Chepkirui Aryasa** (DW8) in her evidence stated that the 1<sup>st</sup> Respondent

won the election. She further stated that she ascribes to leadership principles as the deputy governor.

### **1<sup>st</sup> Respondent's case.**

**Mr. Wilson Ledama Sompisha** (DW9) was the chief agent for URP in Narok County. He testified that he visited approximately three (3) polling centres in the various constituencies; that during his visits he had no complaint by any agent that they were denied access to the polling or tallying centres. He stated that at the county tallying centre on 5<sup>th</sup> March, 2012, the tallying process was peaceful until around 11.00 pm when the Petitioner started moving around shouting that the results were not credible. He affirmed that the Petitioner's own annexure 6 (a) referred to in paragraph 17 of the Petitioner's affidavit confirms that he stormed the tallying centre. He stated that he received the forms 35 for Narok South and Narok North after signing his affidavit. He admitted that the register annexed to his affidavit as '**WLS-3**' does not bear a logo and stamp from the Commission, 3<sup>rd</sup> Respondent and does not bear any signature. He also acknowledged that according to the said document, the number of votes cast was more than the number of registered voters at Musiro polling centre, Narok East Constituency.

**The 1<sup>st</sup> Respondent, Samuel Kuntai Tunai** (DW10) denied all the allegations made by the Petitioner against him and stated that the election was credible free and fair. He added that the results as announced were a total reflection of the will of the people of Narok County. He denied interfering with the election process in any way by compromising them to be skewed in his favour.

### **Scrutiny and re-tallying.**

The Petitioner made two applications for scrutiny. The application dated 20<sup>th</sup> May, 2013 was not granted but this court on 26<sup>th</sup> June, 2013 made an order that there be scrutiny of forms 35 and 36 in respect of Kilgoris and Narok West constituencies. In the application dated 16<sup>th</sup> July, 2013, this court on 23<sup>rd</sup> July, 2013 ordered for scrutiny and recount of valid votes for Iladoru polling station and re-tallying of forms 35 and 36 to establish what each candidate got. The exercise commenced on 29<sup>th</sup> July, 2013 and went on up to 2<sup>nd</sup> August, 2012 and was presided over by this court's Deputy Registrar in the presence of parties and their representatives. The Deputy Registrar, Mr. Felix Kombo prepared a detailed report which is part of these proceedings.

As regards re-tallying of votes for Kilgoris and Narok West Constituencies, Mr. Saitabau raised concerns on the condition of the ballot boxes and forms 35 which concerns were noted in the report. After the re-tally nineteen (19) ballot boxes were found to be without forms 35, four (4) in Kilgoris and fifteen (15) in Narok West Constituencies. The nineteen (19) ballot boxes were excluded from the re-tally. I will consider the findings of the scrutiny and retallying later in this judgment:

### **AGREED ISSUES.**

During the pre-trial conference held on 20/5/2013, the counsel agreed on the 10 issues for determination. The counsel addressed each of these in their submissions. They are as follows:-

- 1. Whether the election results of Narok County Governor's election was credible and accurate;**
- 2. Whether there were instances of votes cast exceeding the number of registered voters in specified polling stations as alleged in the petition or at all;**
- 3. Whether there were alterations and cancellations to the electoral documents and whether**

such alterations or cancellations had an impact on the results of the election;

4. Whether some of the authorized agents were obstructed and harassed or at all;
5. Whether there was bribery, corruption and illegal practices including election offences and bias of electoral officials as alleged or at all;
6. Whether the election for Governor of Narok County was transparent, free and fair or and a complete utter sham as alleged;
7. Whether the alleged irregularities which if proved, materially affected the outcome of the election;
8. Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents were properly declared as Governor and Deputy Governor of Narok County;
9. Whether the petitioners are entitled to the prayers sought;
10. Who is entitled to costs.

## SUBMISSIONS.

### Petitioner's Submissions.

Professor Lumumba submitted on behalf of the petitioner. Professor Lumumba underscored the importance of elections in Kenya whereby in the case of **William Kabogo Gitau v George Thuo & 2 Others (2010)**, the court observed that elections are a matter of life and death. The court took into account the events that followed the 2007 elections whereby elections were followed by violence, and many people lost their lives, property while others were displaced. His submissions were that the petitioner has established on the evidence adduced in support of the grounds in the petition, that the elections were inaccurate, results were incomplete, unverifiable, Forms 35 and 36 for Constituency and County had conflicting and contradictory results, that the results were declared on irregularities, it is unclear what the correct and true results were, that some results in the polling stations exceeded 100% voter turn out, there were cancellations in the electoral forms and lastly that the scrutiny exercise had unearthed further flagrant flaws in the election and hence the petitioner was deserving of the prayers sought in the petition. On the question of the burden of proof, counsel relied on the Supreme Court decision in **Raila Odinga** (supra) where the burden of proof was said to be the same as in a civil case, with the burden resting on the petitioner and would shift to the respondent depending on how the petitioner had framed his/her case. Counsel also relied on the decisions of **Thomas Mahinda Musau & Others v IEBC (2013) (Machakos)**, **Mbowe v Eliafoo (1967) (EA 240)** and **Opitz v Wrzesnewsky**. Counsel, however urged the court to rely on the **Raila** case only as respects the burden of proof because it is *sui generis* in that it relates to a presidential election where the evidence relied upon was in the form of affidavits while this case is based on oral evidence; that in **Raila** case (supra), the time for hearing the petition was limited. Counsel submitted that the elections were not free, fair credible and were a total sham because they were not conducted in accordance with **Article 81** and **86** of the **Constitution**. He urged that the said Articles are couched in mandatory terms and since the respondents have admitted that there were errors, the only question is whether they satisfy the Constitutional test set out in the above Articles. Counsel also submitted that **Section 83** of the **Elections Act** where petitioners seek refuge cannot overrule the mandatory Constitutional provisions. Counsel further submitted that the court is confronted with different totals of the votes garnered and it is

an irregularity that cannot be ignored.

As regards the errors, counsel urged that there is a litany of discrepancies in 63 polling stations i.e. there were discrepancies in Narok East and the court should not countenance the excuse that they are excusable human errors. Professor Lumumba also urged that the missing Forms 35, 36 and County Form 36 show that the Constitutional standards were not met. Counsel further submitted that Regulations 79 and 83 set out what is required of a Returning Officer but the officers lamentably failed to sign the forms or give reasons for failure to do so. He urged the court to adopt the reasoning in **Kabogo** case that failure to explain why the forms were not signed by the Presiding Officer renders the election invalid. He also relied on the decision in **Omingo Magara** (supra) that if the forms are not signed and no reason has been assigned, the election ought not to stand. On the issue that there was duplication of results in Narok East and West, it was just a tip of the iceberg of worse irregularities. He argued that it is the duty of the 3<sup>rd</sup> respondent to ensure that electoral material is kept safely as was held in **Simon Ogari v Joel Omwagwa (2008) KLR** and **William Maina Kamanda v Margaret Wanjiru & 2 Others (2010) KLR** and **Wabuge v Limo & Another (2008) KLR**. Counsel submitted that whatever was discovered through scrutiny is that electoral material i.e. Forms 35 and 36 were in a sorry state and that offends the Constitutional test.

As regards over 100% voter turn out, counsel urged that there was an attempt at an explanation that some people whose features were not captured on Biometric Voter Register were in the Green Book which is regarded as a register. He, however, said that the 3<sup>rd</sup> and 4<sup>th</sup> respondents came up with different figures a demonstration that some people who were not registered were allowed to vote.

As regards alterations and cancellations of the electoral documents, counsel relied on the case of **William Kabogo** (supra) where J Kimaru found the alterations and cancellations to invalidate the documents.

On the question of harassment of agents, Professor Lumumba argued that the petitioner could only have acted through his agents and he did complain to the 4<sup>th</sup> respondent, the County Returning Officer. In conclusion, he said that the irregularities did affect the outcome of the election of Narok Governor and urged the court to adopt the decision in **William Odhiambo Oduol v IEBC EP 2/2013 (Kisumu)** where same issues were canvassed and the court nullified the elections. It was his submission that the elections failed to meet the litmus test set in the Constitution and should be nullified.

### **1<sup>st</sup> Respondents' Submissions.**

Mr. Kemboy in response to the petitioner's submissions urged the court to consider every allegation of fact but ignore those allegations that have been raised during the submissions. He submitted that the petitioner was a contender in the Narok gubernatorial elections and did not manage even a total of 1,700 votes from Narok East, his home area. He further stated that the petitioner told the court that after he voted, he traversed 17 polling stations and did not witness any irregularity. He did not present any of his agents out of his 1300 agents to corroborate his evidence and did not give a list of his agents as was required by the rules. That the only agent present at Eor Ekule polling station did not sign the Form 35 and it was therefore doubtful whether he had had 1300 agents. Counsel also submitted that the petitioner was the lone witness and is only trying his luck a second time.

Mr. Kemboy submitted that Returning Officers, DW1 to DW5 and DW7 had sufficiently explained the errors which were not deliberate, the officers were fatigued after working for 2 days sleepless nights during the election exercise. In respect of DW7, Jackton Okubasu, he explained what a register is; that DW6 the County Returning Officer clearly explained the discrepancy that arose in the transposition of

results of the women representative onto county Form 36 and the multiplication of the figures by 2; that he announced the Governor's results using Constituency Form 36; that DW6 was cross examined on the issue, he clarified that he announced results using Constituency Form 36 and that the results that were announced were accurate.

Counsel further submitted on the law that governs election petitions and especially **Section 83 of the Elections Act** which he argued is made pursuant to the power donated by Kenyans to Parliament to make law and it is for the petitioner to demonstrate that the non compliance with the law affected the elections. He cited several authorities where courts have held that if the non compliance does not substantively affect the result of the election, the court will not nullify that election. **Bogwasi v Morueng & Another Misc. CA F228 of 2004 BCr.HC 97 (Botswana case), Buhari v Obasanjo (supra), Rally for Democracy and Progress v Electoral Commission of Namibia & 5 Others SA 12/2011; Opitz case (supra).**

On the issue of standard of proof, counsel conceded that it is higher than a balance of probability but lower than beyond reasonable doubt and it is upon the court to strike the correct balance. Mr. Kemboy also urged that every party is bound by its pleadings but the petitioner was introducing new issues in the submissions – see **John Kiarie**.

On the question of over 100% voter turn out, counsel submitted that the 3<sup>rd</sup> respondent produced the electoral register for Narok and there was no polling station with more voters than those registered. That as respects Iladoru polling station, it was admitted that an error had occurred during the tallying process and did not affect the results. Mr. Kemboy urged that no evidence was led as regards the allegation that the petitioner's agents were harassed and obstructed at polling stations; that the petitioner failed to call any agents as witnesses to demonstrate that he appointed any agents in accordance with the law.

With regard to alterations and cancellations of the statutory forms, counsel submitted that elections are a human endeavour conducted by human beings. They cannot be perfect and the 88,000 voters in Narok cannot be disenfranchised just because of an erasure on a form. Counsel reviewed the results of Narok West and Kilgoris before and after and found the discrepancies in the figures to be minimal and not substantial. He relied on the cases of **Josiah and Others v Ogutu & Another (2008)1 KLR 73; Mbogo v Kangethe & Another (2008)1 KLR 168; Morgan and Others v Supson (1974)3 ALL FR 72, Joho's case (supra) and Rashid Hammud Ahmed v IEBC EP 6/2013 (Malindi)** where the courts held that the errors found were not substantial to nullify an election. In the end, counsel urged that in any event there was no evidence of manipulation, alteration or doctoring of the documents. He sought to distinguish this case from that of **William Odhiambo Oduol (supra)** where the Governor had garnered 25,047 but on recount, it was reduced by over 5000 votes to 19,757. He urged the court to find that the elections were free and fair.

On the scrutiny exercise, counsel was of the view that even after exclusion of Forms 35 for 19 ballot boxes, there was no material difference in the results.

## **2<sup>nd</sup> Respondent's Submissions.**

Mr. Havi opened his submissions by pointing out that the petitioner was the sole witness to this petition and that he only relied on 7 documents for his case. They are: Form 21 – certificate of nomination, County Form 36, Gazette Notice published on 13/3/2012, Form 35 for Topoti Primary School, Form 34 for Kabolecho Primary School, Form 35 for Siana Primary School, Form 35 for Musiro Primary School. He then reviewed the provisions of the law governing elections which are Article 81 which provides how the election process should be conducted, free, fair, neutral, efficient etc. **Article 86** sets out the

procedure for collating the votes – accuracy and accountability and **Section 39 of Elections Act** which deals with determination and declaration of results by the 3<sup>rd</sup> respondent. He submitted that the poll is participatory and subject to certification by all from primary steps at the polling station. **Section 42 of the Elections Act** allows the political party an agent to be present at polling stations. Counsel observed that the petitioner did not win the election, did not seek a recount at the polling station yet he calls the elections a sham and inaccurate but lacks the yardstick with which to measure.

In respect of the allegations that the petitioner's agents were harassed or obstructed, counsel was in agreement with submissions of the 1<sup>st</sup> respondent save to add that the petitioner did not adduce any evidence that he was singled out for exclusion in the polling stations resulting in prejudice to him (see **John Kiarie** case (supra)).

On over 100% voter turn out, counsel submitted that after the court ordered a recount of Iladoru polling station, it was confirmed that registered voters were 511 and total votes cast were 486. In Siana Boarding School, the registered voters were 625 and votes cast were 682 and the Returning Officer explained to the court that the votes above 625 were for voters who had been registered in the Green Book but not captured in the Biometrics Voter Register. Counsel urged that the petitioner had filed Petition No. 167/2013 in which he sought Forms 35 and 36 from all polling stations and should have used them to ascertain whether indeed there was over 100% voter turnout.

On the allegation of alterations and cancellations, Mr. Havi submitted that the case of **Kabogo** which was relied upon by the petitioner is distinguishable because in that case, evidence was led on specific allegations. He submitted that the petitioner made generalized allegations and failed to show how they benefited the respondents. Counsel urged the court to adopt **William Oduol's** case (supra) where the court declined to uphold the ground of alterations. Counsel further urged that the tallying process is three tier, whereby Form 35 is generated by the polling station, then constituency Form 36 and lastly County Form 36, so that by the time the agents reach the County Returning Officer, they should have the results and the possibility of fraud or cheating is minimized.

As regards re-tallying of Kilgoris Constituency, counsel said that the results were close but not above the declared results and in Narok West, the 1<sup>st</sup> respondent led with a big margin despite exclusion of Forms 35 in 15 polling stations. He submitted that recount and re-tally as ordered by the court established the credibility of the results. He urged that the petitioner cannot claim to have been incapacitated from verifying the results because he had the documents in his possession. Counsel further submitted that having been availed Forms 35 and 36 by the order of court dated 26/3/2013, the petitioner never bothered to rely on them probably because there was nothing capable of challenge on the forms. Counsel therefore concluded that elections were credible, free and fair and orders sought should not be granted but instead his client be paid Kshs.3,000,000/- in costs.

### **3<sup>rd</sup> to 10<sup>th</sup> Respondent's Submissions.**

Mr. Mungai generally adopted the submissions of the other two counsel who submitted before him. On the issue of over 100% voter turn out he added that the **Raila** case held that the Green Book is a register and the voters appearing in the Green Book were duly registered and that in accordance with **Article 3(3) of the Constitution**, the 3<sup>rd</sup> respondent had a duty to allow those registered to vote and that the **Raila** case is binding on this court under **Article 163(7) of the Constitution**.

Counsel observed that elections were unprecedented, 6 elections were conducted at once, the exercise took 3 days and officers worked long hours without rest and the errors that occurred should be understood in that context. Counsel grouped the errors into three (3) – those of Narok East where

women representative results were indicated as Governor's, the failure to give a breakdown of results of Narok and Kilgoris and lastly the two (2) different totals on the 2<sup>nd</sup> last and last pages of County Form 36.

As regards Narok East, counsel submitted that DW6 testified, explained the error and that the women representative results were not taken into account in the final results; that the error occurred during compilation of the results.

As regards Kilgoris and Narok West, counsel submitted that an explanation was given that the spreadsheet used by the Returning Officer did not match that of the County Returning Officer. After scrutiny, the report showed that errors did not largely affect the results. He however submitted that the Registrar erred in omitting the 19 ballot boxes for Kilgoris and Narok West from the tallying just because there were no Forms 35 in the ballot boxes. This is because **Section 82(2)(c) of Elections Act** sets out what can be struck out after scrutiny. He urged the court to ignore the 19 ballot boxes because even if the variation in the results after tally are added together, and given to the 2<sup>nd</sup> highest person, the 1<sup>st</sup> respondent still had a commanding lead by 25,000 votes and therefore, did not materially affect the results. He urged the court not to rely on **Magara's** case (supra) because in that case, the counter foils were missing from the ballot boxes which is not the case here. In this case, only some of forms 35 are missing and if there is any doubt there can be a recount.

In reply to the allegation that they did not comply with Rule 21 in that the election results were not served on the petitioner, counsel submitted that failure to do so is not prejudicial to the petitioner because under **Regulation 10(1)(c)**, the petitioner had a duty to file the petition with the results. He cited the case of **Amina Hassan Ahmed**, J Onyancha struck out a petition on the basis that the results of the election were not included in the petition. The court had evidence that there were worse flaws in the election, but the court was urged to ignore the allegation that the scrutiny report unearthed more flaws because of the broken seals. There was no evidence that the contents of the ballot boxes were tampered with. Besides, it was not one of the irregularities pleaded in the petition. He concluded that the 3<sup>rd</sup> respondent carried out its mandate, made some errors but they were not fundamental and the court should dismiss the petition and order that each respondent be paid Kshs.6 million in costs because of the very serious allegations made against each of them.

## **ANALYSIS.**

### **(a). Burden and Standard of Proof.**

Election petitions are a special jurisdiction. The Court of Appeal decision in **Benjamin Ogunyo Andama v Benjamin Andola Andayi & 2 Others** Civil Application No. 24 of 2013 attempted to define the jurisdiction as follows:-

**“In our view, as has been said time and again, Election Petitions form their own category and are neither controlled by the Civil Procedure Act and Rules made thereunder, nor are they controlled by the Criminal Procedure Rules. They are neither Criminal nor civil in nature. We may say there is an element of Public law in them but even that is not all correct. They are a class of their own.”**

Bearing the above in mind, this court in considering the ten issues framed for determination, must bear in mind the guiding statutory provision on the burden of proof, which is **Section 83** of the **Elections Act 2011**. The **Section** states that:-

**“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the**

**principles laid down in the Constitution and in that written law or that the non-compliance did not affect the results of the election.”**

I am also guided by a host of decisions made by other courts which were cited by the counsel both within and outside this jurisdiction. Counsel for the petitioner acknowledged that it is the responsibility of the petitioner to demonstrate that the irregularities or malpractices he has alleged against the respondents rests on him. In the cases of **Joho Nyange (2008) KLR 3 KLR 500, William Kabogo Gitau v George Thuo & Others 2010 KLR** and **Thomas Mahinda Musau & 2 Others v IEBC (2013)**, the courts have held that the standard of proof in election petitions is higher than in civil cases, that is, it is above the balance of probability but lower than what is required to prove in a criminal case. In **John Kiarie Waweru v Beth Wambui Mugo & 2 Others (2008) KLR** – J Kimaru said as follows:-

**“The burden of establishing all these allegations regarding the conduct of the said election and the results announced thereafter is on the petitioner. This court is aware of its duty to consider and determine the evidence adduced by the petitioner to t his election petition after putting in mind the fact that the election that is sought to be nullified is in respect of an exercise of the right of the voters of Dagoreti Constituency to elect a representative of their choice. This court will not therefore interfere with the democratic choice of the voter of Dagoreti Constituency unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and therefore subject to nullification. It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did occur: he must establish that the said electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the election.”**

Recently, in the **Raila** case (supra), the Supreme Court, after considering the burden of proof required in election petitions and in other comparative jurisdictions, restated the above position. The Supreme Court also considered the case of **Buhari v Obasanjo (2005) CLR 7K** in which the Nigerian Supreme Court stated:-

**“He who asserts is required to prove such fact by adducing credible evidence. If the party fails to do so, its case will fail. On the other hand if the party succeeds adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party’s adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the court giving judgment in favour of the party.”**

The finding of the Supreme Court on the burden of proof and which this court is bound by is:-

**“paragraph 197 there is apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an election cause is established in much the same way as a civil cause. The legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the court to determine whether a firm and unanswered case has been made.**

**Para 203. The lesson to be drawn from the several authorities is, in our opinion, that this Court should freely determine its standard of proof, on the basis of the principles of the Constitution, and of its concern to give fulfillment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the ‘national values and**

**principles of governance' declared in the Constitution (Article 10), judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question.”**

It is generally accepted by the parties herein that the burden of proof rests on the petitioner and depends on the nature of the irregularity pleaded so that if an election offence is committed, then the standard of proof in respect of the offence will be beyond any reasonable doubt. This was so held in the Tanzanian case of **Mbowe v Eliafoo (1967) EA 240** and the Canadian case of **Opitz v Wrzesnewsky (1012) SCC 55-2012-10-256**.

It will be the burden of the petitioner to prove that not only did the errors, irregularities and malpractices occur, but they also substantially affected the election results.

The Respondents herein raised concern on how generalized the Petitioner's claims were, amongst them is the Petitioner's claim on incompleteness of electoral forms. The Petitioner alleged that 'most' of the electoral documents, in particular, forms 35 and forms 36 were returned incomplete with no statutory comments by presiding officers, no signatures of deputy presiding officers and party agents. He however, did not name or enlist the polling stations whose forms were incomplete. As pointed out in the 2<sup>nd</sup> Respondent's submissions, the Petitioner only furnished the court with form 36 for the County (Exhibit 2), form 36 for Narok East Constituency (Exhibit 4), form 35 for Topoti Primary School (Exhibit 5a), form 35 for Kabolecho Primary School (Exhibit 5b), form 35 for Siana Boarding Primary School (Exhibit 5c) and form 35 for Mosiro Primary School (Exhibit 5d). It is therefore unclear how the Respondents are to respond to or counter the Petitioner's allegation.

The general purpose of pleadings is to identify issues for trial, to avoid ambushing the adverse party and the court. The basic principle is that pleadings must be precise and disclose the cause of action(s). In election petitions particularly, pleadings ought to be precise, specific and unambiguous considering the time constraint involved in their determination.

I particularly share the view held in the case of **Mutoko South Election Petition HH 68/2000**, which was quoted with approval in **Hove v. Gumbo (HC 7752/2002) the High Court in Zimbabwe**. That court held as follows:-

**“Procedure lies at the heart of the law. Its aim is to guarantee precision in order that the ends of justice may be achieved and unnecessary time and expense avoided. These ideals are placed in jeopardy where lack of precision leads to the person accused not knowing with sufficient clarity the case he has to meet. Much time and expense is wasted by the failure to set forth succinctly and according to law the charge raised and the particulars relied upon.”**

In **John Kiarie case**, J Kimaru observed as follows:

**“It is trite law that a party is bound by his pleadings. The Petitioner cannot be allowed to introduce new grounds in the course of adducing evidence in support of his petition. This court will therefore address the issues raised by the Petitioner regarding the validity of the Parliamentary form 16As.”**

It is with this aspect in mind that I shall deal with the issues herein.

**(b) Bribery and other corrupt and illegal practices and election offences & bias of electoral officials.**

This ground was raised at paragraph 18 (ix) to (xii) of the petition. The Petitioner however abandoned this ground at submissions stage for the reason that the petition had mutated with two Petitioners' names being struck off. It is however unclear why even with the knowledge of such mutation, the Petitioner proceeded to prosecute this claim only to abandon it during submissions having taken time to cross examine the witnesses. In contention, Mr. Kemboi submitted that this ground having been abandoned, with it every allegation against the 1<sup>st</sup> Respondent had gone. Mr. Havi was of the view that this court needs to consider this ground because it shows how generalised the Petitioner's complaints are. Mr. Mungai also took issue with the Petitioner's move to abandon this ground stating that the Petitioner should be condemned to pay costs for dragging the 4<sup>th</sup> to 10<sup>th</sup> Respondents to court to defend their character on baseless allegations.

I will briefly consider the litany of allegations made against the respondents in any event. The Petitioner alleged that there was rampant bribery of voters by known proxies of the 1<sup>st</sup> Respondent in the days leading to the disputed election. In Angata Barrikoi Ward, on the eve of the election people were given 1kg of sugar, in some areas chiefs and assistant chiefs were used to bribe and intimidate voters and in Kuseret, the area chief Mr. Titus Tanui was caught distributing money to members of the public; that the 1<sup>st</sup> Respondent compromised and corrupted virtually all 3<sup>rd</sup> Respondent's officials conducting the election in particular the 4<sup>th</sup> to 10<sup>th</sup> Respondents to skew the election in his favour; in Lelechonik centre in Kapsasian ward of Emurua Dikirr Constituency and at Sungur polling centre in Angata Barikoi ward in Kilgoris constituency, URP agents were allowed to assist illiterate voters; the presiding officer at Sungur polling centre was not at the station and URP agents had practically taken over the station; that presiding officers in most polling centres refused to issue authorised party agents with copies of forms 35 and in most cases no copy was placed at the door of the polling centre as required; in Emurua Dikirr, Narok North, Narok South, Narok West and Kilgoris, despite numerous pleas, the Petitioner was not supplied with the forms 36 for their respective constituencies; in Kapkoros and Kelonget, URP agents and even presiding officers openly guided voters to vote for the 1<sup>st</sup> Respondent, specifically; using the Kalenjin word "**legem**" which means the one at the bottom which coincided with the 1<sup>st</sup> Respondent's position in the ballot paper; telling voters to vote for the one from Transmara which also coincided with the 1<sup>st</sup> Respondent's origin; telling voters to vote for the one who gave them sugar and telling voters that other candidates are from far.

The Petitioner testified that the 1<sup>st</sup> Respondent influenced the recruitment of the presiding officers and the deputy presiding officers.

The 8<sup>th</sup> Respondent (DW 2) was alleged to have disappeared with Ole Sengeny on 5<sup>th</sup> March, 2013 into Royal Hotel in Narok carrying election material and a computer;

The 9<sup>th</sup> Respondent (DW5) was allegedly sighted in a government vehicle at night meeting the 1<sup>st</sup> Respondent in a secluded place for more than 30 minutes after which he went to the tallying centre inebriated;

Against the 4<sup>th</sup> Respondent (DW6), it was alleged that he took nearly 10 hours to release a copy of the County form 36 he used to declare the 1<sup>st</sup> Respondent the winner and only released the form when the Petitioner and other Narok Gubernatorial candidates stormed the tallying centre accompanied by press; that he blatantly refused to provide the Petitioner and his agents with copies of the returns from the

constituencies that he was using to arrive at the aggregate tallies and deployed the police to intimidate him and his agents and that he refused to take action even after being informed of misconduct by returning officers.

The 6<sup>th</sup> Respondent (DW4), the returning officer, was alleged to have replaced a trained clerk midstream with a fresh recruit under unclear circumstances. The Petitioner averred that form 36 containing the declaration of county Governor results is dated 6<sup>th</sup> March, 2013 yet as late as 8<sup>th</sup> March, 2013 results of some polling stations and constituencies had according to the 4<sup>th</sup> Respondent not yet been received. The Petitioner averred that it is quite obvious from the inconsistencies and discrepancies in the forms 35 and forms 36 that electoral officials and in particular the 4<sup>th</sup> to the 10<sup>th</sup> Respondents were involved in cooking and doctoring of figures in favour of the 1<sup>st</sup> Respondent. All the Returning Officers denied the allegations levelled against them and during their testimonies, explained in detail what happened.

There was a complete twist to the Petitioner's testimony when on cross-examination by Mr. Kemboy, he stated that he did not witness the aforesaid misconducts of the Respondents and the compromise but he had just believed there was compromise based on open bias. The Petitioner failed to furnish any evidence with regard to bias. The entire Petitioner's evidence on bribery/compromise and open bias was hearsay. Having prosecuted the claim, the Petitioner must have believed he could prove his case even as a lone witness and abandoning it at this stage is evidence of very generalised claim made by him without basis. He called no witness to corroborate his testimony. The allegations were serious and touched on the character of the 3<sup>rd</sup> Respondent's officers. These claims were numerous and so serious that they should have been tackled with the gravity commensurate with the dire consequences that would follow by virtue of the provisions of **Section 64 and 67 (1) (a)** of the **Act** and **Article 81** of the **Constitution**. However, considering that the Petitioner failed to prove these claims beyond the required standard or at all, the claims would have failed anyway, but for now, they stand abandoned. The question of costs will obviously be addressed upon this court making its determination in the whole petition.

### **(c) Obstruction and Harassment of authorised agents.**

At paragraph 18 (viii) of the petition, the Petitioner averred that in Lelechonik Primary School Polling Station, Angaset Primary School Polling Station (Emurua Dikirr Constituency), in Kaptembwo, in Enkoperia in Angata Barrikoi ward (Kilgoris Constituency), in Oltanki and Gorofa centres in Emarti ward in Kilgoris Constituency, authorised party agents of the Kenya National Congress (KNC) and other non-URP agents were ejected from polling centres and voting proceeded with only URP agents in attendance. In the Petitioner's Exhibit 6 (b), it was alleged that in over thirty (30) polling stations and in Emurua Dikirr, his agents were denied access.

The Petitioner testified that his complaint to the 4<sup>th</sup> respondent about his agents being obstructed from entering polling stations at Emurua Dikirr Constituency vide a letter to the 4<sup>th</sup> Respondent dated 6<sup>th</sup> March, 2013 (Exhibit 6 (a)) was not acted upon. The 4<sup>th</sup> Respondent admitted that before the elections, the Petitioner called him to seek advice on agents, which he did. He also agreed that the Petitioner called him complaining that his agents were barred from entering polling stations and he advised him to report to the returning officers concerned. The 4<sup>th</sup> Respondent denied that any returning officer reported to him that the Petitioner had made any complaint. DW6's testimony was corroborated by that of DW2 and DW3 who denied that any report was made to them by the Petitioner as regards obstruction or harassment of his agents.

It is the Petitioner's submission that DW6's testimony that the Petitioner complained to him on obstruction of his agents and referring the Petitioner to constituency returning officers corroborates the

Petitioner's testimony as to obstruction of agents and shows the 4<sup>th</sup> Respondent (DW6) abdicated his responsibility as the County Returning Officer.

Constituency Returning Officers are charged with the responsibility of conducting elections at the constituency level, pursuant to **Regulation 3 (3) (a)** of *the Regulations*. The Petitioner therefore ought to have first raised his concerns with the returning officers of the respective constituencies, if any. They would have been in a position to address the complaints faster. The County Returning Officer was based at the County tallying centre and the people to be contacted first were those on the ground. The Petitioner did not prove that he complained to any of the constituency returning officers before reporting to the County Returning Officer.

In examination in chief, the Petitioner only gave an account of the obstruction of his agent at Eor Ekule Primary School polling station stating that his agents were denied access. On cross-examination, the Petitioner's testimony took an interesting twist. When questioned by Mr. Havi, he stated that when he went to vote at Eor Ekule Primary School polling station, his agent by the name Daniel Sankei was present but because his other agents were being harassed in other polling stations which he did not name, he sent Daniel Sankei to those polling stations. On further cross-examination, he said he did not know the exact number of agents that were obstructed but that he tele-conversed with about fifteen (15) of them.

The allegation that the Petitioner's agent was obstructed from entering Eor Ekule Primary School polling station which is in Narok East Constituency has not been pleaded and it is the only evidence that the Petitioner gave in that regard. This is a shift from the pleading that cannot be entertained.

The Petitioner alleged that he had appointed 1,300 agents but admitted that he did not submit a list of his agents to the 3<sup>rd</sup> Respondent. Interestingly, apart from two agents, the Petitioner could not recall any of his agents nor could he produce a list of their names. He stated that he was informed by the 4<sup>th</sup> Respondent two (2) days before elections to submit his agents for training by the 3<sup>rd</sup> Respondent. It is evident that the Petitioner was accorded his right under **Section 30** of the *Act*, to appoint his agents. The petitioner admitted that some of his agents were trained as trainers.

The question then is whether the Petitioner exercised his right of appointing agents, if any, in accordance with the law.

**Section 60(1)** of *the Act* and **Regulation 5** requires of every agent scheduled to take part in any proceedings relating to the issue or receipt of ballot papers or to attend at a polling station or at the counting of the votes to take an oath of secrecy.

**Regulation 62 (4)** of *the Regulations* provides that agents appointed by an independent candidate or political party shall at all times during the performance of duty authorised by their said principals display the official badge supplied by the commission (3<sup>rd</sup> Respondent herein).

**Section 42 (a)** of *the Act* provides for accreditation of agents by the 3<sup>rd</sup> Respondent. The Petitioner totally failed to establish that he complied with the above provisions.

The Petitioner did not call any of the agents as witnesses to corroborate his evidence. No reason was given for that. In his testimony, the Petitioner stated that he sent Daniel Sankei to polling stations where other agents had been obstructed. It is not clear why the form 35 for Eor Ekule primary school polling station did not bear his signature and for what purpose Daniel Sankei was sent to sort out the issue of obstruction of agents who were alleged to be in possession of the requisite documents.

In view of the foregoing, the Petitioner's evidence is all hearsay as he neither witnessed the alleged harassment nor obstruction. It is only the Petitioner who knew his agents, if at all, and that evidence was within his knowledge. I wish to invoke **Section 112 of the Evidence Act, Cap 80 Laws of Kenya** that those were facts peculiarly within his knowledge yet he failed to bring the same before the court and the court can only but draw an adverse inference. I draw an inference that the Petitioner either had agents who were not diligent, had agents who were not authorised to enter polling stations or did not have agents assigned to every polling station or had no agents at all.

The court in the case of in **ABN Amro Bank N.V v. Le Monde Foods Limited Civil Application No. NAI 15 of 2002** stated that where a fact or evidence is so peculiarly within the knowledge of a party, that party has the burden of producing it and in the event it does not, an adverse inference must be drawn as against the party failing to produce the evidence. In this case the Petitioner totally failed to establish the allegation of agents obstruction or harassment.

**(d) Over 100% Voter Turn Out.**

At paragraph 18(c) of the Petition, it was alleged that there was over voting at Siana Boarding Primary School polling station where registered voters were 625 and yet 682 votes were cast making it 109%; while at Iladoru polling station, there were 511 registered voters but 786 votes were cast making it 153%. I will start by addressing the issue regarding Iladoru. After an application for scrutiny made by the petitioner, this court on 23/7/2013 ruled that there be a full scrutiny and recount of all the valid votes in respect of Iladoru polling station under the supervision of Felix Kombo, Deputy Registrar, Nakuru High Court. The scrutiny report was prepared as to the findings. The results are captured in the table here below:-

**ILADORU.**

Total No. of Registered Voters for the Polling Station	511
Number of Spoilt Ballot Papers	00
Total No. of Votes Cast	486
Number of Rejected Votes	03
Number of Disputed Votes	00
Number of Rejected Objected to Votes	00
Total No. of Valid Votes Cast	483

It turned out that the registered voters at Iladoru are 511 and the total valid votes cast was 483. DW2 Malonza, the Returning Officer for Narok South had explained in his evidence that it was a mere human error in the posting of the results onto Form 36. It is obvious that scrutiny confirmed that this was a mere error whereby the wrong figure was entered in both Forms 35 and 36 during posting. The mistake did not affect the results and is excusable. The same having been corrected during the scrutiny, it is surprising that the petitioner still insists on submitting that there was over 100% voter turn out at Iladoru.

As regards Siana Boarding Primary School, the petitioner alleged that the registered voters were 625 but yet votes cast were 682 as per Form 35. The Returning Officer of Narok West, Mr. Okubasu (DW7) said that as per the Green Book, registered voters for Siana are 709. He explained that he instructed the Presiding Officer at Siana to allow the voters who had been registered in the Green Book, but did not appear in the Biometrics Register, to vote. He said that 84 people who were duly registered in the Green Book were not captured by the Biometrics Register. According to the petitioner, the 4<sup>th</sup> Respondent

swore an affidavit in which he deponed that in Narok West, all voters were captured in the Biometrics Register meaning that there could have been no voters outside the Biometrics Register that could have voted. DW7 explained the voting procedure; that they used three registers – electronic register with Biometrics features of the voter, a special register and a Green Book. He said that it is the electronic register that would be looked at first and if the name was missing, they would consult the Green Book which was kept at the Constituency Tallying Centre, where 6 clerks manned the Register. DW7 exhibited as **JO2**, the Green Book for Siana which shows that the registered voters were 709. The 9<sup>th</sup> respondent, Raka (DW5) confirmed to the court that in fact they used three registers; Biometrics Register where photographs and finger prints are captured; special register where people whose Biometrics could not be captured are registered and the Green Book, which is the manual register where all voters are entered upon registration and they sign. Even though the 4<sup>th</sup> respondent deponed that Narok West Constituency did not have any voters without Biometrics, but with the existence of so many registers, one cannot rule out the fact that there could have been people registered in one register and not the other. This is a situation which the 3<sup>rd</sup> respondent should look into in the future elections, so that all registers are harmonized. DW7 exhibited a manual register of Siana and I have no doubt that it was in existence on 3/3/2013. It was DW7's Constitutional duty to ensure that no registered voter was disenfranchised because of an omission by the 3<sup>rd</sup> respondent's officers. **Article 83** of the **Constitution** guarantees a qualified citizen the right to be registered as a voter and also the right to exercise his right to vote or stand for election. Article 83 reads:-

**“83(1) A person qualifies for registration as a voter at elections or referenda if the person –**

- a. **is an adult citizen;**
- b. **is not declared to be of unsound mind; and**
- c. **has not been convicted of an election offence during the preceding five years.**

**(2) A citizen who qualifies for registration as a voter shall be registered at only one registration centre.**

**(3) Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand or election.”**

In addition, **Section 10** of the **Elections Act** provides thus:-

**“A person whose name is entered in a register of voters in particular polling stations, and who produces an identification document shall be eligible to vote in that polling station.**

**(2)....”**

The 3<sup>rd</sup> respondent is mandated to ensure that the rights guaranteed under **Article 83** are effected once a person is registered as a voter, he is expected to vote and if there were mistakes in the register(s) it was the duty of the 3<sup>rd</sup> respondent to ensure that they identified those who were duly registered using their backup systems to ensure no citizen was disenfranchised.

The Supreme Court was found with a similar challenge, that is, existence of several registers in the **Raila's** case and it recognized the Green Book as a register. The court said as follows:-

**“[248] The 1<sup>st</sup> and 2<sup>nd</sup> petitioners' cases turn on the validity or invalidity of the “Principal Register of Voters.” The point was taken up in evidence, and was substantially canvassed in the**

**submissions. What is the “Principal Register of Voters””** In the light of the provisions of the Constitution [Articles 38(3) and 83] and of the Elections Act, 2011 [Sections 2, 3, 4), and of the evidence adduced in Court, we must conclude that such a register is not a single document, but is an amalgam of several parts prepared to cater for divers groups of electors. The number of parts of a register and the diversity of electors for whom it is prepared, is dictated by law, and the prevailing demographic circumstances of the country’s population. The register can also take several forms, as contemplated by Section 2 of the Elections Act, which stipulates that such a register ‘includes a register compiled electronically.’

In addition, the petitioner himself testified that when he went to vote at Eor Ekule, his name was not found in the Biometrics register but it was found in another and that is why he was able to vote. That is evident that more than one register indeed existed that was in use on that day. In my view, the explanation given by the Returning Officer was reasonable and there was no evidence that the officer acted outside his mandate under the law.

At Musiro, Form 35 that was exhibited by the petitioner (Ex.5d) indicated that the registered voters were 449, total votes cast were 438 and valid votes were 434. It is the contention of the petitioner however that DW9, Sompisha who was the 1<sup>st</sup> respondent’s chief agent exhibited a register **WLS 3** which indicates that the registered voters were 393. I have seen the Biometrics Register produced in evidence by DW6 (4<sup>th</sup> respondent) and it does show that the registered voters at Musiro were 449. The authenticity of the register exhibited by DW9 (WLS 3) is not established. It does not bear the logo of the 3<sup>rd</sup> respondent, it is not certified as a true copy or signed by any of the 3<sup>rd</sup> respondent’s officials. In Form 35 (PEX.5d) those who voted were only 438, less than the registered number. I find no evidence of over 100% voter turnout at Musiro polling station.

#### **(e) Incomplete Electoral Forms.**

The Petitioner at paragraph 18 (vi) of the petition, generally claims that most of forms 35 and 36 including the County form 36 were incomplete for lack of statutory comments by presiding officers, signature of deputy presiding officers and signatures of party agents. At paragraph 18 (vii) of the petition, he claims that County form 36 was incomplete for lack of a breakdown of the results for Narok West and Kilgoris Constituencies. The Petitioner testified that the County form 36 omitted the results of Narok East Constituency, lacked a breakdown of Kilgoris and Narok West Constituencies’ results and only bore signatures of two agents, that of TNA and URP with no reason were assigned; form 36 for Narok East Constituency missed the results for two polling stations i.e. Oloikarere Primary School and Moshoro Primary School; form 36 for Narok West Constituency missed the results for Pardamat Polling Station thereby affecting the accuracy of the total votes for the constituency. I shall restrict myself to specifically pleaded issues in dealing with this ground. These allegations were reiterated in the Petitioner’s submissions. It was also submitted that form 36 for Narok West produced during scrutiny was signed by the 1<sup>st</sup> Respondent’s agent only and that forms 35 produced in the affidavit of Wilson Ledama Sompisha (DW 9) as **WLS-3** are not signed by agents for all candidates and no reasons are given by the presiding officer. Many of the forms 35 were also said to lack statutory comments.

**Regulation 79 and 83 of *the Regulations*** set out the features of the declaration of results in forms 35 and 36. The forms should contain the signature of the candidates or their agents; reasons for the refusal or failure by the candidates or agents to sign; a breakdown/schedule of results respectively. The statutory measures in Regulation 79 and 83 above are part and parcel of the measures put in place to ensure that the elections are free, fair transparent and credible.

Professor Lumumba submitted symbolically that the forms must lead to a still birth due to their

inadequacy and for that proposition he relied on the cases of **Kabogo and Magara** (supra) in which the impact of failure to comply with the regulations aforementioned was determined. In both cases, it was held that the presiding officers had a duty to sign the forms and also ensure that the candidates or their agents too signed the forms and in the event their signatures could not be secured then reasons must be given. In the **Magara case** it was held that a form which is not signed by agents and which does not contain reasons for such failure or refusal, is of no value and cannot be used to authenticate any declared results.

It is noteworthy that the decisions in the two cases cited above were made under the repealed Regulations which had no exception such as contained in **Regulation 79 (6)** and **(7)**.

**Regulation 79(6)** provides as follows:-

**“The refusal or failure of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation (2)(a).**

**Regulation 79 (7)** provides as follows:-

**“The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under sub-regulation (2) shall not by itself invalidate the results announced.”** (Emphasis own).

It means therefore that it is a requirement and good practice that candidates and/or their agents should sign the forms, but failure to do so does not invalidate the results as announced unless, in my view, such failure was done knowingly and for malicious reasons occasioned by the presiding officer, candidate or agent.

It is noteworthy that the Petitioner’s agent, Mr. Daniel Sankei was at Eor Ekule primary school polling station at the time of close of counting of ballots yet he did not sign the form 35. There is no explanation as to his failure to sign.

The 5<sup>th</sup> Respondent (DW 3) testified that some agents refused to sign the forms but that he could not force them to sign. If that was the case, the Presiding Officer should have recorded that refusal. Although in the examination in chief, the Petitioner first alleged that the 4<sup>th</sup> Respondent locked him out of the County tallying centre and announced the results without giving him or his agents documents to verify the announced results, interestingly in cross-examination he stated that he and his agent **‘refused’** to sign the County form 36 because of insecurity at the County tallying centre. The Petitioner did not adduce any evidence as to the alleged insecurity. He further testified that he disputed the results because he was not given a chance to verify the results but admitted that the said failure alone does not amount to favouritism of the 1<sup>st</sup> Respondent. When put to task in regard to the contents of his letter dated 6<sup>th</sup> March, 2013 (**Exhibit 6(a)**), the Petitioner confirmed that he had indicated that he would not accept the results as announced for the reason that he believed they were doctored. That particular statement was made even before the results were announced. The Petitioner’s testimony is contradictory when he on the one hand states that he and his agents did not sign the form because he was locked out of the tallying centre and on the other, he stated that he refused to sign because he was not given forms to verify the results and were thereby not credible.

The allegation that he was locked out of the County tallying centre was rebutted by the 4<sup>th</sup> Respondent (DW6) and Mr. Wilson Ledama Sompisha (DW10) who testified that at some point at the time of

announcing the results, the Petitioner stormed into the County tallying centre demanding that the tallying process be stopped. Security officers tried to calm the Petitioner down and escorted him to his designated sitting area but he refused to sit and left the room where the results were being announced. The account of the Petitioner's conduct as given by the 4<sup>th</sup> Respondent (DW6) and DW10 vis à vis the Petitioner's sentiments in the letter dated 6<sup>th</sup> March, 2013 (**Exhibit 6(a)**) go to confirm that the Petitioner and his agent refused to sign the County form 36. It is therefore no wonder that the forms do not bear his signature or those of his agents. The Petitioner is complaining about an omission to which he was a party and bearing in mind the provisions of **Regulation 79 (7)** lack of the Petitioner's and his agents' signatures cannot invalidate the results announced. As considered elsewhere in this judgment, it is even unclear whether the Petitioner had any agents who could sign the forms on his behalf anyway.

The other complaint is failure by the presiding officers to record reasons for lack of signatures of agents and/or candidates. The errors were admitted and attributed to honest human errors. Again the petitioner did not specify where these errors were committed. The Petitioner cannot have expected any reliefs when the pleadings did not include the specific areas where the omissions were made and the fact that the said errors affected the declared results. On the issue of omission of breakdown for Kilgoris and Narok West Constituencies and that of Narok East, the 4<sup>th</sup> Respondent (DW6) explained that he announced the results using constituency form 36 and it is the figures therein that he summed up and used to declare the winner. That issue is dealt with under the scrutiny report. It must also be appreciated that the elections were very complex, they took about 3 days without rest or sleep resulting in the 3<sup>rd</sup> Respondent's officers getting fatigued and minimal errors such as the ones mentioned in this ground are excusable unless otherwise proved to have been deliberate and detrimental to the Petitioner which he has not done. In **Kabogo's case** and **Omingo Magara case** (supra), the Petitioners therein demonstrated the effects of errors on the final results. The Petitioner herein has not demonstrated that the errors were deliberate, ill-intentioned and how the errors mentioned under this ground affected the final results in a negative manner.

#### **(f) Cancellations and Alterations and Their Effect.**

##### **Whether there were cancellations and alterations as alleged.**

The Petitioner avers at paragraph 18 (iv) of the petition that various electoral documents in particular forms 35 contain cancellations and alterations which are neither countersigned nor justified. The Petitioner's submission is that the 5<sup>th</sup> respondent, Samuel Chacha's (DW3's), testimony confirms that there are several alterations on forms 35. Mr. Chacha confirmed that forms 35 for Lelechonik Primary School, Chemurin Primary School, Chepkoiyet Primary School and Lelagoin Primary School had alterations that were not countersigned. It was further submitted that a quick look at annexure **WLS-3** (bundle of forms 35) shows that a good number of forms 35 contain erasures which were not countersigned. The Petitioner did not single out the particular forms 35 that had cancellations and alterations.

Professor Lumumba submitted that cancellations and alterations in the statutory forms were so fundamental that they bring to the fore the fact that this court should apply both qualitative and quantitative test. The qualitative test looks at the integrity of the process and does not deal with numbers but with the credibility of the electoral process. The quantitative test deals with figures and an election will not be annulled when the number of rejected votes is equal or greater than the successful candidate's margin of victory. In my view, courts in Kenya have invoked both the qualitative and quantitative methods as can be gleaned from many decided cases. J Musinga said as follows in the **Magara case**:-

**“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 the conclusion that the process was not transparent, free and fair...it cannot be said that the end justifies the means. In democratic election the means by which a winner is declared plays a very important role...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 officer.”**

The Court of Appeal agreed with J, Musinga’s view when Justice Omollo stated:-

**“It is trite that on the scrutiny and recount of the votes, the appellant still had the largest number of votes. But as I have pointed out that was not all the learned Judge was supposed to go by though it was an important consideration to bear in mind.”**

In **Richard Kalembe Ndile & Another v. Dr. Patrick Musimba Mweu & 2 Others**, Machakos EP No. 1 of 2013, J Majanja observed that other than considering the intent of voters by the number of votes cast in favour of the winning candidate, the court is obliged to consider the quality of the election and see that it conforms with the principles of elections articulated in Article 81 of the Constitution.

I totally agree with the above stated positions. The court cannot ignore the conduct and process by which the results were arrived at. It is a **Constitutional** mandate. If the process is not impartial, neutral, efficient, accurate and transparent as envisaged under Article 81 of the Constitution, then the court will not uphold the election just because of the numbers.

The Petitioner relied on the **Kabogo case** where Kimaru J, found that the alterations and cancellations to form 16A produced in court raised serious questions regarding the veracity of the results and could not be said to contain valid results of the polling stations concerned. Generally, the Respondents did admit that there were errors and irregularities in the election documents but explained that the errors and the irregularities did not materially affect the outcome of the elections.

In response thereto, the 1<sup>st</sup> Respondent quoted the following cases where courts have found there to be errors in the electoral process but upheld the elections.

- a. **Supreme Court of Nigeria in Buhari v. Obasanjo (2005) CLR 7K.**
- b. **Josiah and 4 Others v. Ogutu and Another (2008) 1KLR (EP) 73.**
- c. **Mbogori v. Kangethe and Another (2008) 1KLR (EP)168.**
- d. **Morgan and Others v. Simpson (1974) 3 All E.R 722.**
- e. **Mnene v. Kubo and Another (2008) 1KLR (EP)336.**
- f. **Joho v. Nyange and Another (2008) 3KLR (EP) 500.**
- g. **John Kiarie Waweru v. Beth Mugo and 2 Others (2008) e KLR.**
- h. **Hawa Ng’humbi v. The Hon. Attorney General and 2 Others Misc. Civil Cause No. 107 of 2010.**

i. **Rashid Hamid Ahmed Amana v. I.E.B.C and 2 Others, EP No. 6 of 2013 at Malindi.**

The courts will generally look at the gravity of the errors, motives and effects on the results.

The operative statutory provision is **Section 83** of *the Act* which I have set out earlier in the judgment. It follows therefore that a Petitioner ought to specifically point out irregularities and non-compliance. He also should establish that the irregularities and non-compliance were so massive that they substantially affected the outcome of the results. With regard to how massive the errors were and their effect on the final results, I associate myself with the reasoning of Muchelule J, in **William Odhiambo Oduol v. Independent Electoral and Boundaries Commission & 2 Others (2013) eKLR**, where while disagreeing with the holding in the **Kabogo** case he stated:-

**“I agree with the petitioner, and as was conceded by DW3, that it was desirable for each alteration, cancellation or over-writing to be counter-signed and stamped by the maker as a way of owning the same and saying the Form was authentic. In Kabogo case, Justice Kimaru said the following about such Forms.**

**‘In the case of electoral documents, it is important that the statutory forms which contain results that will invariably be required to be verified by other parties; including the members of public; should be written without any alterations or cancellations. The cancellations or alterations in Forms 16A produced in this court raised question regarding the veracity and authenticity of the said results. The said Form 16A cannot in the circumstances be said to contain valid results of the polling stations in questions.’**

**With respect to the Judge, I would not go that far. Each petition has to be decided on its own merits. It would depend, for instance, on the number of the Forms in question in relation to the total Forms in the petition. It would also depend on the explanations given by the electoral officials, whether or not the agents signed the Forms, or what questions they (the agents) raised about them. But the correct thing should always be that every alterations and/or cancellation be counter-signed and stamped by the maker. I don't find that these 79 Forms should be disregarded”**

I took the liberty to look at **WLS-3** (the bundle of forms 35 for four (4) constituencies) just to inform this court's decision. Alterations and cancellations that are not countersigned were found as follows:-

- **Narok East Constituency – 6 polling stations;**
- **Emurua Dikirr Constituency – 9 polling stations;**
- **Kilgoris Constituency – 6 Polling stations;**
- **Narok West Constituency – 6 polling stations.**

The nine (9) polling stations in Emurua Dikirr Constituency include those pointed out by DW3. Like in the case of **William Odhiambo Oduol** (supra), the forms with alterations and cancellations are not massive. The affected polling stations in the four (4) Constituencies that I looked at are only 27 in number. Taking into account the fact that there were over 600 polling stations in Narok County, the figure is minimal. It is even much smaller than what was found in **William Oduol's** case (supra).

The Court of Appeal in **Josiah and 4 Others v. Ogutu and Another (2008) 1 KLR (EP) 73** held as follows:-

**“(a) By and large, the ballot papers, which the court had scrutinized, were free from irregularities**

**and any discrepancies were minimal and could be accounted for by unintentional human error and not by intentional design or sinister motive.**

**(b) The minimal discrepancies could not and did not affect the result of the election in which the 1<sup>st</sup> Respondent had scored a substantial and legitimate majority over his nearest rival.”**

Further to this, I adopt the reasoning in the above case and hold that the Petitioner should also have established that the alterations were done due to outright negligence, with ulterior or sinister motives. Kimaru, J correctly held in **Rashid Hamid Ahmed Amana’s case** (supra) that a Petitioner not only needs to establish irregularities and their effect on the outcome of the election, but is also required to establish that such irregularities were as a result of outright negligence or deliberate action on the guilty party.

As alluded to earlier, the Petitioner did not outline which polling stations were affected in his petition or in his testimony. He merely mentioned cancellations and alterations in passing without giving any evidence in support thereof. If anything, his generalised pleadings were an ambush on the Respondents. He neither established that the alterations and cancellations were as a result of outright negligence or deliberate action nor that the alterations and cancellations had an effect on the final results. It is during the 5<sup>th</sup> Respondent’s (DW3) and the 6<sup>th</sup> Respondent’s (DW4) testimonies that the issue emerged. DW3 and DW4 denied that the cancellation and alterations had any effect on the final results. DW3 and DW4’s testimonies were not rebutted. The case of **Kabogo** (supra) on which the Petitioner relied is distinguishable from the instant case. As correctly submitted by Mr. Havi, the Petitioner in **Kabogo’s case** exhibited all forms 16 A and 17, interrogated the irregularities in them and led evidence in support thereof unlike the instant case.

#### **Inconsistent and conflicting results, use of wrong results and duplication of results.**

It was the Petitioner’s submission that the results appearing in the Constituency forms 36 and the County form 36 (P. Exhibit 2) differ from those in forms 35.

In Topoti Primary School Polling Station all candidates other than John Oloishuro Konchella were given wrong results in the County form 36. The 9<sup>th</sup> Respondent admitted the error and attributed it to a transposition error. It must be noted that the Petitioner never demonstrated that he disputed the results for Topoti Polling Station as entered in the Constituency form 36 which the 4<sup>th</sup> respondent used to announce the results. Secondly, he did not demonstrate how the error benefited the 1<sup>st</sup> Respondent against him. If anything, the Petitioner who had 0 votes in form 35 was awarded 52 votes in the County form 36 and the 1<sup>st</sup> Respondent who had 54 votes in form 35 was awarded no votes in the Count form 36.

The Petitioner pointed out that form 35 for Iladoru Primary School Polling Station shows the 1<sup>st</sup> Respondent’s votes to be 9 while P. Exhibit 2 showed the votes as 309 (Form 36). The 4<sup>th</sup> Respondent explained that form 35 which is the primary document contained the correct result which is 9 votes but it is during transposition of results onto County form 36 that the results for the 1<sup>st</sup> Respondent were erroneously captured as 309 votes. Considering 4<sup>th</sup> respondent’s explanation that he used Constituency form 36 to announce and compute the results, it cannot be said that the results of Iladoru were affected by that error.

At Oloikarere Primary School Polling Station and Moshoro Primary School Polling Station, the results entered in Narok East form 36 are those for Sintakara Primary School Polling Station and Entashata Primary School Polling Station respectively such that the results for Sintakara Primary School Polling

Station and Entashata Primary School Polling Station are duplicated. The results for Chepinying Polling Station were duplicated in the Narok West Constituency form 36. I have looked at the forms 35 for the said polling stations, the votes attained by the Petitioner and the 1<sup>st</sup> Respondent were as follows:-

<b>Polling Station</b>	<b>Petitioner</b>	<b>1<sup>st</sup> Respondent</b>
Oloikarere Primary School (Narok East Constituency)	11	311
Moshoro Primary School (Narok East Constituency)	14	256
Entashata Nursery School (Narok East Constituency)	0	98
Sintakara Primary School (Narok East Constituency)	9	418
Chepinying Primary School (Narok West Constituency)	0	176

I agree with the petitioner that the omission of the results for Oloikarere and Moshoro Primary School Polling Stations and duplication of the results for Chepinying Primary School Polling Station is a serious error. However, it is clear from the table above that the trend of voting in Narok East Constituency is the same such that the 1<sup>st</sup> Respondent acquired the most votes and the Petitioner the least. As for Chepinying Polling Station, the Petitioner had no votes at all and the 1<sup>st</sup> Respondent had 176 votes. Even if the 1<sup>st</sup> Respondent's votes were divided by two, it would make no impact on the Petitioner's votes. The Petitioner neither called for scrutiny of the votes in these polling stations nor demonstrated that the errors made a difference in the final results. In addition, I have agreed with the respondents that the petitioner was in possession of Forms 35 and 36 and must have been in a position to determine if the errors had any effect on the final results. The court was not told of the effect.

### **Discrepancies In Form 36.**

The 4<sup>th</sup> respondent (DW6) admitted that there was indeed a discrepancy in the penultimate page on the 2<sup>nd</sup> last page of County Form 36 (PEX.1) and the declared results on the last page of the same document. He however, claimed that the discrepancy did not materially affect the declared results. DW6 explained that the error occurred during the transposition of results from Constituency Form 36 for Women Representative of Narok East which had been delivered to the County tallying centre by the Narok East Constituency Returning Officer, Ruto (DW1). That the tallying team inadvertently copied and pasted the results from Form 36 Narok East Women Representative onto the Governor's results and in addition the said Women Representative results were entered twice. DW6, however, told the court that the errors were corrected. DW6 demonstrated the error in the table at paragraph 13(vi) of his affidavit. It is reproduced as hereunder:-

### **CONSTITUENCIES**

<b>CANDIDATE</b>	<b>NAROK</b>	<b>EMURUA</b>	<b>NAROK</b>	<b>NAROK</b>	<b>NAROK</b>	<b>KILGORIS</b>	<b>NAROK</b>	<b>TOTAL</b>
<b>NAME</b>	<b>NORTH</b>	<b>DIKIRR</b>	<b>EAST</b>	<b>EAST</b>	<b>SOUTH</b>		<b>WEST</b>	
Daniel Talengo Kiptunen	1,255	2,260	<b>6,984</b>	<b>6,984</b>	2,957	10,059	2,471	<b>32,970</b>
Francis Simiren Nkoitoi	2,552	289	<b>1,499</b>	<b>1,499</b>	3,684	1,010	10,239	<b>20,772</b>
John Oloishuro Konchellah	715	326	<b>75</b>	<b>75</b>	1,858	5,334	439	<b>8,822</b>

Johnson Parsamet Nchoe	14,368	249	<b>516</b>	<b>516</b>	7,736	4,555	8,211	<b>36,151</b>
Joseph Tiampati Ole Musuni	24,122	10,797	<b>240</b>	<b>240</b>	7,126	5,003	2,407	<b>49,935</b>
Ledama Ole Kina	763	536	<b>2,988</b>	<b>2,988</b>	774	503	448	<b>9,000</b>
Samuel Kuntai Tunai	9,271	11,353	<b>13,970</b>	<b>13,970</b>	21,640	18,731	16,132	<b>105,067</b>

After the errors were corrected, DW6 came up with the following results:-

<b>CANDIDATE NAME</b>	<b>PENULTIMATE PAGE RESULTS</b>	<b>DECLARED RESULTS</b>
Daniel Talengo Kiptunen	<b>32,970</b>	<b>20,073</b>
Francis Simiren Nkoitoi	<b>20,772</b>	<b>20,789</b>
John Oloishuro Konchellah	<b>8,822</b>	<b>9,207</b>
Johnson Parsamet Nchoe	<b>36,151</b>	<b>39,100</b>
Joseph Tiampati Ole Musuni	<b>49,935</b>	<b>55,008</b>
Ledama Ole Kina	<b>9,000</b>	<b>4,175</b>
Samuel Kuntai Tunai	<b>105,067</b>	<b>87,832</b>

According to the 4<sup>th</sup> respondent, the errors were detected when scrutiny was done and that is how they came up with the declared results. I have tested the entries of the results set out in the tables above and found DW6's explanation to be correct.

Referring to the above table; as respects Daniel Talengo Kiptunen, if one subtracts the said Women Representative results ( $6,984 \times 2 = 13,968$ ) from the total of 32,970, then you add the correct results in Constituency Form 36 prepared by the Constituency Returning Officer (IKR2) 1,071, you get the declared results of 20,073. The petitioner had been given  $(2988 \times 2) = 5,976$ , of the women representative results. If the said sum is subtracted from the total of 9000 votes that had been given to him, then you add the correct results declared in constituency Form 36 (IKR 2) i.e. 1,151 votes, it makes the declared total of 4,175 votes. DW6 also said that there were other minor arithmetic errors which were detected and the figures were adjusted accordingly. The variations after audit is negligible, less than 1%. The primary document which contains the correct data is Form 35 from which the results are transferred to the Constituency Form 36 and the last in line is County Form 36. Constituency form 36 (IKR 2) was availed and confirmed that the error had indeed been made during transposition of the results from Constituency Form 36 to County Form 36 and the same was corrected during audit. The error did not affect the final results as it was corrected.

## **SCRUTINY.**

### **(i) Scrutiny And Retally.**

Acting suo motto, this court by its order of 26/6/2013, directed that there be a scrutiny of Forms 35 and

36 in respect of Kilgoris and Narok Constituencies because the results from the two Constituencies could not be verified from Constituency form 36 (PEX.1). DW6 in his evidence explained that the situation arose because the excel spreadsheet used by the Constituency Returning Officer was incompatible with that used by County Returning Officer and they only got the total votes for each candidate onto Form 36. The results upon retally are captured in the report prepared by the Deputy Registrar. The table below shows the results declared by the 3<sup>rd</sup> respondent, the results of the retally and the variations in the figures after adjustment:-

### **KILGORIS CONSTITUENCY**

<b>Name of Candidate</b>	<b>Votes Declared</b>	<b>Votes after Re-tally</b>	<b>Variance</b>
Samuel Kuntai Tunai	18,731	17,970	-761
Francis Simiren Nkoitoi	1,010	1,011	+1
Johnson Parsamet Nchoe	4,555	4,549	+6
Joseph Tiampati Ole Musuni	5,003	4,906	-97
Daniel Talengo Kiptunen	10,059	9,835	-224
Ledama Ole Kina	503	441	-62
John Oloishuro Konchella	5,334	5,279	-55

**Total** **1,206**

### **NAROK WEST CONSTITUENCY**

<b>Name of Candidate</b>	<b>Votes Declared</b>	<b>Votes after Re-tally</b>	<b>Variance</b>
Samuel Kuntai Tunai	16,132	12,391	+3,741
Francis Simiren Nkoitoi	10,239	7,558	+2,681
Johnson Parsamet Nchoe	8,211	6,451	+1,760
Joseph Tiampati Ole Musuni	2,407	2,018	+389
Daniel Talengo Kiptunen	2,471	1,662	+809
Ledama Ole Kina	448	251	+197
John Oloishuro Konchella	439	168	+271

**Total** **9,848**

The total variations in Kilgoris were only 1,206 votes. However, in Narok West, the variations were much higher with 9,848 votes. The variations affect every candidate and there could have been no intention to favour anyone of them. There is no evidence of ulterior motive or manipulation. I also do take into account the fact that the Registrar barred a total of 19 ballot boxes from both Constituencies, which had no Forms 35 from being considered in the retrally. The question is what effect did it have on the final results" Even assuming the 9,848 votes were given to the 1<sup>st</sup> respondent's closest rival (Joseph Tiampati) who garnered 55,008 votes, in the election, his final total would have come to 64,856 and the 1<sup>st</sup> respondent would still have a commanding lead with about 23,000 votes. The petitioner, having only garnered a total of 4,175 votes in the elections, even if added the 9,848, he would still maintain his rear position in the said elections. The scrutiny did disclose that the declared results were fairly credible.

The Court of Appeal Uganda said that it is not the law that every irregularity in filling the forms as regards figures of an election result must be fatal and inexcusable. The same view was echoed in EP 4/2013, **Wavinya Ndeti v IEBC**. I agree with the court which said:-

**“One of the principles governing the electoral process under Article 82 of the Constitution is that**

the election must be transparent and administered in an accurate manner. An election is a human endeavour and is not carried out by programmed machines. Perfectionism is an aspiration but allowance must be made for human error. Indeed the evidence is clear that the counting and tallying was being done at night and in less than ideal conditions hence errors which are admitted, were said to occur pertinently in tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise, electorate is ascertained and upheld at all costs.”

I subscribe to the above views.

**(ii) Broken Seals.**

It is trite law and I have pointed out earlier in this judgment that every party is bound by its own pleadings. The petitioner is bound by the grounds raised in his petition and the court cannot countenance an attempt by the petitioner to introduce in his submissions issues that were not pleaded. In his submissions, Professor Lumumba alluded to the state in which the ballot boxes were found before scrutiny whereby some had missing seals and missing Forms 35. He said that it was but a tip of the ice berg. It is true that under **Regulation 93(1)**, the 3<sup>rd</sup> respondent is the custodian of the electoral material. It reads as follows:-

**“(1) All documents relating to an election shall be retained in safe custody by the Returning Officer for a period of three years after the results of the elections have been declared and shall then, unless the Commission or the court otherwise directs, be disposed of in accordance with procedures prescribed by the Commission subject to the Public Archives and Documentation Service Act.**

**(2) Any person may apply to the High Court with notice to all candidates in the election concerned for authority to inspect documents retained under these regulations, other than ballot papers and their counter foils.”**

As respects the broken seals, set out below is the report of the Registrar on the condition of the ballot boxes before the scrutiny exercise was commenced:-

	<b>NAROK</b>	<b>KILGORIS</b>	<b>NAROK</b>	<b>TOTALS</b>
	<b>SOUTH</b>		<b>WEST</b>	
Box intact	1	116	66	183
Box/Lid Cracked	-	6	1	7
All Seals	-	0	0	0
Missing/Broken				
Boxes with 4	-	0	0	0
Seals Missing				
Boxes with 1,2 or 3 seals	-	25	35	60

None of the boxes was without a seal. On each box, some seals were still intact. From the above table it seems each ballot box had over 4 seals. **Regulation 81** of the **Election (Governor) Regulations**

does not specify how many seals are to be placed on a ballot box after the counting has been done. It reads as follows:-

**“81(1) Upon completion of a count (including a recount), the presiding officer shall seal in separate tamper proof envelopes –**

- a. **the counted ballot papers which are not disputed;**
- b. **the rejected ballot papers together with the statement relating thereto;**
- c. **the disputed ballot papers; and**
- d. **the ‘rejected objected to’ ballot papers;**

**(2) The presiding officer shall, after demonstrating to the candidates or agents as the case may be, that the ballot box to be used to carry the election results is empty, put into that box -**

**(a) the packets specified in subregulation (1); and**

**(b) the statement made under regulations 78 and 79.**

**(3) After the procedure in sub regulation (2), the presiding officer shall seal the ballot box with the seal of the Commission and allow the candidates or agents to affix their own seals on the ballot box, if they so wish.**

**(4) The presiding officer shall, as soon as is practicable deliver to the returning officer for the election area the ballot box containing the items listed under subregulation 2).”**

Regulation 81 specifies what the Presiding Officer will place in the ballot boxes before sealing.

The petitioner has not adduced any evidence to demonstrate that all the above listed items which were supposed to be in the ballot boxes were missing save for Forms 35 that was found missing from 19 boxes. The broken seals did not disclose any tampering or interference with the ballot boxes. The **Kamanda** and **Magara** cases that were relied upon by the petitioner are distinguishable from the instant case because the circumstances of those cases were very different. In the **Kamanda** case, the court made the following observations:-

**“The report of the scrutiny showed that at the time the ballot boxes were received the seals on sixty-one (61) boxes were broken those on fifteen (15) boxes were opened and the seals on seventy-eight (78) boxes were not properly closed. The report also showed that the majority of the ballot boxes had at least one of the rivets missing. After scrutiny, the report showed that Mr. Kamanda had 49,310 votes and Bishop Wanjiru had 34,874 votes. The report also showed that there were 1,106 disputed votes, 1,125 rejected/spoilt votes and 92,757 total votes cast .... There were 37 boxes with broken seals and 167 boxes intact.... The Court noted that the condition in which the boxes were found could not rule out the possibility that at some stage additional ballot papers had been added in the ballot boxes. .... According to the court, the figures meant either that the Returning Officer gave wrong figures when he announced the results or that additional ballot papers found their way into the ballot boxes while they were in the custody of the ECK. On that evidence, the court was unable to determine one way or the other whether the results shown after the scrutiny represented the actual results of the election.”**

In the above case there was evidence of tampering and interference with the ballot boxes.

In the **Magara** case, the ballot boxes had been set ablaze and there was evidence of tampering. The court said:-

**“The second respondent said that it was only the petitioner who stood to gain by the 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 3<sup>rd</sup> respondent and they should have been properly secured. No evidence was given as to what security measures had been put in place by the 3<sup>rd</sup> 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. Mosei, 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 in the 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.”**

From the above quotations it is obvious that there was evidence of tampering and evidence was led to that effect.

The above notwithstanding, the broken seals were not an issue for determination in this case in any event.

### **(iii) Missing Forms 35.**

The scrutiny report found a total of 19 ballot boxes without Forms 35 from Kilgoris and Narok West. In Kilgoris Constituency, Forms 35 were missing from the following polling stations:-

<b>Polling Station</b>	<b>Centre No.</b>
Angata Barikoi Primary School stream 2	60
Mukulelta Primary School	88
Olkiloriti Primary School	114
Olemalit Primary School	127

In Narok West, Forms 35 were missing from the following polling stations:-

<b>Name of Polling Station</b>	<b>Polling Station No.</b>
Laluk Primary School	28
Mpiro Primary School	36
Nkoilale Primary School-Stream2	42
Olchoro-Irouwa Primary School	45
Ole Tuya Primary School	50
Olmuseregi Primary School	59
Olpalagilagi Primary School	67

Osarara Primary School	68
Rongena_Stream 2	72
Kaporet	81
Primbiniet	83
Lemek	85
Enturoto	12
Koitamugul Primary School-Stream 2	23
Mararianda Primary School-Stream 2	33

No doubt Form 35 is the primary document that contains the declared results of the polls at the polling station. Under **Regulation 79(2)(b)** Form 35 is used to declare the results of the National Assembly, County Women Representative, Senator, County Governor and County Assembly members. Under **Regulation 81(2)(b)** it is one of the documents that is supposed to be placed in the ballot box. I have already considered the provisions of Regulation 93 which requires the 3<sup>rd</sup> respondent to keep in safe custody the election materials for 3 years. The question is therefore whether failure to place Form 35 in 19 ballot boxes rendered the poll invalid. The counter foils were in the ballot boxes. There is also evidence that the petitioner had filed **Petition No. 167/2013, Ledama Ole Kina v IEBC** before the High Court Nairobi, in which the petitioner sought to be given all Forms 35 and 36 for all polling stations in respect of election of Governor for Narok. A consent order was recorded on 26/3/2013 granting the forms to the petitioner. Thereafter the petitioner has never complained that the forms were not given to him. Had the 3<sup>rd</sup> respondent failed to avail the forms, the petitioner would have sought the assistance of the court to enforce the consent order. The petitioner is deemed to be in possession of the forms 35 and 36 for the whole of Narok County. The forms were supposed to assist the petitioner in the preparation of his petition. The missing forms 35 from the 19 ballot boxes would therefore not cause any prejudice to the petitioner because he already had them in his possession. The petitioner did not allege that the results after scrutiny were different from those on the Forms 35 in his possession nor did he seek to show the disparity between the evidence in court and the forms that were in his possession.

Again, the **Kamanda** case which was relied upon can only be distinguished from the instant case. In that case, the ballot boxes were in a total mess with many documents missing and the forms were neither signed nor stamped. This court therefore resists the invitation by the petitioner to find that the broken seals or the missing Forms 35 were just a tip of the ice berg disclosed by the scrutiny exercise and that the court should find that such flaws were replicated in the other Constituencies. That is speculation and there are no pleadings to support the allegation and no evidence was lead on that allegation anyway.

#### **(iv) Effect Of Striking Off Form 35 By Deputy Registrar.**

After the re-tallying process in respect of Kilgoris and Narok Constituencies, the Deputy Registrar barred the 19 boxes found to be without Forms 35 when compiling and adjusting the total results. It seems the petitioner had no issue with that exclusion. Mr. Mungai for the 3<sup>rd</sup> respondent submitted that it was an error to bar the 19 ballot boxes because it offends **Section 82(2)** of the **Elections Act** which provides what should be struck out after scrutiny. **Section 82(2)** states as follows:-

**“(a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorized to vote at that station;**

**b. the vote of a person whose vote was procured by bribery treating or undue influence;**

- c. the vote of a person who committed or procured the commission of personation at the election;
- d. the vote of a person proved to have voted in more than one constituency;
- e. the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or
- f. the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.”

Mr. Mungai suggested that where Form 35 is not found there should have been a recount in respect of the affected ballot boxes or the court should disregard the report to the extent of the striking out of the ballots or that in this case, there is no need for a recount because the variance established after scrutiny, even if the figure is given to the 2<sup>nd</sup> highest person in the polls, the 1<sup>st</sup> respondent would still be in the lead. The court was never invited to carry out a recount after the scrutiny exercise. However, I totally agree with Mr. Mungai’s submissions that **Section 82(2)** does not provide for striking out of form 35 just because it was not placed in the ballot box. The petitioner urged that the absence of Forms 35 in the ballot boxes is evidence of the 3<sup>rd</sup> respondent’s failure to perform its statutory duty to safeguard election materials and put to question the validity of the election. Counsel relied on the case of **Magara** (supra) where the court observed that without the vital documents the results in the box are unverifiable. That case however, is not on all fours with the instant case because, in that case, the counter foils were missing. A counter foil can be used to verify the authenticity of a ballot whereas Form 35 does not. Form 35 is a tally of the ballots. By the court ordering a scrutiny of Forms 35 and 36, it wanted to ascertain whether contents of Forms 35 tally with Forms 36. I believe there was another way in which the contents of Form 35 would have been ascertained because the counterfoils were in the ballot boxes. However, that not having been done, I find that no injustice has been occasioned in any event. After the 19 ballot boxes were barred from the tally, the variation between the votes declared and the results of the scrutiny in Kilgoris were only by 1,206 votes while in Narok West, they were 9,848. Every candidate was affected by reduction in their votes. In Narok West, the petitioner garnered only 251 votes while the 1<sup>st</sup> respondent had garnered 12,391. There was indeed a big margin between the two. In Kilgoris the petitioner got 441 votes while the 1<sup>st</sup> respondent got 17,970 votes, a difference of 17,529, a very large margin indeed. In the end, the variation found after the retally did not substantially affect the final results. The 1<sup>st</sup> respondent was still in the lead while the petitioner got the least votes and it did not change the outcome of the elections. The omission by the 3<sup>rd</sup> respondent did not invalidate the elections.

## **CONCLUSION.**

Having considered and evaluated each and every allegation raised by the petitioner, and the response thereto, there is no doubt that there were errors and irregularities that were established by the petitioner. The respondents were candid, they admitted and gave explanations for the said errors and irregularities. The question that begs is whether the elections met the litmus test set out in the Constitution and Elections Act on the conduct of elections.

**Article 81(e)** of the **Constitution** provides that the election process should be free and fair. Free and fair elections encompasses the following principles:-

**“81. The electoral system shall comply with the following principles –**

a. – (d);

(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.”

The 3<sup>rd</sup> respondent is also required to comply with **Article 86** in the conduct of elections which requires the elections to be simple, accurate, verifiable and accountable. It states as follows:-

**“86. At every election, the Independent Electoral and Boundaries Commission shall ensure that –**

- a. whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
- b. the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
- c. the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
- d. appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of elections materials.”

In **PEP 1/2001 Rtd Col Dr. Kiiza Besigye v Yoweri Kaguta Museveni and Electoral Commission**, where Odoki CJ defined the terms ‘free and fair’ elections and generally how the election process should be conducted in compliance with the above articles. The judge said:-

**“To ensure that elections are free and fair there should be sufficient time given for all stages of the elections, nominations, campaigns, voting and counting of votes. Candidates, should not be deprived of their right to stand for elections, and citizens to vote for candidates of their choice through unfair manipulation of the process by electoral officials. There must be a leveling of the ground so that the incumbents or Government ministers and officers do not have unfair advantage. The entire election process should have an atmosphere free of intimidation, bribery, violence, coercion, or anything intended to subvert the will of the people. The election procedures should guarantee the secrecy of the ballot, the accuracy of counting and the announcement of the results, in a timely manner. Election law and guidelines for those participating in elections should be made and published in good time.**

**Fairness and transparency must be adhered to in all stages of electoral process. Those who commit electoral offences or otherwise subvert the electoral process should be subjected to severe sanctions. The Electoral Commission must consider and determine election disputes speedily and fairly.”**

In addition to the above Articles, I also do bear in mind the provisions of **Section 83** of the **Act** which I have already set out earlier in this judgment. The wording of **Section 83** presumes that there will be some minor breaches of the regulations but the election will not be nullified for non compliance. If there is non compliance the court will consider the effect thereof on the final results.

In the case of **John Fitch v Tom Stephenson & 3 Others QBD (2008) EWH C 501**, the court stated as follows:-

**“The decided cases, including those which Lord Denning considered in Morgan v 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 result of the election was unaffected by those breaches. This is because where possible, the courts seek to give effect to the will of the people.”**

**See also Buhari v Obasanjo, Morgan v Simpson (1974) IQB 151 and Joho v Nyange (supra).**

The Returning Officers namely DW1 to DW5, DW7 and the County Returning Officer DW6 all explained to this court that there were indeed errors and irregularities that occurred during the election, mostly during the tallying and transposition of results but they were minor and they owed to the fact that the 3<sup>rd</sup> respondent's officers had been working for three days without sleep or rest and were fatigued. This court cannot also lose sight of the fact that the process was complex in that this was the first election where 6 leaders were being elected at once and the fact that the 3<sup>rd</sup> respondent had expected to use the electronic transmission system which failed to work midway. They had to resort to manual operations. This is also an exercise that takes place once in five years. The petitioner having withdrawn the allegations of bribery and impropriety, the allegations that remained all relate to transposition of the results from one statutory form to another and arithmetic errors. Taking into account all these circumstances, an allowance had to be made for such errors. In any event, the requirement that the elections be accurate does not mean that they will be perfect and devoid of genuine human errors or/and mistakes.

In **Camsell v Rabesca (1987) M.W.T.R. 186 (S.C.)** the court held as follows:-

**“It is clear that in every election, a fortiori, those in urban ridings with large numbers of polls, irregularities will virtually always occur in one form or another. A federal election is only possible with the work of tens of thousands of Canadian who are hired across the Country for a period of a few days, or in many cases, a single 14 hour day. These workers perform many detailed tasks under difficult conditions. They are required to apply multiple roles in a setting that is unfamiliar. Because elections are not everyday occurrences, it is difficult to see how workers could get practical on the job experience.”**

I also agree with the observation by J Majanja in **Wavinya Ndeti** (supra) that elections are a human endeavour and allowances must be made for human error but what is paramount is that the will of the electorate is upheld. Earlier in this judgment, I have carefully considered every allegation raised by the petitioner, the response thereto. Some of the allegations were generalized or were not pleaded and it was not possible to the respondents to ably respond. In my view, even though there were irregularities, they were not so substantial as to affect the results of the election. The court in **Mbowe v Eliufoo** (supra) attempted to explain what the phrase ‘**affected the results**’ means. The court said:-

**“In my view the phrase ‘affected the results’, the word ‘result’ means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proven irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.”**

In the case of **Oboth Marksons Jacob v Utiam Otaala Emmanuel EP 28/2011**, the Court of Appeal of Uganda adopted the above case and held that not every irregularity in filling the form as regards the figures of an election result must be fatal and inexcusable.

In the instant case, even with the admitted errors and the results of the scrutiny exercise, the margin between the petitioner and the 1<sup>st</sup> respondent is large, that is over 80,000 votes. In my view, the petitioner did not establish that any of the errors were intentional, or due to negligence or ulterior motive on the part of the respondents. Because of the large margin between the petitioner and the 1<sup>st</sup> respondent's votes, I find the errors and irregularities did not affect the outcome of the gubernatorial results of Narok County as to render the election null and void. In the end, I find no substance in any of the grounds of the petition. The election was free, fair and credible, conducted substantially in accordance with the **Constitution** and the **Elections Act** in the circumstances. The will of the people of Narok must be upheld. I find and hold that the 1<sup>st</sup> respondent was validly elected as the Governor of Narok pursuant to **Article 81** of the **Constitution**. I hereby declare that Samuel Kuntai Tunai was validly declared as Governor for Narok and Aruasa Evalyn Chepkirui as the Deputy Governor. The sum effect is that the petition must fail and it is hereby dismissed with costs to the respondents.

A certificate shall issue forthwith pursuant to the provisions of **Section 86 (1)** of the **Elections Act**.

**Regulation 36(1)(a)(b)** of the **Elections (Parliamentary and County Elections) Petition Rules 2013** empowers the court to determine the costs payable and who should pay costs. In so doing, I take into account the fact that the petition proceeded within the specified period without much interruption. The petitioner made two interlocutory applications. I must mention here that though the 11<sup>th</sup> respondent was served with all processes and was aware of this petition, there was no appearance at any of the hearings. On 10<sup>th</sup> September 2013, the 11<sup>th</sup> respondent filed submissions. Having ignored the invitation to take part in these proceedings, I find it unnecessary for the 11<sup>th</sup> respondent to come into the proceedings so late in the day when the court has already written its judgment and even ask for costs. It was not enough to come on record. The 11<sup>th</sup> respondent is not deserving of any costs. In assessing the costs, I take into account the fact that the petitioner impugned the decision of the 3<sup>rd</sup> respondent because of the errors that were admittedly made by the 3<sup>rd</sup> respondent's officers. I also take into account the fact that the allegations of bribery, bias and impropriety leveled against the respondents were all abandoned after the full hearing. Instead of suing the Commission alone, the petitioner decided to bring into these proceedings all the Returning Officers involved in the exercise. With all the above facts in mind, this court caps the costs payable to the respondents to a maximum of Kenya Shillings 4.5 million to be shared as follows:-

- 1<sup>st</sup> and 2<sup>nd</sup> respondents a maximum of Kshs.1.5 million;
- 3<sup>rd</sup> to 10<sup>th</sup> respondents a maximum of Kshs.3.00 million.

Before I end, I cannot forget to appreciate all counsel for all the parties for their invaluable contribution to these proceedings, in terms of knowledge, reasoning and industry, a wealth of caselaw from both Kenya and other foreign jurisdictions. I must also commend them for keeping time. I extend this appreciation to the parties, the members of staff, High Court Nakuru, who facilitated these proceedings in one way or the other.

**DATED and DELIVERED this 20<sup>th</sup> day of September, 2013.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

**Mr. Saitabao for petitioners**

**Mr. Kemboy and Ole Ntutu for 1<sup>st</sup> respondent**

**Mr. Havi for 2<sup>nd</sup> respondent**

**Mr. Mungai for 3<sup>rd</sup> to 10<sup>th</sup> respondents**

**N/A for 11<sup>th</sup> respondent**

**Kennedy Oguma – Court Clerk**



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