



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**ELECTION PETITION NO.2 OF 2013**  
**THE ELECTIONS ACT, 2011**

**HENRY OKELLO NADIMO.....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARY COMMISSION .....1<sup>ST</sup> RESPONDENT**

**PAUL CHERUIYOT KONES .....2<sup>ND</sup> RESPONDENT**

**PIUS ABABU NAMWAMBA .....3<sup>RD</sup> RESPONDENT**

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

**The Petition and Pleadings**

1. Sixteen aspirants contested the 4<sup>th</sup> March 2013 Elections for the Member of National Assembly for Budalangi Constituency. At the close of the Polls the 2<sup>nd</sup> Respondent returned the 3<sup>rd</sup> Respondent as the winner of the contest and the 3<sup>rd</sup> Respondent was duly declared as the person elected in a special issue of The Kenya Gazette published by the 1<sup>st</sup> Respondent (hereinafter also referred to as “**The Commission**” on 13<sup>th</sup> March 2013. The Petitioner, who is a voter in that Constituency, is aggrieved by the Return and Declaration and challenges it in this Petition.
2. It is the Petitioner's case that the Respondent violated the provisions of Articles 81 and 86 of The Constitution and Electoral Law and failed to conduct a valid, legal and credible election. The Petitioner gives numerous instances of the alleged violations.
3. It is said by the Petitioner that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent failed to ensure that the Polls and the results were accurate, verifiable, accountable and transparent. The Petitioner cited what he saw as irregularities in the completion and compilation of The Forms 34,35 and 36 used in Declaring the results. It being asserted that some party agents were not allowed to sign the Forms. That in others, the Results were doctored and altered.
4. It was alleged by the Petitioner that the Respondents perpetrated various electoral irregularities and malpractices and in some instances committed electoral offences. Party agents were harassed, voters were threatened and intimidated, and others bribed and treated by the 3<sup>rd</sup> Respondent. It was also averred that the 3<sup>rd</sup> Respondent employed the use of violence and force.

5. There were further claims of pre-polls breaches. It being alleged that, with the complicity collusion or connivance of the commission, the 3<sup>rd</sup> Respondent imported voters from neighbouring Constituencies. The Petitioner stated that the 3<sup>rd</sup> Respondent also breached the Law by conducting night campaigns and campaigns after the close of the Official Campaign Period.
6. Other allegations made in the Petition were that:-

**i) On the election day, Poll Officials misled illiterate and elderly voters and deliberately mismarked their ballots in favour of the 3<sup>rd</sup> Respondent.**

**ii) The ballot papers had anomalies by stating wrong parties and wrong names of certain candidates.**

7. In a joint Response filed on 7<sup>th</sup> May 2013, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied all allegations of wrong doing. It was their view and position they discharged their mandate as envisaged by the Constitution and that they conducted a free, democratic and verifiable process. They defended their declaration of the 3<sup>rd</sup> Respondent as the validly elected member of National Assembly for Budalangi Constituency and were confident that it reflected the will of the people of Budalangi.
8. On his part, the 3<sup>rd</sup> Respondent reiterated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents conducted an election that compiled with the expectation of Article 81 of the Constitution. That the Election was free, fair, impartial, neutral, efficient, accurate and accountable. That the Election was free from violence intimidation, improper influence or corruption. The 3<sup>rd</sup> Respondent denied claims of electoral malpractices and the doctoring and falsification of results. The 3<sup>rd</sup> Respondent had such faith in his Return that he was willing to accede to the Petitioners prayer for production, scrutiny and verification of all Forms 35 and 36 and a scrutiny and recount of the votes.

### **Pre-trial issues**

9. For purposes of effective management of proceedings, Rule 17 of The Election (Parliamentary and County Elections) Petition Rules, 2013 (**the Rules**) requires an Election Court to hold a Pre-trial Conference within 7(seven) days of the receipt of the last response. In obedience to this rule the Court conducted a Pre-trial Conference and an agreement reached on certain procedural issues. It was also in that Conference that the parties framed the issues for determination.
10. Vide an application filed on 27<sup>th</sup> June 2013, the 3<sup>rd</sup> Respondent invited this Court to dismiss the Petition for reasons, inter alia, that it was not accompanied by a duly commissioned Supporting Affidavit. The Application came after the Court had received the evidence of 22 out of the 27 witnesses to be called by the Petitioner. Coming even later still, on 12<sup>th</sup> August 2013, and after the close of the Petitioners case and the reception of the testimony of 7 witnesses for the Respondents, was an affidavit by Advocate John Kariuki Njuguna denying that he had commissioned the affidavits sworn by the Petitioner and three of his witnesses. Given the timing of the application and the affidavit, the Court formed the view that arguments on the matters raised therein would not be allowed to distract the substantial progress made in the hearing. The Respondents did not relent in their pursuant to have those issues heard and determined. The parties addressed me on them in their final submissions. The Court must ultimately determine the issues as a preface.

### **Of striking out of the Petition and/or Witnesses evidence**

11. It was alleged by John Kariuki Njuguna that he did not commission the affidavits sworn by the Petitioner, Hon Raphael B.S. Wanjala, Mbagu Tuzinde Gero and Constantine Ogunga Obuya. In

his affidavit of 7<sup>th</sup> August 2013, the said Advocate stated that the signature appearing on the affidavits was not his signature and the stamp not of his office. In essence that both the signature and stamp were forgeries.

12. In answering to this, the Petitioner had a Mr Jairus Gichigo Kamangu swear an affidavit. He is a Legal Assistant in the firm of Ashfords & Co. Advocates who appeared for the Petitioner herein. He states that the affidavits of the said persons having been prepared in their offices, he and the witnesses, proceeded to offices of Kinyanjui Njuguna & Co. Advocates. That this is what happened while in those offices,

**“12.....we enquired from the reception and were asked to give the documents to a clerk who took them inside the Advocates office for signature. We paid ksh.1100.00 at the reception but no receipt was issued.**

**13. That he returned shortly thereafter with the affidavits bearing the stamp and signature of a Mr Kariuki Njuguna, as the person who commissioned the affidavits.”**

13. There is no unequivocal rebuttable or denial that Mr Kariuki Njuguna did not commission the affidavits. The Deponents of the said affidavits did not see the “Commissioner” append his signature on the affidavits or stamp them with his office mark. To that extent, the 3<sup>rd</sup> Respondents assertion that the signatures and stamps on the 4 affidavits are forgeries have not been denied. Secondly, the 4 did not appear before the “Commissioner” and so no oath was administered on them. For these reasons the 4 affidavits are not valid and are therefore not affidavits as contemplated by The Oaths and Statutory Declarations Act (Chapter 15 Laws of Kenya).

14. As it turned out, and critically, one of the invalid affidavits was that of the Petitioner said to have been sworn on 5<sup>th</sup> April 2013 in support of the Petition. I am urged by the Respondents to find that without an Affidavit in Support there can be no proper Petition and that I should therefore strike out the entire proceedings. The Respondents would be relying on Rules 9(3) of The Rules which provides that;

- a. **An Election Petition shall be signed by the Petitioner or by a person duly authorized by the Petitioner;**
- b. **Be supported by an affidavit by the Petitioner containing the grounds on which the relief is sought and setting out the facts relied on by the Petitioner, and**
- c. ....

15. This Court was beseeched not to uphold the Petition as to do so would be to turn a blind eye to a blatant illegality. Citing the Decision in **Dobson Chiro Mwachunga –vs- Independent Electoral & Boudnries Commission & 2 others [2013] eKLR** and **National Bank of Kenya LIMITED –VS- Ndolo Ayah [2009] eKLR**, it was urged that **“it is public policy that Courts should not aid in the perpetuation of illegalities.”**

16. In answer, the Petitioners Counsel took a view that the issue of the legality of the affidavits was brought too late in the day as it should have been a Pre-trial issue. The Court was asked to disregard the Petitioner’s plea as an Election Petition ought not to be dismissed on account of procedural technicalities.

17. So is the striking out of the Affidavit in Support fatal to a Petition" On this question I find much assistance in the decision of **Muriithi J in Kisii Election Petition No 7 of 2013 Eng. Peter Kimori Maranga & Another –vs- Joel Omagwa & 2 others**. After reproducing Rule 8(i) of the Regulations which reads,

“An Election petition shall,

- a. *Be filed by presenting the Petition to the office of The Registrar or to a designated officer of the Court upon payment of the filing fees specified in the second schedule; and*
- b. *Be in Form EP 1 set out in the First Schedule.”*

The Judge held-

“40. Form EP1 requires the petitioner to “state the facts and grounds on which the petitioners rely” in addition to particulars of the election, the name of petitioner, the date of the election, the candidates, the candidate returned as being duly elected, and the reliefs sought in accordance with the provisions of rule 10 (1) of the Election Petition Rules. The petition is clearly self-contained statement of the petitioners claim in relation to the election dispute and the petitioners’ affidavit is not part of the petition. The provisions of the Constitution and the Elections Act do not require that the petition be supported by an affidavit. The requirement under Rule 10 (3) of the Election Petition Rules for a petition to be accompanied by an affidavit is not backed by statutory or constitutional provision, and in view of this inconsistency the Constitution and Statute prevails. Accordingly, I hold that the Petitioner’s affidavit is not an integral part of the Petition, and the striking out of the affidavit is not fatal to the Petition.” (my emphasis).

On my part, I do not see any inconsistency between Rule 10(3) of the Rules and The Constitutional and Statutory Provisions. Both the Constitution and the Statute are silent on the features of a Petition. It was left to the rules to flesh out the form and contents of a Petition and the manner of its presentation. The accompanying affidavit sets out the grounds on which the relief is sought and the facts relied on by the Petitioner. This gives notice to the Respondent as to the exact nature of the action to be answered. That does not seem to be an unreasonable, burdensome or onerous requirement. It in fact supports fair trial. That said I am in complete agreement with the result reached by the Judge that the affidavit is not an integral part of the Petition.

18. Had this issue been brought to the attention of the Court earlier, then it would have been open to the Court to consider whether or not leave to file a fresh affidavit was deserved. In **Eng Peter K. Maranga** (supra) the Court, after striking out the affidavit in support of the Petition, granted leave for the filing of a fresh affidavit. In the present matter the flaw in the affidavit was pointed out after the close of the Petitioners case and when the Respondents case had already commenced. And there is no begrudging the 3<sup>rd</sup> Respondent as to the timing because the offended Counsel was not a participant in this Petition and only came to learn of the existence of the affidavit when the deponent’s representative called on him requesting for his Practising Certificate. In these circumstances is the Court to allow the Petition to survive without the affidavit in support”
19. The circumstances here are unique. It has not been said that the Petitioner and his witnesses deliberately participated in the illegality. They may have been victims. Given an opportunity the Petitioner may have been able to make out a case for grant of leave to file a valid affidavit. It was not tenable for this Court, at that stage of the proceedings, to order for the filing of a fresh affidavit and in effect to reboot the hearing. Starting the matter *denovo* would not have been an efficient way of using judicial time. In addition the Court did bear in mind that, given the rigid Constitutional timelines, this Petition must be determined by 7<sup>th</sup> October 2013. To restart hearing after 12<sup>th</sup> August 2013 would have left the parties and Court scrambling for limited time. The Court would have been irresponsible if it had put these proceedings in such a quandary.
20. The 1<sup>st</sup> Respondent’s Counsel pointed out that the Court will be a first if it were to allow the

Petition to proceed to determination without a Supporting Affidavit. This Court savours the challenge because the unusual circumstances of this case calls for an unusual approach. I am persuaded that the affidavit is not an integral part of the Petition and its absence cannot deal a fatal blow to these proceedings. Secondly, the approach does not prejudice the Respondents. The Rules, it bears repetition, require that the Supporting Affidavit should contain the grounds on which the relief is sought and sets out the facts to be relied on by the Petitioner. One reason for this requirement is that the Respondents should be made aware, with reasonable specificity, about the case which they are required to answer. Ambush and surprise are eliminated. In the instant case the affidavits which I have found to be invalid gave that information to the Respondents. It is little wonder that they robustly answered to, and participated in the Petition.

21. Before I determine the fate of the evidence of the witnesses who were called to testify on the basis of the affidavits that have turned out to be forged, I deem it necessary to consider the validity or otherwise of the other affidavits.
22. The affidavits of all the other witnesses were commissioned before one Jean Wycliffe O. Onsongo. In a letter dated 24<sup>th</sup> June 2013 annexed to the affidavit of the 3<sup>rd</sup> Respondent sworn on 25<sup>th</sup> June 2013 the Law Society of Kenya confirmed that Mr Onsongo had by that date not taken out a Practising Certificate for the year 2013. This is not disputed by the Petitioner. So the said Advocate did not have a valid Practising Certificate on 8<sup>th</sup> April 2013 when he commissioned the affidavit. By dent of Section 2 of The Oaths and Statutory Declarations Act (Chapter 15 Laws of Kenya), The Chief Justice may appoint persons being Practising Advocates to be Commissioners for Oaths. It seems to me that the Commissioner's authority to administer oaths is available only when he has a right to practice Law. Even the Commission issued by the Chief Justice on appointment is clear on this. The person is appointed to be a Commissioner **"for as long as he continues to practice as such Advocate and this Commission is not revoked."** When an advocate fails to take out a Practising Certificate then he is barred from Practising (Section 31 of Advocates Act). Administering Oaths by the Commissioner of Oaths is part of Legal practice and it would be unlawful for an Advocate to Administer Oaths when he is barred from practise. For that reason all the affidavits commissioned by Mr Onsongo are invalid and are for striking out.
23. What then is the Court to do with the evidence of witnesses whose affidavits have been struck out" Again because of the lateness of the application, 22 witnesses had already testified by the time it was filed on 27<sup>th</sup> June 2013. Although Counsel for the 3<sup>rd</sup> Respondent absolve themselves from blame in respect to the lateness, I would think that on this they squarely bear that responsibility. This is because the information on the status of Onsongo was available right from the time this Petition was filed. The Court is not told why Counsel only thought it important to check that status long after the hearing had gained substantial momentum.
24. By bringing the application late, the 3<sup>rd</sup> Respondent deprived the Petitioner the opportunity of seeking to cure or remove the defect. And the Petitioner may have made out a good case for leave to file fresh affidavits as it is apparent that he was a victim of the unscrupulous and irresponsible ways of the Commissioner. Apparent because, the Petitioner and his Counsel believed that Mr Onsongo was duly qualified to administer Oaths and shown to this Court is a receipt for the payment of ksh.6,640 they made for attestation.
25. Being invalid affidavits, the documents can be treated as unsworn written statements of witnesses akin to those that accompany the filing of a suit in the Civil Process (Order 3 Rule 2 of The Civil Procedure Rules). If for nothing else those statements provided the Respondents with the substance of evidence they were to confront at trial and this helped them prepare their defence. So no harm is suffered by them.
26. Each of the witnesses who testified before me were either sworn or affirmed before giving evidence. Each one of them adopted the contents of the statements in their evidence in Chief. I take the view that by adopting the contents of their statements (the invalid affidavits) under oath

or affirmation, the witnesses of the Petitioner presented the contents therein as evidence under oath or affirmation and the same were properly received. Each witness was then cross-examined. I am swayed towards accepting as properly received the evidence of the Petitioner's witness received. In the rest of this decision, I refer to the invalid Affidavits as written statements.

27. There is another aspect to this. The Court is aware that because of constraints of time, the Petitioner was unable to call as witnesses other persons who had executed written statements. Those people did not have an opportunity of either being affirmed or sworn. For that reason, their written statement did not benefit from the cure of affirmation or swearing. They are all hereby struck out.

### **Issues for Determination and Applicable Principles**

28) At the Pre-trial Conference the parties herein agreed that the following are the issues to be for the Courts determination:-

- a. **“Whether the 3<sup>rd</sup> Respondent was validly elected and declared as member of The National Assembly for Budalangi Constituency during the elections held on 4<sup>th</sup> march 2013.**
- b. **Whether the said election was conducted in a free, fair, transparent and credible manner and in compliance with the provisions of the Constitution and all relevant laws and regulations.**
- c. **Whether there was fundamental breach of the election process or commission of malpractices or irregularities that compromised the outcome or validity of that election and also whether such breaches or malpractices or irregularities, if any, are sufficient ground for nullification of the result of the said election.**
- d. **Whether the Respondents, jointly or severally, were involved in any electoral malpractices or election offences.**
- e. **Whether there are consequential declarations and reliefs including costs that this Court should grant on the determination of the petition.**
- f. **Whether a fresh election for the member of the National Assembly for Budalangi Constituency ought to be held.”**

29. An Election Court is directed by the Provisions of Section 83 of the Act as to when it can declare an Election to be void. That directive reads as follows:

**“83. 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 result of the election.”**

30. Some of the principles laid down in the Constitution are found in Article 81 which is on The Electoral System and Process. Amongst those principles is that an integral component of an Electoral System is a free and fair election which is,

- 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 role of an Election Court is to examine, within the context of the Petition before it, whether a

disputed Election meets those Constitutional expectations and the Electoral Laws and to determine the implications of any non-compliance.

31) Reflecting on Provisions similar to Section 83 of the Act, Githinji J.A in **James Magara –vs- Manson O. Nyamweya & 2 others (2010) eKLR** suggested that those Provisions must be construed on the proposition made by Lord Denning in **Morgan Vs Simpson [1974] 3ALL ER 722**. At page 728 Lord Denning stated:

***“Collating all these cases together, I suggest that the law can be stated in these propositions (1) if the Election was conducted so badly that it was not substantially in accordance with the law as to Elections, the Election is vitiated, irrespective of whether the result is affected, or not ... (2) if the Election was so conducted that it was substantially in accordance with the law as to Elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the result of the Election. (3) But, even though the Election was conducted substantially in accordance with the law as to Elections, nevertheless if there was a breach of the rules or mistake at the polls and it did affect the result then the Election is vitiated.”***

32) The burden of proving that an Election ought to be vitiated lies with the Petitioner who bears the responsibility of proving the grievances raised in the petition. That is what Section 107 of the Evidence Act expects of the Petitioner. He who asserts must prove. On the standard of proof the Supreme Court recently in **Petition No.5 of 2013 Raila Odinga and The Independent Electoral and Boundaries Commission & 2 others** states as follows-

***“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.”***

That is the weight of responsibility that a Petitioner in an Election Petition bears.

33) More than a third of the Petitioners witnesses were party Agents during the disputed Election. For this reason, the Court is inclined to make some observations, at this early stage, about the role of Agents in an Election and therefore in a dispute that ensues. In doing so, this Court borrows from the recent decision

of The Supreme Court of Ghana in Writ **No.J1/6/2013 NANA ADDO DANKWA AKUFO-ADDO & 2 OTHERS and JOHN DRAMANI MAHAMA & 2 OTHERS**.

34) The Provisions of Section 30 of The Act is on appointment of Agents. A political Party may appoint one Agent for its candidates at each Polling Station. The Political Agents, as in this dispute, undergo training conducted by the Commission on their roles, responsibilities and duties. Before commencing their duties, an oath is administered on them.

35) At the Polling, authorized Agents are admitted to the Polling Station. (Regulation 62 of The Election,(General) (the Regulations 2012) Before the commencement of the Poll, they are at liberty to ascertain that the Ballot box/boxes are empty. Once the boxes are closed, the Agents are permitted to affix the seals on the boxes or the apertures.

36) During voting the Agents observe the process and can raise any queries about it. The Agents have a right to be present when a Presiding officer assists or supports assisted voters. At the end of voting, a counting Agent observes the counting. And under Regulation 76 (4) the Agent has a right

to raise certain contentions or objections in respect to counting. In addition the Agent has a right to require the Presiding officer to re-check or re-count the votes. After the count, the Agent is expected to sign the Declaration of Results and where the Agent refuses or fails to sign, the Agent is under an obligation to record the reasons for the refusal or failure to sign. Those are some of the roles, duties and rights of an Agent. And as correctly stated by PW 8, who was a contestant herein, the Agent is the eye and ear of the candidate in the Election. It is through Agents that candidates participate in and observe the Election process. It is through these Agents that candidates and indeed the public can require that the Commission administers the Election in an impartial, neutral, efficient, accurate and accountable manner. And when Agents carry out their roles diligently, then pressure is put to bear on the Commission to carry out its mandate as expected by the Constitution and the Electoral Laws. As observed in **NANA ADDO DANKWA AKUFO-ADDO & 2 OTHERS and JOHN DRAMANI MAHAMA & 2 OTHERS** Agents are not merely exalted observers.

37) For those reasons, how the Agent carries out his duty, conducts himself, treats or is treated by the Polling officials is important. An Agent who accepts or acquiesces to an outcome but wishes to recant it must give plausible reasons for the change of heart where at the hearings an Agent raises complaints about the conduct of the Election the Agent must be asked questions about the action taken by him or her to seek intervention when the issues arose. Where the Agent is guilty of inaction, then the Agent will be hardput to explain the inaction. On the converse the Court may take a benign view of the evidence of an Agent who raises a legitimate complaint or query in a formal and timeously fashion. These are but a few instances on how the evidence of an Agent can assist the Court to assess the credibility of the Election process. The point to be made is that the evidence of Agents can turn out to be crucial in aiding the Court to get a true impression of how an Election was managed and conducted.

38) Having set out the above principles the Court now turns to evaluate the evidence presented to it.

### **Voter Bribery**

39) Section 64 of The Act elaborately defines conduct that amounts to voter bribery. It is a detailed provision of the law. Perhaps a reflection of how serious the offence is viewed. Both the giver and the taker deserve censure. An allegation of the offence must be proved with cogent, credible and firm evidence. Halsbury's Laws of England – Fourth Edition at paragraph 780 says this of Proof of Bribery.

**“780. Proof of bribery. Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the election. The Judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be, such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive.”**

Our Courts have in the past and more recently approved that approach in considering proof of bribery.(see **Election Petition No.9 of 1983 Mohamed Jahazi –vs Sharrif Nassir A. Taib and Machakos Election Petition No.4 of 2013 Wavinya Ndeti & 4 others**).

40) Fredrick Wamoyi (PW1) was a polling official at Ruambwa Primary School Polling Station. He says that he saw one Pascalia Akochi bribe voters as a result of which she was arrested. Michael Okongo Osodo (PW2) who voted at Ruambwa also says that he witnessed the bribery and the arrest.



41) It was the evidence of PW1 that Pascalia Akochi was urging voters to vote “**chungwa**”. This is the party slogan for ODM Party, the Party of the 3rd Respondent. As for PW2, he said-

***“It is true that in the affidavit, I have not stated on whose behalf the money was being given.”***

These two witnesses do not say that the money was being given on behalf of the 3rd Respondent or with his approval or consent. Neither was it proved, nay alleged, that the giver was the candidate’s agent. The evidence does not incriminate the 3rd Respondent.

42) The same can be said of PW2’s evidence in respect to Jacinta Okengo Khayinya also known as Jacinta Auma Muludi. It was his evidence that Jacinta bribed voters at that polling station. Then the link of Jacinta to the 3rd Respondent she said-

***“Jacinta was well known as a follower of the 3rd Respondent, she must have been giving money to persuade people vote for the 3rd Respondent. It is true that I never mentioned in my affidavit that she was doing this on behalf of the 3rd Respondent. I must have forgotten because of my age.”***

The witness held a strong suspicion that Jacinta was doing it on behalf of the 3rd Respondent, but suspicion alone is not good enough. This evidence is not cogent enough to prove that if there was bribery then it was at the instance or approval of the 3rd Respondent.

43) Sebastian Onyango Kamanda (PW3) says that he was bribed by one James Okumu. This was at Namalo Primary School Polling Station. If the witness was to be believed then he would be as guilty as the person who bribed him. It must be noted however that the confession of the person alleged to have been bribed is not conclusive evidence that it happened. That aside, for purposes of this Petition a nexus needed to be made between the giver and the 3<sup>rd</sup> Respondent. PW3 does not say that James was an agent of the 3rd Respondent or acting on his behalf or with his approval. That evidence proved nothing against the 3rd Respondent.

44) The evidence of Mwei Sebby Omoga (PW11) on bribery at Kenya Gauze Primary School would suffer the same fate. This was his written statement-

***“I noticed that one Sospeter Opamo in the company of Kalori Ogwanyi, who were ODM Sisenye Sub-Location officials were handing out money to the voters in the polling station.”***

This is hardly sufficient evidence to prove bribery but even more critical is that, although linked to his Party ODM, a firm association between the bribery and the 3rd Respondent is not established. Bribery by ODM Party, without more, cannot be attributed to the 3rd Respondent.

45) Obwanda Osunga Edward (PW22) was a United Democratic Front (UDF) party agent assigned to Osieko Primary School Polling Station. It was his evidence that he saw some people being bribed with notes of Kshs 200/- and 500/- denominations. He noticed this after receiving the information of bribery from a Pastor Moses Odhiambo. The givers were said to be Dan Ogutu, Josephine Auma, Vincent Amolo Osure and Alex Wanga Okello. But that evidence failed to state the connection of the givers and the 3rd Respondent.

46) Also at Osieko Primary School Polling Station was Phydalis Oweso Anyona (PW20) who was an agent for UDF Party. He says that he saw Dan Ogutu Madiega bribe one Ayenda with Kshs. 200/- at the gate of the school. He said that Ogutu is the husband of Alice Chevi. It being alleged that Chevi was

an ardent supporter of the 3<sup>rd</sup> Respondent. The link that misses is one between the giver himself i.e. Ogutu and the 3<sup>rd</sup> Respondent.

47) Bernard Majoni Agoya (PW23) visited Bubango Primary School on the Election day after he received a call from one Martin Ojiambo Namuye that voters were being bribed at Bubango. He alleges that whilst there, he saw some voters visit the home of one Patrick Kechula where they were bribed by one Victor Moi Osuri and Sebastian Malingu Juma. He named Joseph Ambugo and Carol Were as some of the recipients of the bribe. He attempts to connect the 3<sup>rd</sup> Respondent with Victor and Sebastian when he remarked-

***“I know Victor Osuri, he is in Court ... He is the Chairman ODM Bulemia Sub-Location. I know Sebastian Malingu Juma ... He is an ODM activist ... Hon Namwamba was an ODM Parliamentary candidate.”***

This is not good enough unless it is assumed that all the members of ODM Party, its officials or activists acted with consent, approval or on behalf of the 3<sup>rd</sup> Respondent or that they were his agents. At any rate this evidence of a single witness does not establish that there was indeed bribery.

48) Then there is the evidence of PW26 who was an agent for the Pick Party at Mau Mau Market Polling Station. This was his written statement on the allegations of bribery-

***“4. I noticed the occupants, Godfrey Obayi and David Sumbi were actually handing out money to voters ranging from Kenya Shillings one hundred to Kenya Shillings two hundred (Kshs. 100-Kshs. 200.00).***

***5. That on seeing that I was closing in on them they sped off in the car.***

***6. They later came back and once again proceeded to hand over money to voters again.”***

Neither here nor in his oral evidence does he implicate the 3<sup>rd</sup> Respondent at all. Besides, the witness conceded that this incident was significant enough to be raised in Form 35. He however says that he did not do so as he was threatened by the poll officials. Notice however that this weighty allegation of threat was not raised in the written statement presented by the witness. Such a serious incident would also have been raised with the Commission as soon as it happened.

49) There was also evidence that Mbagu Tuzinde Gero (PW27) saw voter bribery at Lugale Primary School. That he went there after receiving information about this irregularity from one of his agents Bethwel Mango. That he had a first-hand account of the bribery would be a departure from his written statement in which he simply said that he had received a report of the incident. His evidence is further weakened because Bethwel was not a witness and his account is therefore not supported. The Lugale incident is not proved.

50) So much for allegations of voter bribery on the Election day. I turn to examine Pre-Election day allegations.

51) There was a contest as to whether the 3<sup>rd</sup> Respondent used Constituency Development Funds (CDF) to bribe voters. Pantheleo Bwire (PW12) says that he saw him do so on 30<sup>th</sup> January 2013 at a meeting in Port Victoria. PW12 in fact lodged a written complaint with the Commission. The 3<sup>rd</sup> Respondent thought the allegation to be preposterous in that CDF accounts had closed by then and he would not have access to the funds. These rival positions were not resolved. The Petitioner

who had the obligation of proving what he had asserted needed to do more. One way of doing so would have been to avail to this Court copies of the cheques said to have been given out on that day. CDF are public funds and the Petitioner with some effort would have accessed copies of the said cheques. As it is, the allegation is unproved.

52) It was the case of the Petitioner that the 3rd Respondent held three (3) public rallies on the night of 26th February 2013. Osborne Wanyama Oyoma (PW 13), Edufostin Kadenge Oriaro (PW 14) and Joseph Oduori Chembu (PW15) are said to have attended the meeting at Mumbaya. PW14 and PW15 informed Court that they also attended a second meeting at Bulagu, while PW15 attended the meeting at Nagoba. If it was true that the 3rd Respondent held these meetings then he would be contravening the law as he would be conducting campaigns outside the campaign time which had been stipulated by the Commission to run from 7.00 am to 6.00 p.m. That is discussed later. For now this Court inquires as to the allegations of bribery in those meetings.

53) PW13 was not only a voter but a Party agent for UDF Party. It was his testimony that he attended the Mumbaya meeting. At that meeting were PW14 and PW15. Although he says that the 3rd Respondent gave money at that meeting, he does not say how much it was. And he does not seem to have seen the 3rd Respondent give the money but insisted that it was announced over a Public Address System. As for PW14 and PW15, it was their evidence that they saw the 3rd Respondent give Kshs. 10,000/- to the youth group. And PW14 told Court that he had a recording of this. But there was a contradiction as to how money was given to the other groups, i.e. to the women and the old. PW14 says that the candidate put money in envelopes while PW15 was unequivocal that he never placed or put the money in anything.

54) As for the meeting for Bulagi, PW14 says nothing about bribing of voters. On his part, PW15 says-

***“... he then proceeded to hand over money to the leaders of the groups, to be shared out amongst the members, with the elders group receiving Kenya shillings three thousand (Kshs. 3,000/-) which was received on their behalf by Ogutala Wilfred Sumba.”***

In re-examination he told Court that Sumba is the one who told him that Kshs. 3,000/- was given to elders.

55) Of these three witnesses only PW15, if he is to be believed, followed the night campaign to Nagoba Village. It was allegedly that whilst here the 3rd Respondent gave a Mr. Tabu Otimbo Kshs. 10,000/- to distribute to the persons who had attended the meeting.

56) Proof of bribery, it bears repetition, must be cogent and consistent. Is the evidence of bribery at Mumbaya, Bulagi and Nagoba Village firm enough? There seems to have been unanimity by the witnesses that Kshs. 10,000/- was given by the 3rd Respondent to the youth at Mumbaya. But PW13 never saw this, he says he heard it announced over the public address system. PW14 and PW15 who claimed to have witnessed this directly, broke ranks as to how the money to the other groups was given. PW14 says it was placed in an envelope while PW15 says it was not.

57) That inconsistency would perhaps be inconsequential if other crucial aspects of the testimony of the witnesses had been supported. PW13 who was a party agent was well aware that bribery of voters is an electoral offence. It is for this that, he says, he reported the Mumbaya incident to the police. But where is proof of that report! None I am afraid, because the Officer-in-Charge who is said to have received the report was not asked to verify this account. Then there is the evidence of PW14, that he recorded the proceedings of that night on his phone. Had that recording been produced in Court then

it would be a gamechanger or a masterstroke.

58) At pre-trial and by consensus of Counsel for the parties it was agreed that-

***“All video, electronic or photographic evidence shall be exchanged by the parties within seven (7) days hereof and it is hereby agreed that the evidence shall be admitted without calling their makers or producers.”***

The Petitioner breached that timeline and this Court was invited to shut out that evidence in Motion dated 20th May 2013 filed by the 3rd Respondent.

59) In agreeing with the application the Court observed-

***“This Court has discretion to extend that time but cannot do so without a specific request by a party requiring the intervention.”***

It came to pass that the Petitioner did not subsequently make a formal request to expand the time for admission of that evidence, and so the recording for what it may have been worth, is not part of the Court record. And the Court will never know its contents. That with the other reasons I have stated considerably weakens the Petitioners case in respect to the incident at Mumbaya.

60) As for Bulagi, this Courts finding is that the evidence of PW15 is hearsay. He conceded as much. It was his testimony that Wilfred Sumba informed him that the 3rd Respondent gave Kshs. 3,000/- to be distributed to those who attended the meeting. In addition, one must wonder why PW14 who is said to have been also present said nothing of this incident.

61) The event at Nagoba Village was on the account of one witness. The 3rd Respondent denied bribing any voters. And when he took the witness stand, no questions were put to him about the activities of the night of 26th February 2013. In these circumstances, it is the word of one witness against the other. None has an advantage over the other and I must reach a decision that the claim for bribery is not sufficiently proved.

62) There was a meeting held on 1st March 2013 at Mulukoba Resort that was much talked about. It was a meeting of teachers from Budalangi Constituency. In attendance were also Hon. Amos Wako (RW11), Mark Oseno Hannington (RW4) and the 3rd Respondent. Amongst the teachers who attended that meeting were John Onyango Ochieng (PW4), William Were Oyindi (PW6), Fredrick Wandeyi Makio (RW5), Roselyne Ombada Okumu (RW6) and Patrick Lumumba Namunje (RW9).

63) It was the testimony of PW4 that the 3rd Respondent was among the guests who addressed the meeting. He thereafter gave Kshs. 450,000/- to Rose (RW 6) to be shared amongst the teachers present in the meeting. That Namunje (RW9) announced that each teacher present would receive Kshs. 600/-. Although PW 4 does not give the names of the teachers who received the money, he thought it was given to induce teachers to vote for the 3rd Respondent. PW6 gave a similar story but was able to give names of two recipients being Godfrey Oungo and Egesa.

64) It was the evidence of Hon. Wako (RW 11), Oseno (RW 4) and the 3rd Respondent that the meeting was convened by Kenya National Union of Teachers (KNUT) at the behest of Hon. Wako. Hon Wako and Oseno defended the 3rd Respondent against accusations of bribery. Both denied seeing the 3rd Respondent or any other person give money to the teachers.

65) This was the same line of evidence by Roselyne(RW6) and Namunje (RW 9). Roselyne denied receiving any money whatsoever from the 3<sup>rd</sup> Respondent or the other guests. Namunje who was the master of ceremony was certain that he saw no money change hands and that he never made an announcement that each teacher would receive Kshs. 600/.

66) My observation of the Malukoba situation is that witnesses on both sides of the divide gave evidence that was consistent to their different accounts. Non faltered in the critical aspects of their testimony. I see no reason as to why I should believe one side and not the other. The onus was on the Petitioner to sufficiently prove the allegation of bribery. But on the evidence on record that allegation is not proved even on a balance.

67) It was also the Petitioners case that the 3<sup>rd</sup> Respondent personally bribed voters on 3<sup>rd</sup> March 2013 at Nyambare Hill Mission. Bernadette Akochi Muhudi (PW 10) says this in her written statement.

**“That on the night of 3<sup>rd</sup> March 2013, on the eve of the elections day, I witnessed Mr Namwamba sent two Nissan vans to pick a total of 52 voters from Namalo and tak(sic) them to Nyambare Hill Mission where they met him waiting for them.”**

At the hearing the witness stated that the 3<sup>rd</sup> Respondent gave her ksh.350/= which she returned. When this happened the 3<sup>rd</sup> Respondent decided to pass the money through John Ndagwa. That Ndagwa attempted to bribe her but she refused.

68) The evidence of that witness was not without difficulty. In the cross-examination proceedings she was challenged to prove that she was a voter. And although she maintained that she was, one had nothing to show for it. She did not have her voter's card. More difficult was the inconsistency between the witnesses written statement and her oral evidence. It was her written statement that she witnessed the 3<sup>rd</sup> Respondent send Nissan vans to pick the voters who were to be bribed. It was also her evidence that Hon Namwamba was at Nambare Hill Mission waiting for the van. This does not seat consistent with her oral evidence that at the time the vans were dispatched to pick the voters, the 3<sup>rd</sup> Respondent was not present. Secondly, that when she reached the venue, the 3<sup>rd</sup> Respondent was not present. That he came after John Ndagwa. The inconsistency in this evidence weakens it and places it below the quality required by the law.

### **Treating of voters**

69) Just like Bribery, Treating of voters is criminalized by The Election Act Section 62 provides-

***“A candidate who corruptly, for the purpose of influencing a voter to vote or refrain from voting for a particular candidate or for any political party at an Election-***

***(a) before or during an Election-***

***(i) undertakes or promises to reward a voter to refrain from voting;***

***(ii) gives, causes to be given to a voter or pays, undertakes or promises to pay wholly or in part to or for any voter, expenses for giving or providing any food, drinks, refreshment or provision of any money, ticket or other means or device to enable the procurement of any food, drink or refreshment or provision to or for nay person for the purpose of corruptly influencing that person or any other person to vote or refrain from voting for a particular candidate at the Election or***

***being about to vote or refrain from voting, for a particular candidate, at the Election; or***

***(b) after an Election, gives, provides or pays any expense wholly or in part to or for any particular voter or any other voter for having voted or refrained from voting as aforesaid,***

***commits the offence of treating.***

***(2) A voter who accepts or takes any food, drink, refreshment, provision, any money or ticket, or adopts other means or devices to enable the procuring of food, drink, refreshment or provision knowing that it is intended to influence them commits the offence of treating.”***

Just like bribery, allegations of treating must be proved with credible and cogent evidence. Pamela Okora is said to have treated voters to food on the eve of the Election. Patrick Okora (PW7) a UDF agent said as follows-

***“Pamela is my step-sister. We live in one compound. She was a campaigner of ODM. She was cooking for ODM supporters. I have not stated for which candidates she was cooking.”*** (my emphasis)

Little more needs to be said. This may have incriminated ODM party but does not pointedly incriminate the 3rd Respondent. That is not cogent and firm evidence.

#### **Voter intimidation and violence**

70) Two huts of Wycliff Abira (PW8) were razed down by fire. One on 5th March 2013 and another on 6th March 2013. That prior to this he had, on 2nd March 2013, been threatened by Sagiti Opuli and Charles Agiti said to be ODM supporters that they would burn down his house if he voted for the UDF National Assembly aspirant. The witness thought that one of the people who had burnt his house was Charles because he had seen him outside the house at about 10.00 p.m. on the fateful night. This was two (2) hours before the house was set on fire. He connected that incident to the 3rd Respondent when he said-

***“The supporters of the 3rd Respondent razed down my houses.”***

On the other hand the 3rd Respondent denied any involvement in that incident.

71) This Court saw the photographs of the destroyed huts. That would be evidence that the houses were burnt. But the evidence that the persons responsible were Charles and Sagiti is circumstantial. Weaker still there is no evidence whatsoever that Charles and Sagiti were the Agents of the 3rd Respondent or that they committed this heinous offence at the instance or consent or approval of the 3rd Respondent. It would be unjust to indict the 3<sup>rd</sup> Respondent with such a serious allegation on weak and tenuous evidence.

72) It is now appropriate to consider the evidence of a violent incident at Rugunga Polling Station. There was an altercation between a polling clerk by the name Eugene Wanga and a voter, Caroline Ojwang (PW16). Then Eugene slapped the voter. Alphonse Opondo (PW17) saw this.

73) It was not said that Eugene was acting for the 3rd Respondent or with his approval. It is not said that the violence was used to compel or induce the victim to vote one way or the other. But that violence would nevertheless amount to an Election malpractice if it had the effect of disrupting the

voting. There is no evidence that this single incident disrupted voting at that polling station. And looking at Form 35 of that station, the voter turnout was high at 92%. That does not tell a story of disturbed polling.

74) Other evidence of violence given by Hon. Raphael Wanjala (PW8) and Constatine Obuya (PW9) were either too generalized or hearsay accounts.

### **Unlawful Campaigns**

75) It is Public knowledge that on 11<sup>th</sup> February 2013, the Commission published a Notice in respect to the campaign period. In that Notice, the campaign period for purposes of the 4<sup>th</sup> March 2013 General Election ceased on 2<sup>nd</sup> March 2013. The campaign time was to run from 7.00am to 6.00p.m during the campaign period. This judgment has already alluded to the night campaigns that are said to have taken place on 26<sup>th</sup> February 2013 at Mumbaya, Bulagu and Ngoba Village. The Court gave reasons why it thought that the evidence did not sufficiently prove bribery. It is for the very same reasons that I hold that the evidence was too faint to prove that those meetings took place. Let me reiterate two of those reasons. The evidence that the night meetings were reported to the Officer-in- Charge (OCS), Port Victoria Police Station was left unsupported. The OCS was not called by the Petitioner to confirm this. Secondly, the all important recording of the proceedings was not availed to the Court.

76) Benard Majoni Agoya (PW23) talks of a campaign meeting by the 3<sup>rd</sup> Respondent held on the night of 28<sup>th</sup> February 2013 at the home of the late Abuoga Njosi. He says that although he did not see the 3<sup>rd</sup> Respondent, he heard his voice over the Public Address System. He says that he attempted to report this matter to Port Victoria Police Station on the next day but he was rebuffed.

77) Fabianus Onyango Situbi (PW24) told Court that he attended that night meeting. That he saw the 3<sup>rd</sup> Respondent at that meeting and that he addressed voters in Kinyala language. The 3<sup>rd</sup> Respondent denied holding any night meeting. At the opportunity presented by cross-examination I never saw any real effort by the Petitioners Counsel to challenge this denial. This Court is unable to hold that the 3<sup>rd</sup> Respondent held a night meeting on the 28<sup>th</sup> of February 2013.

78) As to the Petitioner's reference to night meetings of 1<sup>st</sup> March 2013 at Musuma, Mau Mau and Rukala, those were not proved at all.

79) Campaigns are barred after the close of the campaign period. For purposes of the 2013 Election the close of the campaign period was 2<sup>nd</sup> of March 2013. In addition Regulation 65 limits the communication with voters at the Polling Station. The Regulation provides as follows:

**“65.(1) No person other than an election officer or police officer on duty shall, except with the authority of the presiding officer, have any communication whatsoever with a voter who is in, or in the immediate precincts of, a polling station for the purpose of voting.”**

80) PW17 saw Alphonse Obwori an ODM Agent tell voters on the queue to vote “**Chungwa**”. That would be the ODM slogan. This was at Rugunga Primary School. It is however not said that Alphonse urged voters specifically to vote for the 3<sup>rd</sup> Respondent and I have to disbelieve the testimony of this witness because he was an agent at that polling station and yet he never raised a formal complaint with the Commission about the alleged misconduct of his co-agent.

81) PW14 was a registered voter at Budalangi Primary School Polling Station. That at that station he saw Okika an ODM agent talking to voters on the queue attempting to influence them

to vote "*in a certain way*". But his other testimony differed. He said-

***"The ODM agent was speaking to voters on the queue but I could not hear exactly what he said but it was wrong for an agent to speak to voters on queue."***

That inconsistency does not help the testimony of the witness. The 3rd Respondent cannot be condemned on this type of evidence.

82) PW22 was a UDF agent at Osieko Primary School polling station. He accused an Assistant Chief of asking voters to vote for the 3rd Respondent. This evidence was not mentioned in his written statement. The testimony first came up during the oral hearing. That indeed is a serious allegation yet he never raised any complaint about this until his cross-examination testimony. The Court is unable to believe this witness.

83) One other issue needs to be discussed under this Section. At the time of receiving the Nominations of candidates the Commission required that each candidate furnish the Commission with a proposed campaign schedule. The intention was to harmonize the campaigns of the various candidates so that their events would not take place at the same time and venue. It is common ground that the 3rd Respondent did not provide that schedule at the time he presented his nomination papers to the Commission. It was however the evidence of both the 2nd and 3rd Respondents that the 3rd Respondent gave that schedule immediately after the nomination. From the evidence it would have been within 1 ½ weeks of the nomination. The complaint by PW8 was that the 3<sup>rd</sup> Respondent and his supporters disrupted his rallies at Bulwani, Bukoma and Port Victoria. But looking at the entire evidence he failed to give any details of how the rallies were disrupted. The evidence was extremely scanty.

### **Voter Importation**

84) RW8 had served as a Member of Parliament for Budalangi Constituency for two terms (1994-2002 and 2002-2007). He is familiar with the political terrain of this Constituency. It was his testimony that during voter registration, there was a plan to register voters from the neighbouring Uganda. This apprehension led him to raise a written redflag with the Chairman of the Commission who gave him assurances that it would not happen. But PW8 says that in spite of this assurance there was massive importation of voters from Uganda. That they were issued with Kenyan IDs and then registered as voters in various polling stations. He named at least 12 Polling Stations said to have been affected. It was his further testimony that these illegal voters cast their Ballot in the 2013 Elections.

85) The Commission, through the 1st Respondent, denied this allegation. The denial by the 3rd Respondent was more categorical. Responding to questions in cross-examination, the 3rd Respondent denied using National Youth Service (NYS) buses to import voters. Although he acknowledges that he was at one time the Minister for Youth & Sports, which is the parent Ministry of NYS, he denied using or hiring those buses to import voters.

86) That is the evidence of voter importation during the registration period. Voter Registration is governed by the Elections (Registration of Voters), Regulations 2012. Part VI of those Regulations is on inspection of the voter register while Part VII is on preparation of a new register. The Commission is required under Regulation 27 to publish in the Kenya Gazette and at least (2) newspapers of national circulation a Notice of the availability of the register for inspection. The purpose of inspection is stated in



the form of notice set out in the schedule to the Regulations. The purpose of the inspection is to-

- (a) ensure that no person is incorrectly registered;
- (b) ensure that no person is registered more than once;
- (c) ensure that no registered person is omitted from the register;
- (d) to correct clerical errors.

The Regulations provides an avenue for anyone dissatisfied with the register to lodge an objection thereto. In addition, the Elections (General Elections) Regulations On Settlement Of Disputes makes provision in respect of disputes arising from Registration of Voters. Regulation 7(1) reads as follows:

**“7.(1) Any person objecting to the registration of a voter may file a complaint with the Commission on any of the following grounds-**

- a. **That the person has registered in more than one registered centre;**
- b. **That the person has been convicted of an election offence at any time material to the registration;**
- c. **That the person is not qualified to be registered under any law.**” (my emphasis).

PW8 was always alert, about the possibility of voter importation. It was for that reason that he raised this issue at the highest level of the Commission, the Chairman. PW8 did not explain why he never took advantage of the elaborate procedure provided by the Law to complain or to challenge the supposed registration of Ugandans as voters at the earliest opportunist.

### **Mismanagement of polling by IEBC**

87) There were numerous allegations about the manner in which the Commission mismanaged the polls. In one instance it was said that a voter Vitalis Tanga Auma was found with 2 ballot papers. But it appears that his effort to cheat came to nothing as the Presiding Officer caused the voter to be arrested. It was then the evidence of PW21 that Beatrice the poll officer who had issued the ballots, was moved to other duties. The Presiding Officer took action against his officer by removing her from the duties of issuing ballots.

88) There were allegations that some IEBC officials possessed loose ballot papers. Allegations were made by PW8 and RW20. The evidence of PW8 was in his written statement. He does not say that he witnessed this directly or which polling stations were affected. As for PW20, she says it was at Osieko Primary School. She does not say under what circumstances the officials were holding the loose ballots. She does not say how many they were. She knew that some ballots were spoilt in that station but she could not tell whether these were the loose ballots held by the officials. Whatever the case the Court did not get an impression that this isolated incident was evidence of widespread, systemic or

deliberate malpractice.

89) There were other allegations which, in my view, were not proved. Allegations by PW1 that voters were allowed to vote without their names being marked at the register. PW1 was manning the register outside the polling room at Ruambwa and his duty was to direct voters into the correct stream. The Registers to be marked off would be in the polling rooms. He says that he does not know what happened in those polling rooms. He cannot confirm whether or not the registers there were properly marked off. Similarly the allegations by the same witness of double and multi- voting were not proved.

90) See also the allegation made by PW25 about a person by the name Joseph Odhiambo. The evidence is that this person attempted to vote yet he was not a duly registered voter at Ranyu. But the Presiding Officer acted and stopped the person from casting a vote. Then there was an allegation by PW 20 about a voter by the name Margaret Odeya. PW 20 thought that she would not vote because she had misplaced her ID. He did not have unequivocal proof of the misplacement of the ID. This cannot be proof that the voter did not possess her ID or was not a registered voter.

### **Assisted Voters**

91) There are voters who, because of physical disability or illiteracy, require assistance or support to cast their vote. So that the Right of such a voter to vote a person of his/her own choice is protected and to ensure the integrity of the process, Regulations 72(2), 72(5) and 72 (6) and provide as follows-

***“2. Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the Presiding Officer shall assist such voter, in the presence of the agents.***

***5. The following shall apply with respect to a person who assists a voter under this Regulation-***

***(a) the person shall, before assisting or supporting the voter, make a declaration of secrecy before the Presiding Officer in Form 32 set out in the Schedule;***

***(b) a person who breaches his or her declaration commits an offence under the Act;***

***(c) the person shall assist or support only one voter at that Election and have a mark as proof of assisting or supporting a voter.***

***6. Where a Presiding Officer grants the request of a voter under this regulation, the Presiding Officer shall record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance.”***

92) The Petitioner assails the manner in which assisted voters were assisted or supported. PW1 who was a polling clerk at Ruambwa Primary School polling station gave evidence that the Presiding Officer marked the ballot papers of assisted voters without allowing the party agents to witness the process. That is contrary to Regulation 72(2). This polling station had two streams but the Court is not told in which stream the malpractice took place. For some reason none of the agents who were said to have been denied the opportunity to witness the voting testified. I also find it incredible that this irregularity was not formally raised to the Commission by any of the many agents present at the time of Polling.

93) What happened at Kenya Gauze Primary School polling station was even less clear. PW11 was the UDF agent at that station. It was his testimony that illiterate voters would be allowed assistance from persons who accompanied them. If however they came alone then the Presiding Officer would provide the assistance. That oral testimony was in contrast to what the witness stated in paragraph 5 of his written statement where he said-

***“The Presiding Officer, in conjunction with the Security Officer at the polling station went as far as picking those who could help the voters in marking the ballot papers and for those voters who had come with their preferred choices of persons to help, the Security Officer would turn away such people and appoint someone else to help the voter.”***

94) Which account was to be believed" In respect to those assisted by the Presiding Officer, the allegation was that the Presiding Officer resorted to picking only two (2) agents of his choice to witness the marking of the ballot papers. Under cross-examination he conceded that he never made a formal complaint to the Commission. When testifying in Court, he did not provide names of any assisted voter who was aggrieved. In addition none of these voters testified. The evidence on this is insufficient.

95) PW 20 was a UDF agent at Osieko Polling Station Stream 1. This is oral testimony about what happened in respect to assisted voters-

***“The Presiding Officer marked the ballots of assisted voters. He would call 3 agents to verify. He (Presiding Officer) chose the 3 agents. We wanted the agents chosen from the three Alliances (Jubilee, Cord and Amani).”***

He later said-

***“I was called to verify as well. He was choosing agents people at random. I noticed him direct a voter to vote for Hon. Namwamba (3rd Respondent). I protested. I noted this in the checklist.”***  
(emphasis mine)

This evidence was consistent with his written statement and there was no direct rebuttal of this from the Commission. In addition the witness did not sign Form 35. I am inclined to believe that the Presiding Officer did not follow the law to the letter. As to the evidence that the Presiding Officer was directing voters to vote against their choice, that evidence required corroboration of the affected voters.

96) The account given by PW5 on this aspect of his case was a hearsay account. He stated-

***“At Mau Mau market I was told by agents that Mr. Obasu had signed a ballot paper wrongly against the wish of the voters. I was not present. I was told that by agents like Taifa and Boniface Achoka.”***

That hearsay evidence was not confirmed by the named agents. That evidence does not prove the allegation.

### **Forms 35**

97) The Petition attacks the manner in which the results were declared. The declaration of results for the National Assembly Election is in Statutory Form 35. It was the Petitioners case that the 1<sup>st</sup> Respondent failed to provide the Party Agents with that Form and in many Polling Stations the Agents

were not allowed to sign them. In addition where the Agents did not sign, the Presiding Officer failed to record the fact of their refusal or failure to sign the Forms. There was also a complaint that the results in those Forms were doctored.

98) At the hearing Hon. Wanjala (PW 8) and Constantine Obuya (PW 9) added a fresh complaint in respect to Form 35. It was their testimony that some of their Agents were forced by Presiding officers to sign the Forms. PW 17, PW 20, PW 21 and PW 22 who were Party Agents gave evidence in support of this. The Returning Officer disputed this evidence and stated that he never received any complaint of this nature at the time of Polling.

99) The signing of Form 35 by an Agent is of great importance because it signifies that the Agent accepts the results shown in the Form to be a true and accurate account of the Ballots. An allegation that an Agent has been forced to sign this all important Form is a serious allegation because if it is proved to be true, then it is a great travesty of the Electoral process. That would bring the integrity of the process into question. In addition, the Presiding Officer would be committing an offence. This is not the sort of allegation to be made casually. The Court is surprised that such a grave matter was not raised in the Petition itself or as a formal complaint to the Commission or to the Police at the time it happened.

100) The evidence by PW8 seems to suggest that this complaint is infact an afterthought. If it was not, then why did he not raise it in his letter of 7<sup>th</sup> March 2013 to the Chairman of the Commission and his statement of 26<sup>th</sup> March 2013 to Sio Port Police Station" He had taken those 2 occasions to raise several other allegations of Electoral irregularities and malpractices. This Court doubts the veracity of that allegation.

101) It is nevertheless true that some of the Forms 35 may have not been signed by all Party Agents. I come to this conclusion on the basis of what the 2<sup>nd</sup> Respondent stated in paragraph 10 of his Affidavit in Response.

**“That they may be some Forms which were not signed but it is not mandatory that an Agent must sign for the Form to be valid. Some Agents disappear during re-tallying and one cannot be reasonable (sic) expected to wait for them to return to announce the results.”**

102) What this Court must decide is the legal effect of the non-signing of the Forms. Necessarily the relevant provisions of the Law need to be recalled. These are Regulations 79 (3), 79 (4), 79 (5) and 79 (6) of the Regulations which read,

**“79(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.**

**(4) where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.**

**(6) 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 their regulation shall not by itself invalidate the results announced under subregulation (2) (a).”**

103) Of the Agents who testified on behalf of the Petitioner 3 of them did not sign Form 35. PW 13 did not sign as he had left the Station before the end of counting. PW 26 seemed unsure of himself. At

one point, he says that he had left the Station at the time of counting. At another, he says, “**I would have indicated this incident on Form 35 but I was threatened.**”

104) As for PW 20, he refused to sign the Form 35. He was dissatisfied and disenchanted with the manner of Polling. Yet he did not, as required by the Law, give reasons for his failure to sign the Declaration. If he is to be believed, then he would be just as guilty as the Presiding Officer who failed to record the fact that the Agent failed to give reasons. Importantly however, is that the failure to comply with those provisions cannot in itself lead to the invalidation of the results announced using that Declaration. That is the spirit of the Regulations. What the Petitioner failed to demonstrate in my view is that there would be other reasons for this Court to impeach those results.

105) Turning to another aspect of Form 35 there are 2 Stations namely; Sisenye Primary School Polling Station and Runyu Primary School Polling Station where only the Deputy Presiding Officer and Agents signed the Declaration. That in itself cannot invalidate those Declarations because under Regulation 5(4) the Deputy Presiding Officer may perform any Act which a Presiding Officer is required or authorized to perform under those Regulations. One of those Acts is the signing of Form 35 and the announcement of the results.

106) The Constitution and Electoral Laws requires that an Election be conducted in a transparent, accurate and accountable manner. It would be for this reason that Regulation 79 (2) requires the Presiding Officer to provide each political party, candidate, or their Agent with a copy of The Declaration of the Results. The Returning Officer conceded that because of lack of sufficient copies of Form 35 in some Polling Stations not all parties or candidates were provided with a copy of the Form. For that reason, they resorted to providing copies of the Form to coalitions of parties. It is the responsibilities of the Commission to ensure that it has sufficient Electoral material to enable it carry out its mandate as expected by the Law. There cannot be a good excuse for the Commission to fail to have sufficient copies of such an important document. What I must then determine is whether this failure amounts to substantial non-compliance with the written Law and if so whether it affected the result of the Election. Having heard all the evidence surrounding the completion and compilation of Forms 35, the Court did not get the impression that the results in those Forms did not reflect a true and correct count of the ballots cast at the various Polling Stations. The Commission, granted, failed in its duty to provide the Forms to the all the candidates but I come to the conclusion that this non-compliance with the Law did not affect the result of the Election and in so far as the Forms 35 were not a distortion of the count the non-compliance was not substantial.

### **Forms 36**

107) It is common ground, I think, that there were some errors in the entries made in Form 36. The Petitioner thought that they were deliberate and fraudulent and intended to skew the result in favour of the 3<sup>rd</sup> Respondent. It was however the assertion of the Respondents that they were genuine clerical errors committed in the process of transposing the results from Forms 35 to Form 36. After an analysis of the Form 36, the Court noted errors in the results in respect to 4 Polling Stations. Tables gives some clarity and the tables below show those errors.

The Following tables show the errors only and how it affected the candidates

#### **Runyu Primary School Polling Station**

Candidate	Form 35	Form 36	Effect on vote
George Okada Wanyama	06	106	- 100

**Bubango Primary School Polling Station Stream 1**

Candidates	Form 35	Form 36	Effect on votes
Pius Ababu Namwamba	183	212	+ 29
Achoka Aloyse Luduba	07	06	-1
Vincent David Obara	00	06	+ 6
Constatine ogunga Obuya	09	10	+1
Nyangori John Ohenjo	02	01	- 1
Aloyse Wangira Okoba	01	06	+5
Leonard Tilly Sumba	01	00	-1
Rafael Bitta Sauti Wanjala	154	133	-21

**Bubango Primary School Polling Station Stream 2**

Candidites	Form 35	Form 36	Effect on votes
Constatine Ogunga Obuya	10	70	+69

**Sifugwe Primary School Polling station**

Candidates	Form 35	Form 35/ transposed to form 36	Form 36	Eff
Pius Ababu Namwamba	018	218	218	00
Crizantus Ogusini Odongo	03	03	02	- 1
Nyangori John Ohenjo	03	03	01	-2
Constatine Ogunga Obuya	003	283	283	00
George Okada Wanyama	01	11	1111 11	00

108) The story emerging from these tables is that there was no single candidate who benefited from all the errors. Similarly, no single candidate was disadvantaged by all the errors. The anomalies do not seem designed to benefit or prejudice any candidate. More importantly the variations make a minute difference to the outcome of the results. Even if the errors were to be corrected, it would fail to significantly close the big gap between the winner and the runners up. It also needs to be noted that the mistakes were in the results of 4 out of 64 Polling Stations. The errors were neither systemic nor pervasive. I accept the explanation by the Commission that the mistakes were not deliberate or intended to advantage the 3<sup>rd</sup> Respondent. In this regard, I recall the words of **Justice Machanja Machakos High Court Petition No 4 of 2013 WAVINYA NDETI –VS IEBC & 4 OTHERS** (Ruling No 3)

**“An election is a human endeavor and is not carried out by programmed machines. Perfection 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 were admitted, were bound to occur particularly in the tallying of the results. What is paramount is that even in the face of such errors, whether advertent otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs.”**

109) There was also criticism as to the Form 36 which was used to announce the Election result. The Returning officer announced the results from a handwritten Form 36. That Form contained results that were transposed from Forms 35 from various Polling Stations. This Court has already considered some of the errors that occurred in the transposition. Looking at the handwritten Form 36, one notes that it was not dated by the Returning officer. Secondly, the gate results of only 2 candidates were entered. Thirdly, the results were signed by only Agents of 2 parties. Interestingly, one of them was the Agent of the LPK party which did not have a candidate for the National Assembly seat and could not therefore have been an Agent for that Election. Clearly the manner in which the Form 36 was completed was irregular and unsatisfactory. Nevertheless, in respect to the final tally for each candidate the results were on the front page of the Form 36. This Court is not told that those results are inaccurate or do not reflect the true count of the ballots from the various Polling Stations. The Form 35 is the primary document which contains the result as tallied and announced at the Polling Station. The Petitioner has been unable to impeach the integrity of the Forms 35 that were used in that Election. What then would matter is whether the results entered in the handwritten Form 36 was an accurate transposition of the results from the Forms 35 from the various Polling Stations. Save for the errors noted in the Form 36 in respect to 4 of the 64 Polling Stations, the others were a faithful transfer. And the Court has already noted that where there were errors, they were insignificant and would not change the outcome. For these reasons, the Court finds that the irregularities in Form 36 were not substantial enough for the Court to annul the outcome of the Election.

### **The Courts Determination**

110) Having analyzed the issues raised by this Petition and the evidence presented, this Court is now in a position to answer the questions it was asked to determine. This Court concludes that the disputed Elections were conducted and managed very substantially in accordance with the Constitution and the Electoral Law. The allegations of Electoral malpractice made against the Respondents were not proved. And where the Commission transgressed the irregularities were insubstantial and did not compromise or affect the result or outcome of the Election. The Court further concludes that the result returned in favour of the 3<sup>rd</sup> Respondent was valid and reflected the will of the people of Budalangi Constituency. The big margin between the victor and the runners up reflected the clarity of that will. This Court sees no reason for upsetting the will of the people of Budalangi Constituency which they empathically expressed at the Ballot.

### **A Proxy Petition**

111) As I conclude my decision, there is one other issue for this Court to determine. Right from the outset of these proceedings the Respondents maintained that this action was a Proxy action and that the real Petitioner was Hon Raphael Wanjala. Indeed, in its belated submissions the Commission urged this Court to make an order that Hon Wanjala bears the costs of this Petition. This Court has already made its views known on the possibility of holding responsible, a person other than the Petitioner, for costs of a failed Petition. In an earlier decision rendered herein in respect to an interlocutory application I observed,

**“The 3<sup>rd</sup> Respondent has repeatedly asserted that this Petition is brought by the Petitioner as a proxy of some named principles.**

The 3<sup>rd</sup> Respondent will have to prove those allegations. Needless to say no adverse finding can be made against the so called principals without affording them an opportunity of answering the allegations. But in the event that the proxy arrangement were to be proved and the Petition fails, then a fair question would be whether the Respondents should have a remedy of costs against the principals. It is the suggestion of this Court, without pretending to provide a final answer, that Rule 136 (1) of the Election Petition (Parliamentary and County Elections) Petition Rules 2013 is wide enough to enable a Court direct an order of costs against such persons. The Rule provides:

“36(1) The court shall, at the conclusion of an election petition, make an order specifying-

- a. The total amount of costs payable; and
- b. The persons by and to whom the costs shall be paid.” (my emphasis)

The use of the word “persons” and not “party” is, in my view, deliberate. In appropriate circumstances, persons other than the Petitioner/s or the Respondents may be subjected to costs. There is no reason why the actual owner of a failed Petition should be left unpunished. This could be one way of deterring the abuse of Court process. And this may yet be another way of addressing the 3<sup>rd</sup> Respondent’s fears.”

112) I expected the Respondents to follow through their allegation with a probe of the role of Hon Wanjala in the presentation and prosecution of the Petition. This aspect of the Respondents case appeared all but abandoned because there was no serious attempt in the course of the hearing to implicate Hon Wanjala. No probing questions were put to the Petitioner or Hon Wanjala about the existence of a proxy arrangement. This Court sees no reason to assign Hon Wanjala any other role in the proceedings other than him having participated as witness no 7.

### Costs

113) On costs, Rule 36 of the Rules gives this Court discretion to order the total amount of costs payable at the conclusion of an Election Petition. This Court has anxiously considered whether in view of the involved nature of the Petition it should exercise this discretion. The Petitioner presented a Petition with statements of over 70 potential witnesses. The Petition, though not complex, was always going to be fairly involved because of the number of witnesses. The Respondents would have to employ a substantial amount of time and energy in studying and answering to the material presented by the Petitioner. In the course of the lengthy hearing of this Petition the Court heard and received the evidence of 39 witnesses. In the end the taxing officer will have to decide how to remunerate the Respondents for the effort they have put in defending this action. I must nevertheless not lose sight of the rationale for granting an Election Court discretion to cap costs. **Kimondo J. in Kakuta Maimai Hamisi vs Peris Pesi Tobiko** and others Nairobi High Court election petition 5 of 2013 observed as follows:

“Successful parties have in the past abused the taxation process to exaggerate their costs to the chagrin and detriment of the losing party. That is the genesis of the rule requiring this election Court to set a ceiling on costs.”

I associate myself with the need to guard against the abuse of costs.

114) I settle on a position that although I will cap the costs the taxing officer should be granted sufficient latitude to reach a fair and just remuneration. The taxing officer shall tax the costs herein the usual



manner but the total amount of costs payable shall not exceed the sum of kshs.4,000,000/=. The amount arrived at on taxation shall be shared equally between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent on the one hand and the 3<sup>rd</sup> Respondent on the other.

115) A French novelist, Sidonie – Gabrielle Claudine once said,

**“A total absence of humour makes life impossible.”**

The seriousness and intensity of these proceedings was often punctuated with good natured humour. I thank the parties, Counsel and those who attended Court for giving these proceedings that good side of life. To Counsels, my gratitude for the professional manner in which each one of you conducted your clients brief. You showed courtesy to each other and to the Court. Lastly, and by no means least, I thank the staff of Busia High Court for giving this Court invaluable support in the course of the disposal of these proceedings. In this regard, the Deputy Registrar of this Court Mildred Munyekenye deserves my special gratitude.

**F. TUIYOTT**

**J U D G E**

**DATED, DELIVERED AND SIGNED AT BUSIA THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2013.**

**IN THE PRESENCE OF .....**

**KADENYI .....COURT CLERK**

**MURIMI.....FOR PETITIONER**

**NO APPEARANCE.....FOR 1<sup>ST</sup> & 2<sup>ND</sup> RESPONDENT**

**MANDALA.....FOR 3<sup>RD</sup> RESPONDENT**



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