



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELECTION PETITION NO. 1 OF 2013**

**PHILIP MUNGE NDOLO .....PETITIONER**

**VERSUS**

**1. OMAR MWINYI SHIMBWA**

**2. FLORENCE BIRYA (RETURNING OFFICER I.E.B.C.)**

**CHANGAMWE CONSTITUENCY**

**3. INDEPENDENT ELECTORAL & BOUNDARIES**

**COMMISSION .....RESPONDENTS**

**JUDGMENT**

On the 4<sup>th</sup> of March, 2013 citizens of the Republic of Kenya participated in a historic election in exercise of their democratic right to elect their leaders. This was the first election to be conducted under the New 2010 Constitution of Kenya and proved to be a mammoth task as it required that six (6) positions be filled simultaneously. One of the six (6) positions to be filled was that of Member of National Assembly. In Mombasa County seven (7) candidates presented themselves to vie for the post of Member of National Assembly for Changamwe Constituency. The petitioner herein **PHILLIP MUNGE NDOLO** as well as the 1<sup>st</sup> respondent **OMAR MWINYI SHIMBWA** were amongst the candidates who vied for the seat of National Assembly Member for Changamwe. The aggregate results as declared by the Independent Electoral and Boundaries Commission (hereinafter referred to as *'the IEBC'*) in the Declaration of Results (Form 36) were as follows:

<b><u>Name of Candidate</u></b>	<b><u>Aggregate Results</u></b>
1. David Kyalo Kimanathi	3,083
2. Francis Oduor Amolo	2,007
3. Godfrey Ingala Nengo	451
4. Omar Mwinyi Shimbwa	15,923
5. Patrick K. Ngugi	197
6. Peterson Mittau	4,104
7. Philip Munge Ndolo	11,891

As a result the IEBC declared the 1<sup>st</sup> respondent as the winner of that election by virtue of his having garnered the highest number of votes. The petitioner however being dissatisfied with both the process and the outcome of the election filed in court this petition dated 3<sup>rd</sup> April, 2013. In his petition, the petitioner sought declarations that:-

**“(a) The 1<sup>st</sup> respondent was not validly elected for [sic] Member of the National Assembly for Changamwe Constituency in the general elections held on 4<sup>th</sup> March, 2013.**

**(b) The petitioner was validly elected for [sic] Member of Parliament for Changamwe Constituency in the general elections held on the 4<sup>th</sup> March, 2013, and in the alternative an order should issue that a fresh election be held for the National Assembly for Changamwe Constituency.**

**(c) The costs of this petition be borne by the respondents.”**

Aside from the 1<sup>st</sup> respondent the petitioner also included as respondents in his suit **FLORENCE BIRYA** who was the Constituency Returning Officer for Changamwe Constituency as the 2<sup>nd</sup> respondent whilst the IEBC was named as the 3<sup>rd</sup> respondent. The 1<sup>st</sup> respondent filed his response to the Election Petition on 30<sup>th</sup> April, 2013. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents both filed in court a response to the petition dated 30<sup>th</sup> April, 2013.

Following the appointment of this election court by the Honourable Chief Justice on 19<sup>th</sup> April, 2013 proceedings commenced at the High Court in Mombasa. Pre-trial directions were made on 19<sup>th</sup> June, 2013. During the pre-trial by consent of all parties, the following issues were identified for determination.

**“(a) Whether the 1<sup>st</sup> respondent was validly elected as Member of National Assembly for Changamwe Constituency.**

**(b) Whether the respondents breached, contravened and/or failed to comply with the law before and during the elections held on 4<sup>th</sup> March, 2013 for Member of National Assembly for Changamwe Constituency.**

**(c) Whether the elections held on 4<sup>th</sup> March, 2013 for the Member of National Assembly for Changamwe Constituency including the voting, counting and tallying was flawed, irregular, biased, free, fair and credible.**

**(d) Whether the printing and use of a wrong symbol in the ballot papers rendered the ballot papers defective and null and void and incapable of conducting the elections held on 4<sup>th</sup> March, 2013 for Member of National Assembly for Changamwe Constituency.**

**(e) Whether an order for scrutiny and recount of ballot papers for the elections held on 4<sup>th</sup> March, 2013 for Member of National Assembly for Changamwe Constituency should be issued.**

**(f) What consequential declarations, reliefs and orders should the court grant based on the determination of the petition.”**

It was also agreed during the pre-trial conference that all affidavits on record would constitute the evidence-in-chief of the particular witness. As such parties were directed to summon only the witnesses whom they would be seeking to cross-examine. The main hearing commenced on 15<sup>th</sup> July, 2013. **MR. MUTISYA** Advocate acted for the petitioner, **MR. ABEID** acted for the 1<sup>st</sup> respondent whilst **MR.**

**NYAMODI** represented the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

### **THE EVIDENCE**

Together with the petition dated 3<sup>rd</sup> April, 2013 a total of fourteen (14) affidavits sworn by the following witnesses were annexed in support of the petition.

1. Phillip Munge Ndolo (the Petitioner)
2. Charles Oliviah Aliaro
3. Nancy Kaveza Mudogo
4. Rajab Amboko Ismael
5. Eunice Mutuku
6. Jackton Obera Aomo
7. Susan Wakuthi Wanjohi
8. Martin Mwatemi Mwanzia
9. Michael Ikuthu
10. Evans Nzuki Kawilly
11. Onesmus Kasilu Nzioka
12. Patrick Kris Ngugi
13. Nancy Ngaira
14. Saline Murombo

Out of these only nine (9) witnesses appeared in court for purposes of cross-examination. The totality of their evidence included various claims of irregularities and/or election offences perpetrated by the respondents which the petitioner argued rendered the whole election in Changamwe Constituency fatally flawed. These included allegations that:

- a. The 1<sup>st</sup> respondent engaged in illegally assisting/advising voters how to vote in the election.
- b. The 1<sup>st</sup> respondent failed to comply with the electoral Code of Conduct by applying actual and threatened violence towards both voters and the polling officials thereby instilling fear and creating voter apathy.
- c. The 3<sup>rd</sup> respondent failed to put in place proper administrative and security arrangements following the murder of two police officers within the Constituency, which led to voter apathy and/or fear resulting in the failure of several voters to turn up to vote in the election.
- d. That the 3<sup>rd</sup> respondent printed the wrong symbol for one of the candidates in the election leading to voter confusion and uncertainty.
- e. The 3<sup>rd</sup> respondent failed to ensure that polling stations were opened on time. Due to late opening of the polls in several stations voters got discouraged and went away without voting.
- f. The 3<sup>rd</sup> respondent failed to make provision of basic infrastructure for the conduct of polling specifically in Lilongwe Gardens Polling station and allowed voting to take place in an un-gazetted area leading to uncertainty and confusion amongst voters with many not knowing where to cast their votes.
- g. The 3<sup>rd</sup> respondent unfairly and illegally ejected and or kept out of the polling stations the agents of the WIPER Democratic Party on whose ticket the petitioner was running, thus making it impossible for the petitioner to properly monitor events inside the polling stations.
- h. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent refused to allow a recount of the votes cast despite the petitioner having made several requests for the same.
- i. The respondents jointly and severally engaged in ballot stuffing to the benefit of the 1<sup>st</sup> respondent and to the detriment of the petitioner during the elections.

On the basis of all the above allegations the petitioner claimed that the elections held were neither credible, free nor fair. That the 1<sup>st</sup> respondent was not in fact validly elected as Member of National Assembly for Changamwe Constituency and sought orders of the court to this effect. The petitioner further prayed for the court to find that the petitioner was validly elected as Member of National Assembly for Changamwe Constituency and in the alternative that the court issue orders for a fresh election to be conducted in Changamwe Constituency by the 3<sup>rd</sup> respondent. Finally, the petitioner sought to be awarded the costs of the petition.

On his part the 1<sup>st</sup> respondent through his response to the petition filed on 30<sup>th</sup> April, 2013 denied all allegations made against his election by the petitioner. The following ten (10) witness affidavits in support of the 1<sup>st</sup> respondent's response were annexed.

1. Omar Mwinyi (the 1<sup>st</sup> respondent)
2. George Onyango Samuel
3. Kitum Kutwa Saunya
4. Mohamed Juma Hamisi
5. Anthar Juma
6. Japheth Bengo
7. Richard Ngemu Musau
8. Ali Sulubu Bali
9. Sivirike Josphat
10. Babu Mbaruku

Out of these four (4) appeared in court for purposes of cross-examination. The 1<sup>st</sup> respondent and his witnesses denied any involvement in election offences and/or malpractices and in their evidence averred as follows:

- a. That neither the 1<sup>st</sup> respondent nor any of his agents was involved in the incidences which are alleged to have led to insecurity in Changamwe Constituency on the polling day.
- b. That no link was proved to have existed between the 1<sup>st</sup> respondent and the Mombasa Republican Council (hereinafter referred to as 'MRC'), and that no evidence had been adduced to show any negative impact the murder incident had on the result and the validity of the 1<sup>st</sup> petitioner's election.
- c. The 1<sup>st</sup> respondent categorically denied having in any way bribed and/or influenced voters in his favour. He also categorically denied having pulled out a gun at Bomu Polling Station with a view to intimidating any party in the election.

All in all the 1<sup>st</sup> respondent insisted that the election as conducted by the 3<sup>rd</sup> respondent was credible, free and fair and asserts that he was validly elected as Member of National Assembly for Changamwe Constituency.

Finally, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents also filed a response to the petition dated 30<sup>th</sup> April, 2013. Annexed to the response were affidavits sworn by the following witnesses:

1. Florence Taabu Biryia (the 2<sup>nd</sup> respondent)
2. Miriam Mohamed Abdalla
3. Agnes Kamanthe Mailu
4. Lucy Musimbi Manyano Gisore
5. Joyce Kasyoka Mwadime
6. Jame Katambani Mulama

7. Henry Wanjala Murenga
8. Festus Kioko Wambua
9. Olpha Mwebi Moraa
10. Phyllis Mukene Kimilu
11. Agripina Mkanyika Mwavula

Out of these four (4) witnesses presented themselves before the court for purposes of cross-examination. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents denied any allegation, bias or wrong doing in the conduct of the election. They jointly insist that:

(a) all steps were taken to ensure that the election was properly conducted.

(b) the 3<sup>rd</sup> respondent denied any responsibility for any act of insecurity in the Constituency and the 2<sup>nd</sup> respondent stated that all reasonable and logical steps were taken to ensure that voting was conducted in a secure and safe environment.

(c) the 2<sup>nd</sup> and 3<sup>rd</sup> respondents denied that polling in any area was conducted in an un-gazetted area.

(d) only agents who did not have properly authenticated documents were barred from the polling station.

(e) the mis-printing of the symbol of one candidate was said to be inadvertent and in any event had no impact on the outcome of the polls.

Finally, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents insist that they conducted the polls in a legal, free and fair manner and that their declaration of the 1<sup>st</sup> respondent as the winner was a true manifestation of the will of the voters in Changamwe Constituency.

## **ANALYSIS**

In determining an election petition the court must be guided by the Constitution which is the supreme law, the Elections Act, 2011 the Elections (Parliamentary and County Elections) Petition Rules 2013 (hereinafter referred to as '*the Election Rules*') as well as the Elections (General) Regulations, 2012 (hereinafter referred to as '*the Election Regulations*') and all other relevant and enabling legislation. This court is mindful of the fact that election petitions are '*sui generis*' matters and as such election courts are under an obligation to render substantial justice as envisaged by the overriding objective of the Election Rules which is stated in the provisions of Rule 4(1) thus:

**“4(1) the overriding objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.”**

The mandate of any election court is to ensure that the true manifestation of the will of the voters with respect to any particular elective position is upheld. In the case of **MORGAN & OTHERS VS. SIMPSON AND ANOTHER 1974 All ER 722** the court stated the principles upon which an election could be nullified thus:

**“an election court was required to declare an  
election invalid**

- a. **If irregularities in the conduct of elections had been such that it could not be said the election had been conducted as to be substantially in accordance with the law as to elections or**
- b. **If the irregularities had affected the results.”**

In the case of **GEDION MWANGANGI WAMBUA VS. IEBC & 2 OTHERS E.P. 4 OF 2013** it was held that it is a presumption of law that elections were properly conducted and as such the burden is always upon the petitioner to prove otherwise. Following on this the legal principle that *‘he who asserts must prove’* is applicable. The burden of proving any allegation of electoral misconduct and/or irregularity lies squarely upon the petitioner. In the case of **JOHO VS. NYANGE & ANOTHER (2008) 3 KLR E.P.** the court in upholding the position that the burden of proof lies with the petitioner held as follows:

**“1. Election petitions are no ordinary suits but**

**disputes in rem of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent, credible and consistent evidence.....”**

**2. The burden of proof in election petitions**

**lies with the petitioner as he is the person who seeks to nullify an election .....**”

The court must be satisfied that any such electoral irregularities and/or malpractices were so widespread, persuasive and of such magnitude as to render the entire election null and void. In the case of **MAHADEO VS. BABU UDAI PRATAP SINGH & OTHERS** the Court of India held as follows:

**“But the proof of such non-compliance did not necessarily or automatically render the appellant election void. To make the election void the 1<sup>st</sup> respondent had to prove the non-compliance and its material effect on the election.”**

Similarly, in the case of **JOHN KIARIE VS. BETH MUGO & 2 OTHERS (2008) eKLR** it was held as follows:

**“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 affect the outcome of the electoral process in regard to the election .....**”

I wish to echo what was said by Muchelule J in **WILLIAM ODUOL VS. IEBC & OTHERS Kisumu EP 2 of 2013:**

**“The court should always consider whether the election with all its imperfections was substantially conducted in accordance with the principles enshrined in the Constitution and the electoral law. The court will determine whether the imperfections compromised the process so much that an ordinary man cannot say that the win as declared was a valid one” [my emphasis]**

This leads to the next logical question - that of the standard of proof required to prove an election petition. Is it the civil law standard of beyond a balance or probability or the standard in criminal law being beyond a reasonable doubt" This question was answered in the **JOHN KIARIE** case where the

court held that the standard of proof required in election petition cases is

**“higher than proof on a balance of probabilities but lower than the standard of proof beyond a reasonable doubt required in establishing criminal cases. Allegations of electoral malpractices like for instance bribery, require a higher proof.”**

With this background on the law and principles on Election petitions on which basis this court will be guided I will now proceed to analyze the issues for determination in this case.

**Did the respondents breach, contravene and/or fail to comply with the law before and during the elections held on 4<sup>th</sup> March, 2013 for Member of National Assembly for Changamwe Constituency**

In the evidence presented to court the petitioner made several allegations of a breach of the law before, and during the election in question.

**i. SYSTEM FAILURE**

On this point the petitioner alleged that due to the failure of the Electronic Voter Identification System (EVID) in most polling stations, the IEBC had to resort to the use of the manual registers in order to identify voters. Some of the voters who presented themselves at the polling stations to vote found that their names were missing from the registers and therefore were not permitted to vote. This is the petitioner claimed resulted in the disenfranchisement of those particular voters and affected the result of the election. Firstly it is important to note that the failure of the EVID was not limited only to Changamwe Constituency. This was a technological failure that occurred throughout the whole country and in many other cases the IEBC was left with no choice but to resort to the identification of voters through the manual registers.

Did this failure of the EVID seriously compromise the validity of the election process in Changamwe" The question of electronic facilitation of the election process was addressed by the Supreme Court in the case **RAILA ODINGA & 5 OTHERS VS. IEBC & 3 OTHERS [2013]eKLR** where it was held:

**“An objective reading of the regulations cited, does not reveal a contemplation of elections conducted solely by electronic means. The elections of 4<sup>th</sup> March, 2013, were not envisaged to be conducted on a purely electronic basis. Regulation 60 of the Elections (General) Regulations 2012 illustrates that if the elections are to be facilitated by electronic means only, the relevant guidelines shall be availed to the public. Regulations 59 provides that voting is done by marking the ballot paper or electronically. Thus the voting system envisaged in Kenya appears to be manual.....”**

**It is rightly argued by the respondents in our opinion that the court must be alive to the fact that most polling stations are in the rural areas where the primary school polling stations are dilapidated and the supply of electricity to date is a distant dream. Yet voters still go to such polling stations to exercise their right to vote and to discharge their civic duty.....”**

This latter observation is true in many parts of the country. Although Changamwe is basically an urban area, where it would be expected that electricity supply would be available, the fact of the matter is that electricity supply in many parts of this country wildly fluctuates and is rarely reliable. The ruling in the **RAILA case** held that the General Election of 2013 was legally and essentially based on the manual register. In such circumstances it would be unreasonable to hold as a fast rule that voter identification

could only be deemed valid if it is done electronically.

Several of the respondents' witnesses indicated that voters whose names were not initially found in the register were told to wait a while and that in most cases their names were eventually found and they were then permitted to vote. In his own testimony the petitioner stated as follows:

**“Some voters were being turned away because their names were missing from the registers. I cannot recall any names right now .....**”

He later goes on to state

**“I found Ngumbi Manthi outside Magongo polling station. In the end he went back to the polling station. I do not know where he eventually voted. I did not see him later to ask him .....**”

It would appear that the main problem here was not that names were missing but rather that the voters were confused as to which queue to join as each polling station had several streams. Voters who failed to find their names in one stream eventually found it in another and voted. The petitioner had specifically claimed that two voters namely:

1. Evance Nzuki Kawilly
2. Saline Murombo

had their name missing from the register. This as evidence proved was not the case.

**DW8 LUCY MUSUMBI MANYANO GISORE** who was the presiding officer at Mikindani Primary school stream 3 annexed to her affidavit an extract of the photo list register/green book *“LMMG’J”*. It shows clearly that **Evans Kawilly** ID No. 22235440 and holder of electors care No. 01388712120107298 was in fact a registered voter whose name did appear in the Principal Register of voters. This evidence was not controverted upon cross-examination of the witness. The said Evans Nzuki Kawilly did swear an affidavit in which he stated that on 4<sup>th</sup> March, 2013 he went to vote at Mikindani primary school at 6.30 a.m. However he was informed by the polling clerk that his name was not on the register and hence he did not vote. This witness was not cross-examined thus it is not clear why he failed to vote yet his name has been shown to have been in the register. He could have just gotten impatient and gone away. **PW9 MICHAEL IKUTHU** who was a WIPER agent and mobilizer told the court of a voter whom he called *‘Mary’* who failed to find her name in the register at Bomu Primary polling station. However he goes on to admit that:

**“She may have stood in the wrong line as she may not have understood the alphabet. I handed her over to police for assistance. I told her to try another line but she said she was tired.”**

Clearly therefore if this *‘Mary’* failed to vote it was not on account of her name not being found in the register but rather she left because she was tired.

**DW8** confirmed that although the EVID had initially failed it was later repaired and worked. She confirms that there were some voters whom she told to await verification of their particulars. Once this had been done and they were all allowed to vote.

Similarly in the case of Serline Chao the affidavit of **PHILLIS MUKENE KIMILU** the presiding officer at Bokole Nursery school (stream 3) puts this matter to rest. In paragraph 9 of her affidavit this Presiding Officer stated that the voter by name *‘Serline Mwandagha Chao’* was in fact as a registered voter in

Bokole Nursery school polling station and annexed an extract of the photo list register/green book 'PMK'1' which clearly showed that the name of this person did appear in the Register of Voters. Therefore the claim that the two voters names were missing from the register is patently false and if they failed to vote this must have arisen from a reason other than the fact that their names were missing from the register. Apart from these instances mentioned by the petitioner there is no single voter who testified that he/she was unable to vote due to the fact that their names were missing from the register. It is clear that voters whose names were not traced by the EVID system were later traced by reference to the manual register. The petitioner himself stated that he personally encountered a similar situation when he went to vote. He states:

**"I encountered problems. My name could not be traced in the register. The BVR machine was not working. After searching for 15 minutes my name was located in one of the other registers. There was a slight delay before I could vote."**

The existence of a slight delay cannot be said to amount to the disenfranchisement of any voter. I take judicial notice of reports across all major media outlets on how citizens of Kenya exercised great patience and some stood in queues even for the whole day waiting for their chance to vote. I am sure the voters of Changamwe were no exception. This problem of confusion in the registers has not been proved to have been so widespread as to materially affect the outcome of the election.

**(ii) Sealing and Transportation of ballot boxes**

In his submissions the petitioner alleged that most ballot boxes were not properly sealed in the presence of agents. It was further alleged that the ballot boxes were not transported to tallying centres in the presence of security officers as required by law. This, the petitioner claimed left room for manipulation of the ballot affecting the credibility of the election. However, no evidence was adduced at all in support of these allegations. Not a single ballot box or any polling station so affected was identified. This was a mere general allegation with no evidence to support it and thus merits no further consideration.

**Did the printing and use of a wrong symbol in the ballot papers render the ballot papers defective, null and void"**

The petitioner claimed that the symbol for one of the candidates namely **PATRICK KRIS NGUGI** was wrongly printed on the ballot paper thus rendering the ballot paper null and void. The petitioner submits that an election result based on a defective ballot paper cannot be upheld. The said '*Patrick Kris Ngugi*' filed an affidavit dated 3<sup>rd</sup> April, 2013 in support of this petition. He stated in his affidavit that the IEBC wrongly printed his symbol on the ballot paper as a circle with the initial "FND" instead of printing the correct symbol of a tiger. This he claimed led to confusion of the voters and affected the election result. Mr. Mutisya for the petitioner relied on the case of **ALI OMAR & OTHERS VS. JULIUS BARAKA MBUZI Civil Application No. 50 of 2006** wherein the Court of Appeal held that a party symbol is an integral part of the election and where it is wrongly printed the ballot paper is rendered defective and the election must be postponed.

The 3<sup>rd</sup> respondent while conceding that the symbol for this candidate was wrongly printed submitted that this defect alone could not have voided the entire election. Counsel for the 3<sup>rd</sup> respondent argued that unlike in previous elections, in the March, 2013 election both the name **and** the photograph of each candidate was required to be printed on the ballot paper, which was in fact done. I find that the **Ali Omar case** is easily distinguishable from the present situation on account of Regulation 68(4)(b) of the Election Regulations which requires that in addition to a candidate's name and symbol a **photograph** of

the candidate also be printed on the ballot paper. The '*ratio decidendi*' of the **Ali Omar case** was clearly stated as follows:

**“As regards the ballot paper, the court was of the considered view that there was a defect in the ballot paper. This defect was too important to be ignored as it was capable of misleading the voters.....” [my emphasis]**

The court in that case felt that a misprint of the symbol was likely to mislead the voters. In this case where the candidates name was properly printed and the correct photographic image printed on the ballot paper it is hard to see how a voter could be misled.

I have carefully examined the sample ballot paper annexed to the affidavit of the 2<sup>nd</sup> respondent. The photographs of **all** candidates are clear and unmistakable. In my view there is no possibility for any confusion. For voters who were illiterate, they could rely on the photograph in order to identify the candidate of their choice. No voter had testified that due to the misprint of the symbol they were unable to identify the said Kris Ngugi by his photograph and thus felt confused as to whom to vote for. The said candidate only garnered 197 votes out of the total 37,656 votes cast. He did not file a petition to challenge the election result on account of the misprinted symbol. There has been no allegation that this action of misprinting the symbol of this particular candidate was deliberate, intentional and/or malicious. It was a genuine mistake. In the case of **MAHADEO VS. BABU CIDAI PRATAP SINGH & OTHERS** the Supreme Court of India gappled with a somewhat similar situation. In that case the court held as follows:

**“The argument urged by respondent No. 1 before the Election Tribunal was that the misprint of the name constituted a serious irregularity in the form or design of the ballot paper .....Misprinting of the name of respondent No. 1 on the ballot papers amounts to non-compliance with rule 22 of the Rules; but the proof of such non-compliance does not necessarily or automatically render the election of the appellant void. To make the said election void, respondent No. 1 has to prove the non-compliance in question and its material effect on the election.”**

In the case of **RISHAD HAMID AHMED AMANA VS. IEBC & OTHERS Malindi EP No. 6 of 2013** the court held that irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. I therefore find that although a wrong symbol was used for one of the candidates in the election for Member of National Assembly, proving non-compliance with regulation 68(4) (a) of the Election Regulations such non-compliance did not in my view have the result of materially affecting the election. Therefore, the use of this wrong symbol did not render the ballot papers defective, null and void and incapable for use in conducting the election.

**Were the elections held on 4<sup>th</sup> March, 2013 for Member of National Assembly for Changamwe Constituency including the voting, counting and tallying flawed, irregular, biased, free, fair and credible"**

The petitioner has in his petition alleged that the election as held in Changamwe Constituency was severely compromised and cannot be said to have been free, fair and/or credible. The petitioner made several allegations of irregularities/flaws which in his view served to impugn the election. I will now proceed to consider and make determination of each individual allegation using as a basis the final submissions made by Mr. Mutisya for Petitioner.

### **1. Lack of proper or adequate administrative**

**arrangements for the conduct of the election.**

Under this ground the petitioner raised two distinct complaints:

- Security
- Voting in an un-gazetted area

On the first limit the petitioner claims that the 3<sup>rd</sup> respondent breached Article 83(3) of the Constitution by failing to ensure that there was adequate provision for security both prior to and during the polling exercise. This, the petitioner submitted led to voter apathy/fear with the result that many voters failed to come out to vote thus denying him victory. He also claimed that due to hate leaflets which had been circulated in Changamwe several of his voters left the Constituency and returned to their rural/upcountry homes thus denying him votes. The petitioner claimed that due to this insecurity and fear the process cannot be said to have been free and fair. On its part the 3<sup>rd</sup> respondent denied each specific allegation. They countered that the killings which occurred on the eve of the election took place in Miritini which is **not** part of Changamwe Constituency. The 3<sup>rd</sup> respondent also countered that the IEBC took all the steps it was mandated to take in order to ensure that there was adequate security during the election. Article 83(3) of the Constitution provides as follows:

**“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 for election.”**

Obviously in a situation of heightened insecurity and fear no meaningful election can take place.

It is a fact and one which is conceded to by the respondents that on the night of 3<sup>rd</sup>/4<sup>th</sup> March, 2013 an incident took place in which a number of police officers were killed in Mombasa County. Although the petitioner states that the incident occurred in Changamwe Constituency he accepted under cross-examination that Miritini where the incident occurred actually falls within Jomvu Constituency, a separate Constituency which had been carved out of Changamwe Constituency during the last Constituency Boundary Review. Nevertheless the petitioner insists that since the officers who were killed were from Changamwe police station this act had a bearing upon the security in Changamwe Constituency. Without a doubt the killing of the police officers on the eve of elections was an unfortunate occurrence which must be condemned in the strongest possible terms. However, this was a deviant criminal act for which certain individuals were arrested and stand charged in a court of law. The attack was beyond the control of any party and certainly cannot be blamed on the 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> respondents. The petitioner also made reference to statements which had been issued by the MRC calling for a boycott of the election process in the Coastal area. Once again these threats were made by an outlawed and illegal organization and cannot be attributed to the 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> respondents. The MRC had been reported in the media to be calling for a boycott of the polls in the **whole** of Mombasa County and not just in Changamwe. The issue of security must have been uppermost in the mind of both the Government and the IEBC as media reports indicate that immediate steps were taken to bolster security in the whole of the Coast region. Reference was also made by the petitioner to leaflets put out by the MRC urging “*kura kwa wapwani*” i.e. “*votes for Coastal people*”. This the petitioner claimed alienated the non-coastal or up-country people who formed the bedrock of his support base leading to many of his supporters leaving Mombasa during elections.

These remain mere allegations which are not supported by any tangible evidence. There is no evidence that even one of the petitioners’s supporters left Mombasa and failed to vote for him as a result of these incidences. Even if some voters shown to have left the coast during the election period, there can be no way of knowing if such persons would have actually voted for the petitioner. It cannot be

assumed that all up-country voters living in Changamwe supported the petitioner. Annexed to the petition were two newspaper reports from the local dailies which detailed the deployment of the military to the coast to bolster security. The article in the Daily Nation of March 5<sup>th</sup> 2013 annexed to the petition 'PMN-4A' read as follows:

**“The presence of soldiers re-assured residents of their security many of who later trooped to polling stations to vote after initial fears triggered by the attacks.”**

Similarly the petitioner's own annexure a report by MUHURI a Muslim based Human Rights organization states at page 8:

**“MUHURI commends the swift action taken by police to arrest the situation and restore order in most parts of the [Coast] region. By the morning of polling day, the violence had been quashed and no further insecurity incidences were reported. Security personnel could be seen patrolling estates and ensuring voters of security as they voted. Though in few parts of the region the situation remained tense, the presence of security personnel was assuring and comforting to most .....**”

It is clear therefore from the petitioner's own annexures that proper efforts were made to address and overcome any fears that could have resulted from the murder of the officers. The 2<sup>nd</sup> respondent who was the Constituency Returning Officer in her evidence confirmed that she took steps to ensure that there was adequate security before polling commenced, and to this end she participated in meetings held with Government and security organs to address the issue and to plan for the polls ahead. Several of the presiding officers who testified told the court that they were given strict instructions not to open the polls until police officers deployed to their polling stations had arrived and were on site. It is clear therefore that the respondents did all that was within their power to ensure that adequate security arrangements were in place during the election. To place upon the respondent's responsibility for criminal acts like murder or the utterances of illegal organizations would be overstretching their mandate. With respect to the 1<sup>st</sup> respondent no link has been ever alleged much less proved between himself and MRC or the killers of the police officers. The mere fact that the 1<sup>st</sup> respondent has roots in the coastal region does not mean that he supported or condoned the beliefs and utterances of the MRC. Indeed the fact that the 1<sup>st</sup> respondent did not condone this position is evidenced by the very fact of his participation in the election as a candidate.

Contrary to the petitioner's claim that voting was marred by apathy and fear the fact of the matter is that out of a total of 50,025 registered voters 38,068 took part in the election. This represents a voter turnout of 64.5% which by any standards is a good turnout. Once again the MUHURI report annexed by the petitioner states at page 21:

**“.....It is very encouraging that people came out in large numbers in all polling stations to exercise their democratic right to vote for individuals who will take over the mantle of leadership for the next five years. We are indeed elated that persons from all walks of life, male and female, young and old, the rich and poor all showed their patriotism and stood in long queues to vote. The turnout at the Coast was over 70% which was one of the best in the country .....**”

Clearly the voters of Changamwe were not deterred by the incidences referred to and came out in full force to exercise their Constitutional right to elect leaders of their choice. I therefore find that there was no breach of Article 83(3) by the respondents in the election for Member of National Assembly in Changamwe Constituency.

The second limb of this particular ground related to the allegation that the 3<sup>rd</sup> respondent illegally carried out elections in an un-gazetted area. The area in controversy here was **Lilongwe Gardens polling station** which is conceded by all parties to be located in an open field bordered by shops, bars, charcoal dens and residential houses. The petitioner alleges that the respondents moved from the open space to conduct the counting and tallying of votes in a residential house owned by a female village elder known as '**LOISE NAMAYAN alias Mama Prisca**'. The 3<sup>rd</sup> respondent denies having illegally moved the polling station but concedes that a decision was made to move the activities to the veranda of a house in the vicinity in order to protect the election officials as well as the election materials from the rain which had begun to fall at about 11.00 p.m. **PW7 SUSAN WAKUTHI** told the court that no structures like tents, chairs, etc. were provided for the election officials and she herself voted at the residence at this female village elder. **DW7 AGNES KAMANTHE MAILU** was the presiding officer at the Lilongwe Gardens polling station stream 1. She conceded that no tents were provided at the polling station but states that she only decided to move to an adjacent house when it began to rain. Given that this polling station was in an open ground the officers as well as the materials they had like ballot papers, registers, etc. were at the mercy of the elements. I doubt that a move a few metres away to a covered veranda for protection from the rain can be said to amount to a move to a non-gazetted area. The fact that **PW7** went to this place and actually voted means that voters who turned up to cast their ballot at Lilongwe Garden were able to easily identify the polling station. There was no confusion or ambiguity about the location of the polling station. For the IEBC to move to a sheltered spot nearby complete with ballot boxes and other materials cannot have been said to be an action intended to prejudice the petitioner. There is no voter who has claimed to have gone out to vote at Lilongwe Gardens and failed to locate where the IEBC officials were. The actions of **DW7** are covered and given legality by Regulation 64 of the Elections (General) Regulations 2012 which provides:

**“64(1) Notwithstanding the terms of any notice issued under the Act or these Regulations, a presiding officer may, after consultation with the Returning Officers, adjourn the proceedings at his or her polling station where they are interrupted by a riot, violence, natural disaster or other occurrence, shortage of equipment or other materials or other administrative difficulty, but where the presiding officer does so, the presiding officer shall re-start the proceedings at the earliest possible moment.**

**2. The discretionary powers of a presiding officer under sub regulation (1) shall include a power in the circumstances therein mentioned to transfer the proceedings to another polling station or public facility in the same Constituency, and where presiding officer does so .....**”

I therefore find that **DW7** the presiding officer having been compelled by the circumstances to be creative when no tents were forthcoming from IEBC, did properly exercise her mandate under Regulation 64(2) to move the proceedings to a sheltered veranda in order to protect the election materials. It was suggested that the IEBC officials received certain benefits like food and water from the owner of the house. This has not been proved to have happened and in any event to offer a fellow human being a glass of water cannot in any way be seen to be prejudicial to any candidate. **DW7** is categorical that she did not enter the house in question nor did she consult or communicate with any occupant of that house. She only made use of the veranda as a shelter. In my view the fact that the veranda so used was in the house of a village elder is neither here nor there as this fact has not been shown to have had any effect on the counting or tallying of votes. The petitioner has failed to show how the move to this veranda either prejudiced his position as a candidate or affected the election results.

(ii) **Violence, Corruption and Bribery**

The petitioner submitted that the electoral process in Chamgamwe was marred by violence, corruption and bribery. On the question of violence the petitioner alluded to the murder of police officers at Miritini. This aspect of the petition has been dealt with earlier on in this judgment. There were claims that voters had been threatened and intimidated. These claims are not convincing particularly since no witness who experienced such threat and/or intimidation was called. Particularly the petitioner claimed that at Bomu primary school polling station the 1<sup>st</sup> respondent drew a gun which he used to threaten people at that venue. On his part the 1<sup>st</sup> respondent categorically denies this and states that he is not even licenced to carry a firearm. These are very serious allegations which have a criminal connotation. As such the standard of proof required here would be *'beyond a reasonable doubt'*. The petitioner himself did not witness this incident and no report was made to any police station regarding this gun-waving incident. Even to date there is no evidence that this alleged incident has been reported to any police station.

Allied to this claim of violence was the claim of bribery and corruption by the 1<sup>st</sup> respondent and persons who were said to be his agents. There were allegations of voter bribery at Chaani primary school and Kipevu primary school polling stations. The persons who were alleged to have been perpetrating these offences were some unidentified people believed to be ODM representatives. Such allegations are far too vague to be taken seriously.

**PW5 EUNICE KAMBUA MUTUKU** testified that she saw ODM agents taking away identity cards from voters in the queue which they would then enter with into the polling station (presumably to vote on behalf of these people). Once again these claims are very short on specifics. **PW5** is unable to name or identify the persons who were doing such acts and she is also unable to name or identify any person whose identity card was taken from them in this manner. She also took no steps to report these activities to any police station – she only reported to an officer at the polling station and to the petitioner himself. The claims of bribery by giving out money to voters were similarly unsubstantiated. In such instances where bribery or vote buying is being alleged there must be unequivocal proof. **Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 15 on Elections paragraph 695** provides some insight on the nature of evidence required to prove bribery as follows:

**“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.”**

In the case of **SIMON NYAUNDI OGARI & ANOTHER VS. HON. JOEL OMANGWA ONYANCHA & 2 OTHERS [2008] KLR** Hon. Justice Musinga held that:

**“Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it is not easy to prove bribery more especially where it is done in secrecy. In such cases, perhaps bribery may be inferred from some peculiar aspects of the case but when it is alleged that bribery took place publicly and in presence of many people, the court cannot be satisfied with anything less than the best evidence which is always direct evidence given first hand.”**

The evidence of **PW5** is that this vote-buying was taking place in the open whilst people were on the queue waiting to vote. Surely many people other than herself would have witnessed this incident if in fact it actually occurred. Yet no action was taken by IEBC officials and **PW5** herself did not bother to report the incident to any police station and point out the culprits (who were probably still in the vicinity).

**PW9 MICHAEL IKUTHU** told the court that at Kipevu polling station he saw money being dished out

by 1<sup>st</sup> respondent's agents. He could not identify those agents who were giving out the money nor could he state how much money was being given. In the case of **THOMAS MALINDA & 2 OTHERS VS. IEBC & 2 OTHERS EP No. 2/2012 Machakos** the court held that where allegations of bribery are made against party agents concrete evidence must be tendered of what makes the witness associate the person he alleges to have been bribing voters with the respondent or his party. The allegations in addition must be confirmed by another party.

Under cross-examination **PW9** admits

**“Bribery of voters is an election offence .....I did not report the incident to the police station.”**

This court cannot be used to remedy the failure to report alleged bribery, intimidation and violence [**Thomas Malinda** case]. This evidence does not meet the standard required to prove election offences and this ground is therefore dismissed.

(iii) **Late opening of polling stations and locking out of**

**the petitioner's agents from the polling stations:**

The petitioner complained that the polling stations did not open on time thus causing the commencement of voting to be delayed. The 3<sup>rd</sup> respondent concedes that many of the polling stations in Changamwe were opened late from about 10.00 a.m. instead of at 6.00 a.m. This has been explained by the fact that security needed to be guaranteed before the polling stations could be opened. (I have dealt with this aspect of security earlier on in this judgment).

The second respondent who was the Constituency Returning Officer told the court that she did instruct her presiding officers not to proceed to their polling stations until proper security was in place. This was prudent action in the circumstances and was actually taken to avoid any disruption of the polls. It has been conceded by several of the petitioner's witnesses that the polling stations were all kept open beyond the 6.00 p.m. official closing time to compensate for the time lost due to the late start. In his own testimony the petitioner accepts that the late opening of polling was compensated for when he states as follows:

**“When we completed [voting] the IEBC extended voting hours to compensate for lost time because in Changamwe most polling stations had opened late.”**

Regulation 64(3) authorizes a presiding officer to

**“Extend the hours of polling at the polling station where polling has been interrupted under this regulation or for other valid cause, and**

**Where polling in that polling station has started late, extend the hours of polling by the amount of time which was lost in so starting late.”** [my emphasis]

The actions of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were therefore perfectly lawful and justifiable. In any event there is no evidence from any voter who went to try and vote but could not do so due to late opening. In other words there is no evidence that the late opening prejudiced the petitioner in any way or had any adverse effect on the outcome of the election.

The petitioner did also complain that in several polling stations his agents were denied access. This

denial the petitioner submitted affected the credibility of the election as he was denied the opportunity to confirm the validity of the results at the polling station where this occurred. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents in their reply stated that only agents who did **not** have authentic identification documents were denied access. **PW2 CHARLES OLIVIA ALIARO** names one *John Nzioka* as a WIPER agent who was denied access to the polling station at Baraka village despite having proper documentation. However, under cross-examination by counsel for the 1<sup>st</sup> respondent **PW2** says

**“Nzioka told us that he was sent away because he did not have all the relevant documents.”**

Therefore this very agent confirmed to **PW2** that he did not have with him proper identification to access the polling station. The IEBC were under no obligation to admit every Tom, Dick and Harry into the polling stations. The requirement that one produce the relevant authentic documents before being allowed access existed to ensure good order and to keep out imposters and trouble makers. **PW4 JACOB AMBOKO ISMAEL** who was the lead agent for the WIPER party in Changamwe Constituency also claimed that their agents were locked out of polling stations. He confirmed that an agent was required to carry his letter of authorization, oath of secrecy and accreditation badge in order to be allowed into the polling station. **PW4** states that he did instruct all his agents to carry with them the relevant documents but also concedes that

**“I cannot tell if all WIPER agents carried the requisite documents.”**

Regulation 62(c) of the Election Regulations provides that the presiding officer shall admit into the polling station *‘authorized agents’*. Regulation 62(1) however allows the presiding officer to regulate the number of persons to be admitted into a polling station at any one time. Regulation 62(2) provides:

**“(2) Notwithstanding sub-regulation (1) the**

**presiding officer shall admit to the polling station not more than one agent for each candidate or political party.”**

Therefore as stated by the 2<sup>nd</sup> respondent the denial of access to a second WIPER agent where there was already one inside the polling station was quite lawful in order to avoid overcrowding. The complaint that WIPER agents were denied access is belied by the fact that most of the Form 35's were in fact signed by WIPER agents proving that they were inside the polling station after all. **PW9 MICHAEL IKUTHU** mentioned certain polling stations from which he claimed WIPER agents had been thrown out. However, upon seeing the Form 35's he admitted that the agents did actually sign the form.

It is not shown that WIPER agents were denied access unreasonably or capriciously. No agent who had proper and valid documents has testified that he was denied entry. From the evidence I find that it is most likely that only agents **without** proper accreditation were denied entry – as they ought to have been. Lastly, Regulation 62(3) states that:

**“(3) the absence of agents shall not invalidate**

**the proceedings at a polling station.”**

This ground of the petition therefore has no merit.

(iii) **Irregularities and Errors in the Form 35's**

The petitioner alleged that the Form 35's which were used as the basis for counting and tallying in order to arrive at the determination of who won the election, were so marred with irregularities and errors as to render them totally unreliable as a basis of determining who garnered the highest number of votes. Under this heading the petitioner cited the following anomalies –

- a. Form 35's not signed by agents and not bearing comments of the presiding officer.
- b. Form 35's with alterations which had not been counter-signed and Form 35's with total number of votes which were different from the total individual tallies
- c. Form 35's indicating the existence of stray ballots.

At this juncture before I proceed to analyze the evidence adduced in support of the above allegations, it is important to note that the petition did include a prayer for scrutiny and recount of all votes cast. During the pre-trial conference it was agreed that this particular prayer be dealt with through the Notice of Motion dated 24<sup>th</sup> May, 2013. At the close of the cross-examination of the petitioner's witness this particular Notice of Motion was substantially argued before the court. In my ruling dated 24<sup>th</sup> July, 2013, I found that no sufficient basis had been laid and I did dismiss the prayer for scrutiny and recount made by the petitioner. The analysis of the evidence relating to the anomalies in the Form 35's will provide greater insight on the reasons why I came to that conclusion.

**a. Form 35's not signed by agents and not bearing any comments from the presiding officers.**

The petitioner complained that several of the Form 35's used to tabulate the election results were not signed by agents and some did not bear any comments by the presiding officers in the space provided on the Form for that purpose. He argued that this contravened Regulation 79 and rendered the figures contained in those forms unverifiable. The 3<sup>rd</sup> respondent did avail to the court a bundle of all the Form 35's from all 86 polling stations in Changamwe Constituency. A perusal of these forms confirms that indeed some were not signed by agents and others bore no comments from the presiding officers. On their part the respondents submit that this failure to comply with Regulation 79 does not negate the results contained in the Form 35's. The witnesses for the respondents explained that in certain cases the agents left the polling stations before the documents were filled and were therefore not present to sign the forms. There is evidence that in certain circumstances the presiding officers did endorse on the Form 35's the reasons why agents failed to sign the Form 35's. At Changamwe **Social Hall polling station No. 014, stream 6**, the presiding officer indicated the reason for failure of agents to sign as "*Had already signed in my poll day diary*". At **Bomu primary school polling station No. 001, stream 2** the remark endorsed by the presiding officer read "*left before I filled the forms were not friendly because we went late to the polling station*". It is arguable that the fact that an agent has signed the polling day diary does not mean he need not sign the Form 35, however in cases where an agent has left or is hostile then there is not much a presiding officer can do. **PW8 MARTIN MWANZIA** was one of the petitioner's agents at Bokole primary school polling station. He testified that several Form 35's were not signed by agents but he is unable to give specifics of this allegation. **PW8** however concedes that he did himself sign the Form 35 for his polling station thereby confirming the results therein. In any event the petitioner has failed to demonstrate how the failure of agents to sign the Form 35's affected the results contained therein. No agent has come forward to claim that any Form 35 did not contain the correct figures, nor that the results were incorrect. In the case of **JOHN KIARIE WAWERU VS. BETH MUGO & 2 OTHERS 2008 e KLR** the court held that the mere non-attendance by an agent at a place and time contemplated does not invalidate the Act. Further Regulation 79(6) of the Elections (General) Regulations, 2012 specifically provides that

**“The refusal or failure of a candidate or 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”.**

Therefore the failure by agents to sign the Form 35's and the failure to indicate reasons by the presiding officers cannot be a reason to invalidate the figures contained in such Form 35's. In other words failure to sign a Form 35 does not in itself automatically render the contents of that form invalid.

**b. Alterations on the Form 35's**

The petitioner took issue with the fact that certain Form 35's contained alterations, which alterations were not counter-signed. He argued that this provided evidence of interference with the results. The respondents submitted that the alterations whether counter-signed or not did not affect the total number of votes for each candidate in the Form 35. As a court I did conduct a careful examination of each Form 35. I noted that the alterations complained of only affected the totals of the votes cast in each polling station. There were no alterations to the figures for votes assigned to each individual candidate. I also noted that in every Form 35 (save for two (2)) including the ones which had unsigned alterations the totals of the number of votes assigned to each candidate were correctly indicated against the row for 'Total number of votes cast'. This persuades me that the alterations contained in the Forms were due to inadvertent arithmetical mistakes made by the officer filling out the form. In the case of **WAVINYA NDETI VS. IEBC & 4 OTHERS Machakos EO 4/2013** it was held that the task of conducting elections is undertaken by human beings and not programmed machines. Given the strenuous conditions and long working hours involved, it is quite feasible that such errors would occur. An allowance must be made for such human errors which are innocent mistakes that do not fundamentally affect the results.

As alluded to earlier in two (2) Form 35's I noted that the figures did not quite add up. This was at **Al-Irshad Nursery school polling station No. 011 stream 2** where the total for the votes garnered by each candidate (i.e. total number of valid votes cast) was indicated to be **289**. The correct figure ought to have been **420**. Similarly at **Chaani social hall polling station No. 021 stream 4** (which did not contain any alteration) the total number of valid votes cast was indicated to be **462** whereas the correct figure as obtained by adding up the number of votes assigned to each individual candidate was **412**. These were probably errors in addition. The total difference in number of votes from the two polling stations amounted to only **181** votes. Even if these votes were to all be assigned to the petitioner his vote tally would still **not** have exceeded that of the respondent. Therefore these discrepancies in my view had no material effect on the final outcome of the election. I have also carefully examined the Form 36 which is a compilation of the results transferred from Form 35 and I find that in the Form 36 the correct totals i.e. 420 for Al Irshad Nursery and 412 for Chaani Social Hall are indicated. Therefore it is evident that the arithmetical errors which existed in the Form 35 were not carried over onto the Form 36. I wish here to adopt the words of Kimondo J in **KAKUTA MAIMAI HAMISI VS. PERIS PESI TOBIKO & OTHERS EP NO. 5 of 2013** where he observed that:

**“I am satisfied that the process can result in clerical errors due to the speed and flow of information. What is material is whether the final Form 36 corresponds in all particulars with entries in part B of all the Form 35.”**

It is the Form 36 that is ultimately used to determine the number of votes each candidate garnered, thus in the absence of any error in the Form 36, the complaint about the alterations in the Form 35's cannot be sustained.

Finally, on this point I find that alterations complained of were not so widespread and pervasive as to have had an effect on the total tally of votes. I therefore dismiss this ground.

**c. Form 35's indicating the existence of stray ballot**

The petitioner took issue with an endorsement on some Form 35's indicating the existence of '*stray ballots*'. He argued that such stray ballots may have affected the final tally of results. This phenomenon of stray ballots occurred in only two out of the 86 polling stations in Changamwe Constituency being **Changamwe Social Hall polling station No. 014** and at **Baraka Village polling station No. 010**. The 2<sup>nd</sup> respondent who was the Constituency Returning Officer gave the court a detailed explanation of the meaning of the term '*stray ballots*'. She explained that a stray ballot is a ballot which though properly marked is placed by the voter in the wrong ballot box e.g. a vote cast for senator is wrongly placed in the ballot box for Member of National Assembly or vice versa. It must be remembered that this was the first time in Kenya where voters were being required to cast votes in respect of six (6) elective posts at the same time. It is not surprising that some confusion could have occurred and a voter inadvertently places a ballot in the wrong box. This is quite clear from the Form 35 for **Umoja primary school polling station No. 004 stream 3** where the presiding officer clearly endorsed on the Form 35 the following comments:

**“The number of votes cast was higher than the number of voters in the station as some voters miscast their ballots”.**

Such a miscast ballot obviously cannot be counted in favour of any candidate. Any such stray ballot found in the ballot box for Member of National Assembly was not counted in favour of the petitioner, the respondent or for any other candidate. It is excluded from the tally of votes for that particular elective post.

The 2<sup>nd</sup> respondent told the court that such stray votes would only pose challenges when reconciling the votes cast. The stray votes are included as "*rejected votes*." That being the case such stray ballots would obviously have no effect on the final tally of votes and thus would have no effect on the result of the election. Finally on this ground of irregularities in the Form 35's, I am not persuaded that such irregularities were of such magnitude and were so widespread as to materially alter the result of this election.

**d. Ballot stuffing and double voting**

The above allegations were made against the respondents but once again I find the allegations to have been vague and short of specifics. The act of ballot stuffing and double voting is alleged to have occurred at Changamwe Social Hall polling station. **PW4 RAJABU AMBOKO ISMAIL** who was the chief agent for WIPER in his evidence stated:

**“Marked ballot papers were stuffed into ballot boxes. This was at Changamwe Social Hall. I was informed of this by my agent Joseph Munyotu. He followed me and told me about this when I had gone to vote. He told me that some voters were being given more than one ballot paper.....”**

This Joseph Munyotu did not swear an affidavit as proof of these claims. **PW4** goes on to admit that:

**“I personally did not witness this stuffing of the ballot boxes.”**

These therefore remain mere allegations with no tangible evidence to prove them.

(iv) **Alleged bias against the petitioner:**

The petitioner finally claimed that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents exhibited open bias against him during the electoral process. He claimed that he made several oral and written complaints which were never addressed nor replied to. The petitioner further complained that he made several demands for a recount to the 2<sup>nd</sup> respondents but that she did not accede to his request. In response the 2<sup>nd</sup> respondent conceded that the petitioner did come to the Constituency tallying centre and that they spoke several times. She further confirms that the petitioner did make a verbal complaint to her about non-admission of his agents. She also confirms that the respondent handed her a letter dated 5<sup>th</sup> March, 2013 which letter she received and stamped 'PMN-10'. The 2<sup>nd</sup> respondent explained that she endorsed the date of receipt as 4<sup>th</sup> March, 2013 but this was an error. She confirms that she actually received the letter which was dated 5<sup>th</sup> March, 2013 on the same day 5<sup>th</sup> March, 2013 at 22.15 p.m. while at the tallying centre. In his letter the petitioner demanded a recount and tallying of votes at seven (7) named polling stations.

With respect to the complaint over non-admission of his agents the 2<sup>nd</sup> respondent explained to the court that she did act on this complaint by calling the presiding officers to confirm whether any agent holding proper accreditation had been excluded from the polling stations. They denied this was so. 2<sup>nd</sup> respondent stated in her evidence:

**“After the petitioner made the allegation [of failure to admit his agents into the polling stations] I checked with my presiding officers whether any agent holding proper documentation had not been admitted ..... I was told that there was none. The presiding officers told me that they denied entry to agents who either did not have the required documents for admission or where another WIPER agent had already been admitted. The petitioner complained to me verbally and I responded to him verbally. I did not reply in writing due to time constraints and lack of secretarial services at the tallying centre.”**

The 2<sup>nd</sup> respondent also explained that the reason she did not act upon the petitioner's demand for a recount and re-tally of votes was because by the time he handed her his letter of complaint (on the day after the election) the ballot boxes had already been delivered to the tallying centre from the various polling stations with seals intact. Regulation 80(1) allows a candidate or his agent to demand a recount at the polling station. Once the boxes are sealed a recount cannot be conducted. The petitioner confirms this position in his evidence when he says:

**“I am aware that I am entitled to a recount at the polling station. By the time I wrote the letter the ballot boxes had already been transferred to the tallying centre.”**

Therefore there was nothing malicious in the refusal by the 2<sup>nd</sup> respondent to accede to the petitioner's demand for a recount. His agents at the polling stations who ought to have made such a request obviously did not do so. Many of them did sign the Form 35's indicating that they had no quarrel with the counting as conducted at the polling stations. I was able to observe the demeanour of the 2<sup>nd</sup> respondent as she testified in court. She struck me as a mature and organized officer who was clearly up to the task which had been assigned to her. She gave evidence in a clear and concise manner and was able to answer questions put to her in cross-examination in a calm and efficient way. She demonstrated that she received and acted upon all the complaints which the petitioner made to her. Her failure to respond by letter does not amount to proof of bias. I find no evidence of bias by herself or indeed by any other officer as against the petitioner.

The respondent relied on a report prepared by Muslim For Human Rights (MUHURI) which he annexed to his petition as 'PMN9'. In that report teams from 'Muhuri' who went out to monitor the elections at the Coast Region concluded that

**“We cannot say for certain that the elections were peaceful, free and fair”.**

Firstly, although Muhuri is a well respected NGO in the Coast their report does not bind this court at all. Secondly there is no evidence that ‘Muhuri’ teams had the benefit of hearing the evidence which has been availed to this court before they made their conclusions. No mention was made in the report of any bias noted against the petitioner. All the report spoke about were the usual challenges expected to be experienced in mounting a General election of such a magnitude. Had any member of the MUHURI team noted specific incidences of election offences, malpractices or bias against any candidate, I have no doubt they would have readily sworn affidavits to this extent. This report does not add much value to the petition.

### **CONCLUSION**

From the evidence adduced before this court it is evident that indeed some errors and/or irregularities may have occurred during the election for Member of National Assembly for Changamwe constituency. However, in order to justify the nullification of the election the court must be satisfied that such errors and/or irregularities had the effect of rendering such election invalid, null and void. I am guided in coming to my decision by section 83 of the Elections Act, 2011 which provides:

**“No election shall be declared void by reasons 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 that written law or that the non-compliance did not affect the result of the election.”**

In **RTD. COL. DR. KIZZA BESIGYE VS. ELECTORAL COMMISSION and MUSEVERNI PRESIDENTIAL PETITION NO. 1 OF 2006**, the Hon. Odoki, Chief Justice of the Republic of Uganda noted that:

**“Courts are therefore enjoined to disregard irregularities or errors unless they have caused substantial failure of justice ..... The fundamental or primary consideration in an election contest should be whether the will of the people has been affected.”**

In the **JOHN KIARIE** case Hon. Justice Luka Kimaru held that a court ought not interfere with the democratic choice of voters unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the election null and void and therefore subject to nullification. This is not the case here. The petitioner has failed to discharge his burden of proof.

My finding therefore is that this election was conducted in a manner that was unbiased, credible, free and fair and was an accurate manifestation of the will of the people. I find no valid grounds upon which this election ought to be nullified and I am satisfied that the 1<sup>st</sup> respondent garnered the majority of the votes cast in the election. Consequently I do hereby declare that the 1<sup>st</sup> respondent **OMAR MWINYI SHIMBWA** was validly elected as Member of National Assembly for Changamwe Constituency.

Therefore this petition dated 3<sup>rd</sup> April, 2013 fails and is hereby dismissed in its entirety. I further direct that the petitioner shall pay the costs of this petition to the 1<sup>st</sup> respondent in the sum to be taxed but not in excess of Kshs. 1.5 million. In addition I do direct that the petitioner shall also pay the costs of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as taxed but not in excess of Kshs. 1.5 million. The securities for costs which had been deposited in court to remain so held pending taxation of costs, and thereafter the said security deposit to be utilized to pay the respondents’ on a pro-rata basis..

A certificate of determination of this petition shall henceforth be issued in accordance with section 86 of the Elections Act, 2011.

I wish to end by expressing my sincere thanks and appreciation to all counsel for their diligence in handling this petition, and for their co-operation in keeping to the timelines agreed upon in order to expedite the hearing.

**Dated in Mombasa this 24<sup>th</sup> day of September, 2013.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Mutisya for Petitioner

Mr. Balala for 1<sup>st</sup> Respondent

Mr. Nyamodi for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Court Clerk Mutisya



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