



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

THE ELECTIONS ACT (2011)

ELECTION PETITION NO. 7 OF 2013

ELECTION FOR THE WOMAN REPRESENTATIVE OF LAMU COUNTY

BWANA MOHAMED BWANA.....PETITIONER

VERSUS

SILVANO BUKO BONAYA.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....2ND RESPONDENT

SHAKILA ABDALLA MOHAMED.....3RD RESPONDENT

JUDGMENT

1. Introduction

The Petitioner Bwana Mohamed Bwana filed this petition in his capacity as a voter challenging the election of the 3rd respondent as the Woman Representative Lamu County in the general elections held on the 4th March 2013 in the country. The returning officer Lamu county Silvano Bonaya and the Independent Electoral and Boundaries Commission hereinafter referred to as the Commission are named as the 1st and 2nd respondent respectively.

The 3rd respondent Shakila Abdalla Mohamed was declared the winner out of four candidates for the seat of Woman Representative whose results were as follows:

Shakila Abdallah Mohamed	- 17,233
Anastacia Wanjiru Mwangi	- 12,458
Ruweida Mohamed Obo	- 11,595
Pricilla Wambui Mutie	- 2,221

2. The Pleadings

This petition filed on the 28th March 2013 contains allegations that the Lamu County Women Representative election was not carried out in accordance with the **Constitution** and the **Elections Act** and the relevant regulations. The petitioner specifically complains of the following:

1. That most of the petitioner's candidate Ruweida Mohamed Obo's agents were locked out of the polling stations and were unable to scrutinize the ballot boxes, papers and other election materials or to verify the votes cast for their candidate;
2. Some of the agents who were present at the polling stations were not issued with Form 35 and 36 for verification of results;
3. That the presiding officers barred the agents from accompanying ballot boxes to the tallying centre contrary to regulations;
4. That the presiding officers did not address the protestations of the agents for being excluded from the poll or for being denied Form 35 and 36 and neither were reasons for such actions recorded as required by the law;
5. That some presiding officers influenced voters in favour of certain candidates;
6. That the Electronic Voter Identification Devices (EVID), the Biometric Voter Registration (BVR) and Results Presentation Systems (RPS) failed resulting to use of manual registers which are inaccurate, inefficient and susceptible to manipulation;
7. The presiding officers allowed agents and relatives of certain candidates to mingle freely with the Commission officials and to tamper with the Commission's machines and data at the County tallying centre;
8. That the 1st and 2nd respondents irregularly and wrongfully moved Ndau Dispensary polling station to Hanifiya, a distance of about one kilometre thereby disenfranchising the voters;
9. That the whole tallying exercise was marred with irregularities rendering the results unacceptable;
10. That the results were not officially announced by the returning officer and that his deputy was arrested one day after the returning officer had gone to the National Tallying Centre at Bomas of Kenya, Nairobi and that the officer was subsequently charged with doctoring the results.

The prayers sought in the petition are for nullification of the Lamu county Woman Representative election and an order for fresh elections. The prayer for scrutiny and recount of votes was granted by consent of the parties.

The 1st and 2nd respondents deny all the allegations and respond thus:

1. That the petitioner's candidate was represented by agents in the polling station named in the petition and some of them appended their signatures on Forms 35s.
2. That the 2nd respondent provided transport to the presiding officers and the clerks to transport election materials and was under no obligation to provide transport to agents.
3. That the election materials were securely sealed in presence of agents and transported to the tallying centres without any interference;
4. That the moving of Ndau Dispensary polling station was done because the room at the Dispensary was too small to accommodate election materials and the Commission staff considering that there were six (6) elections being held on the same day.
5. That upon the failure of the Electronic Voter Identification Devices (EVID) the manual register was reverted to and it was credible and secure;
6. That the elections were conducted in compliance with the law.

The 3rd respondent in denying all the allegations averred in her response:

- (1) That the elections were conducted in compliance with the law and the principles laid down in the Constitution;
- (2) That the moving of Ndaui polling station to Hanifiya was within the mandate of the presiding officer;
- (3) That the presiding officers could only allow one agent for each party in a polling station adding that failure or refusal by an agent to sign Form 35 cannot by itself nullify an election;
- (4) That the tallying exercise in both the Lamu East and West Constituencies and at the county tallying centre was done in a transparent manner and results announced publicly;
- (5) The 3rd respondent denies colluding with any presiding officers to do any unlawful act with view of manipulating or tampering with the elections;
- (6) That the petition ought to be dismissed and her election upheld.

3. The Law

The law governing electoral disputes is contained in the **Constitution**, the **Elections Act** and the relevant regulations. Election disputes belong to a special category strictly governed by the **Constitution** and the electoral statute.

Article 38 of the **Constitution** grants every citizen the right to make political choices:

38. (1) Every citizen is free to make political choices, which includes the right—

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

(3) Every adult citizen has the right, without unreasonable restrictions—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

The **Constitution** does not restrict the right to sue for enforcement of any fundamental right or freedom

envisaged in the **Constitution**. In an election petition, a candidate, a voter or any other person can approach the court to probe into the issue of whether an election was conducted in accordance with the principles laid down in **Chapter 7** of the **Constitution**.

Article 81 lays down the principles which the electoral system should adhere to. The elections must be free and fair and be by secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body in a transparent, accurate and accountable manner.

These principles are replicated in **Section 25(e)** of the **Independent Electoral Boundaries Commission Act**.

Article 81 of the **Constitution**, the **Elections Act** and the regulations provide the framework for the conduct of elections and resolution of disputes at different levels. **Section 75** of the **Act** empowers the High Court to deal with the question of validity of county elections. The dispute forming the subject matter in this petition falls within the jurisdiction of this court.

The Independent and Electoral Boundaries Commission is mandated to conduct and supervise elections under **Article 88** of the **Constitution** in accordance with the law. In any election petition, the Commission is a mandatory party to participate and defend its actions in the conduct and supervision of elections.

Elections are an expensive and tedious exercise for both the government and the candidates concerned. For this reason the law provides in **Section 83** of the **Act**:

83. No election shall be declared to be void by reason of non-compliance with compliance with any written law relating to that election if it appears 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.

This provision was drawn from the case of **Morgan & Others vs. Simpson & Others All E.R. (1974) 3 where it was held:**

Under

Section 37(1)

An election court was required to declare an election invalid (a) if irregularities in the conduct of the election had been such that it could not be said that the election had been 'so conducted as to be substantially in accordance with the law as to elections', or (b) if the irregularities had affected the result. Accordingly, where breaches of the election rules, although trivial, had affected the result, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections.

As an election court deals with allegations of fraud, irregularities, malpractices and other related issues, it must bear in mind the provisions of law and apply them for the general good with a view of probing whether the will of the electorate was exercised in the disputed election.

In the case of **Joho vs. Nyange** Maraga, J dealt with the subject of nullifying an election. He said:

An election will be nullified if it is not conducted in accordance with the law as to elections. It will also be nullified, even though conducted substantially in accordance with the law as to elections, if there are errors or mistakes in conducting it which, however trivial, are found to have affected the results of the election.

The Constitutional guidelines as to voting are contained in **Article 86** and imposes an obligation to the Commission to ensure compliance:

86. At every election, the Independent Electoral and Boundaries Commission shall ensure that—

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

4. The Burden of Proof

The burden of proof in an election dispute is on the petitioner to establish that there were irregularities, malpractices or fraud in the conduct of the disputed election for the court to grant him the remedy sought. The petitioner must discharge the burden of proof by adducing cogent, credible and consistent evidence as required by **Section 107 (2)** of the **Evidence Act**:

107(2). When a person is bound to prove the existence of any fact it is said the burden of proof lies on that person.

The burden of proof and the degree required in an election petition was set in the election petition of **Raila Odinga vs. IEBC & Others Petitions nos. 3, 4 and 5 of 2013.**

The threshold of proof should, in principle be above the balance of probability, though not as high as beyond-reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question.

It is therefore an established position that the degree of proof is between the balance of probability and beyond reasonable doubt. However, election offences will require to be proved beyond reasonable doubt.

The petitioner called 20 witnesses to support his case dropping off one Twalib Mzee. The 1st and 2nd respondents conducted their cases jointly and called a total of seven (7) witnesses leaving out five (5) who had filed affidavits. As for the 3rd respondent six (6) witnesses testified while five (5) fell by the way side. All the affidavits of the witnesses who did not testify were expunged from the record.

5. The Issues

I have perused the pleadings, the evidence, the submissions and the issues filed by the parties during the pre-trial conference and scaled down on the following issues for determination:

- a) whether the elections for Lamu County Woman Representative were conducted in accordance with the Constitution and the statutes;
- b) whether the 1st and 2nd respondents are guilty of any election offences;
- c) whether any order of costs will be made and who bears the burden.

6. The Submissions

Mr. Kilonzo of Kilonzo and Aziz was the counsel for the petitioner while the 1st and 2nd respondents were represented by Mr. Khaseke of Mohamed Muigai & Co. Advocates. Mr. J. K. Munyithia was the advocate for the 3rd respondent.

a) The Petitioner

The court was addressed on the law relating to the form and procedure of declaration of results under **Article 86(b) and (c)** of the **Constitution** which is the mandate of the Commission under **Section 39** of the **Elections Act**. **Regulations 83, 84 and 87** provide for the form and procedure of announcement of results. The petitioner contended that at Lamu county tallying centre, the results were not declared according to the law for the returning officer only announced the winners without giving results of each candidate. The court was urged to nullify the elections on this ground.

It is the petitioner's submission that where Forms 35 has not been signed by agents and statutory comments for failure to sign are not recorded, such results are in breach of a fair and transparent electoral process contrary to **Article 81** of the **Constitution**. The absence of agents in an election is evidence of an obscure process which resulted in the 2nd respondent failing in its mandate.

The petitioner relied on **Article of 99(2) (c)** of the **Constitution** which requires that a person who has not been a citizen of Kenya for the last ten years may be disqualified from being a Member of Parliament. This was in relation to one Anastacia Wanjiru Mwangi a candidate in the Lamu County Woman Representative election. At the time of nomination, Anastacia was said to possess dual citizenship namely that of Australia and Kenya and therefore not qualified to contest any elective post.

On the law relating to transfer of a polling station the petitioner referred the court to **Regulations 64** read together with **7(1)(c)** of the **General Regulations** arguing that the moving of Ndau Dispensary station to Hanifiya was arbitrary, illegal and irregular for lack of notice and gazettelement.

The petitioner urged the court to take note of judgment in Chief Magistrate to **Criminal Case No. 180 of 2013, Republic vs. Jonathan Kazungu Ngowa** where the deputy returning officer one Jonathan Kazungu Ngowa was convicted of an election offence and that it was recommended by the court that the returning officer Silvano Bonaya PW4 also be investigated. Relying on **Section 47A** of the **Evidence Act** the petitioner urged the court to call for the criminal record in **Criminal Case No. 180 of 2013** and recommend that PW4 be charged with an election offence for violating the law in the flawed announcement of the results and the subsequent events which led to the charge and conviction of Kazungu.

The missing counterfoils, broken seals, missing seals, missing ballots revealed by the scrutiny and

recount report point out to an election which were not free and fair.

(b) 1st and 2nd Respondents

It was submitted by Mohamed & Muigai Advocates for the 1st and 2nd respondent that the petitioner confined himself to only 9 polling stations and the tallying centre where irregularities occurred. In his submissions, he attempted to introduce other stations which is not proper and that the court should resist the attempt.

On the issue of transfer of polling station from Ndau Dispensary to Hanifiya, the court was urged to look at the reason behind it which was said to be limited space and take note that announcements were made in the mosque and a notice affixed at the Ndau Dispensary. The 2nd respondent was therefore within its mandate under **Regulation 64(3)**. If the voters turn out was anything do go by, the 1st and 2nd respondents argue that the voters were not disenfranchised.

On the allegations of barring agents from certain named polling stations, the 1st and 2nd respondent argued that the presiding officers could only admit one party agent as stipulated in **Regulation 62(2)**. The Independent Electoral and Boundaries Commission has no obligation to provide transport to agents to accompany ballot boxes to the tallying centre and neither is there a regulation requiring agents to accompany the ballots. Some agents who complained that they were barred, indeed signed Form 35. Those agents who failed to sign the form failed to record reasons for not doing so as required by the law.

On the issue of an unqualified candidate, the 1st and 2nd respondent argue that there was no evidence tendered to prove the allegation.

As for allegations regarding the events at the tallying centre, the 1st respondent summarized his submissions splitting them into four parts:

1. That there was no evidence adduced that any relative of the 3rd respondent manipulated the results at the tallying centre using a computer.
2. That the petitioner did not prove that the 3rd respondent made any threats to the returning officer.
3. The criminal case against the deputy returning officer is not relevant because the offence was committed after the announcement of results
4. That there is no evidence that the petitioner or his candidate requested for a recount at any polling station.

The petitioner has relied on authorities except one (*no.5 on the list*) based on the previous election laws which the court is urged to reject and focus on the current law.

The petitioner cannot allege at this stage that election offences were committed when he has not adduced evidence to prove the same.

Finally the court was reminded that the burden of proof never shifts to the respondent despite failure by the respondent to call any witness to rebut the petitioner's evidence.

c) 3rd Respondent

The 3rd respondent analyzed the evidence against the allegations in the plaint and in regard to issues filed by the petitioner after the pre-trial conference. The law applicable in the participation of agents in the election supported by case law was interrogated to the effect that the petitioner did not adduce

tangible evidence to prove the allegations in the plaint. These include claims of irregularities, breaches and election offences. It was submitted that presiding officers have the mandate to control the number of agents in a polling room in exercise of which may have had the effect of the petitioner's candidates agents being locked out.

The scrutiny and recount report had minimal mathematical errors which did not affect the election results announced by the returning officer. In the claim of that the Commission illegally nominated an unqualified candidate, the 3rd respondent submitted that the petitioner's evidence was not sufficient to prove the claim.

It is admitted that there were unauthorized persons at the Lamu County tallying centre who shouted and caused commotion. However, the returning officer with the assistance of some candidates managed to control the situation. The disturbance did not affect the tallying process. There was no violence as stated by the petitioner and his witness and no election offence was committed.

The 3rd respondent addressed the court on the burden of proof in regard to irregularities and election offences. It was submitted that the position is that the burden of proof for irregularities is above balance of probabilities while that of election offences is beyond reasonable doubt. The 3rd respondent argues that the arrest and subsequent conviction of Kazungu is not relevant to this petition because the incident occurred after the election.

7. Analysis of the Evidence

The main issue of whether the election was conducted in accordance with the law relates to the participation of the agents or lack of it at the polling stations and the tallying centre; the manner in which the votes were counted and tallied and in what circumstances; and the manner in which the results were announced. The failure of the electronic devices, transfer of a polling station and nomination of an unqualified candidate were also a basis of contention in the petition.

Before analysis of the evidence, I wish to state that in the submissions, the petitioner introduced new issues and new stations which were not pleaded in the plaint. It is established law that parties must confine themselves to their pleadings. A court of law will be seen to deviate from disputed issues if it engages in matters that are not specifically pleaded in the plaint. The court is therefore not bound to render any opinion on any new issues raised in the submissions.

a) *Electronic Equipment*

The petitioner alleges that the failure of the electronic equipment devices which would have ensured a credible and fair election exposed the process to manipulation and abuse when upon their failure the Commission used manual voting system. The Biometric Voter Registration (BVR) devices were used for registration of voters. There was no complaint from the petitioner on how the registration of voters was done and I suppose that the inclusion of the BVR in the petition was a mistake. No evidence was adduced by the petitioner relating to BVR.

The Electronic Voter Identification Devices (EVID) were used to identify voters by the 2nd respondent. It is not disputed that these devices failed early on the voting day or failed to work at all in some stations. Upon failure of the EVID, the 2nd respondent resorted to manual system of identification. A voter produced his identity card or passport and voted on confirmation of his identity in the manual register. The Result Transmission System (RTS) used by the presiding officers for transmission of results to the returning officer were used to a very limited extent. The 2nd respondent admitted that there were

challenges faced with the transmission of results. All that notwithstanding, the results in Forms 35 were delivered to the returning officers and tallying was done as required though not without minimum delay. The constituency returning officers prepared the Forms 36 and delivered the results for tallying to the county returning officer who did his part in accordance with the law.

The RTS system was designed to transmit provisional results pending the manual tallying as provided by **Section 39(2)** of the **Act**. The final tallying of results was to be done manually. The failure of RTS therefore had no effect on the voting system.

The Supreme Court in the Petition of **Raila vs. IEBC and others, Petition no.5 of 2013** dealt with the law on manual and electronic voting. It was observed that the Commission has the option to use manual or electronic voting or a combination of both subject to compliance with **Section 44** of the **Elections Act** and **Regulation 50** and **60** of the **General Regulations**. The ultimate goal is to deliver a free and fair election in accordance with **Article 81** of the **Constitution**. The court took judicial notice that some polling stations are situated in very remote areas where technology is still a pipe-dream. Yet voters have been able to exercise their voting rights as required by the law.

The failure of the devices was a problem which affected the whole country but had no effect on the conduct of credible elections. It must also be noted that voting during the last general elections was conducted manually countrywide. The petitioner failed to adduce any tangible evidence to prove that the failure by the Commission to use electronic devices in the voting exercise rendered the process susceptible to manipulation and tampering. This ground in the petitions was therefore not proved.

b) Transfer of Polling Station

The petitioner claimed he was aggrieved by the unlawful and illegal action of the 2nd respondent to move Ndau Dispensary polling station to Hanifiya Muslim School which disenfranchised voters. His evidence and that of his witnesses PW8, PW9, PW10 and PW12 was that the polling station was moved without notice to a facility about one (1) kilometre away in the morning of the voting day. Some voters did not vote due to the hustles occasioned by the transfer which was done without notice. The petitioner adduced evidence that the place where the station was moved is far from the village of Ndau where people reside. The Hanifiya Muslim school is situated in the forest which was not easy for the voters to access. Some voters upon finding no polling going on at Ndau Dispensary went to Ndau Primary School, the second polling station in Ndau area and spent many hours in the queue just to be told that their names were not in the voters' register. By the time the witnesses reached Hanifiya, the polling station was closed. PW10 said he knows about eight of his friends who did not vote due to the inconvenience caused.

The presiding officer RW2 testified that the decision to move the station was reached on the eve of the polling day on consultation with the constituency returning officer. According to the witness, an announcement was made at the Mosque in Ndau in the early morning of the voting day. RW2 further testified that the announcement was done using a loudspeaker and that it was possible for all the village residents to hear and take note of the change. The petitioner argued that Muslim Women and Christians who do not go to the mosque had no way of knowing that there was any transfer of the polling station. The presiding officer said that he affixed a notice at Ndau Dispensary premises in the morning of the voting day.

The presiding officer RW2 testified that the decision to move the station was done in consultation with the returning officer Lamu East. RW2 arrived at Ndau on 3rd March 2013 around 7.00 p.m. and inspected the room that was set aside for polling. He found it was too small to fit in all the electoral

materials, officials and agents. He called the returning officer, who gave a go-ahead for the moving of the polling facility from Ndaui dispensary to Hanifiya Muslim School. The announcement was made in the mosque at Ndaui village in the early morning of 4th March 2013. The presiding officer said that he affixed a notice of the change at the dispensary premises. The witness did not annex a copy of the said notice to his affidavit.

Regulation 64 permits the presiding officer on consultation with the returning officer to transfer proceedings to another station:

64 (1) Notwithstanding the terms of any notice issued under the Act or these Regulations, a presiding officer may, after consultation with the returning officer, adjourn the proceedings at his or her polling station where there are interruptions by a riot, violence, natural disaster or other occurrence, shortage of equipment or other material or other administrative difficulty, but where the presiding officer does so, the presiding officer shall restart the proceedings at the earliest practicable 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 -

(a) the presiding officer shall advertise the fact in such manner as is sufficient to bring it to the notice of voters; and

(b) the electoral area for the polling station from which the proceedings are transferred shall, for all the purposes of these Regulations, be deemed to be part of the electoral area of the polling stations to which the proceedings are transferred.

In exercising his discretionary powers, the presiding officer is required to give notice to the voters. There is no doubt that RW2 had a good reason based on the size of the room to move the polling station to another location. The question is whether he complied with the provisions of the law as to notice.

The case of **Mahamud Muhumed Sirat vs. Ali Hassan Abdirahman & 2 Others Election Petition no. 15 of 2008 High Court of Kenya Nairobi** had similar facts. It was held by Kimaru J, that moving of two polling stations a day before the voting day without notice was contrary to the law.

In the case of **Mathew Adam Karauri vs. Lameck Mbogo & Another Election Petition no. 49 of 1993**, it was held by a three judge bench of Mbitio J, Mwera J and Okubasu J, that:

“The power to postpone (proceedings) cannot be exercised at the whims of a presiding officer or the Chairman of the Electoral Commission. We note that the postponement may only be justified in case proceedings at a station were interrupted by a riot, open violence, flood, natural catastrophe or other cause....”

These cases were decided during the now repealed electoral statute but the same provisions have been reproduced in **Regulation 64**. The case is therefore relevant and it faulted arbitrary transfer or postponement of a polling station.

The 2nd respondent only moved the facility and retained the gazetted name of the polling station namely Ndaui Dispensary polling station. In this regard there was no requirement for gazettement as required under **Regulation 7(1) (c)**.

It was mandatory that the movement of the polling station be recorded in the polling day diary. This was not done by the presiding officer and the officer gave no explanation for the omission. There was no indication in the 2nd respondent's records that voting took place at Hanifiya Muslim School.

The distance from Ndau to Hanifiya was given by the petitioner as about one kilometre and by the respondent about 400 metres. The petitioner did not produce any statistical evidence to show that the distance was one kilometre. Neither did the presiding officer present any tangible evidence on the distance apart from an estimate. Taking the petitioner's estimate which is the longest distance of one kilometre, it is my considered opinion that it is manageable for any determined voter in good health. It would take not more than forty five (45) minutes walk from Ndau Dispensary to Hanifiya.

Although the 2nd respondent acted within its mandate to move the polling facility, there was a breach of the law as regards notice. The announcement made to the voters in the morning of the polling day was not sufficient notice. The 2nd respondent failed to use due diligence to inspect the polling facility before gazetting it or well in advance of the voting day in order to give the voters adequate notice. The legal requirement of notice serves the purpose of avoiding or minimizing inconvenience or hardship that may be suffered by a voter. The 2nd respondent indeed breached the law despite the good reason behind the movement.

However, despite this breach, the petitioner failed to prove that the relocation of the station significantly affected the outcome of the elections. The voter turnout in Ndau Dispensary polling station was over 86% and the petitioner's candidate indeed garnered the highest number of votes. Despite the irregular movement of the station, the outcome of the election was not materially affected.

(c) Agents

The petitioner alleged that the agents of his candidate were excluded by the 2nd respondent from participating in the elections and this deprived them of the opportunity of representing their candidate in the elections in various stages.

The stations named in the petition as having been affected were Mwangala, Mapenya, Kilimani, Mkunumbi, Myabogi, Mikinduni, Mkomani and Kiongwe.

The evidence of the petitioner and his witnesses most of whom were agents of various parties was that the agents who were duly appointed by the party and presented accreditation documents were refused entry. As a result most of the agents did not witness the opening of the ballot boxes at the commencement of the poll; did not oversee the voting, the counting of the ballots and were not allowed to accompany the ballot boxes to the tallying centre. It is the petitioner's evidence that the electoral process could not have been free and fair and the act of the 2nd respondent denied his candidate victory in the elections.

In some of the stations where the petitioner candidate's agents were allowed to participate, the petitioner claims that they were denied the opportunity to verify the number of votes garnered by the candidates; did not sign Form 35 and 36 and were not issued with copies of the declaration of the results.

In this regard, the petitioner argued that in the absence of Form 35, the agents and the candidate were at a disadvantage for they were not able to participate in the tallying of votes both at the constituencies and at the county tallying centres.

The 1st and 2nd respondents called evidence of the presiding officers in some of the stations named while the 3rd respondents called her Wiper Democratic Movement (WDM) and one United Democratic Party (UDF) agents who denied the allegations. The presiding officers testified that all the party agents who were accredited were admitted in the polling station and participated fully in the process. Owing to limited space in some stations, the presiding officers only admitted one agent for each political party. Agents were allowed to alternate if they so wished. It was admitted by some presiding officers that they did not have sufficient copies of Form 35 and could not give copies to the agents who participated in the elections. RW1 the presiding officer Mikinduni said he did not give Form 35 to the agents and that he expected them to use their notes for verification of the results during tallying. RW3 said he had 14 agents at Mapenya and that he gave each of them a copy of Form 35. The presiding officers testified that agents participated in the election and that the process was free and fair. They denied favouring any candidate.

The 3rd respondent and some of her witnesses testified that no agents were refused entry in the polling stations. She said that all agents took part in the election process without any hindrance. It was also her evidence that all agents were issued with the results and that the same case applied to other party agents.

It was the evidence of some of the 3rd respondent's agents that they were issued with copies of Forms 35 and 36 save for RW5, RW6 and RW9 who took different positions.

RW5 the agent of the 3rd respondent at Mwangala polling station, said in cross-examination that he signed Form 35. When shown Form 35, he agreed that his name and signature were missing from the form. He claimed that the document before the court is not the one he signed. The witness was also not aware how many candidates for Woman Representative were there during the elections. The witness raised doubts as to whether he was at the polling station at the material time.

PW14 was the petitioner candidate's agent at Mwangala who told the court that no agent signed Form 35. The presiding officer RW4 denied barring any agent from overseeing the voting process. He said only three agents signed Form 35 because others had already left.

At Mikinduni, PW4 was the TNA agent. He said he participated in the process but did not sign Form 35. He said the reason was that he was refused to sign though a few others signed. This explanation was not credible. On examination of Form 35, there were six (6) agents who signed the document. An annexure of particulars of the polling diary to RW1's affidavit shows that there were 15 agents at the station when it opened including PW4 of TNA party. The presiding officer RW1 explained that the agents who did not sign at the close of the station must have left earlier. The court believed this witness on the basis that six (6) agents signed the document and that the TNA agent signed the diary early in the morning. The officer admits he did not give any of the agents a copy of Form 35 although he knew he was required to do so. He denied barring any agent from accompanying the ballot boxes if only they secured their own transport.

At Mapenya, PW6 testified that he was allowed entry in the polling station but his TNA colleague agent one Rehema was denied entry. He was at the polling station throughout the day and signed Form 35. His complaints were that that he was not issued with Form 35 and was not allowed to accompany ballot boxes to the tallying centre. The presiding officer RW3 said in cross-examination that he gave all the agents copies of Form 35. Eight agents signed the form. It was noted that there were no statutory comments on the form.

PW7 testified that her colleague TNA agent and herself were refused entry at Kilimani Primary school

despite presenting their accreditation documents. Form 35 is clear that no agents signed and no statutory comments were noted on the form. The presiding officer did not testify. There was no explanation as to why the agents did not participate in the election and why the statutory comments to that effect were not made.

PW11 was the only TNA agent at Myabogi. She said he reported at 5.00 a.m. and was refused entry by the presiding officer. She stayed outside till the close of the station at 5.00 p.m. Votes in that station were counted by the presiding officer and his deputy after all agents were forced to leave the room at around 5.00 p.m. PW11 said he was denied the opportunity to accompany ballot boxes to the tallying centre. PW15 said that PW11 was denied the opportunity to accompany ballot boxes to the tallying centre. This witness (PW15) was an election observer at the station and corroborated PW11's evidence that she was refused entry at the station. Only 3 agents signed Form 35. The presiding officer did not testify to refute the allegations. The court believed the unrebutted evidence of the two (2) witnesses.

At Mwangala, the National Vision Party agent, said he was present at the station although his party had no Woman Representative candidate. There were 12 agents at the station who participated during the voting. The presiding officer sent away all the agents during vote counting for about one hour leading to some protest from members of public outside the station. The presiding officer RW8 denied chasing away agents during vote counting. She could not remember whether there was an agent of National Vision Party present at the polling station. Her evidence was that only three (3) agents signed Form 35 because others had left. She admitted that she failed to make any statutory comments on the relevant documents. In cross-examination, the witness agreed she made an error in Form 35 where she added one candidate Ruweida Obo 4 votes but explained that it was not deliberate. The petitioner's candidate is the one who won at Mwangala with 316 votes against 3rd respondent's 137 votes.

As for Mkunumbi, the petitioner alleged that the agents were refused entry and that they did not accompany ballot boxes to the tallying centre. It was also alleged that the presiding officer and his officials used a blue Probox car belonging to the 3rd respondent while transporting the boxes to the tallying centre. The 3rd respondent denied the allegation telling the court that she did not own a car let alone a blue Probox. Her party agent RW8 supported her evidence that it was a Probox car of IEBC which was used to ferry the ballot boxes. The petitioner did not avail the registration number of the car. The burden is on him to prove the identity and the ownership of the car. These allegations were not proved. The presiding officer did not testify to answer to the allegations about the barring of agents and Form 35 which was signed by 5 agents.

The petitioner alleged that the presiding officer and clerks at Kiongwe influenced voters. PW20 was the TNA agent at Kiongwe. He testified that the presiding officer Nancy W. Gicheru waited for voters outside the station and told them to vote for some candidates. Although the presiding officer did not testify, PW20 admitted on cross-examination that he heard people shouting and complaining about Nancy outside but did not witness her talking to the voter. Three agents signed Form 35 including PW20. There was no evidence to prove the allegation of voter influence.

At Myabogi, the TNA agent PW11 and an ELOG election observer PW15 said that the presiding officer one Khadija Ali Swaleh talked to voters outside the polling station. Some of the illiterate voters were given handwritten notes which they brought to the polling room bearing names of preferred candidates. The presiding officer did not testify. The 3rd respondent denied the allegations from the information she obtained from her agents but did not call her agent who was at the station to testify. However, there was no evidence of the particulars of the voters who were influenced and none of them was called to testify. Neither the petitioner nor any of his witnesses produced any of the said handwritten notes in court. The petitioner failed to prove these allegations of voter influence at Myabogi.

At the County tallying centre, the petitioner alleged that Form 36 was not prepared and therefore the tallying agents did not get copies. PW2 and PW3 testified that a notebook was used to announce the winners on 6th March 2013 when the tallying exercise was concluded.

PW2 said he found the deputy returning officer one Jonathan Kazungu preparing Form 36 on 7th March 2013 which was one day after tallying closed. PW2 was requested to sign the form in his capacity as the Narc Kenya agent. On looking at the document, the witness noticed that two agents had signed and backdated the form to 6th March 2013. He therefore declined to sign the form and reported the matter to the police. Kazungu was arrested and charged with an election offence.

PW4 the county returning officer denied that he did not prepare Form 36 on 6th March 2013. He said he did so and used the Form 36 to announce the results. According to the witness, he said that he did not instruct Kazungu to prepare Form 36. He asked him to do a report that was to be handed over to the Commission in Nairobi after the elections.

The 3rd respondent and her witnesses denied the petitioner's allegations and maintained that Form 36 was prepared at the county tallying centre before announcing the results. The respondent in cross-examination said she saw the returning officer read the results from a paper. She could not tell the court what sort of paper it was raising doubts whether she saw it at all. Two of her witnesses testified to the contrary. RW6 said he did not see the Form 36 at the County Tallying Centre and that he was not given a copy. RW9 and RW6 were Wiper Movement tallying agents. RW9 said he did not sign any Form 36 and neither did he see any agent signing it. The returning officer did not state in his affidavit whether he gave copies of the Form 36 to any agent at the tallying centre yet this was a disputed issue in the petition. From the evidence of the petitioner and that of the respondents, this court comes to a conclusion that Form 36 for Lamu County Woman Representative Election was not prepared or available at the close of the tallying exercise. I find the evidence of PW2 credible in this regard. If the form was available on 6th March 2013, the candidates and the agents would have seen it and signed it on the material day. It would not have been necessary for the agents to go to IEBC offices at Lamu Fort on 7th March 2013 to obtain the results. I will come later to the issue announcement of the results.

Regulation 62(1) names authorized agents among the people to be allowed in a polling station or a tallying centre. An authorized agent must possess accreditation documents namely, the letter of appointment from his party or the candidate and the Oath of Secrecy from the Commission. **Regulation 62(3)** provides that the absence of agents shall not invalidate the proceedings at a polling station. The presiding officer shall therefore carry on the polling exercise even where all the agents or some of them are not present. This provision does not give the presiding officer the licence to bar or remove authorized agents from the polling station.

The attendance of agents in a polling station is regulated under **Regulation 74**.

R.74(3). The presiding officer shall not be obliged to admit more than one agent of any political party, candidate or referendum committee, as the case may be to the counting venue.

This provision falls within the mandate of the presiding officer to keep order and control of the station to facilitate an environment conducive to sound polling electoral business.

It is therefore within the power of the presiding officer to allow only one agent from a party or candidate to avoid overcrowding in the polling room. This was the case at Mapenya where one TNA agent was allowed in and the other barred. In regard to this incident the petitioner's candidate was represented by one agent which is in accordance with the law. The presiding officer acted within his mandate under

Regulation 74(3).

It was explained by the presiding officers that the 2nd respondent is not obligated to provide transport for party and candidate agents to the tallying centre from the polling station. The petitioner alleged that his agents were denied the opportunity to accompany the ballot boxes to the tallying centre. I am not aware of any provision which imposes on the Commission the obligation to provide transport to agents. The parties and candidates ought to take this responsibility until such a time that IEBC will be in a position to make convenient and coordinated arrangements for the enhancement of transparency and accountability of elections. It is now apparent that the 2nd respondent has not reached that level.

The presiding officers had very limited transport facilities and it was not possible to fit in the ballot boxes, their officials, security officers and the agents. There is evidence that small cars were used with limited passenger capacity.

There was evidence that security personnel accompanied the ballot boxes and the officials to the tallying centre except in the case of Mapenya where two security personnel were left behind. However, even for this polling station, the petitioner failed to adduced any evidence of tampering with the ballot boxes while on transit. It is therefore the duty of the parties and candidates to facilitate their agents by all means.

In regard to the signing of results declaration by agents and candidates, the law provides guidelines. **Regulation 79** governs the duty of the presiding officer, the candidates and agents on declaration of an election:

79. (1) The presiding officer, the candidates or agents shall sign the declaration in respect of the elections.

(2) For purposes of subregulation (1), the declaration for -

(a) presidential election results shall be in Form 34 set out in the Schedule;

(b) National Assembly, county women representatives, Senator, county governor and county assembly elections shall be in Form 35 set out in the Schedule.

2) The presiding officer shall -

(a) immediately announce the results of the voting at that polling station before communicating the results to the returning officer;

(b) request each of the candidates or agent then present to append his or her signature;

(c) provide each political party, candidate, or their agent with a copy of the declaration of the results; and

(d) affix a copy of the declaration of the results at the public entrance to the polling station or at any other place convenient and accessible to the public at the polling station.

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 any agent refused 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.

5) Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence.

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 this regulation shall not by itself invalidate the results announced under subregulation (2(a)).

7) The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under subregulation (2) shall not by itself invalidate the results announced.

8) After complying with the provisions of this regulations, the presiding officer shall, as soon as practicable, deliver the ballot boxes, and the tamper proof envelopes to the returning officer who shall take charge thereof.

The presiding officer, the candidate or agent are required to sign the declaration of elections. Form 35 is the official document for declaration of results to be signed immediately after announcement of results. It is a requirement of the law that the presiding officer requests each of the candidate and agent to sign Form 35 and provides a copy of the document to each one of them. The failure by a candidate or agent to sign and failure, to record reasons for failure to sign and well as recording the fact for absence of the candidate or agent must be recorded by the presiding officer.

The evidence adduced in this case is that there was a blatant breach of **Regulation 79**. The presiding officers who testified said they were aware of their duties as pertains to this regulation for they had been trained for the job. It was admitted by some of them that they did not do as required by the law. The presiding officer Mikinduni RW1 told the court:

“I did not issue the agents at Mikinduni with Form 35. An agent would have verified the results with their votes. They were taking notes”.

On being asked why he did not make statutory comments on the form, RW1 said:

“I was trained that I need to make statutory comments in Form 35 where an agent refuses to sign”.

Yet no statutory comments were made on Form 35 for Mikinduni by RW1. His language and demeanor in court demonstrated the casual manner in which the presiding officer treated his official duty. Examination of Form 35 for most of the stations in Lamu county, showed that there were no statutory comments even where not a single agent signed the document.

RW6 the 3rd respondent's tallying agent said that as he went to the county tallying centre to represent his party on 5th March 2013, he did not have the Form 35 for the polling stations from his agents. Form 36 from Lamu West constituency was also not available. He was at the Lamu West tallying centre at Mokowe and testified that no agent was given Form 36. This explains that there was a trend in Lamu County of not providing candidates and agents with copies of results contrary to the law.

On perusal of Form 35 for all the polling stations seventeen were not signed by any agent:

Shella Primary School, Moa Primary School, Kilimani Nursery School, Uziwa Primary School, Dide Waride Primary School, Kiongwe Primary School, Kilimani Primary School, Lake Kenyatta ATC, Ocean View Primary School, Kizingitini Primary School, Kizingitini Dispensary Stream 1, Mtangwanda Primary School, Bori Centre, Myabogi Centre, Kizingitini Secondary School, Mb wajumwali Nursery School, Kiunga Primary School Stream III.

In all the seventeen result declaration forms, no statutory comments were made by the presiding officers or even by the agents or candidates as required by the law. The same case applies to the forms signed by only one or two agents. These are just a few examples of breaches of the law by the 2nd respondent.

I am aware of the provisions of **Regulation 79(6)** to the effect that the refusal or failure of a candidate to sign Form 35 shall not by itself invalidate the results announced. The existence of this provision should not lead to total disregard of the role of agents in an election by the 2nd respondent.

It was held in the case of **Manson Oyongo Nyamweya vs. James Omingo Magara & 2 Others, Election Petition no.3 of 2008 High Court of Kenya** at Kisii that whereas the court may not nullify an election for failure of a candidate or agent to sign the result declaration form, the failure by a presiding officer to comply with the other requirements constituted a serious breach which requires appropriate explanation by the officer concerned. The breaches referred to herein include the failure to request a candidate or agent to sign Form 35; failure to give a copy of the results; failure to record reasons for refusal or failure of a candidate or agent to sign the result declaration, and failure to record the fact of absence of a candidate or agent. Failure to comply with the provisions of **Regulation 79** led to a host of breaches of the law by the presiding officers.

The role of an agent in a polling station is a legal requirement which must not be taken lightly. A vigilant polling agent would detect some wrongful acts at a polling station. He could initiate a complaint at the polling station or tallying centre with minimum delay. Providing the agents with Form 35 makes their work easier and tallying process manageable. An agent without results is like blind mouse as he goes to the tallying centre. The empowerment by the Commission is critical to the work of an agent. An agent ceases to be of any use to his candidate or party if he lacks the tools.

(d) Announcement of Results

The petitioner's contention is that there was no proper declaration of results as required by the law for the county returning officer RW4 merely announced the winner without announcing the votes for each candidate. The petitioner's case was that the results were aggregated in a notebook. The petitioner also complained of delayed results which were communicated to the persons present 43 hours after close of voting. Earlier in this judgment, this court found that the petitioner has proved that Form 36 for Woman Representative election was non-existent on 6th March 2013 and that the results were not properly announced.

In interrogating the question of determination and declaration of election of results, the court will be guided by the provisions of **Article 86** of the **Constitution**, **Section 39** of the **Act** and **Regulations 83, 84 and 87**.

Article 86 reads:

At every election, the Independent Electoral and Boundaries Commission shall ensure that -

(a)

(b)

(c) *the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and*

(d)

39. (1) The Commission shall determine, declare and publish the

results of an election immediately after close of polling.

(2) Before determining and declaring the final results of an

election under subsection (1), the Commission may announce the provisional results of an election.

(3) The Commission shall announce the provisional and final

results in the order in which the tallying of the results is completed.

Regulations 83, 84 and 87 are based on the constitutional provision that govern the procedure of tallying and announcement of election results.

The provisions of the electoral laws as relates to the determination and announcement are based on **Article 82** of the **Constitution**. The provisions send a very clear message that the presiding officer of each polling station shall ensure that votes cast are counted, tabulated and the results announced promptly. The returning officer is mandated to openly and accurately collate and promptly announce the results from the polling stations; tally the results of each candidate and announce to the persons present. The results shall include the total number of valid votes cast for each candidate, votes cast in the respective electoral area, spoilt votes and rejected votes. All the votes shall be aggregated in Form 36 which must be signed and dated by the returning officer and the candidate who wins shall be declared.

The provisions of **Regulation 83** relate to the returning officers in the constituencies. The regulations are silent on the procedure to be followed by a county returning officer. In my considered opinion, the same procedure set out in **Regulation 83** should apply to the county returning officers taking into account any distinct features of the county tallying. The county returning officer is mandated to tally the results from the constituencies where a tallying sheet is prepared and eventually developed into a result declaration form.

It was the petitioner's evidence that the returning officer did not comply with the procedure of announcement for he only read the names of the winners. This was disputed by the respondents who said the results were properly announced and certificates issued. RW4 in cross-examination said he announced the results in compliance with the law without giving details of what he actually did. The court found this witness very economical with the truth.

The issue before the court is whether results announced without the final result declaration form would be held to be valid. The **Constitution Article 159(2)(d)** and **Section 80(1)(d)** imposes an obligation to

the court to decide all matters without undue regard to technicalities. In view of these provisions, courts will focus more on the substance other than the form. At the time RW4 left the tallying hall, there is no doubt that the winners of the election were known by all the persons present. The candidates who were present were aware of the votes they garnered in the election. These results were subsequently gazetted by the 2nd respondent on 13th March 2013. The failure by the returning officer to complete his task of tallying the county results is an irregularity. The process of declaration and gazettelement validated the results irrespective of the missing county result declaration.

(e) Acts of Violence and Threats

At Myabogi PW11 and PW15 testified that voting went on peacefully until close of the station. PW15 was an election observer and was inside the polling station on the material day. PW11 was the TNA agent who sat outside the station after being barred by the presiding officer. The witnesses said that it was during the counting of the votes that people outside the station got agitated and shouted thereby causing commotion. The presiding officer had excluded agents from the counting of votes and had at one moment halted the counting process for about an hour. Police had to shoot in the air to disperse the crowd. The respondent did not call any evidence to rebut that of the petitioner. The court notes that there was no evidence of violence that occurred during the voting. The exercise went on to closing time without disruption. The commotion experienced during the counting was quelled by the security personnel and the counting exercise proceeded on. The petitioner did not blame any particular person for the disturbance. No proof any acts of violence has been tendered.

At Mwangala, it was the evidence of PW14 that voting was peaceful. He said ***“voting went on well without any problem and it was only after the polling station closed that there was a problem.”***

PW14 testified that the presiding officer ordered the security officer to remove the party agents from the polling room. The officer and his staff were left inside sorting out the ballots. It was due to the action of the presiding officer that people waiting outside caused commotion which was controlled by the security personnel. The presiding officer of Mwangala testified. His evidence dwelt more on the conduct of the polls and the participation of the party agents which was in answer to allegations contained in PW14's affidavit. The officer was not cross-examined on the violence during vote counting. PW14 talked about the violence during his cross-examination. His affidavit was silent on the issue of violence. The allegation was baseless and was not proved.

At the County tallying centre, the petitioner alleged that the 3rd respondent came with her supporters and confronted the County returning officer PW4. She threatened him with death if he did not announce her as the winner. PW2 and PW3 testified that they heard the threats being made by the 3rd respondent. The 3rd respondent denied threatening RW4 at the centre. RW4 also denied that he was threatened. Both the 3rd respondent and RW4 admit that there were disturbances at the tallying centre due to anxiety of candidates and agents as they waited for the results which had delayed from the constituencies. PW4 in cross-examination said he had to use the security personnel to remove some unauthorized persons from the tallying centre. From the evidence of the parties, it is not disputed that the atmosphere at the tallying centre was charged with anxiety attributable to several factors. In such a situation, shouting and harsh language may be exchanged. A process of that nature can hardly be conducted with the solemnity common in official meetings and religious gatherings. Security was provided at the venue as RW4 explained and any explosive situation which arose was dealt with and peace restored.

It is not disputed that the petitioner and his witnesses did not report the threat to the police. PW2 made a report to the police on a different incident on 7th March 2013 but did not mention the issue of threats at

the tallying centre.

It was alleged that PW4 allowed unauthorized persons to the tallying centre who caused chaos and interfered with the tallying process. The evidence of PW1, PW2 and PW3 was generally talking of the political supporters of the 3rd respondent. None of the supporters was named and no details were given as to the role played by the supporters in causing chaos. RW4 admitted that there were unauthorized persons whom he got security personnel to remove from the tallying centre and that by the time tallying commenced, the atmosphere was peaceful. The situation cannot be said to have gone out of control to an extent of interfering with the tallying process.

Although it was alleged that election observers were kept out of the tallying centre the petitioner adduced no evidence to prove this allegation.

The burden of proof of an election offence lies on the petitioner. It is trite law that the standard of proof is beyond any reasonable doubt. In the case of **Abdulrahman Hassan Halkano vs. Abdi Nasir and 2 Others Election Petition no.6 of 2008**, there were allegations that the 1st respondent or his agents used violence and other means to disrupt the tallying process. Azangalala, J held that the petitioner failed to discharge the burden of proof which was beyond any reasonable doubt.

Election offences are criminal in nature and must be proved beyond any reasonable doubt. The petitioner has failed to discharge the burden of proof of any election offence committed by the 3rd respondent at the tallying centre.

f) Unqualified Candidate

The petitioner alleged that one Anastacia Wanjiru Mwangi a candidate for the election of Woman Representative was illegally nominated by the 2nd respondent which put the petitioner's candidate at a disadvantage in regard to the votes numbers. In his further affidavit sworn on 24th July 2013 the petitioner avers that Anastacia was an Australian citizen at the time she was nominated to contest the election and was therefore ineligible. He further said that Anastacia originates from Lamu West constituency which is mostly inhabited by her Kikuyu community and garnered 12,458 votes. The community was unanimously united in favour of petitioner candidate's TNA party and in the absence of Anastacia, his candidate would have won the election.

It was the testimony of the county returning officer RW4 that he cleared the candidate after she presented to him a letter of nomination from her party and her Kenyan identity card. He also said that the candidate indicated to him that she did not possess dual citizenship. The witness said that the complaint on dual citizenship was not addressed to him but to the 2nd respondent's head office. A copy of Anastacia's identity card annexed to RW4's shows that she was born in Kiambu in Kenya. The petitioner attempted to produce a computer generated Australian passport issued in 2003 which was rejected for lack of the required certificate under **Section 108 of the Evidence Act. Article 16 of the Constitution** provides:

A citizen by birth does not lose citizenship by acquiring the citizenship of another country.

Article 99 sets out the qualifications and disqualifications for election as a Member of Parliament. Part of the **Article 99 (2) (c)** is reproduced in **Section 24 of the Elections Act** and it provides:

24. A person is disqualified from being elected a member of Parliament if the person -

2. (c) has not been a Kenyan citizen for at least ten (10) years preceeding the date of election.

The petitioner did not produce documentary evidence to prove dual citizenship. Neither did he prove that Anastacia had violated **Article 99(2)(c)** and **Section 24(2) (c)** of the **Act**. In his submissions, the petitioner urged the court to treat as evidence a letter written by Anastacia to this court. The letter is not admissible in evidence for lack of compliance with the rules. It was only admitted to form part of the court record as correspondence.

The evidence of the petitioner and his witness PW2 lack backing of documentary evidence to prove dual citizenship. The issue of the votes that the petitioner's candidate would have garnered in Lamu West constituency, had Anastacia not been nominated is not supported by any statistics and remains merely speculative. The petitioner has failed to adduce cogent evidence to prove the allegation contained in paragraph 18 of his petition.

g) Unsigned Document

The Form 36 for Lamu West constituency was not signed by the returning officer or any agent and was not dated. This one of the two Form 36 for the constituencies used by the county returning officer as the raw material for tallying the final results for the county. The form bears the name of the officer and the official stamp of the 2nd respondent. **Regulation 83** provides that the returning officer after tallying and announcement of the results prepares Form 36 which is the instrument for declaration of results. **Regulation 83(d)** mandates the officer to sign and date the form and -

(i) give to any candidate, or agent present a copy of the form; and

ii. deliver to the Form 36 (together with others as the case may be) to the Commission.

The constituency returning officer is therefore required to sign, date the form, and give it to any candidate present to append their signatures. The officer failed to comply with **Regulation 83** which is indeed a breach of the law and shows neglect of duty on part of the officer. The county returning officer received the form and used it to tally the results. Due to lack of diligence, the county returning officer did not notice the omission by his junior officer.

The question arises as to whether the unsigned and undated form is valid. Any legal document will be held to be authentic if it has been signed by the maker and in case of a public body or company be signed and affixed with an official stamp.

The form was received at the county tallying centre and used to tally results. The tallied results were announced at the county level and the candidate who won the election was issued with a certificate. Finally these results were declared through a gazette notice by the respondent-

It is my considered opinion that the process to the very end validated the results of Lamu West constituency as contained in the Form 36.

The Lamu East Form 36 was signed by the officer and only one agent. There was no explanation why other agents did not sign or whether they were absent at the time of signing. There was no explanation why the returning officer signed the result declaration on 5th March 2013 and why the agent signed on 6th March 2013. This is another unexplained act by the returning officer who has a duty to carry out his obligations in accordance with the law which include the preparation of the necessary documentation

with all the required entries.

h) Relatives

The petitioner alleged that some relatives of the 3rd respondent were allowed free access at the 2nd respondent's equipment at county tallying centre and mingled freely with the 2nd respondent's staff. In his affidavit the petitioner mentioned names of some people allegedly related to the 3rd respondent directly or indirectly. The petitioner tendered no cogent evidence of the alleged relationships and did not connect any wrong doing to any of the people he mentioned.

In particular, it was alleged that one Rukia Aboud was the presiding officer at Mkomani polling station and that she was related to one Issa Timamy. The said Timamy was neither a candidate for this particular election nor a party to these proceedings. Form 35 for Mkomani primary school station showed that Rukia Aboud was neither the presiding officer nor the deputy presiding officer.

The petitioner's witness PW19 was also under the same mistaken belief. None of the said allegations were proved by the petitioner.

The allegation that one Sabila Mohamed the daughter of the 3rd respondent interfered with IEBC computers and transferred data using a flash disk at the tallying centre was also not backed by any tangible evidence. The tallying was being conducted manually and the issue of data transfer using a computer does not arise. Assuming that data was transferred, the petitioner was obligated to tender credible evidence including the particulars of the data in question. The allegation was not proved.

As regards one Faiz Fankupi, the alleged chief campaigner of one Timamy working as an IEBC facilitator, the petitioner did not adduce any evidence to support this allegation. Neither did he make any attempt to connect the 3rd respondent with the said Faiz Fankupi.

i) Criminal Judgment

The petitioner attached to this affidavit a charge sheet for **Malindi Chief Magistrate Criminal case no.180 of 2013** where the deputy returning officer Kazungu Ngowa was charged and convicted of four counts of breach of official duty contrary to **Section 59(1)(j)** of the **Elections Act**. It was alleged that on 7th March 2013 in Lamu County, being a staff of the Electoral Commission, without reasonable cause, did prepare Form 36 declaration of results for President, Governor, Senator and Woman Representative in Lamu County. Statements of witnesses recorded by the police for the criminal case were annexed to the petitioner's affidavit.

In his submissions, the petitioner urged the court to call for the criminal record from the Chief Magistrate's court and inquire into whether the county returning officer RW4 was guilty of an election offence. It was alleged that RW4 is the one who instructed his deputy to prepare the form for he would also be guilty of an election offence.

The copy of the charge shows that the date of the offence was 7th March 2013 one day after the tallying of the results was concluded. The petitioner's request was not pleaded in the petition. The court's inquisitorial jurisdiction will not be invoked in matters outside the scope of this petition. The rule of parties restricting themselves to their pleadings must be adhered to.

On perusal of the bundle authorities filed by the petitioner, I noticed that the judgment of **Chief magistrate criminal case no. 180 of 2013** was the last item in the bundle. The judgment is neither

binding nor persuasive to this court and no reference will be made to it herein.

8) Recount and Scrutiny Report

On the 2nd July 2013, this court by the consent of the parties ordered scrutiny and recount of votes in Lamu County for Woman Representative election held on 4th March 2013. The exercise was supervised by the Deputy Registrar High Court who filed her report on 2nd August 2013.

The petitioner submitted on the report in his submissions. He listed various polling stations which were found to have some anomalies, discrepancies and irregularities which include:

(a) 36 stations with broken or missing seals namely Lake Kenyatta primary school, Manda Yawi Nursery school, Bobo primary school, Witu Mjini secondary school, Mokowe primary school stream 2, Uzida primary school, Mokowe primary school stream 3, Baragoni primary school, Ndambwe primary school, Uziwa primary school, Majambeni primary school, Safirisi nursery school, Ziwani primary school, Msefuni primary school, Umoja primary school, Kilimaninursery school, Witu primary school stream 2, Hindi primary school stream 1, Mapenya primary school, Lake Kenyatta primary school stream 3, Lake Kenyatta primary school stream 2, Dide Waride primary school, Mbujumwali primary school, Tchundwa primary school, Bori centre, Pate Primary school, Mwajumwali nursery school, Chandani primary school, Mangai primary school, Maranani primary school, Milimani primary school, Faza health centre, Pate dispensary school, Kiunga primary school, Ishakawi primary school and Kizingitini Secondary school stream 3.

(b) Eight (8) stations where counterfoils were missing from the boxes namely Lamu Boys primary, Msefuni primary school, Lamu Girls Secondary school, Chalaluma primary school, Mkomani primary school, Witu primary school, Boko primary school and Chandani primary school.

It was the petitioner's contention that all the irregularities unearthed in the recount scrutiny report confirm the inaccuracy of the results announced and reflects an election wanting of fairness and credibility. The 1st, 2nd and 3rd respondent were of the opinion that the report was a true reflection of a free, fair and credible election.

I proceed to examine the impact of the report as against the results attained by each candidate. The results announced were as follows:

- a) Anastacia Wanjiru Mwangi - 12,458
- b) Priscilla Wambui Mutie - 2,221
- c. Ruweida Mohamed Obo - 11,595
- d) Shakila Abdalla Mohamed - 17,233

Upon recount and scrutiny some discrepancies were found where some candidates gained or lost votes as follows:

- a) Anastacia Wanjiru Mwangi increased by 26 votes.
- b) Priscilla Mutie decreased by 66 votes.

c. Ruweida Obo decreased by 18 votes.

d) Shakila Mohamed increased by 54 votes.

The rejected votes were grouped in constituencies as follows:

Results announced by IEBC		Results after recount
Lamu West	466	432
Lamu East	188	187
Total	654	619

The rejected votes reduced by only 35 votes.

There were no major discrepancies in the number of votes garnered by each candidate after the recount. The petitioner's candidate Ruweida Obo votes decreased by 26 thus reducing her total from 11,595 to 11,577. The votes of the 3rd respondent increased by 54 votes changing her total votes from 17,233 to 17,287. The difference between Ruweida Obo and Shakila Mohamed after the recount is 5,710 votes. The 3rd respondent is therefore leading with a margin of 5,710 votes.

The issues raised by the petitioner in the report are twofold:

a) **Broken and missing seals**

b) **Missing counterfoils**

The seals found broken from the ballot boxes are mainly one or two per ballot box which normally has about 5 – 6 seals affixed on it. Most of the seals in question were broken while others were missing.

This disputed election took place in Lamu which is about over 200 kilometres from Malindi on a rather rough road. This court takes judicial notice of this fact in relation to the movement of the ballot boxes from Lamu to Malindi. I come to a conclusion that the movement of the ballot boxes to Malindi court and from the court basement to the 2nd floor of the court where the recount was done, may have caused the breaking and dropping off of some of the seals securing the boxes. There was no evidence of tampering with the ballot boxes in the report.

On perusal of the report it shows that counterfoils were available for Witu primary school Stream 1 and 2, Msefuni Primary school, Boko primary school, Lamu Boys Primary school both streams and Chandani polling stations contrary to the contention in the petitioner's submissions. However, counterfoils were found to be missing for Lamu Girls secondary school, Chalaluma primary school, Lamu Boys primary school and Mkomani Girls. All seals were intact on the ballot boxes for these stations which rules out any tampering after the sealing of the boxes at the polling station.

I am aware that elections have been nullified for the reason of missing counterfoils. I was referred to the case of **Thomas Malinda Musau & 2 Others vs. The IEBC & 2 Others Machakos Election Petition no. 2 of 2013**, the court found counterfoils missing in eight stations where the total valid votes were 2,680 for all the candidates. The election was nullified and a fresh one ordered mainly for that reason and for other irregularities.

In this case, it is imperative to give consideration to the votes of each candidate and more specifically the petitioner's candidate and the 3rd respondent before making my findings.

The valid votes cast for the candidates are as shown by the recount and scrutiny report are as follows:

Station	Anastacia Mwangi	Pricilla Mutie	Ruweida Obo	Shakila Mohamed
Mkomani Girls Primary school	16	10	90	352
Lamu Girls Secondary school	4	8	103	209
Chalaluma Primary school	144	4	86	21
Total	164	22	279	582

The total valid votes for the three stations are 1,047.

The totals of each candidate reduces with the total votes garnered in each of the three stations with the following result:

- 1) Anastacia Wanjiru Mwangi 12,484 - 164 = 12,320.
2. Priscilla W. Mutie - 2,155 – 22 = 2,133
- 3) Ruweida Obo - 11,577 – 279 = 11,298
- 4) Shakila Mohamed - 17,287 – 582 = 16,705

Shakila Abdalla leads with a total with 5407 votes with Anastacia Mwangi taking position 2 while Ruweida remain in position 3.

The facts in this case are different from those in **Thomas Mulinda** case in that the margin of the 3rd respondent still remain high with over 5000 votes. The problem of missing counterfoils was only in three out of 136 polling stations in Lamu. In the interests of justice, I am of the considered opinion that nullifying the results for the three stations is the appropriate thing for this court to do. I hereby nullify the said results for each candidate as shown in the foregoing calculations.

From the recount and scrutiny report which covering the whole county, no major discrepancies were detected in the counting and tallying of votes save for minor mathematical errors which did not favour any particular candidate. The 3rd respondents votes increased by 54 votes upon scrutiny and recount. The only grave issue unearthed by the report was the missing counterfoils in the three stations which I have already dealt with.

The petitioner was therefore not able to establish that the tallying process favoured the 3rd respondent and disadvantaged his candidate.

9. Determination

Upon analysis of the evidence, this court has reached some findings on whether irregularities or election offences were committed. It is now the defining moment for determination of whether the election was conducted in a free, fair and credible manner.

The irregularities established by the petitioner are the following:

- a) *failure by presiding officers to admit agents in some polling stations;*
- b) *failure by presiding officers to issue Form 35 to agents;*
- c. *failure by presiding officers to request agents and candidates to sign Form 35;*
- d) *failure to make statutory comments where agents did not sign form 35;*
- e) *failure to sign and date Form 36 by Lamu West constituency returning officer;*
- f) *failure to record significant incidents in the polling diary;*
- g) *failure by the county returning officer to prepare Form 36 and provide copies to agents and candidate;*
- h) *transfer of a polling station without complying with the law.*

The petitioner prays for nullification of the election and orders for fresh election. The court has a duty to determine whether the irregularities substantially affected the outcome of the election. In deciding whether the elections were fair, free and credible, the court will be guided by the principles contained in **Articles 38, 81 and 86 of the Constitution.**

In an appropriate situation, an election court strives to give effect to the will of the electorate. The will of the people is demonstrated by the number of votes cast in favour of the winning candidate. This is not to say that the court will not consider other issues that are likely to comprise the integrity of an election. The constitutional principles as to elections must always guide an election court in its decision. The manner in which the numbers were obtained is paramount to the integrity of the election.

In the case of **John Fitch vs. Tom Stephenson & 3 Others (2008) EWHC 501(QB)** it was held:

“.....the courts will strive to preserve an election as being in accordance with the law, even where there has been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches This is because where possible, the courts seek to give effects to the will of the electorate ...”

In the case of **Dorothy E. Brownton vs. Jean Hart Kangas & Others suit no.CI 98 – 01 – 10265, Queen's Bench Division, Manitoba** it was held in regard to elections:

“When interpreting legislation relating to elections, one may reasonably conclude the primary purpose is to ensure that we have a free, open and properly conducted democratic elections. If there have been irregularities, these should be exposed to the view of the general public through the returning officer and through the candidates and their agents involved in the recounts.”

Section 83 of the Act is based on the principle that non-compliance with the law shall not invalidate an election if the court is satisfied that the election was conducted in accordance with the principles laid down in the **Constitution.**

The petitioner has failed to establish that the irregularities and breaches of the law by the 1st and the 2nd respondent significantly affected the outcome of the election. I hereby declare that the 3rd respondent was elected in a free and fair election by the people of Lamu County as the Woman Representative in

the National Assembly. The petition is accordingly dismissed.

Section 84 of the **Act** empowers the court to award costs of an incidental to a petition. In making the order, it is important to consider that the 1st and 2nd respondent were in breach of the law in the manner in which the elections were conducted.

It is hereby ordered that the 1st and 2nd respondent shall bear the costs of the petition.

The petitioner and the 3rd respondent will each be paid costs not exceeding Kshs.1,500,000/= to be taxed by the Deputy Registrar.

The total costs shall not exceed Kshs.3,000,000/=. The security of costs deposited by the petitioner shall be released to him.

A certificate in accordance with Section 86 of the Elections Act shall issue.

10. Appreciation

It is an appropriate moment for me to express my gratitude to the counsels for the parties for the industry in prosecuting and defending this petition: Mr. Kilonzo for the petitioner, Mr. Khaseke of Mohamed Muigai & Co. Advocates for the 1st and 2nd respondents and Mr. J. K. Munyithia for the 3rd respondent.

The Deputy Registrar Liza Gicheha, my legal researcher Fred Odhiambo, my secretary Anne Wanyoike and my clerk Samuel Misian are highly appreciated for their tremendous input in facilitating the timely determination of this petition. The role played by my driver Simon Chirchir and security personnel Harrison Mwatemo by putting in extra hours cannot be over-emphasized. I thank them most sincerely.

Dated and delivered at Malindi this 23rd day of September, 2013.

F. N. MUCHEMI

JUDGE

In the presence of:

Mr. Kilonzo for the petitioner;

Mr. Khaseke for 1st and 2nd respondents;

Mr. Munyithia for 3rd respondent.

F. N. MUCHEMI

JUDGE



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