



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

ELECTION PETITION NO. 5 OF 2013

THE ELECTIONS ACT NO.24 OF 2011: THE ELECTIONS

(PARLIAMENTARY AND COUNTY ELECTIONS) PETITION _____ RULES, 2013

**IN THE MATTER OF THE ELECTION FOR THE WOMEN MEMBER OF THE NATIONAL ASSEMBLY
OF THARAKA-NITHI COUNTY**

THE PETITION OF

MERCY KIRITO MUTEGI.....PETITIONER

-VS-

BEATRICE NKATHA NYAGA.....1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION...2ND RESPONDENT

SAMUEL MUCHERU.....3RD RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Petitioner, MERCY KIRITO MUTEGI, herein after the Petitioner and BEATRICE NKATHA NYAGA herein after the 1st Respondent together with BONIFACIA NJERI KIGWARI, CATHERINE MUTHONI, JULIET ITHIMA NJAGE, KATHOMI GATUGI NJERU, PENINA NKAMBA MURUNGI, and ANESTINE N KINGA NJUE were candidates for election as Women Representative of Tharaka-Nithi County.
2. According to the Petition which was filed on 10th March, 2013 the 1st Respondent was declared the winner for the seat of Woman Member of National Assembly after she garnered 47,000 votes. The Petitioner was the 1st runners up with 37,000 votes. In the 1st Respondent response to this Petition it is stated that the 1st Respondent garnered a total of 48,966 votes against the Petitioner's 31,531 votes.
3. The 1st Respondent was declared the duly elected Woman Member of National Assembly for the Tharaka-Nithi County by Special Issue Gazette of 13th March 2013 No. 3155 VOL CXV-NO.45.

4. The Petitioner has challenged the election of the 1st Respondent and contends that the election was irregular and unlawful because the 1st Respondent engaged in numerous election offences and malpractices. The Petitioner seeks the following orders:

a). a declaration that Beatrice Nkatha Nyaga committed election offences and engaged in serious electoral malpractices contrary to section 71,72 and 82 of the Election Act.

b). a declaration that Beatrice Nkatha Nyaga was not validly and lawfully elected as Woman Member of the National Assembly for Tharaka-Nithi County due to her participation in the electoral malpractices as stated above;

c). a declaration that the 2nd and 3rd Respondents conducted the elections for Woman Member of the National Assembly for Tharaka-Nithi County in an irregular, unlawful and unfair manner with the intention of denying the Petitioner her right to be elected as the Woman Member of the National Assembly thereof.

d). an order nullifying the election of Beatrice Nkatha Nyaga as the Woman Member of the National Assembly for Tharaka-Nithi County.

e). a declaration that the validly elected County Woman Member of the National Assembly for Tharaka-Nithi County is the Petitioner herein.

f). costs of this Petition be awarded to the Petitioner.

g). Such further, other and consequential orders as this Honourable Court may lawfully make.

PETITIONER'S CASE

5. The Petitioner's case against the 1st Respondent is that the 1st Respondent's votes were largely procured through bribery, treating and undue influence and that further the 1st Respondent committed numerous election offences and malpractices contrary to law and the will of the people of Tharaka-Nithi County, which election offences and malpractices renders the 2nd Respondent's purported announcement and declaration of the 1st Respondent as the duly elected Woman Member of the National Assembly for Tharaka-Nithi County null and void. The Petitioner has particularized the said election offences against the 1st Respondent as follows:

a). communicating with the voters during the election process in various Polling Stations contrary to regulation 65 of the Elections (General) Regulations;2012

b). unduly influencing voters to vote for her by dishing out bribes on the election date contrary to Section 63 of the Election Act.

c). unduly inducing voters to vote for her paying and bribing them using treated money on the election date contrary to Section 63 of the Election Act.

d). visiting a witchdoctor to procure the treatment of monies through culturally unacceptable ways with a view of confusing and tricking voters who received the moneys into voting for her.

6. The Petitioner contends that the Respondents colluded to deprive her of some of her votes by either failing to record the same and/or transferring others to the 1st Respondent.

7. The Petitioner contends that the 2nd Respondent willfully refused to collate all the votes cast in the Polling Stations in the tallying process and that it breached the election regulations by counting, collating and tallying votes in an opaque manner and in the absence of Petitioner's Agents.
8. The Petitioner avers that the election results as read by the 2nd and 3rd Respondents were inconsistent and irregular as there were wide disparities on the total votes cast and the announced results and in some Polling Stations, the number of total votes casts were more than the number of the registered voters which discrepancies were intentionally designed to favour the 1st Respondent.
9. The Petitioner contends that contrary to the Election Regulations, the Respondents deliberately evicted the Petitioner's Agents from various Polling Stations effectively barring them from witnessing the whole process in furtherance of their agenda of manipulating and doctoring of the outcome of the elections.
10. The Petitioner contends that the 2nd and 3rd Respondents falsely, unlawfully and illegally disregarded the law in collating, tabulating and declaring the results of Tharaka - Nithi **gubernatorial** election held on the 4th March, 2013 based on inaccurate and manipulated tallying sheets.
11. The Petitioner contends that the 2nd and 3rd Respondents willfully and deliberately delayed without reasonable cause to publicly announce to persons present at the Constituency tallying centers, the results of Maara and Tharaka Constituency as required by law thus prejudicing the right of the Petitioner and the people of Tharaka-Nithi to a transparent, free and fair elections as enshrined in the Constitution
12. The Petitioner contends that the election was marred with widespread incidences of voter bribery by the 1st Respondent who either directly or indirectly bribed voters with an objective to influence the outcome of the elections contrary to law thereby invalidating her eligibility.
13. The 3rd Respondent failed to take any action and/or report to the Commission and any other relevant authority of electoral malpractices, unlawful conduct and offences by the 1st Respondent despite severally being brought to his attention as required by law.
14. The Petitioner contends that she has been deprived of a free and fair election devoid of manipulation, and expectation in contravention of Article 81 (e) (iv) (v) & Article 86 of the Constitution, thereby irreparably undermining the entire Woman Member of the National Assembly elections in Tharaka-Nithi County.
15. The Petitioner called 12 witnesses including her. Fifteen witnesses swore affidavits in support of the Petition but only eleven of them testified.
16. The first affidavit was sworn by Amram Muthee, PW1 who testified that he was the Chief Agent of Democratic Party. He confirmed that he had over 500 Agents and that some of the Agents were denied access into Polling Stations.
17. PW 2, Gillian Karim Nyaga testified that she saw three people who she did not name bribing voters at Kiangondu Polling Station where she was based as the DP Agent.
18. Oswald Nyaga Raini, PW3 said that he was an Agent for UNITY PARTY OF KENYA at Kirubia polling station No.121 Chuka-Igambangombe Constituency. His evidence was to the effect that the elections went on peacefully except for the Deputy Presiding Officer who left with people with TNA T-Shirts. He stated that the D/Presiding Officer was arrested for that act. He then stated that there was widespread bribery of voters without being specific.
19. PW 4 James Muriithi Nanua was an Agent for DP at Kiunguni Primary School Polling Station No.119 in Chuka-Igambangombe Constituency. His affidavit evidence is that some two unknown persons in two unidentified Motor Vehicles were bribing people to vote for TNA candidates.
20. PW5, Mwathi Frankline Kirimi's evidence was that at Turima Polling Station he saw a lady giving money to voters and asking them to vote for Mr. Ragwa, Nkatha and TNA candidates. He stated that he interviewed the said voters and that they confirmed to him that the bribery would influence

them to vote for the 1st Respondent.

21. PW6 Francis Mutegi Kijogi was a gubernatorial candidate for Tharaka-Nithi County. His evidence was that he saw the running mate for TNA Governor's candidate, one Mr. Mate bribing voters and asking them to vote for TNA candidates at Meru Boys Chiakariga Polling Stations.
22. PW7 Prof. Lawrence Mbae M'Mbijiwe deposed that while at Methodist Kathuguwe Polling Station, one of his party Agents John Peter informed him that Mr. Ragwa, Nkatha and TNA Agents were dishing out money to voters and instructing them to vote for Mr. Ragwa. He deposed that he went to Mitheru where people were making symbols of the dove in almost all the Polling Stations.
23. The Petitioner called PW8 Muriithi Bore who deposed that he was a DP agent at Kambandi Polling Station. This is the sole witness who alleged that he was personally given 200/= for tea by the 1st Respondent.
24. PW9, Grace Wangeci was the Coordinator of the DP Agents. She deposed that she visited various Polling Stations and found that her party's agents were denied access to various Polling Stations. She deposed that she got calls from her Agents complaining of being harassed by the TNA and IEBC officials. That several of them were either denied entry into Polling Stations or evicted without any probable cause contrary to law. PW9 deposed that she in company of the Petitioner proceeded to Mukui Polling Station where they found their Agent outside the Polling Station and stated that they too were denied entry. PW9 deposed that it was only after vehemently protesting to the Presiding Officer, Mukui Polling Station that their Agent was finally let into the Polling Station. PW9 deposed that outside Ndunguri Polling Station gate he found a man calling those who were going into the Polling Station and giving them money, and that he would then ask the persons to vote for Nkatha and the "*Kajia*" which was the symbol of the TNA party.
25. PW9 deposed that she went to Ngaita Polling Station where she found some people in a car with TNA T-shirts and caps giving money to voters and asking them to vote "*six-piece*" which meant voting for only TNA aspirants. She deposed that voters were annoyed and started rioting forcing the police to shoot in the air to disperse the rioters after which she left in fear for her life.
26. PW10 was Elias Mwenda, who was a DP Agent. He deposed that on 4TH MARCH 2013 at about 12 noon he was at Kiereni Market when he saw three people standing outside a car Reg. No. KBR 375N, Navy blue Probox parked at the Market. He said that the three men approached voters as they passed by and offered money in exchange for a promise to vote for NKATHA, RAGWA and any other TNA candidates. PW10 deposed that when people realized that the three were bribing voters, they shouted at them and criticized them until they drove their vehicle towards Kambandi.
27. PW11 was Humphrey Gitonga who was an Agent for Safina party. He deposed that he reported to Kiarugu Primary School Polling Station where he found that all party Agents except those for TNA were denied access into the Polling Station. He further deposed that only the TNA Agent was allowed to assist disabled and illiterate voters. This witness spoke at length about the counting and tallying of votes with respect to the gubernatorial seat.
28. The Petitioner in her affidavit in support of the Petition paragraph 42 thereof has deposed that she perused tallying sheets for Maara Constituency which her Agents managed to retrieve from the other candidates, and discovered numerous discrepancies in the manner in which the 2nd Respondent conducted the collating process and that she realized from the said Form that there was systematic, strategic, planned and executed manipulation of the election tallying process in favour of the 1st Respondent. She has given the table below as demonstration of the manipulation from registered voters for Maara Constituency. The Petitioner contended that she compared the registered voters for each election and found the numbers inconsistent for each election and that the said discrepancy was deliberately created to favour the 1st Respondent. The following is the Petitioners table:

| Polling station | National Assembly | Governor | Senate | Discrepancy voter number | |
|-----------------|-------------------------|----------|--------|--------------------------|-----|
| 022 | Magundu Primary School | 416 | 416 | 22 | 394 |
| 043 | Mumbuni Primary School | 398 | 398 | 468 | 70 |
| 053 | Itara Primary School | 362 | 361 | 361 | 1 |
| 108 | NkaNgani Primary School | 314 | 341 | 314 | 27 |
| 111 | Ntumu Boarding School | 186 | 166 | 186 | 20 |
| 112 | Ndunguri Primary School | 682 | 582 | 682 | 100 |
| 116 | Nturiri Primary School | 364 | 384 | 384 | 20 |
| 131 | Makuri Primary School | 395 | 375 | 395 | 20 |
| 148 | Mutindwa Primary School | 288 | 228 | 288 | 60 |
| 152 | Mwema Coffee Factory | 454 | 464 | 454 | 10 |

THE 1ST RESPONDENT'S CASE:

29. The 1st Respondent on the other hand has contended that the Tharaka-Nithi County Women Representative elections held on 4th March 2013, were in accordance with and the spirit and intention of Article 81 of the Constitution of Kenya, 2010, the Election Act, 2011 and the Elections (General) Regulations, 2012 all which promote the holding of free, fair and transparent elections. Consequently she urges this court to strike out the Petition with costs and declare the 1st Respondent herein was duly elected as the Woman Representative for Tharaka-Nithi County.
30. The 1st Respondent further categorically denies involvement in electoral malpractices and offences leveled against her or in irregularities and/or unlawful acts in the entire election period. The 1st Respondent contended that she was lawfully and legally declared the duly elected Women Representative of Tharaka-Nithi County with a total of 48,966 votes against the Petitioner's 31,531, thus creating a margin of 17,435 votes between the two. The 1st Respondent further contends that in response to the alleged electoral offences, all are cognizable offences and if indeed they were committed, then the Petitioner ought to have inter alia recorded appropriate statements with the police to facilitate the arrest and prosecution of the 1st Respondent, and any other person alleged to have committed the offences. The 1st Respondent further contends that the Petitioner has totally failed to provide any reasons why the 2nd and 3rd Respondents were out to favour the 1st Respondent as against the Petitioner or any other candidate, and that as such all the allegations of malpractice against the 1st and 2nd Respondent for the benefit of the 1st Respondent are totally misplaced, false, farfetched, unreasonable and incompetent and ought to be totally rejected for lack of any material evidence and want of particulars.
31. The 1st Respondent avers that she did not have any personal Agents in the said elections, but rather her party had various Agents in the various Polling Stations under the leadership of the Chief County Agent.
32. The 1st Respondent called one witness apart from herself. The sole witness she called was NJAGI MBURIA KENNETH, RW1. He was the Chief County Agent for the 1st Respondent's party, TNA. In that affidavit he deposes that he visited a number of Polling Stations and that he did not experience any problems. He further deposed that his party had a clear and good network for monitoring the elections. He confirmed that he never witnessed any malpractice by any person in the Polling Stations he visited during the elections. RW1 denied that his party's Agent were involved in any malpractice.

THE 2ND AND 3RD RESPONDENTS CASE :

33. The 2nd and 3rd Respondents jointly filed a response to this Petition urging the Court to dismiss the Petition because the 1st Respondent was validly elected in a free, fair and transparent election. The response was supported by the affidavits of Samuel Mucheru, George Karani Ng'ang'a, Wario Ibrahim Ali, Hellen Mutuva and Oswald Muriithi Miriti.
34. The 2nd and 3rd Respondent's contend that the elections for Tharaka-Nithi County were lawful having been conducted in accordance with the principles laid down in the constitution, the Elections Act the Elections (General) Regulations, 2012 and all other applicable laws. Subsequently they contend that the announcement and declaration of the 1st Respondent was lawful. The 2nd and 3rd Respondents further deny any existence of malpractices and offences to the extent that this was never brought to their attention by anyone, not even the Petitioner. The 2nd and 3rd Respondents have further denied having thrown out the Petitioners Agents and further stated that for Agents to be allowed into the Polling Stations, they were required to present a duly signed and stamped Oath of Secrecy, an appointment letter by the respective political party and an accreditation badge and that where an Agent lacked any of these, he would not be allowed into a Polling Station.
35. Oswald Muriithi RRW1 who was the Presiding Officer for Kiarugu Polling Station deposed in response to the affidavit of Humphrey Gitonga who complained that despite being an Agent of Safina party he was evicted from the Polling Station, that he went to the Station drunk and that he identified himself as an Agent of Orange Democratic Movement and not Safina Party as he had deposed. He further deposed that he did not allow him because there was already another Agent for ODM party and that they had been advised by the 2nd Respondent to allow only one Agent per political party. He deposed that when the said Humphrey Gitonga came back to the Polling Station he was allowed in as a Safina party Agent. He further categorically denied that there were any Agents who were allowed to assist disabled and illiterate voters.
36. Hellen Mutuva, RRW2 who was the Constituency Coordinator for the 2nd Respondent in Maara Constituency, Tharaka-Nithi County deposed that she did not receive any report from the Petitioner or any other person that Agents were not allowed into Polling Stations in Maara Constituency. She further deposed that she did not receive any reports of electoral malpractices. In regard to paragraph 42 of the Petitioner's affidavit, Ms Mutuva testified that the number of registered voters in various Polling Stations for the Senatorial, Gubernatorial, National Assembly and Women Representative was the same. She further deposed that all Agents who were available when the results were being announced signed Form 35s and 36s and that when she was announcing the results, most of the Agents had left the Tallying Centre and only those who were around signed Forms 36.
37. Wario Ali, RRW3 who was the Constituency Coordinator in Chuka Igambang'ombe Constituency deposed that in response to paragraph 13 and 14 of the Petitioner's affidavit, he did not at any one time speak to the Petitioner about the number of streams at Kirubia Polling Station. In response to paragraphs 28, 29 and 30 of the same affidavit, Mr. Wario stated that the Presiding Officer at Ndiruni Market had inadvertently placed Form 35s for Gubernatorial and Senatorial Election for the said Polling Station in the ballot box where he sought consensus amongst the stakeholders who were present (who included the Petitioner) so as to enable the ballot boxes for the Gubernatorial and Senatorial election from Ndiruni Market be opened so as to retrieve the said Form 35s from them.
38. George Karani Ng'ang'a, RRW4 who was the Constituency Coordinator for Tharaka-Nithi County deposed that he did not receive any report from the Petitioner or any other person that Agents were not allowed into Polling Stations except for one case in Githunguri Polling Station which situation was later remedied. He further deposed that no case of voter bribery was

reported to him and that neither was he aware of any such matter being reported to the police.

39. Samuel Mucheru, did not testify. However he filed an affidavit which he swore as the County Returning Officer for Tharaka-Nithi County, and as the 3rd Respondent in this Petition. He deposed that there were no complaints made to him either by the Petitioner or any other person regarding election malpractices, except one incident which does not relate to this Petition. The 3rd Respondent deposed that the 2nd Respondent did not abandon the electronic system but rather that the same failed throughout the country. The 3rd Respondent deposed that he did not receive reports or complains of any Agent who was not allowed into the Polling Station. He further deposed that at the time of announcing the results, most of the Agents and candidates had left the Tallying Centre.
40. Consequently, the 2nd and 3rd Respondents pray that Petition herein be dismissed with costs to the 1st and 2nd Respondents.

THE ISSUES FOR DETERMINATION

40. The uncontested issues are:

- (i) **Whether the 1st Respondent committed election offences and engaged in serious electoral malpractices contrary to Section 63, 71, 72 and 82 of the Elections Act"**
- (ii) **Whether the 2nd and 3rd Respondents conducted the elections for Woman Member of National Assembly for Tharaka-Nithi County in an irregular, unlawful and unfair manner with the intention of denying the Petitioner her right to be elected as the Woman Member of the National Assembly thereof"**
- (iii) **Whether the 1st Respondent was validly and lawfully elected as the County Woman Member of the National Assembly for Tharaka-Nithi County in the elections held on 4th March 2013 due to her participation in the electoral malpractices as alleged"**
- (iv) **Whether or not there are valid grounds to nullify the election of the 1st Respondent as the elected County Woman Member of the National Assembly for Tharaka-Nithi County; and if so should the elections of the 1st Respondent be nullified"**
- (v) **Whether or not the irregularities were so substantial as to affect the results declared by the 2nd and 3rd Respondent.**

Contested issues adopted by the court as issues for determination are:

- (vi) **Whether or not the results in the 10 Polling Stations specified in paragraph 42 of the Petitioners supporting affidavit to the Petition were properly counted, tallied and correctly recorded in the Statutory Forms"**
- (vii) **Whether the Petitioner is entitled to any of the reliefs sought in this Petition"**
- (viii) **What orders, remedies and declarations the Court should make"**
- (ix) **Who should bear the costs of this Petition"**

In the judgment I have merged some of the issues and considered them accordingly.

EVIDENTIAL, INCIDENCE, BURDEN AND STANDARD OF PROOF

41. The evidential burden is the obligation of a party in a case to adduce sufficient evidence to raise an issue to the satisfaction of the court or tribunal hearing the case to enable the tribunal find the issue a matter that should be considered as being an issue for determination. This being an Election Petition filed under the New Election Laws, the issue of the evidential burden of proof is sorted out due to two reasons. First the parties and in particular the Petitioner has filed both the Petition and the evidence she will be relying upon in the form of affidavits and it is out of this pleadings that the issues of determination are derived. Secondly under Rule 17 of Elections (Parliamentary and County Elections) Petition Rules, 2013 herein after the Rules, requires that Pre-Trial Conferencing be held within seven days after the receipt of the last response to a Petition in which inter alia the court shall frame contested and uncontested issues in the Petition. For these two reasons the evidential burden of prove is largely settled.
42. The incidence, burden and standard of proof were the subject of a lively debate between the parties to this Petition in their written and oral submissions. Mr. Agwara submitting on the burden of proof required in allegations of bribery in an Election Petition and urged that under section 108 of the Evidence Act the burden of proof lies on the person who would fail, if no evidence is adduced. Counsel argued that under that section of the Evidence Act, the 1st Respondent is required to tender evidence on bribery since it is she who would fail if she called no evidence. Counsel submitted that since the 1st Respondent failed to respond to the allegations, the Petitioner should be considered to have proved the allegations.
43. Mr. Mithega in his submissions urged that the cardinal rule was that *he who alleges must prove* as required under section 107 of the Evidence Act. Counsel urged that in this case the burden is heavy on the Petitioner because she challenges a concluded election. He urged the Petitioner had the duty to prove her case by tendering credible and well corroborated evidence. In regard to allegations of corruption, bribery and undue influence, witchcraft, Oathing, and other crime related inferences counsel urged that these are very serious charges which must be strictly proved to the required standard due to their very serious consequences. The counsel relied on the case of **Mohamed Jahazi vs Sharif Nassir A. Taib, Election Petition No. 9 of 1983** where it was held that;

“...the burden of proof throughout rests on the Petitioner and the quality of evidence that is advanced is to be considered with a thoroughness and gravity which is commensurate with the dire consequences that can follow by virtue of the provisions of section 6 of the National Assembly and Presidential Elections Act and section 35 of the Constitution.”

44. Miss Omuko for the 2nd and 3rd Respondent urged that the Petitioner bears the burden of proof. Counsel relied on the Supreme Court Case of **Raila Odinga vs IEBC and four others, Petition No. 5 Of 2013**, which I have considered. Regarding the standard of proof Ms Omuko urged that the position is that the standard is higher than on a balance of probability save for criminal allegations such as bribery and data specific allegations which have to be proved beyond reasonable doubt.
45. I have considered the rival arguments by the counsels on the burden and standard of proof. As to the burden of proof the fundamental principle is based on the Latin maxim ‘**ei qui affirmat, non ei qui negat, incumbit probatio**’ applies, that is ‘**the burden of proof lies upon him who affirms and not upon him who denies.**’ In this case therefore the burden lies with the Petitioner to prove the allegations made in the Petition. When considering whether the burden of proof has been satisfied, the court will consider the substance of the issue(s) asserted, not just the form in which it has been presented.
46. The Election Petition court has to determine, as against the Respondents, whether the Petitioner

has been able first and foremost to establish that the acts or omissions complained of or alleged were indeed committed, and then secondly whether she has proved that these acts or omissions did affect either the outcome and/or validity of the elections. Contrary to what Mr. Agwara submitted, the Petitioner must establish these facts and discharge this burden before the Respondent is called upon to respond. It is not enough to prove that the acts complained of took place. For the first part of the burden of proof, section 107 of the Evidence Act applies which stipulates:

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

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

47. In **Raila Odinga vs IEBC & Others Supreme Court Election Petition No. 5 of 2013** the court held:

“Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the Respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta*: all acts are presumed to have been done rightly and regularly. So, the Petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”

48. As to the Standard of Proof, that will depend on whether the affirmation made is based on allegations of quasi criminal nature, in which case proof must be above preponderance of probability but below proof beyond reasonable doubt. That will be the Standard of Proof I will adopt in determining the allegations of fraud, undue influence, treating and data specific allegations. In the case of all other issues not of quasi criminal nature the Standard of Proof will be on a balance of probabilities. In the case of **Benard Shinali Masaka –vs- Boni Khalwale & 2 others (2011) eKLR**, the Court held:

“Further, I agree with the proposition grounded on the decision in Mbowe vs Eliufoo [1967] E.A. 240 that any allegations made in an election Petition have to be proved to the “satisfaction of the court”. Like Rawal J. in Onalo case, I am certain that the standard of proof, save in matters where electoral offences are alleged, cannot be generally beyond reasonable doubt, but because of the quasi – criminal nature of some election Petitions, it is almost certainly on a higher degree than merely on a balance of probabilities, the latter being the standard in civil cases.”.

49. I have considered the pleadings, the evidence adduced both in the filed affidavits and the testimony of those called to testify, and will consider the principles and provisions of the relevant applicable substantive law, precedent and oral and filed submissions by counsels in this case.

FACTS NOT IN DISPUTE.

50. It is not disputed that the Petitioner, the 1st Respondent, and 6 others Bonifacia Njeri Kigwari, Catherine Muthoni, Juliet Ithima Njage, Kathomi Gatugi Njeru, Peninah Nkamba Murungi and Anestine Nkinga were the candidates for the seat of the Woman Member of Parliament/Woman

Representative for the Tharaka-Nithi County in the 4th March general Elections. It is also not in dispute that the County Returning Officer, Tharaka-Nithi County, who is the 3rd Respondent in this Petition, announced the results of the said election and declared the 1st Respondent the duly elected Women Representative for that County on the 6th March, 2013, having garnered 48,966 votes against her nearest rival, the Petitioner who garnered 31,531. I have however noted that the Petitioner has contested the results.

51. It is not in dispute that pursuant to the above, the 2nd Respondent subsequently declared the election results through Gazette Special Issue Notice No. 3155 Vol. CXV-NO. 45 of 13th March, 2013.
52. It is not in dispute that the Petitioner has challenged the declaration of 6th March and 13th March, 2013 by the 2nd and 3rd Respondent respectively, declaring the 1st Respondent the duly elected Woman Member of the National Assembly for Tharaka-Nithi County.

PRELIMINARY ISSUES

53. There is a preliminary point argued by the 1st Respondent's advocate that the Petition as filed was incompetent on grounds it did not comply with Rule 10 and 12 of the Election (Parliamentary and County Elections) Rules, hereinafter the Rules. He also raises issue with the complaint of bribery and urged that the offence of bribery fell under section 64 of the Elections Act which, counsel urged was not pleaded. For the latter complaint I will deal with it at a later stage. I must note that the issues raised here were not the subject of the interlocutory application by the 1st Respondent where she sought to strike out the Petition on grounds of being filed out of time and secondly to strike out affidavits for being defective.
54. Mr. Mithega specified the violations as failure to comply with the Rules as follows:
 - a. **Rule 10(1)(c) – The results of the elections, if any, and the manner in which it has been declared;** Counsel urged that the results of the election were not disclosed anywhere in the Petition.
 - b. **Rule 10(1)(d) – The date of the declaration of the election results;** Counsel urged that no date for the declaration of the results was given.
 - c. **Rule 10(1)(e) – The grounds on which the Petition is presented;** Counsel urged that The grounds on which the Petition is presented are not pleaded in the Petition as required.
 - d. **Rule 10(3)(b) – Be supported by an affidavit made by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on by the Petitioner.** Counsel urged that the annexed affidavit of the Petitioner did not contain grounds upon which the reliefs are sought.
 - e. **Rule 12(6) – The provisions of Order 19 of the Civil Procedure Rules, 2010 and the Oaths and Statutory Declarations Act shall apply to affidavits under this rule.**
55. Counsel relied on **Mbaghadi Fredrick Nkayi & An vs Dr. Nabwiso Frank Wilberforce, Uganda Court of Appeal Election Appeals No.14 & 16 of 2011; Ismail Suleman & 9 others vs Returning Officer Isiolo County & 2 others HC Election Petition No.2 of 2013 at Meru and John Njenga Michael N. Mututho vs Jane Njeri Wanjiru Kihara & 2 others (2008) 1KLR 10.** I have considered each of these cases.
56. The question is whether the Petitioner failed to plead the election results" Were the particulars vital to prove the Petitioner's case clearly stated in the Petition"
57. It is clear that the Petitioner gave an estimate of the votes garnered by the 1st Respondent and herself, and not the actual declared results as spelt out in the Respondents responses. In **Mbaghadi Fredrick Nkayi & Another**, supra, cited by Mr. Mithega the court ruled that particulars vital to the Petitioner's case should clearly stated. In the second case cited, **Ismail**

Suleman & 9 others, supra, and in **John Njenga Michael N. Mututho**, supra, the two courts came to somewhat similar conclusion. In the Meru case, Makau J. concluded that where the matters supposed to be included in the Petition as provided under Rule 10 (1) c are omitted, that Petition is incomplete and therefore incompetent. I agree with the conclusions reached by my brothers in the above cited cases.

58. In **AMINA HASSAN AHMED vs IEBC Garrissa EP No. 4 of 2013** the learned Judge laid down the reasons why Rule 10 of the Rules cannot be ignored. I agree with him. Rule 10 are not mere technical requirements laying down procedural form and content of intended Election Petitions but are substantive as they go to the root and substance of the issues and matters prescribed upon. Since the Rules, like the Elections Act, are a special legislation created to give effect to the overriding objective mentioned in Rule 4, which is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act. Every Rule is intended to achieve a required result geared towards, inter alia, expedition in the resolution of the petitions.
59. Having said the above I will examine whether the Petitioner breached any of the provisions under Rules 10 and 12 as alleged. In compliance to Rule 10 (c) the Petitioner at paragraph 3 of the Petition stated thus:

“From the said election, the 2nd and 3rd Respondents announced the 1st Respondent, BEATRICE NKATHA NYAGA as the purported winner with 47,000 votes and/or thereabout, followed by your Petitioner who had 37,000 votes and/or thereabout.”

60. The test is whether the Petitioner has pleaded particulars vital to support her case, and in this regard whether she has a ground to file this Petition. The results pleaded are approximate figures. I am satisfied that they meet the requirement as they show that the Petitioner lost the election, and that is the basis for filing the Petition in the first place.
61. In regard to Rule 10 (1) d, the Petition provides as follows at paragraph 4:

“...the 2nd Respondent have subsequently declared the elections results by gazetting the 1st Respondent, BEATRICE NKATHA NYAGA of The National Alliance party (TNA) as being the purported duly elected Woman Member of the National Assembly for Tharaka-Nithi County Code Number 13 as gazetted on the 13th March, 2013 vide GAZETTE SPECIAL ISSUE NO. 3155 VOL. CXV – NO. 45.”

62. The above paragraph pleads the date the results of the Election the subject matter of this Petition were declared, and the same meets the requirement of the stated Rule.
63. As for Rule 10(1)(e) and Rule 10(3)(b), the grounds on which the petition is presented and an affidavit made by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on by the Petitioner, are all met as these grounds run through out the Petition and the affidavit in support, and are the basis upon which the issues for determination were drawn. Nothing turns on these grounds.
64. In regard to Rule 12(6), Mr. Mithiga analyzed the affidavit sworn by the Petitioner making general observations regarding it, which do not lay a clear basis of what in the affidavit violates Rule 12 (6) or Order 19 of the Civil Procedure Rules. More importantly, this Rule was the subject matter of the application by the 1st and 2nd and 3rd Respondents in which they sought to have the petition struck out at the Preliminary stage. The court will be guided by Order 19 of the CPC when considering the affidavit and other evidence adduced in this case, not just by the Petitioner but the Respondents as well.
65. I find that the Petition is not incompetent for the reasons stated herein above. The Preliminary point is accordingly dismissed.

ANALYSIS AND EVALUATION

Whether the 1st Respondent committed election offences and engaged in serious electoral malpractices contrary to Section 63, 71, 72 and 82 of the Elections Act"

66. The Petitioner's complaints in this Petition under this head are that there was widespread voter bribery and corruption which occurred on the night of 3rd March 2013 and also on the day of election 4th March 2013. The other complaint was that the 1st Respondent visited a witchdoctor in order to unduly influence voters to vote for her.
67. In support of the complaint of bribery the key witness was PW8 who testified that on 3rd March 2013 he was at Kambandi Market when at around 10 pm he received Ksh.200/- from the 1st Respondent in presence of 75 people. PW8 in his affidavit paragraphs 2, 3 and 4, and also in his evidence in court, PW8 testified that the 1st Respondent in person invited people to take money from her and that she had a bundle of Ksh.200/- which she dished out to the people telling them to buy "gachai" and also asking them to vote for her.
68. The 1st Respondent denied the allegation in her affidavit and response to the Petition. When cross examined in court the 1st Respondent stated that she could not remember where she was on the evening of 3rd March, 2013.
69. Mr. Agwara in his submissions urged the court to find that the Petitioner had proved the allegation of corruption as against the 1st Respondent in the absence of any denial or evidence to refute or rebut the Petitioner's case. Counsel urged that under section 64 of the Act corruption is attached to a candidate to an election, unlike in the past where bribery was an offence both to the receiver and the giver. Mr. Agwara urged that the current law only requires the Petitioner to prove that bribes or monies were offered and or given to voters by the 1st Respondent and/or her Agents or supporters in an attempt to induce voters to vote for the 1st Respondent. Mr. Agwara suggested that the party that would fail if no evidence was adduced was the 1st Respondent and that having failed to respond to this allegations, she had not discharged her burden. Counsel relied on Halsbury's Laws of England 4th Edition Vol. 15 where it is stated:

"Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by Agents, however insignificant that act may be, is sufficient to invalidate the election. The judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be, such as they can allow in certain conditions in cases of treating or undue influence by Agents."

59. Mr. Mithega submitted that section 64 of the Elections Act is not pleaded anywhere in the Petition but that rather the Petitioner makes general allegations touching on bribery. Counsel urged that bribery was not pleaded and should not be considered. Counsel urged that because parties are bound by their pleadings and as such cases must only be decided on issues on record. Counsel urged that a case must either succeed or fail within what is pleaded since a party is forbidden from shifting her case from that she set out in her pleadings. Counsel urged that it should not be forgotten that a point which is not pleaded even if canvassed at the hearing cannot be a basis of a determination. Counsel cited four cases which I have considered and I will quote only two which I consider appropriate, the other two being distinguishable as they do not relate to election Petitions. The two are:

a. Ndolo v Wathika & Others (2010) 1EA 279 where the court held:

*"In the case of election Petitions the Petition itself and the particulars where supplied constitute the pleadings and the issues as framed should stem from the pleadings and evidence must relate to the issues arising from the pleadings. **Leading evidence on an issue that is not pleaded circumvents the***

Petition and particulars supplied, is irrelevant and inadmissible and is unacceptable for introducing an element of surprise and uncertainty. Particulars are part of the pleadings and the purpose of the pleadings is to give fair notice of the case which has to be met. Since an election Petition is not capable of being amended all issues in the Petition crystallize after the service of the particulars and therefore any attempt to introduce evidence outside the Petition as particularized would violate the rule on what issues are before the court and would also violate the principle of relevance”

b. Benjamin Ogunyo Andama v Benjamin Andola Andayi & 2 others [2013] eKLR where the court said;

“The second point I must make at the outset, is that the pleadings of the parties herein are specific. The complaints in the Petition are also specific. The affidavit evidence relied upon by the Petitioner however, sought to expand the scope of the Petition by adding complaints which were not pleaded in the Petition. It is trite, in my view, that parties are bound by their pleadings. A party cannot be allowed to come to court and attempt to prove complaints which are not pleaded, unless a request for amendment of pleadings is considered and granted by the court”.

70. Mr. Mithega submitted that the 1st Respondent adequately responded to the general allegations of bribery leveled against her. Mr. Mithega drew the court’s attention to paragraph 35 of the 1st Respondent’s response to the Petition and paragraphs 9, 23 and 24 of the 1st Respondent’s Replying Affidavit. Regarding the change of the law on bribery counsel urged that the law on bribery has not changed. He submitted that section 64 captures bribery committed by the candidate and any other person who participates and that the effect is that bribery must have two parties involved, the one who gives and the one who receives, and that both of them are guilty of the offence.
71. Mr. Mithega cited the case of **Aggrey Awori Siryoyi vs Kevina Taaka Wanaha Wandera High Court Election Petition No. 19 of 2011** where the court stated that in order to prove bribery one must show that:
- Money or gift was given to a voter;
 - the money or gift was given by a candidate or his Agent;
 - it was given to induce the person to vote for the candidate or to refrain from voting the other; and,
 - that the Respondent gave the money or gift personally or through her Agent with her knowledge consent or approval.
72. Counsel relied on the **Black’s Law Dictionary 6th Edition** on the definition of bribery. Counsel also cited the case of **Mohamed Ali Mursal vs Saadia Mohamed and two others 2013 eKlr** for the proposition that bribery is both an electoral and criminal offence, and should be proved by credible evidence on a standard of proof of beyond reasonable doubt. Mr. Mithega also quoted **Makumbi Kamyia Henry vs Kaddu Ssozi Mukasa & Another High Court of Uganda Election Petition No. 43 of 2011** for the proposition that a court should not regard an allegation of bribery as proved unless the evidence before the court is cogent and quite compelling, for the reason that in an election dispute witnesses who testify for either party are either their supporters or campaigners or Agents and would desire to see their candidate score victory. Counsel also relied on **Thomas Malinda Musau and two others vs IEBC and two others (2013) eKLR** for the proposition that failure to report alleged bribery of voters or Agents cannot be remedied by this court and similarly it cannot be upheld. Counsel also relied on the case of **Wilson Mbithi Munguti Kabuti and five others vs Patric Makau Kingola and Another 2013 eKLR** for the Proposition that where bribery is an allegation in the Petition a high degree of proof is required.
73. In regard to PW8, Muriithi Bore, Mr. Mithega urged that his evidence is not enough to prove the

serious charge of bribery because the witness did not prove, by documentary evidence, that he was a registered voter. Secondly PW8 is a partisan witness by virtue of being an Agent for the Petitioner's party. Thirdly that his evidence was not corroborated even though he alleged that he received the 200/- from the 1st Respondent in the presence of 75 people in a market place yet none of them were called as witnesses.

74. Mr. Mithega urged that the evidence of PW8 that he saw voters being bribed on the election day at Kambandi Market yet he was supposed to be inside the Polling Hall as he was a Polling Agent for the Petitioner, should not be believed. Counsel urged that PW8 did not admit that he was bribed but said that he was given tea which he took because he was thirsty and that he was not influenced by the money.
75. Ms. Omuko submitted that the evidence of PW8 even if it were to be believed could not be relied upon without corroboration because the witness committed an offence under section 64 (g) and 62(2) of the Act. Counsel relied on the case of **Sambu vs Kenga and Another (2008) 1 KLR(EP)** for the proposition that any person receiving bribes is an accomplice and their evidence cannot be acted upon without corroboration. Ms. Omuko also relied on the case of **Thomas Malinda Musau**, supra, for same proposition as cited by Mr. Mithega.
76. Mr. Agwara in response to the cases cited by the Respondents on the issue of bribery urged that there was a difference between the cited cases and the instant Petition in that in the cited cases the Respondents denied the allegations of bribery and called evidence in support thereof, while in the instant case the Respondent has not denied that she was at the place where she was alleged to have bribed voters. In regard to credibility of PW8 counsel submitted that in his affidavit PW8 stated clearly that he was a registered voter and that he voted on the Election Day. In regard to the issue of bribery Mr. Agwara submitted that contrary to what the Respondents counsels had suggested, section 63 as read with section 64 of the Elections Act does not obligate a party to report acts of bribery to the police, and that therefore the fact that no report was made to the police should not be held against the Petitioner.
77. Regarding whether bribery was pleaded, Mr. Agwara submitted that this was pleaded in the Petition and that the 1st Respondent in paragraphs 25 and 28 of his submissions confirms that allegations of criminal nature including bribery are pleaded in the Petition.
78. The Petitioner called several witnesses who made allegations to the effect that the 1st Respondent's Agents and supporters were seen bribing voters in exchange of a promise they would vote for the 1st Respondent. These witnesses were Mutegi Francis Kijogi, Elias Mwendu Nthiri, Mwathi Franklin Kirimi, James Muriithi Nanua, Grace Wangeci and Gillian Karimi Nyaga.
79. Mr. Mithega on his part urged that no tangible evidence is given to associate the alleged persons who were allegedly bribing voters with the 1st Respondent at all. Counsel urged that a mere statement to the effect that they were 1st Respondent's Agents will not do, and further that the Petitioner's affidavit does not indicate that they were committing the alleged offences with the knowledge and consent of the 1st Respondent or at all.
80. The first issue raised is whether bribery should be considered as an issue for determination in this Petition. It is trite law now that the issues for determination can only be drawn from the Petition or pleadings. The affidavit or other evidence adduced in support thereof must be confined within the ambit of the Petition. Was bribery pleaded"
81. Under paragraph 8 of the Petition the Petitioner pleaded particulars of electoral offences and malpractices against the 1st Respondent as follows:
 - b. **Unduly influencing voters to vote for her by dishing out bribes on the election date contrary to Section 63 of the Election Act.**
 - c. **Unduly inducing voters to vote for her paying and bribing them using treated money on**

the election date contrary to Section 63 of the Election Act.

82. Under paragraph 9 of the Petition the Petitioner pleads as follows:

The Petitioner avers that the 1st Respondent's votes were largely procured through bribery, treating and undue influence. The same should not be considered during the scrutiny and recounting of the votes as provided by the Election Act.

83. Similar allegations of bribery are also made under paragraph 20 of the Petition. Under the Petitioner's affidavit in support of the Petition, paragraphs 17 to 20, she deposes to reports of voter bribery received by her from various persons and Agents.

84. The intention of, inter alia Rules 4 and 10 of the Rules is to inter alia prevent the element of surprises and the resultant delay in the manner in which election petitions are drawn. It is however quite clear that a Petitioner will not be allowed to adduce evidence in support of allegations not pleaded in their Petition. Is the 1st Respondent taken by surprise or ambushed by the allegation of bribery" I will consider some of the paragraphs in the 1st Respondent's pleadings in order to answer this question. Paragraph 23 and 24 of the 1st Respondent's response pleaded as follows:

23. That I further state that the alleged offences of bribery, treating, and undue influence were not committed and as such a vote scrutiny and recount would not prove their commission or at all.

24. That I further aver that the allegations of bribery, treating and undue influence are all incompetent and bad in law."

85. The 1st Respondent gave a response to the allegations of bribery in her pleadings. She was not taken by surprise.

86. It is true, and I take responsibility for this, that neither the Petitioner nor the Respondents' counsels identified bribery as an issue for determination, despite the fact that the issue was even particularized in the Petition, including reference to section 63 of the Act which deals with bribery, and despite response to those allegations by the Respondents. The court failed to pick out section 63 of the Act as one of the issues which arise in the Petition. It was an issue which required to be addressed, and to which all the parties have made a response to. I will therefore consider it here.

87. The **Black's Law Dictionary Eighth Edition** defines bribery and gives an illustration as follows:

"The corrupt payment, receipt, or solicitation of a private favour for official action. Bribery is a felony in most jurisdictions."

88. The same dictionary gives an illustration which I think is of help to include as follows:

"If money has been corruptly paid and corruptly received, for the purpose of influencing official action, do we have one crime of which two are guilty, or two different crimes" No uniform answer is possible under existing statutes. Under some of the provisions bribery is one offence and references to (1) giving or offering a bribe, or (2) to receiving or soliciting a bribe, are merely factual statements in regard to the guilt of one party or the other. Under another plan, regard to the guilt of one party or the other. Under another plan 'bribery' is employed as generic term to cover two different offenses; (1) giving or offering a bribe, and (2) receiving or soliciting a bribe. A third plan uses the word 'bribery' to indicate the offense of the briber and 'receiving a bribe

for the other side of the transaction.”

86. This illustration addresses the issue raised by Mr. Agwara whether the offence of bribery under the Act creates one offence or two offences. That is whether the giver and the receiver commit one offence or whether the giver commits a complete offence and the receiver another complete offence.

87. Section 64 which deals with bribery stipulates:

64. (1) A candidate who—

(a) directly or indirectly in person or by any other person on his behalf gives, lends or agrees to give or lend, or offers, promises or promises to procure or to endeavour to procure any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter or to or for any other person in order to induce any voter—

(i) to vote or refrain from voting for a particular candidate;

...

(g) being a voter, before or during any election directly or indirectly, in person or by any other person on his behalf receives, agrees or contracts for any money, gift, loan, or valuable consideration, office, place or employment for himself or for any other person, for voting or agreeing to vote or for refraining or agreeing to refrain from voting for a particular candidate at any election; commits the offence of bribery.

89. Section 64 (1) (a) and (g) creates an offence called bribery. The section is clear that he who gives and he who receives a bribe commit an offence. The circumstances which constitute the offence are set out under the section. It is also clear that he who gives and he who solicits or receives a bribe under the circumstances set out under that section commits an offence. Either one of the acts constituting bribery forms a complete offence.

90. I will begin with the allegations I consider were not supported by any evidence. The Petitioner made allegations that the 1st Respondent consulted witch doctor(s), however no evidence was adduced to support this allegation. The Petitioner also alleged that there was collusion between the Petitioner on one part and the 2nd and 3rd Respondents to deny her of her right to be elected the Woman Member of Parliament for Tharaka-Nithi County; that the 1st Respondent communicated with voters, and gave treated money to voters in order that they vote for her. I find all these allegations unproven from the onset as no particulars of these offences were pleaded, and no evidence called to support any to them and I therefore find it unnecessary to consider.

91. In regard to bribery, we have direct evidence against the 1st Respondent through PW8. There was indirect evidence of allegations of bribery against the 1st Respondent through PW2, 4, 5, 6, 7, 9 and 10.

92. At paragraph 4, 5 and 6 of his affidavit PW8 stated as follows:

“4. That after she (1st Respondent) addressed the crowd of about 75 people, she asked them to queue for “gachai” money so they could vote for TNA. TNA is not mean” she said she had a bunch of 200/- notes which she personally gave 200/- (one note) to each individual present. However towards the end one person snatched the remaining notes from her and escaped into the darkness. I was given a two hundred shilling note.

5. That on 4th March, 2013 about 12.30 pm Nkatha’s Agent arrived at Kambandi Market in

a vehicle Reg. No. KBR 375R a probox, navy blue in colour. They were three in number. They parked at the matatu stage and started talking to those who were going to vote individually.

6. That they were seen dishing out money. They also urged those they talked to vote for Nkatha. Ragwa and other TNA candidates. They asked them to vote for those with dove as their symbol.”

93. The Petitioner has to adduce cogent, compelling, credible and substantial evidence to prove on a standard of proof above balance of probabilities but below proof beyond any reasonable doubt that indeed the 1st Respondent directly or indirectly bribed voters. Under Rule 12 of the Rules witness affidavits should contain the substance of the evidence in support of the facts and grounds in the Petitioner’s Petition and supporting affidavit.

94. I have set out herein above a summary of all the evidence adduced by the Petitioner in this Petition. PW8 stated that he saw the 1st Respondent dishing out money at Kambandi Market. The time was 10pm, one day to the election. PW8 testified that there were 75 people at the scene and that many took the money, including him. He admitted taking money for tea. When asked by Mr. Mithega whether he bought the tea, PW8 stated that he bought the tea because he was thirsty. He further went on to say that the tea did not influence his voting and that he did not vote for the 1st Respondent. The credibility of PW8 is questionable because on one hand he said he took “gachai” or tea and not a bribe from the 1st Respondent. On the other hand he did not spare the 1st Respondent and declared that by dishing the money, the 1st Respondent was unduly influencing voters by asking those who received the money to vote for her. Quite apart from his half hearted admission to involvement to bribery, PW8 did not name any one who was present at the bribery scene. Yet he admitted he was in familiar grounds. The other fact which is not in dispute is the fact PW8 was not just an accomplice, but also a partisan witness, being an Agent of the Petitioner’s party. For all these reasons, PW8 was not a credible witness and his evidence required corroboration of direct and credible evidence implicating the 1st Respondent. The evidence of PW8 did not receive any corroboration and is therefore of no assistance.

95. The 1st Respondent denied allegations leveled against her by PW8, in her response at paragraph 35 (Viii) stated the following :

“Affidavit of Muriithi Bore allegedly sworn on 8th April, 2013.

- a. No evidence is provided to prove that the deponent was an Agent as alleged in paragraph 1.**
- b. Paragraph 2 of the affidavit does not identify any of the people who were with the deponent in the said market.**
- c. In as much as the contents of paragraph 3 and 4 are denied the deponent clearly admits to having committed an electoral offence and as such he should be arrested and prosecuted.**
- d. Paragraph 5 of the affidavit does not identify the alleged NKATHA’s Agents and it is of no evidential value.**
- e. Paragraph 6 of the affidavit is an empty statement. The deponent does not even say who saw the alleged Agents or disclose the source of his information.”**

96. PW2, 4, 5, 6, 7, 9 and 10 made general allegations of corruption against the 1st Respondent, as set out herein above. PW2 was an Agent of DP. She testified that she saw three people bribing people and asking them to vote for TNA. She did not name the three people and more importantly did not adduce any evidence to prove they were Agents or supporters of the 1st Respondent. She did not name who were bribed and what effect the alleged bribery had on the voting pattern of those allegedly bribed. Same goes for the evidence of PW4, 9 and 10. They saw

unnamed people bribing voters but were unable to connect them to the 1st Respondent.

97. The only slightly different evidence was that of PW5, 6 and 7. PW5 said that after seeing a lady bribing voters at Turima Polling Station, he asked the voters whether the bribe would influence the way they voted and that they answered in the positive. PW7 gave hearsay evidence that his Agent at Methodist Kathuguwe Polling Station, one John Peter told him that he had seen one Ragwa, One Nkatha, both candidates for different electoral seats, and TNA Agents bribing voters. Amazingly, being an Agent of a party, ODM, knowing how serious the allegations were and the fact the candidates could be disqualified for that, took no action whatsoever. At the end of the day his evidence is worthless as John Peter was not called as a witness.
98. PW7 was a gubernatorial candidate in the said elections. His evidence was to the effect that he saw the running mate of his opponent, one Mate, bribing voters at Meru Boys Chiakariga Polling Station. The Forms 35 and 36 were in court. There was no Polling Station by that name. Having been a candidate, it is difficult to understand whether PW7 made a genuine mistake of the name of the Polling Station, or whether there was no such incident. The benefit of the doubt should go to the 1st Respondent.
99. Contrary to the Petitioner's advocates submissions, in her filed affidavit the 1st Respondent at paragraphs 9, 23 and 24 responded to these allegations and stated as follows.

9. That I totally deny the unsubstantiated allegations of malpractices in the Petition and ever that I was not involved in any malpractices, irregularities and/or unlawful acts in the entire election period and I was legally and lawfully declared the duly elected Women Representative for Tharaka-Nithi County with a total of 48,966 votes against the Petitioner's 31,531 thus creating margin of 12,435 votes between the Petitioner and I.

23. That I further state that the alleged offences of bribery, treating, and undue influence were not committed and as such a vote scrutiny and recount would not prove their commission or at all.

24. That I further aver that the allegations of bribery, treating and undue influence are all incompetent and bad in law."

100. I find that no tangible evidence was given to associate the alleged persons who were bribing voters with the 1st Respondent at all. The standard of proof required to establish the allegations is so high that a mere statement to the effect that they were 1st Respondent's agents will not do. The Petitioner's affidavit does not indicate that they were committing the alleged offences with the knowledge and consent of the 1st Respondent or at all. Neither was such evidence adduced in court. I find that these allegations of bribery of voters whether widespread or isolated were not proved to the required standard and must therefore fail.

Whether the 2nd and 3rd Respondents conducted the elections for Woman Member of National Assembly for Tharaka-Nithi County in an irregular, unlawful and unfair manner with the intention of denying the Petitioner her right to be elected as the Woman Member of the National Assembly thereof"

101. Mr Agwara urged that the 2nd Respondent failed to meet what it is mandatorily obligated of it under Article 86 of the Constitution, to ensure that in every election. That Article stipulates:

- 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 each Polling Stations are openly and accurately collated and promptly announced by the Returning Officer; and that;**
- d. appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safe keeping of election materials.**

102. The Petitioner also urged that the 2nd Respondent contravened section 30 of the Election Act as read together with Regulations 62 (1) and (2) and 74 of the Elections (General) Regulations 2012, (hereinafter the Regulations) when the 2nd Respondent through its Presiding Officers admitted into every Polling Station for favoured parties more than one Agent for each candidate or political party during the election on 4th March 2013. The Petitioner contended that the 2nd Respondent disregarded this law and regulation and declined to admit a large number of the Petitioner's Agents in the various Polling Stations which act the Petitioner contend was deliberate and denied her a free, fair and transparent election.
103. Mr. Agwara urged that the Petitioner had adduced evidence to show that all the Form 36 for Tharaka and Maara Constituencies were only witnessed by two Agents from the 1st Respondent's Party. Further, whereas the Petitioner was denied Forms 35 and 36, RW1 testified that all their Agents were given Form 35 and Form 36 and that this further confirms that the elections were not free and fair.
104. Mr. Agwara urged that contrary to Regulation 76 (3) of the Elections (General) Regulations 2012 (the Election Regulations), the Presiding Officers did not enter the results in a tallying sheet Form 33 set out in the Schedule and required by the Regulations. Counsel urged that Form 33 in which the results were to be entered after counting is designed in such a way that it is hard to alter the results once entered as opposed to Form 35 which can easily be doctored once the results are entered therein. Mr. Agwara urged that Regulation 83(1) of the Regulations mandatorily obligated the Returning Officers to apply the Tallying Sheets and tally the results in presence of candidates and/or Agents and thereafter complete Forms 35 as prescribed under Regulation 83(1)(c) of the Election Regulations, and that this was not done. Mr. Agwara further urged that Regulation 79(1) of the Regulations is very clear that the Presiding Officers are required to sign the Forms 35 once the same have been completed by the Returning Officers as required by law, which was not done.
105. Mr. Agwara urged that contrary to the requirements of Regulation 87 of the Elections (General) Regulations 2012, the Constituency Coordinators testified that they did not forward to the County Returning Officer the results in Form 38 as required under Regulation 87(1)(b).
106. Mr. Agwara stated that the Returning Officer for Maara, Hellen Mutuva testified that she had various Forms 36 which she kept on changing while calling others original and others drafts yet there is no provision in the Election Act, the Rules and/or the Regulations allowing for preparation of draft election results as alleged. Counsel urged that the Constituency Coordinator for Mara confirmed having prepared draft election results and entered the same in Form 36 which she signed and gave out to the Agents to sign as the results for the Woman Member of Parliament election in Maara, and that she then later changed these results and came to court with a totally different result whose entries depart from the once she had originally signed and given out to some of the Agents to witness. Counsel urged that the action was not only irregular and unlawful but confirmed the manipulation of results at the Constituency Tallying Centre.
107. Mr. Mithega in reply submitted that it was worth noting that the Petitioner failed to attach a copy of a list of her party's Agents, letters of appointment, Oaths of Secrecy, and/or any other appropriate document in support thereto. She did not also give full particulars of the Agents who

were allegedly barred from representing her. Counsel urged that the particulars of the Polling Stations and relevant IEBC officials involved in this were also not given. Counsel submitted that the Petitioner only gave a rough estimate of a figure of 130 Agents as those who were not allowed into some undisclosed Polling Stations. Counsel urged that in court when she was shown various Form's 35 duly signed by several Agents the Petitioner could not confirm whether or not her party's Agent was among those whose names were listed there as having signed the Forms.

108. Miss Omuko in her submissions urged that Article 81 Constitution provides for the principles of an electoral system which includes the freedom of citizens to exercise their political rights under Article 38; and free and fair elections. Counsel urged that under Article 38(2) it provides for the right to free fair and regular elections based on the universal suffrage and the free expression of the will of the people. Counsel submitted that the will of the people can be discerned from whoever garners the highest number of votes in an election, and that in this case, it was the 1st Respondent.
109. Miss Omuko submitted that under Article 81(e), free and fair elections are by secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner. Counsel cited the case of **Thomas Malinda Musau & 2 Others**, supra, where the court held that a free and fair election depends on whether it was representation of the will of people, which could be established if people had confidence in the outcome of an Election, which confidence ought to be as a result of due process of the law.
110. Miss Omuko submitted that it is important to note that Regulation 79 (2) of the Election (General) Regulations requires the Presiding Officer after announcing the results to affix a copy of the results at the door of the Polling Station. Counsel urged that since no evidence was led to the contrary on this, there is a presumption that the elections were properly conducted until proved otherwise by the Petitioner. Counsel urged the court to find that the results were annexed at a conspicuous place, and that this would have allowed the Petitioner or her Agents to access the information in the Forms.
111. Miss Omuko urged that the Petitioner had the burden to prove that the election of the Women representative for the Tharaka-Nithi County was conducted contrary to the above provisions of the Constitution and that the 1st Respondent was not validly elected.
112. I have considered the submissions by counsels and the cases cited by each of them. The burden of proof lies upon the Petitioner to demonstrate that the 2nd and 3rd Respondents did not conduct the elections properly in accordance to the election Act, Rules and Regulations.
113. I will begin with the complaint against the 2nd Respondent that the Presiding Officers and Returning Officers failed to record reasons for the Agents' refusal to sign Forms 35 and 36 and refused to supply copies of these Forms to the Petitioner's Agents. PW9 the DP Coordinator testified that their Agents were not allowed into the Polling Stations. This witness did not specify which these Polling Stations were except one, Mukui Polling Station. At the named Polling Station, PW9 said she was able to intervene. When probed further she admitted that the Agent did not have accredited documentations and she had to obtain them before she was allowed in. The rest of the alleged Agents were not named, the Polling Stations not disclosed and the reason they were denied access not given. In the face of the admission that the sole named Agent did not have proper papers, the allegation cannot be said to have been proved.
114. Similar evidence was adduced by PW1 Amram. He said that he was the Chief Agent of DP. He testified that their Agents were not allowed into most Polling Stations. In cross examination he admitted that those denied entry, and whom he dealt with did not have proper documentation. He also said that his Agents did not obtain Forms 35 and 36. PW1 stated that he did get all the Forms 35 and 36 and was able to carry out independent tallying of results. This is a contradiction of his evidence. This witness, like PW9, provided no list of their Agents, no list of those denied

- access into the Polling Stations and no list of the Polling Stations where the access was denied.
115. There was other evidence from DP Agents called as witnesses, PW2 and 3. The two Agents testified that they were able to access the Polling Station where they were based, and that after the elections, they signed Form 35. I find that the only reasonable explanation why they signed the Form 35 was as proof of their approval of the electoral process which had just taken place. Apart from these two Polling Station Agents, no other DP Agents were called as witnesses.
116. The Petitioner on her part alleged that she got 50,450 votes. She admitted she did not provide any personal analysis, tabulations or audit to contradict the results she pleaded in her Petition or those declared by the 2nd and 3rd Respondents. She said she got the figure of 50,450 votes in her favour from her Agents. This contradicts her evidence that she had no Agents in about 130 Polling Stations because they had been denied entry. The affected Agents were not disclosed.
117. Besides, Regulation 79(6) and 79(7) are clear that failure to sign Form 35 does not necessarily nullify the election. Even if it was to be believed that the Petitioner's Agents were not allowed into the Polling Stations, that per se does not affect the validity or integrity of the elections. Section 30 of the Act which deals with appointment of agents uses a passive word "may" and not "shall" appoint agent. It provides as follows:

"30. (1) A political party may appoint one agent for its candidates at each polling station.

(2) Where a political party does not nominate an agent under subsection (1), a candidate nominated by a political party may appoint an agent of the candidate's choice.

(3) An independent candidate may appoint his own agent."

118. These provisions speak for themselves. It is not a must that every candidate must have an Agent in every Polling Station relevant to their election. That is why failure to have any Agent cannot be a ground to nullify an election.
119. Regulation 79 (6) and (7) are even more explicit and demonstrate that the presence or absence of Agents for parties or candidates cannot be used as a yardstick to determine the validity or otherwise of an election. It provides as follows:

"The refusal or failure of a candidate or Agent to sign a declaration Form under sub-regulation (4) or to record the reasons for their refusal to sign as required under this sub-regulation (2) shall not by itself invalidate the results announced under regulation (2) (a). The absence of a candidate or an Agent at the signing of a declaration Form or the announcement of results under sub-regulation (2) shall not by itself invalidate the results announced." Nothing turns on these issues and the complaints are dismissed.

120. Regarding failure by the 2nd Respondent to use the relevant electoral Forms 33 and 38, Mr. Agwara urged that Regulation 76(3) of the Election Regulations expressly and mandatorily required the Presiding Officers to record the count of the vote in a Tallying Sheet in Form 33 set out in the Schedule. Counsel urged that Regulation 83(1) of the Election Regulations mandatorily obligated the Returning Officers to apply the Tallying Sheets and tally the results in the presence of candidates and/or agents and thereafter complete Forms 35 as prescribed under Regulation 83(1)(c) of the Election Regulations.

121. Mr. Agwara quoted Kimaru J. (the citation of the case was not given) where he held as follows:

" What does the law say in regard to the completion of form 17a" regulation 40(1) of the election regulation provides that

"Immediately after the results of the poll for all polling stations in a constituency have been

received by the returning officer he shall in the presence of their candidates or their agents:

...

(f) Complete form 17a set out in the first schedule in which he shall declare the

(i) name of the constituency;

(ii) total number of the registered voters

(iii) votes cast for each candidate in each polling station

(iv) number of rejected votes for each candidate in each polling station

(v) aggregate number of votes cast in the constituency; and

Aggregate number of rejected votes

(g) sign and date for and

(i) give to any candidate or candidates present a copy of the original form 16a together with 17a and form 18'

It was therefore, clear that it was the duty of the returning officer to personally complete the form 17a. Regulation 40(1) is set out in mandatory terms meaning that the returning officer "shall perform the task". The task cannot be delegated to anyone else. It was apparent from the evidence adduced by the third respondent that he did not train the persons who tallied the results in the said form 17a. the 3rd respondent could not even remember their names. He told the court that he accepted the two persons to tally the results because he had been so instructed by the eck. This explanation will not do. It was evident that the third respondent failed in statutory duty to personally enter the results from 231 polling stations as reflected in the form 16a in juja constituency in the form 17a.

The third respondent was further mandatorily required to make entries in respect of all polling stations in juja constituency contained in the form 16 as he cannot purport to abdicate from his statutory responsibility by casually pleading to be excused on the grounds that non0inclusion of form 16a in respect of the 7 polling stations was understandable because it was occasioned by human error. The issue in regard to the manner in which the form 17a is required to be filled was considered by Musinga, J. in Manson Oyongo Nyamweya v James Omingo Magara and others Kisii High Court Election Petition Number 3 Of 2008 (unreported) where at 84 of his Judgement the learned judge held as follows:

"it is apparent that the returning officer abdicated his responsibility by failing to personally complete form 17a after declaration of the winner and in the manner stated hereinabove. He said that it is not possible for a returning officer to complete form 17a by himself without delegating the responsibly to the other people. He said it is very tedious to do so. However the above quoted regulations couched in mandatory terms and do not permit a returning officer to do otherwise. But in the event that he chooses to delegate the responsibly to anyone else (which seems to be against the law) the returning officer has to ensure that the form is filled correctly and in accordance with the declared results as they appear in forms 16a. In the event of any mistake in completion of form 17a, he cannot shift the blame to anyone else"

122. The cited case can be distinguished from the instant case due to the enactment of new laws. My greatest difficulties however is lack of the full citation of the case cited by counsel to enable me see it.
123. The pertinent question is whether failure to fill Forms 33 renders the elections invalid. Form 33 is a candidate tally sheet. It is filled during tallying. It has no requirement to be authenticated by signing, or for subsequent use. In order to have a nullification of the elections based on failure to fill Statutory Forms, the Petitioner needed to prove beyond any reasonable doubt that the said failure was a deliberate act intended to subvert the democratic right of voters to choose a candidate of their choice, and that it affected the integrity and validity of the elections as to invalidate them. I have thoroughly considered the Petitioner's evidence. I realized that no attempt was made to adduce any such evidence. It is not sufficient to show that certain Forms were not completed as required; their negative effect to the credibility of the elections must be demonstrated to the required standard. This was not done. Nothing therefore turns on this point.
124. Forms 35 are completed at the Polling Stations according to the Schedule under the Regulations. The schedule reads '**Declaration of Women Representative Election Results**'. It is the Presiding Officers who have the information required to complete these Forms. That information is then delivered to the County Coordinator in the form of the Form 35 which is an open document; and is accompanied by the parent documents where the data is obtained from, sealed in the ballot boxes. These other documents include all the ballot papers, whether cast or not, rejected, contested, valid and spoilt, among others. This is clear proof that the Presiding Officer, who is the custodian of all these documents containing the required data to complete Form 35, should fill the said Forms. The Presiding Officer is the Officer accountable for the information contained in all the supporting documents. His role cannot under any circumstances be taken over by any other Officer, apart from of course his Deputy. Form 35 is completed at the Polling Station by the Presiding Officer, and not at the Constituency Tallying Centre where the Coordinators were stationed.
125. I find that the requirement under the Regulations 83, that the Returning Officer should complete the details of Form 35 is not only humanly impossible but also ludicrous. I recommend an amendment to Regulation 83 to remove the absurdity created by that requirement.
126. Mr. Agwara urged that contrary to Regulation 87 of the Regulations the Constituency Coordinator testified that they did not forward to the County Returning the Officer the results in Form 38 as required under Regulation 87(1)(b).
127. Miss Omuko submitted that the Petitioner has to not only prove irregularities to the required standard but also prove that the irregularities affected the outcome of the results of the elections. Counsel urged that data specific allegations such as those raised regarding breach of the Regulation, the Law and Rules have to be proved beyond reasonable doubt. Counsel urged that the Petitioner had not discharged that burden.
128. Miss Omuko relied on the Supreme court case of in Raila Odinga case, supra, where it was held:

“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. In the case of data-specific electoral requirements (such as those specified in Article 38(4) of the Constitution...), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.”

129. I have considered the submissions by counsel. The 2nd and 3rd Respondents do not deny that they did not fill Forms 33 and 38 and in fact the majority expressed shock at the provisions requiring them to fill these Forms. There is no dispute that these were never completed. In the case of Form 38, it is a certificate from the Constituency Returning Officer to the County

Returning Officer, certifying the candidate that has been elected for the relevant seat, whether MP, Woman MP, Senator, Governor and County Rep. The Regulations do not say what the County Returning Officer does with the certificate. Regulation 87 (3) (c) does say that the certificate should be issued to the persons elected pursuant to the results indicating their election. The person who should complain about this Form is the 1st Respondent and she is not doing so. Further, forwarding a copy of this Form to the County Returning Officer is a mere formality and has no effect whatsoever on the validity of the election. I am also satisfied that the Petitioner does not stand to suffer any prejudice if the Form 38 was never received by the County Returning Officer. I must end by saying here that the 2nd Respondent who drafted the Regulations should not be seen to trash the importance of the regulations they themselves drafted. It is a good demonstration of professionalism, solemnity and commitment to operationalizing the set rules and regulations, and to the thorough, efficient, transparent and predictable application of the set electoral processes. Not being committed to these standards does create an opportunity for unnecessary suspicion which erodes confidence not only of the Officers themselves but the very Institution tasked with carrying out this delicate process that is National Elections. Faced with these lapses, I can understand the frustrations of candidates. The bottom line however is that the lapses do not go to the substance of the election, nor does it affect the results.

130. Regarding doctoring of Forms 35 and 36 by RRW2 in favour of the 1st Respondent, and filling Forms 36 in pencil for doctoring purposes, and making of draft Forms 36, Mr. Agwara urged that the Returning Officer for Maara Constituency, Hellen Mutuva, RRW2 testified that she had various Form 36 which she kept on changing, while calling others original and others drafts, yet there is no provision in the Election Act, the Rules and/or the Regulations allowing for preparation of draft election results as alleged. Counsel submitted that RRW2 confirmed having prepared draft election results, and entering the same in Form 36, which she signed and gave out to the Agents to sign as the results for the Woman Member of Parliament election in Maara; that she then later changed these results and came to court with a totally different result whose entries depart from the ones she had originally signed and given out to some of the Agents to witness.
131. Miss Omuko urged that no evidence was tendered in support of the allegations made against RRW2. Miss Omuko cited the case cited by Mr. Mithega of ***Rishad Hamid Ahmed Amana v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR***. I will quote it later.
132. RRW2 in her evidence stated that she did not actually complete or fill any Forms. She explained that the Presiding Officers arrived at the Constituency Tallying Centre where she was based. She explained that her Deputy received Form 35 from the Presiding Officer, and verified it before passing it to her. RRW2 testified that she read out the results in these Forms loudly, and that at the same time two clerks entered the results in Form 36, one manually and the other one in the computer. RRW2 explained that later on she counter checked the Forms 36 to verify the results against the Forms 35 and then printed a copy as the final Form 36. She then had Agents present sign them before counter signing the same. She said that the final results were the printed ones, copies of which IEBC supplied to court.
133. RRW3 the Constituency Coordinator for Chuka-Igambang'ombe Constituency Coordinator on his part stated that he read out the results Form 35 while two clerks entered the results in the computer. He said that he gave the Form 35 to the clerks who verified the results in the Form 36 before printing the final copy. RRW4, the Constituency Returning Officer for Tharaka testified that his clerks filled one manual and one electronic (computer) Form 36 after he announced the results.
134. It is abundantly clear that the Returning Officers did not adopt the same system of doing things. RRW2 and 4 worked with two copies Forms 36 before they prepared the final copy. RRW3 had only one. In the case cited by the counsels, ***Rishad Hamid Ahmed Amana***, supra, the court

held:

*“At this juncture, it is important to point out that under Regulation 83 of the Election Regulations, the 2nd Respondent was required to fill one Form 36 setting out the results of the various Polling Stations. There is no provision for a Returning Officer to prepare a draft Form 36 before preparing a final one. It is this court’s view that the reason for the requirement that only one Form 36 be filled (subject to copies being made from the original) is to prevent the abuse of process where more than one Form 36 may be prepared by a Returning Officer in respect of a particular electoral area. The regulation requires one Form 36 to be prepared to obviate disputes by contestants. This court holds that the 2nd Respondent breached Regulation 83 of the Election Regulations when he prepared two (2) Form 36s. This was an illegality which the Petitioner has established to the required standard of proof. **However, this court holds that in preparing what he referred to as the final Form 36, the 2nd Respondent acted in good faith and had no intention of subverting the democratic exercise by the voters of Lamu West Constituency to elect a person of their choice”.***

135. I agree with my brother in the cited case. I have also come to the same conclusion as he, that in absence of any evidence to the contrary, I find that the 2nd Respondent's Officers acted in good faith. I must conclude by saying that I believe a case has been made out for subjecting the IEBC officials to Refresher courses on the purpose and relevance of the various Forms under the electoral laws, and in the general handling of the same.
136. In regard to assisting voters by TNA Agents. Regulation 72 of the Election (General) Regulations provides that a voter who is unable to vote on their own shall be assisted by a person of their free choice who shall not be a candidate or Agent and where the voter is not accompanied, then the Presiding Officer shall assist in the presence of the Agents.
137. There were allegations by Humphrey Gitonga, PW11 that the TNA Agent was assisting voters at Kiairugu Primary School Polling Station. That is contrary to Regulation 72(1) of the Regulations which provides that an Agent is not qualified to assist any voter(s) with a disability or incapacity.
138. Party Agents were supposed to, and several witnesses confirmed that the Party Agents attended training in which they were informed of their roles during the elections. If not, they were expected to know the applicable rules and regulations. They should have been taught the rules including the limitations within which they were to operate, and the expectation placed upon their shoulders to oversee the elections on behalf of their principles or party candidates. PW11 was failing in that duty if he allowed contravention of the law without raising a finger, yet there was action he could have taken to put a stop to it.
139. It is rather late in the day to raise these issues and especially where his information is devoid of necessary details. For instance which party Agent was involved in that malpractice, and from which party" Can he be able to identify him" That report should have been made earlier either to the IEBC or the Police. It is a very scanty report and is of no use. The mere fact this Agent could swear an affidavit and claim he saw the Rules or Regulations being contravened, and he did nothing about it makes him an accomplice. The only reason why he did not complain until later is because he stood to gain at the time and the only thing which has changed is that his party did not win the election. He was not a credible witness because he recanted parts of his affidavits and contradicted himself; and secondly, he alleged that there was a voter whose ballot paper was crumbled and thrown away and a fresh ballot paper given to that voter; which cannot happen as such ballot paper is preserved as spoilt or other ballot paper. Pursuant to Regulation 71 of the Election (General) Regulations such paper is placed in the sealed ballot box and delivered to the Returning Officer.
140. In regard to assisting voters at the Polling Station complained of by PW11, the Presiding Officer of the Polling Station, Oswald Muriithi Miriti, RRW1 denied the allegations. He testified that he

received three assisted voters at the Polling Station with their own people to assist them. He testified that for those ones who did not come with people to assist, the Presiding Officer himself assisted in the presence of Agents. RRW1 testified that it was the evidence of the said witness that no single Agent assisted voters to vote.

141. Paragraph 6 of the Petitioner contends that the 1st the 2nd and 3rd Respondents have colluded to deprive her of some of her votes by either failing to record the same and transferring others to the 1st Respondent. The 1st Respondent has denied these allegations. The Petitioner should have adduced evidence to support those allegations. The Petitioner's assertions of collusion are not supported by any evidence, or any details for instance who did it, where and in what way" The Petitioner has not proved this allegation and the same fails.
142. The Petitioner complained that the 2nd Respondent' Officer unilaterally moved the ballot boxes and the counting process to the nearby church from Kiairugu Primary School Polling Station. This was done by the Presiding Officer RRW1.
143. Regulation 64 of the Election (General) Regulations allows the Presiding Officer to transfer the proceedings to another Polling Station or public facility in the same Constituency where they are interrupted by shortage of equipment or other material or other administrative difficulty. The Presiding Officer is however required to restart the proceedings at the earliest practicable moment. The Presiding Officer testified that it was getting dark and the lamp did not work when he tried to light it. Counting could not proceed in darkness. He testified that only the Presidential votes had been counted, results entered in the declaration Form and the ballot box sealed. All the other ballot boxes were sealed, and he consulted the Constituency Coordinator and the Agents who were present. The Petitioner did not adduce any evidence to show that the 2nd and 3rd Respondents acted in bad faith or had an intention to interfere with the election process in order to deny the Petitioner of her right to be elected in a fair, impartial, and transparent process. I am satisfied that the Presiding Officer, RRW1 acted in good faith and without ulterior motive, and that he exercised due diligence when he moved to the Church building for the counting process to continue under suitable lighting.
144. I find that the 2nd and 3rd Respondents complied with the requirements of Article 81(e), by ensuring that the elections were free and fair, free from violence, intimidation, improper influence or corruption. I am satisfied that the electoral process was largely transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

Whether the 1st Respondent was validly and lawfully elected as the County Woman Member of the National Assembly for Tharaka-Nithi County in the elections held on 4th March, 2013 due to her participation in the electoral malpractices as alleged"

Whether or not there are valid grounds to nullify the election of the 1st Respondent as the elected County Woman Member of the National Assembly for Tharaka-Nithi County; and if so should the elections of the 1st Respondent be nullified"

Whether or not the irregularities were so substantial as to affect the results declared by the 2nd and 3rd Respondent"

145. I will consider these three issues, 3, 4 and 5 together.
146. Mr. Agwara urged that since the 1st Respondent participated in the electoral malpractices, her said election cannot be valid and/or lawful as the same was in contravention of Section 63, 64 of the Elections Act and Article 38 and 81 of the Constitution. Counsel urged that the 1st

Respondent engaged in voter bribery contrary to Section 64 of the Elections Act. Counsel relied on the Petitioner's evidence on record and urged that the evidence confirms the 1st Respondent's involvement in the electoral offences and malpractices, acts which invalidate her election as the Woman Member of Parliament for Tharaka-Nithi County.

147. Mr. Agwara urged that as discussed above, the 1st Respondent having participated in the electoral malpractices her said election cannot be valid and/or lawful as the same was in contravention of Section 63 and 64 of the Elections Act and Article 38 and 81 of the Constitution. Counsel urged that the election malpractices the 1st Respondent engaged in were so fundamental and the same cannot be countenanced by a court of law. Mr. Agwara urged that the above matters coupled with the election irregularities carried out by the 2nd and 3rd Respondents as discussed above offers valid and sufficient grounds for the nullification of the election of the 1st Respondent as the Woman Member of National Assembly for Tharaka-Nithi County.
148. Mr. Mithega urged that there is no evidence tendered to question the validity and legality of the election and declaration of the 1st Respondent as the duly elected Woman Member of the National Assembly for Tharaka-Nithi County; that there is no credible evidence against the 1st Respondent on allegations of bribery, communicating with voters, undue influence, witchcraft, or at all.
149. Miss Omuko urged that the Petitioner is required to establish that the errors and irregularities were either occasioned by outright negligence or deliberate action on the part of the guilty party. Counsel urged that irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. This court is mindful of the fact that at the stage where election officials are required to tally the results, some of them would have stayed awake for more than thirty-six (36) hours and therefore simple arithmetical mistakes are bound to happen.
150. Counsel submitted that the Petitioner has not proved any irregularity in the election of the Tharaka-Nithi County Women Representative to the National Assembly. Counsel urged the court to be guided by the persuasive authority of John Kiarie Waweru vs Beth Wambui Mugo & 2 Others [2008]eKLR, Kithinji Kiragu vs Martin Nyaga Wambora & 2 others E.P 1 of 2013 and Mbowe vs Eliufoo [1967] E.A 240
151. In the John Kiarie Waweru case, supra the court held :

“This court will not interfere with the democratic choice of the voters of Dagoretti Constituency unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and therefore subject to nullification. It will not be sufficient for the Petitioner to establish that irregularities or electoral malpractices did occur; he must establish that the said electoral malpractices were of such magnitude that it substantially and materially affected the outcome of the electoral process.”

152. In the Kithinji Kiragu vs Martin Nyaga Wambora & 2 others E.P 1 of 2013 case, it was held that the court should only exercise its discretion to annul an election where there is a serious reason to believe that the results would have been different but for the irregularities and that the Petitioner had to prove that the irregularities were so substantial and did affect the outcome of the results.
153. In Mbowe case, supra the court was of the view that the results can be said to have been affected if after making adjustments on account of proven irregularities, the contest seems much closer than it appeared at first. But where the winning majority is so large that even a reduction still leaves a wide margin, then it cannot be said that the results are affected by the non-compliance.
154. I have found that the Petitioner has been unable to adduce credible, cogent, compelling and material evidence to establish that there were electoral malpractices and offences and

contraventions of the law of such a magnitude as to lead to the conclusion that these breaches substantially and materially affected the results. The conclusion I make therefore is that the 1st Respondent was validly and legally elected as the Women Representative of the Tharaka-Nithi County.

Whether or not the results in the 10 Polling Stations specified in paragraph 42 of the Petitioners supporting affidavit to the Petition were properly counted, tallied and correctly recorded in the Statutory Forms"

155. Mr. Agwara submitted that the attached copies of Form 36 in respect to the election results of Mara Constituency together with the evidence of the Returning Officer, Hellen Mutuva who testified before this court confirmed that she signed the said Forms 36 attached to the Petition. It is clear that the same were irregularly and carelessly entered by the said Returning Officer. Counsel urged that during cross examination the Returning officer claimed that the entries as made were a draft and that she prepared a final copy which she later applied. Counsel urged that some of the entries were made using pencils and others done with serious alterations thus eroding any confidence in such a tallying process.
156. Mr. Agwara urged that there is no provision in the Election Act, the Election Regulations and/or the Rules made thereunder which allows a returning Officer to prepare draft Form 36 and/or draft election results as these as such requirement would necessarily allow for the manipulation of election results and negate the provisions of Article 86 of the Constitution.
157. Mr. Mithega submitted that the Petitioner did not offer any evidence to prove that the election in the 10 Polling Stations listed in paragraph 42 of her affidavit were not properly counted, tallied and correctly recorded in the Statutory Forms.
158. Mr. Mithega urged that during cross-examination, the Petitioner was thoroughly led through Forms 35 for those Polling Station and Form 36 thereof and revealed that there was no material irregularities/anomalies that would substantially affect the results declared in those Forms.
159. Mr. Mithega urged that the Petitioner failed in the quantitative approach. He urged that firstly she failed to provide personal audit/analysis/tabulations to contest/contradict the election results declared by the 2nd and 3rd Respondents. Counsel submitted that there was nothing to compare the declared results with and that secondly the results in the 10 Polling Stations listed in paragraph 42 of her affidavit were properly and correctly entered in the statutory Forms and any error therein had negligible effects on the declared results.
160. Miss Omuko submitted that there was no discrepancy in the number of registered voters as recorded in Form 36 and that the Petitioner was taken through the results for Governor, Senator and Woman Representative and confirmed to this court that none of the Polling Station had discrepancies. Counsel urged that this was further confirmed by annexures HM1, HM2 and HM3 in the affidavit of Hellen Mutuva. Counsel submitted that Form 36 attached to the Petitioner's affidavit were drafts and that the Constituency Coordinator confirmed to this court that the said Forms were drafts and were never used to declare the results.
161. Miss Omuko urged that HM1 is the Form 36 used to declare the results for Woman Representative and that even if there was any discrepancy, which is denied, the same did not affect the results in that the votes garnered by each candidate were not affected at all.
162. The Petitioner at paragraph 42 of her affidavit deposed as follows:

“THAT upon perusal of the tallying sheets for Maara Constituency, I discovered numerous discrepancies in it and was shocked at the recklessness and utter disregard for the law in the manner in which 2nd Respondent conducted the collating process. That I realized from the said form that there was systematic, strategic, planned and executed manipulation of the election tallying process in favour of the 1st Respondent as demonstrated in the table below.”

The Table is included earlier on in this judgment.

163. The particulars of manipulation and tampering with voter registers are given thereunder as follows:

- a. **In *Magundu Primary School* the registered number of voters as shown in the table and on form 36 for Maara Constituency for the Senatorial seat was 22 while that for the Governor and National Assembly seat were 416 respectively. There cannot exist different registered number of voters for every particular seat.**
- b. **The discrepancy in the collated results was widespread and the Respondents deliberately created the same to favour the 1st Respondent thus casting doubt on the transparency, veracity and integrity of the outcome of the results as announced and declared by the 2nd Respondent**
- c. **Entries in Form 36 were made in pencil to allow for future manipulation and as such defeating the whole objective of providing a tamper proof and credible method of verifying results that should have been in indelible ink.**
- d. **As a result of the foregoing, it was easy to doctor and manipulate the results in favour of a particular candidate as against another as was the intention of the s from the onset.**
- e. **The 2nd Respondent showed outright favoritism to the 1st Respondent and his agents contrary to the Election Act and the Regulations made thereunder.**

164. The Petitioner in her evidence explained that her quarrel with the ten Polling Station shown on the provided table was that the number of registered voters for each electoral seat was different, so that the registered voters entered in Form 36 for the Senatorial seat was different from those shown for the Governor seat and the National Assembly. She admitted that the differences complained of did not affect the Women Representative seat.

165. The table provided shows that the differences in the number of registered voters for the three electoral seats in the ten Polling Stations was minimal. The Petitioner admitted in cross examination, after being taken through the same entries in Form 35 for each election seat that there was no difference in the number of registered voters. The Petitioner admitted that in all the Stations, the number of votes cast did not exceed the registered voters.

166. RRW2 Hellen in her evidence demonstrated that the registered voters for the Senator, Governor and Women Rep in Form 36 used to announce the results were all the same.

167. In regard to paragraph 42 (b) the Petitioner stated that discrepancies in the collated results were widespread and had been deliberately created by the Respondents. She however admitted that she had no evidence to support that allegation.

168. In regard to paragraph 42 (c) the Petitioner testified that entries in Form 36 were made in pencil to allow for future manipulation. She stated that even though she had nothing to prove it, the results for Women Rep in Form 35 and 36 did not tally.

169. The Petitioner had a copy of Form 36 in regard to which an application was made to have it admitted as evidence for the purposes of the Petitioner using it in evidence. Rule 10 of the Rules is clear that the grounds on which the Petition is made must be included in the Petition. Rule 12 is also clear that the substance of the evidence relied upon must be stated in affidavits filed in support of the Petition, and these by implication include any documentary evidence relied upon. Rule 17 (1)(f) is also clear that at the Pre Trial Conference the court should give directions as to the furnishing of further particulars. That means that a party who may have overlooked important evidence or documents had an opportunity to have them included during the Pre-Trial Conference stage. The Petitioner failed to raise the issue of the Form 36 she intended to use

until the time she presented herself to court to testify in support of her Petition. This was clearly way out of line, was in total contravention of the spirit and purpose of the Rules, and did not further the overriding objective of the Rules.

170. In the case of election petitions, the Petition itself and the particulars where supplied constitute the pleadings and the issues as framed should stem from the pleadings and the evidence must relate to the issues arising from the pleadings. Any attempt at introducing evidence outside the petition would violate the rule on what issues are before the court and would also violate the principle of relevance. **NDOLO VS WATHIKA EALR (2010) 1 EA 278.**
171. RRW2, the Constituency Returning Officer for Maara Constituency who was alleged to have had Form 36 filled with pencil testified that even though she had draft Form 36 and a final copy, none of them were completed in pencil including the one the Petitioner's advocate gave her to look at before the Respondents' advocates objected.
172. RRW2 admitted that indeed the Form 36 she gave to Agents after announcing the results were the draft copies which had alterations. She stated that the alterations were made during the tallying process at the Constituency Tallying Centre as part of their work, and that they reflected the same results as the final copy. RRW2 testified that she created the draft or hand written copy of the Form 36 as a fall back in tallying. RRW2 testified that the Form 36 she used to announce the results with was the Printed copy which is also the one she gave to the County Returning Officer. RW2 testified that in all the results she received in her Constituency, it was only in Muthambi Polling Station where one for Women Rep had a material difference because the candidate had garnered 23 votes but the results entered were 823. The candidate was neither the Petitioner nor the 1st Respondent. She denied any bad faith in her work.
173. The burden lay with the Petitioner to show that RRW2 acted in bad faith, that the irregularities alleged were ill motivated and were so great as to prevent the election to be a true election that was free and fair, and was not a reflection of the will of the Tharaka-Nithi County electorate. What emerged from the evidence of the Petitioner and RRW2 both in evidence in chief and in cross examination was that the results in the ten Petition were correctly collated, tallied and recorded in the statutory forms.
174. In regard to the complaints particularized at paragraph 42 (d) and (e), the Petitioner admitted that she had no evidence to support her allegations.
175. Having considered the evidence before the court, I agree that there were irregularities on the part of RRW2 in the filling and supplying Form 36 which was not contemplated under the Regulations. The Form 36 supplied to Agents was the one used in the tallying process and had alterations and in some cases, like those shown in the table at paragraph 42 of the Petition, the registered voters for each election in the same electoral area did not tally. It is that draft Form 36 which is the reason for the differences noted in the table at paragraph 42. It has been proved that the draft Form 36 was not the one used to announce the results both at the Constituency and the County level.
176. The Petitioner did not include the one she was holding in her Petition and so there was no opportunity to compare the two and determine whether there were material differences in both. Besides, the source of her document was not confirmed, since she claims to have received from someone who is not a witness before the court.
177. Be that as it may, I find that the irregularities complained of were not so great as to affect the result or lead to nullification of the election. It is trite law that no election shall be declared void by reason of non-compliance with any written law relating to that election. I find that the results in the ten Polling Stations specified in paragraph 42 of the Petitioner's supporting affidavit to the Petition were properly counted, tallied and correctly recorded in the Statutory Forms.

Whether the Petitioner is entitled to any of the reliefs sought in this Petition" What orders, remedies and declarations the Court should make"

178. Mr. Agwara submitted that based on the foregoing discussions and the evidence before court, the Petitioner has sufficiently demonstrated that she is in the least entitled to prayers (a), (b), (c), (d), (f) and (g) as expressed in the Petition. In regard to prayer (e) of the Petition counsel urged that the same is discretionary and the same was pegged on the result of the recount as earlier sought by the Petition.
179. Mr. Mithega submitted that the Petitioner is not entitled to the reliefs sought and that the Petition should be dismissed with costs to the 2nd and 3rd Respondents. Counsel urged that pursuant to Rule 36 of the Elections (Parliamentary and County Elections) Petition Rules and Section 84 of the Elections Act, an election court shall make an order specifying the total amount payable and the persons by whom the costs shall be paid. He urged that the 2nd and 3rd Respondents be awarded costs.
180. Miss Omuko submitted that based on the above analysis, the Petitioner is not entitled to the reliefs sought and prayed for the Petition to be dismissed with costs to the 2nd and 3rd Respondents. Counsel submitted that this Court should decline to grant any of the reliefs sought in the Petition and make declarations in favour of the 1st Respondent.
181. The Petitioner has not succeeded in establishing any of the allegations. She has failed to show that she is deserving of any of the reliefs, orders and or declarations sought in the Petition. The answer to this issue is therefore in the negative.

Who should bear the costs of this Petition "

182. Mr. Agwara submitted that this Petition was primarily occasioned by the irregular, unlawful and belligerent actions of the Respondents. Counsel urged that the 3rd Respondent being a public officer for the purposes of the Election Act during the election of 4th March 2013 rudely and irregularly refused to give the Petitioner the results as requested and told the Petitioner to go to court and ask for the said results. Counsel submitted that the 3rd Respondent testified before this Court that he told the Petitioner that he had seven days to announce the result, which was very careless and reckless on the part of public officer holding such an important post in the elections. He urged that these irresponsible utterances were in contravention of Article 10, 38, 81 and 86 of the Constitution and negated the principles of free, fair and transparent elections as provided for in Article 86 of the Constitution. He urged that the 3rd Respondent played hide and seek with the election results and only announced late in the night in the absence of the Petitioner despite knowing very well that the Petitioner legitimately expected the results and had been waiting for the same. The position is that the 3rd Respondent did not testify in this Petition.
183. Mr. Agwara urged that the 2nd Respondent declined to give any of the Petitioner's Agents results as recorded in Forms 35 and 36, that they irregularly elected to ferry the result to the Tallying Centre in their own company and without the Petitioner Agents and/or other Agents and that this granted the 2nd Respondent's officers an opportunity to alter the Forms 35, which in most cases was not witnessed by the Petitioner's Agents as required by law. Counsel urged that the refusal by the 2nd Respondent to comply with Regulations 76, 79 and 83 of the Election Regulations in respect to recording and tallying results has further worsened the matters. Mr. Agwara urged that these issues forced the Petitioner to file this Petition as the election was not transparent and/or free and fair.
184. In regard to the 2nd and 3rd Respondents, Mr. Agwara urged that they engaged in irregularities which deprived the election process the necessary transparency required to demonstrate to the participants and most importantly the candidates that the election process was free and fair and in the absence of the above the Petitioner had no other recourse but to exercise her rights as

provided under the Constitution and the Election Act and seek remedy from the Court.

185. In regard to the 1st Respondent Mr. Agwara urged that she engaged in election malpractices, bribed voters, breached Section 63 and 64 of the Election Act, and that all these actions disentitle her to any costs arising from this Petition and as such she should in the least be compelled to bear the costs of this Petition together with those of the 2nd and 3rd Respondents. Counsel urged that the court do exercise its powers as provided under Rule 36(1) and (2) (b) the Elections (Parliamentary and County Elections) Petition Rules 2013, and order the Respondents to pay the costs of this Petition to the Petitioner.
186. Mr. Mithega submitted that the costs in this Petition be awarded to the 1st Respondent since none of the alleged election offences and/or electoral malpractices have been proven against her. He urged that the Petitioner has not demonstrated that she had a good reason to file this Petition, and that she has occasioned a lot of anxiety not only to the 1st Respondent but also to the people of Tharaka-Nithi County who exercised their democratic right in the last elections. Counsel relied on the case of **Wilson Mbithi Munguti Kabuti & 5 others vs Patrick Makau Kingola & another (2013) eKLR (Election Petition No.9 of 2013 at Machakos)**
187. Miss Omuko urged that pursuant to Rule 36 of the Rules and Section 84 of the Act, an election court shall make an order specifying the total amount payable and the persons by whom the costs shall be paid. Counsel urged the court to award costs to the 2nd and 3rd Respondents.
188. I have considered the rival arguments of the counsels to the parties. Rule 36 of the Elections (Parliamentary and County Elections) Petition Rules 2013 provides as follows:

“36 (1) The Court shall, at the conclusion of an election Petition, make an order specifying the total amount of costs payable; and the persons by and to whom the costs shall be paid.

(2) When making an order under sub rule (1), the court may-

(a).....

(b) impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.”

189. Costs usually follow the events. In this Petition, it is the Petitioner who has lost her case. It is only fair and just that the Petitioner pays costs to the Respondents pursuant to Rule 34 (1) (a) of the Election Petition Rules. Pursuant to Rule 34 of the Rules, I order that the maximum amount of costs that the Petitioner shall pay to the Respondents is Kshs. 3.5 million. The 1st Respondent shall be paid a maximum of Kshs. 2.2 million while the 2nd and 3rd Respondents shall be paid a maximum of Kshs. 1.3 million. The amount deposited with the court shall remain deposited in court pending the taxation of the costs.

APPRECIATION

190. Before I end this judgment may I express my gratitude to the advocates to all the parties in this Petition, Mr. Agwara for the Petitioner, Mr. Mithega for the 1st Respondent and Miss Omuko for the 2nd and 3rd Respondents. They were extremely courteous to the court and to one another throughout these proceedings, and observed time both by their punctuality in court and in the presentation of their respective client's case. They have exercised great patience and understanding throughout the trial process. They demonstrated their great commitment to their clients by tirelessly and professionally prosecuting their respective cases. The counsels were diligent in their research, which is exemplified by the excellent standard and quality of submissions made and authorities cited by them I am indebted to all of you.

FINAL ORDERS

- 191. The orders sought by the Petitioner are without merit and are declined.
- 192. I declare that the 1st Respondent was legally validly and lawfully elected as the women representative of the Tharaka-Nithi County in an election that was in the opinion of this court free, fair and transparent with an overwhelmingly big margin of votes. I declare that the results reflect the will of the electorate of the Tharaka-Nithi County and will not interfere with them.
- 193. In the result this Petition is dismissed with costs as specified herein above.

READ AND DELIVERED IN OPEN COURT THIS 27TH SEPTEMBER, 2013.

JESSIE LESIIT

JUDGE.

JUDGMENT READ AND DELIVERED IN OPEN COURT

In the presence of

Mr. Agwara.....For Petitioner

Mr. Mithega.....For 1st Respondent

Miss OmukoFor 2nd & 3rd Respondents

Jane/Kirimi Court Clerks.

JESSIE LESIIT,

JUDGE.



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