



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELECTION PETITION NO. 2 OF 2013**

**JACINTA WANJALA MWATELA ..... PETITIONER**

**VERSUS**

**THE COUNTY RETURNING OFFICER**

**(TAITA/TAVETA) ..... 1ST RESPONDENT**

**THE SECRETARY I.E.B.C. .... 2ND RESPONDENT**

**THE IEBC ..... 3RD RESPONDENT**

**JOHNSON MTUTA MRUTTU ..... 4TH RESPONDENT**

**AND**

**1. ELIJAH MWANDOE ..... 1ST INTERESTED PARTY**

**2. MWATENGELA NGALI ..... 2ND INTERESTED PARTY**

**3. SOPHIE KIBAI ..... 3RD INTERESTED PARTY**

**4. WISDOM MWAMBURI ..... 4TH INTERESTED PARTY**

**JUDGEMENT**

This Election Petition was filed in court on 5th April 2013 challenging the declaration of the 4th Respondent as the winner of the Gubernatorial race in Taita/Taveta County. The Petitioner **JACINTA WANJALA MWATELA** who stood on a WIPER ticket, the 4th Respondent **JOHNSON MTUTA MRUTTU** who stood on an ODM ticket and four (4) others were all candidates vying for the post of Governor of Taita-Taveta County in the last general election held on 4th March 2013. Upon conclusion of the electoral process the results declared by the Independent Electoral and Boundaries Commission

(hereinafter referred to as '**IEBC**') were as follows:

Elijah Mwamidi Mwandoe	-	5,234
Jacinta Wanjala Mwatela	-	32,890
John Mtuta Mruttu	-	34,290
Mwanyengela Ngali	-	6,784
Sophia Wali Kibai	-	3,551
Wisdom Mwamburu	-	7,714
<b>Total Valid Votes Cast</b>	<b>-</b>	<b>90,463</b>

On the basis of these results the 4th Respondent was declared the Governor of Taita-Taveta County by virtue of having garnered the highest number of the valid votes cast. In her petition the Petitioner prayed that the court do hold and determine that:

***"I (a) the said Mr. John Mtuta Mruttu was not duly elected governor of Taita-Taveta County And the election for Governor of Taita-Taveta County, as conducted within Taveta Constituency, was void and should be annulled forthwith AND***

***(b) your Petitioner do and is hereby returned as duly elected governor of Taita-Taveta County on the basis of the election results from Voi, Mwatate and Wundanyi Constituencies only;***

***II In the alternative to the above and without prejudice thereto***

***(a) there be a scrutiny and recount of all ballots cast in all polling stations within Taveta Constituency for the election of Taita-Taveta County governor under the provisions of Sections 80 (4) (a) and 82 (1) of the Elections Act (2011) and Rule 33 (1) of the Rules thereunder AND***

***(b) there be a scrutiny and recount of the tally of ballots cast in all polling stations within Taveta Constituency for the election of Taita-Taveta County Governor under the provisions of Rules 32 and 33 of the Elections Act (Parliamentary & County Elections).***

***III The costs hereof be paid by the INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION and by MR. JOHN MTUTA MRUTTU and by the TAITA-TAVETA COUNTY RETURNING OFFICER to your Petitioner.***

***WHEREFORE YOUR PETITIONER prays that it be determined that the said JOHN MRUTTU was not duly elected and the election was void."***

In the petition, the County Returning Officer was named as the 1st Respondent, the Secretary IEBC as the 2nd Respondent, the IEBC as the third Respondent whilst the declared winner **JOHN MTUTA MRUTTU** was sued as the 4th respondent. Four of the other candidates in the election were named as interested parties but they neither entered appearance nor participated at all in the petition. The petition was supported by the affidavit of the Petitioner sworn on 26th March 2013 as well as the affidavits of nineteen (19) other witnesses. The 1st, 2nd and 3rd Respondents (hereinafter jointly referred to as

IEBC) filed a joint Response to petition on 8th March 2013, whilst the 4th Respondent filed his Response to petition dated 30th April 2013 on the same date. At the pre-trial conference it was agreed that witness affidavits would constitute the evidence-in-chief and it was further agreed that parties would only call those witnesses whom they wished to cross-examine. **MR. KITHI** Advocate acted for the Petitioner, **MR. KHAGRAM** represented the 1st, 2nd and 3rd Respondents whilst **MR. KEMBOY** appeared for the 4th Respondent.

## **THE EVIDENCE**

The Respondents called a total of 14 witnesses out of the Petitioner's 18 witnesses for purposes of cross-examination. Four (4) of the Petitioner's witnesses had summonses issued for their attendance but failed to present themselves in court. On 28th August 2013 the court ruled that the affidavits of these four (4) witnesses (who failed to appear) would be retained as part of the record. The Petitioner and her witnesses averred that the elections for county Governor in Taita-Taveta were neither credible, free nor fair and cited the following malpractices and/or irregularities which they submit invalidated the election: -

1. Failure by the Presiding Officers in the 58 polling stations in Taveta Constituency to issue out copies of the Form 35s to WIPER agents for approval signature and record.
2. Blocking party agents (specifically WIPER agents) from accompanying the ballot boxes from the polling stations in Taveta to the Constituency Tallying Centre at Timbila High School.
3. Disorder at the Taveta Constituency Tallying Centre at Timbila High School thereby rendering the tallying not transparent.
4. Failure by the Taveta Constituency Returning Officer to announce the **totals** of results for the seat of Governor, Senator and Women's representative; failure to affix results on the wall and failure to transmit the results electronically to the County tallying Centre in Mwatate.
5. Transporting the results and election materials on 6th March 2013 from Taveta to Mwatate in a private motor vehicle Registration KBT 940C which vehicle was alleged to belong to an associate of the 4th Respondent.
6. Failure by the Taita - Taveta County Returning Officer to personally announce the results of the Taita-Taveta Gubernatorial race and instead allowing the Taveta Constituency Returning Officer to make the announcement.
7. Illegally altering the results from Taveta Constituency with influence of and in favour of the 4th Respondent.
8. Making two different announcements for the winner of the Gubernatorial race for Taita-Taveta County.
9. After the 1st announcement, failing to issue the Petitioner with a winner's certificate despite demand having been made for the same.
10. Failing to return the Petitioner as duly elected as Governor for Taita-Taveta County on the basis of the results from Voi, Mwatate and Wundanyi Constituencies alone.

The Responses filed by 1st, 2nd and 3rd Respondents contained denials of all the claims made by the Petitioner. The IEBC maintains that there were no breaches of law and irregularities/malpractices in the manner in which the election was conducted. On his part the 4th Respondent denies having influenced and/or altered the Taveta results to his benefit and in his favour and maintains that he was duly elected and validly returned as the Governor of Taita-Taveta County.

## **THE LAW**

Election Petitions will be decided with reference to the Constitution of Kenya, the Elections Act 2011, the Elections (General) Regulations 2012 (hereinafter referred to as the 'Elections Regulations'), the

Elections (Parliamentary and County Elections) Petitions Rules 2013 (hereinafter referred to as the 'Elections Rules') together with all other relevant and enabling legislation. An election in any democratic society is the manifestation of the collective will of the voters with respect to their choice of leaders. The discernible will of the voters must be upheld at all costs. In the case of **WAVINYA NDETI - VS - IEBC AND 4 OTHERS EP NO. 4 OF 2013 MACHAKOS** Majanja J. held that:

***“Under our democratic form of government, an election is the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bed rock of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible while upholding the principles that underlie a free and fair election.”***

The general election of March 2013 was indeed a mammoth task as it required the voter to make choices for six (6) elective posts all at the same time.

Therefore the role of an election court in any election dispute is to discern and to uphold the decision of the voters. At this point I deem it prudent to cite the relevant portions of my decision in **EP NO. 1 OF 2013 PHILLIP MUNGE NDOLO – VS – OMAR MWINYI SHIMBWA & 2 OTHERS** as follows: -

*“This court is mindful of the fact that election petitions are 'sui generis' matters and as such election courts are under an obligation to render substantial justice as envisaged by the overriding objective of the Election Rules which is stated in the provisions of Rule 4 (1) thus:*

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

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

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

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

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

***“1. Election petitions are no ordinary suits but disputes in rem of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent, credible and consistent evidence .....***

**2. The burden of proof in election petitions lies with the Petitioner as he is the person who seeks to nullify an election .....**

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

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

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

**“It will not be sufficient for the Petitioner to establish that irregularities or electoral malpractices did occur, he must establish that the said electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the election.....”**

I wish to echo what was said by Muchelule J in **WILLIAM ODUOL – VS – IEBC & OTHERS KISUMU HC. EP No. 2 OF 2013**: -

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

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

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

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

## **ANALYSIS**

During the pre-trial conference held on 1st August 2013 **MR. KITHI** counsel for the Petitioner stated that he would adopt the consolidated issues for determinations as filed by the 1st, 2nd, 3rd and 4th Respondents. The **'Agreed issues for determination'** as filed in court on 1st August 2013 by the Respondents were as follows:

**“1. Was the election for the position of the Governor in Taita-Taveta County on the 4th March 2013 carried out in a free, fair and credible manner”**

**2. Was the election carried out in compliance or substantial compliance of the principles laid**

*down in the Constitution and other governing written law"*

**3. If not, did the non-compliance materially affect the results of the election"**

**4. Were any election offences committed by any person in connection with the election which is the subject of this Petition and if so, by whom"**

**5. Was the Fourth Respondent validly elected as the Governor for Taita-Taveta County"**

**6. who should bear the costs of this petition""**

Before I proceed to conduct an in depth analysis of the evidence adduced in this Petition, I feel it is pertinent at this early stage to consider and address matters raised by Mr. Kithi on behalf of the Petitioner in his final submissions to the court. The Petitioner filed her final submissions dated 11th September 2013 on the same date at 4.33 pm. In those submissions counsel dealt at great length on the legality, or otherwise of the Responses filed to the petition and the legality/appropriateness of the appearance for the Respondents by Mr. Khagram of A.B. Patel and Patel Advocates. The Petitioners advocate submitted that: -

- i. There existed no valid response to the Petition as the Responses filed in court on behalf of the Respondents were signed not by the Respondent themselves but by their respective advocates. This meant that the legal requirements relating to the filing of responses to the Petition had not been met. He further submitted that in the absence of the official seal of the 3rd Respondent, a Constitutional body, being affixed on its Response dated 7th May 2013 that response cannot properly bind the 3rd Respondent. Lastly on this point counsel submitted that the 3rd Respondent being a body corporate could not execute pleadings jointly with the 1st and 2nd Respondents who were individuals. Mr. Kithi submitted that the Civil Procedure Rules could not be deemed to be applicable to Election Petitions unless this was expressly stated to be the case.
- ii. Mr. Kithi submitted on behalf of the Petitioner that the advocates for the 1st, 2nd and 3rd Respondents were **not properly on record**. He relied on his cross-examination of **PW2 BEJA KALIMBO** (the 1st Respondent herein) who told the court that he was instructed by IEBC (the 3rd Respondent) to go and see the lawyer Mr. Khagram and stated **"I have not signed any agreement with Khagram."**
- iii. Finally Mr. Kithi submitted that there being no proper response on record to this Petition the contents therein remain undisputed, thus the Petition ought to be allowed as unopposed.

Not surprisingly these submissions were strenuously opposed both by Mr. Khagram for the 1st, 2nd and 3rd Respondents and by Mr. Kemboi for the 4th Respondent. They both submitted that these arguments basically amounted to a **'red herring'** and were merely an attempt by counsel for the Petitioner to deflect attention from the real issues requiring determination.

On my own part I note that this limb of the submissions were all issues of procedure which the Petitioner did not raise at all until the conclusion of the Petition. It is a basic tenet in law that a party ought to be bound by its pleadings. Nowhere in the Petition did the Petitioner raise the question of the invalidity of the Responses on record, or of the impropriety of the appearance by the opposing counsel. If the Petitioner genuinely sought to contest the Petition on the grounds submitted, then the proper procedure would have been to file a Preliminary Objection seeking the striking out of the Responses on record. As it is the Petitioner and her advocate both actively participated in the trial of the Petition, called for the Respondents witnesses and availed their own witnesses for cross-examination only to cry foul at the very end of the trial. The above submissions which ought to have been canvassed at the earliest

possible opportunity amount to nothing more than a mere afterthought and can be said to be tantamount to a **'trial by ambush'**. The role of this election court (and indeed any other court) is to render justice in the circumstances of each case. In **MICROSOFT CORPORATON - VS – MITSUMI COMPUTER GARAGE LIMITED & ANOTHER 2001 KLR 470** Ringera J (as he then was) cited Hon. Madan JA in **DT DOBIE & COMPANY (KENYA) – VS – MUCHINA 1982 KLR1** who opined in his obiter remarks that a court should aim at sustaining rather than terminating a suit. No suit ought to be struck out on a technicality unless it is so weak as to be beyond redemption and incurable by amendment. This is more relevant in this case which being an Election Petition is of greater significance not only to the parties to the suit but also to the wider constituency of Taita-Taveta County and the Republic as a whole. Election Petitions are disputes **'in rem'** which are of great public importance. I find that having failed to raise the issues of procedure at the opportune time, the Petitioner is estopped from raising them during her final submissions to court. Finally on this ground I am guided by Article 159 (2) (d) of the Constitution of Kenya which provides: -

**“159 (2) In exercising judicial authority, the courts and tribunals should be guided by the following principles**

**d. Justice shall be administered without undue regard to procedural technicalities, ………”**

As a court I am bound to uphold this constitutional principle. Elections are won at the ballot box not by way of **'technical knock-outs'** in the courts. For the above reasons I do dismiss this limb of the submissions.

I will now proceed to consider this petition on its merits based on the evidence presented to court. In the Petition certain allegations were made of electoral irregularities/malpractices which the Petitioner claimed rendered the electoral process tainted, and which rendered the election of the 1st Respondent as Governor invalid. The substratum of this election Petition may be condensed into three (3) main issues: -

1. Failure by the constituency Returning Officer at Taveta Constituency to announce the aggregates of the results for Governors contest at the Constituency tallying Centre being Timbila High School and his decision to travel to the County Tallying Centre at Mwatate and make the announcement there instead.
2. The use of a motor vehicle KBT 904C to transport the Taveta Returning Officer and the Taveta Election materials to Mwatate which was submitted by the Petitioner to be both suspicious and irregular.
3. The making of two separate and contradictory announcements of the totals for the results of the Governors contest at the County Tallying Centre at Mwatate.

Aside from these three main allegations the Petitioner did in her Petition raise other allegations of anomalies which it was submitted rendered the electoral process invalid and for completeness I propose to consider and determine each individual allegation. From the evidence adduced and by her own admission the Petitioner has no complaints or issues at all with the results as announced from Voi, Wundanyi and Mwatate Constituencies. She concedes that the results announced from those three Constituencies were correct and accepts them. Her only issue is with the results from the fourth Constituency making up Taita-Taveta County being **Taveta Constituency**. As such all allegations of irregularities/malpractices relate **only** to Taveta Constituency.

**(1) FAILURE TO ISSUE COPIES OF THE FORM 35'S TO THE AGENTS IN TAVETA CONSTITUENCY: -**

Taveta Constituency had 58 polling stations. The Petitioner alleged that contrary to the laid down requirement her agents being WIPER Agents were not supplied with copies of the Form 35's by the Presiding Officers at these polling stations. Regulation 79 (2) (c) of the Election Regulations provides: -

***“The Presiding Officer shall***

***c. provide each political party, candidate or their agent with a copy of the declaration of the results ...”***

Regulation 79 (1) (b) of the same provides that in the case of the election for County governor the declaration of results shall be in the Form 35. Therefore a failure to provide the party agents with a copy of the Form 35 would amount to a breach of Regulation 79 (2) (c). One of the Petitioner's witnesses **BENEDICT WAMBUA KIEMA** in his affidavit dated 26.3.2013 stated at paragraph 5 as follows: -

***“THAT despite the requirement that the Form 35's were to be given to all the Agents, the IEBC officials claimed that they did not have enough copies, that there was only one original copy of the form, and that if we wanted a personal copy, then we had to make arrangements on our own and as a result many if not all of the party agents present at Irrigation Polling station did not get a copy of the said Form 35 and therefore had no means to confirm the final tally of votes.”***

The Respondents did ask that this witness be availed for purposes of cross-examination but this was not done. The court even issued summons for the witness upon request by Mr. Kithi but he still failed to appear. As such it was not possible to test the veracity of his averments by way of cross-examination. His evidence in this regard therefore is of little probative value. From the evidence on record it would appear that each polling station had one extra copy of the Form 35 which was handed out to the agents to share and make copies. **DW1 ISIAH MADZUNGU SAHA** who was the Constituency Returning Officer for Taveta Constituency denied the allegation that agents were denied a copy of the Form 35. He insisted that each polling station in Taveta had four (4) copies of the Form 35 which allowed one copy to be pasted on the wall of the polling station, one placed inside the ballot box, one forwarded to the Tallying Centre and a last copy availed to the agents. **DW3 JAPHETH NYAKUNDI OMARIBA** the Presiding Officer for Sowene Primary School told the court that he did affix a copy of the Form 35 on the door of the polling station and that he gave one extra copy to the agents. Likewise **DW4 JOYCE MARTHA CHIKIRA** the Presiding Officer for Msengoni Nursery polling station confirms that she did affix a copy of the Form 35 on the door of the polling station. I am satisfied that all agents had the opportunity to peruse the Form 35 and in any event the agents present at the polling station must have been making their own notes as the tallying progressed. Any agent who disagreed with the results was at liberty to demand a recount – none did so. Of importance is the fact that no single agent has come forward to controvert or deny the contents of any Form 35. There has been no allegation that the figures entered therein were incorrect. The fact that in most cases WIPER agents are shown to have signed the Form 35's is sufficient proof that they saw them and agreed with their contents. **PW12 MUTUA NDONDU** was a Narc agent at Kitoghoto Nursery polling station. He complained that he was not given a copy of the Form 35. In his evidence **PW12** states as follows: -

***“This is a form 35. I confirm that I did sign the Form 35 to confirm that the votes endorsed thereon were correct ... these are my handwritten notes showing the votes garnered by the governor candidates in Kitoghoto polling station. The Form 35 corresponds exactly with my handwritten notes. The Form 35 is correct with respect to the results which I personally recorded. I signed to confirm the correctness of the results. I was not given a copy of the Form 35 ....”*** [my emphasis]

**PW12** goes on to confirm that the WIPER agent one '**Florence Emily Mwero**' did also sign the Form 35. The court was able to observe the demeanour of this witness and he did not strike me as an honest witness. He claimed that at some point all agents were told to leave the polling station (thereby implying that something sinister could have been taking place in their absence) but then he goes on to state that he did not include this important piece of information in his affidavit. In my view **PW12** was not an objective witness. He clearly was slanting his evidence to favour the Petitioners case. Short of any specific allegation that certain results recorded in a particular Form 35 were different from those which an agent recorded at the time of counting, it is fallacious to claim that failure to provide **each** agent with a copy of the Form 35 would affect in any way the integrity of the results. I therefore find that no sufficient evidence has been adduced to show that the failure to issue copies of the Form 35 to agents had any material effect on the result of the election.

Allied to this ground of the petition were allegations made regarding certain irregularities that occurred within the polling stations, which irregularities it was submitted would have had an effect on the outcome of the election. One such allegation was that WIPER agents were denied entry into the polling stations, thus they were unable to participate in the vote tallying and/or verify the results contained in the Form 35. Many of the complaints in this regard were generalities which were short on specifics. **PW7 JOSEPH MWANDAU MUIKAMBA** an agent of the Petitioner, testified that he communicated with the WIPER chief agent named '**KOPLO**' who told him that their agents were being denied entry into certain polling stations. Under cross-examination **PW7** says: -

***“This was a serious thing. I do not know in which particular polling station they were denied entry. I did not ask for any particulars.”***

**PW11 KOPLO MAGARA** the WIPER chief agent in Taveta stated that at Rekeke Primary School polling station WIPER agents were not allowed in. However upon being shown the polling diary for Rekeke he conceded that in fact two (2) WIPER agents accessed the polling station. **PW6 LILLIAN NDANGWA KIO** who was the Presiding Officer for Rekeke Primary School did produce in court her poll diary for the day which revealed that there were two WIPER agents present when the station opened and both signed the diary. The attempt by **PW11** to try and deny that those who signed the documents were WIPER agents falls hollow. No complaint was made that persons masquerading as WIPER agents had infiltrated polling stations in Taveta. Clearly this is a poor attempt to try and give credence to his claims.

**PW13 PENINAH MSAHA BALIA KALUNDA** was a WIPER agent assigned to Kitoghoto Nursery School polling station. She claims that despite her request to access the polling station in order to witness the counting and tallying of votes, the Presiding Officer denied her such access. However under cross-examination **PW13** concedes that the Form 35 for Kitoghoto Nursery School is signed by a WIPER agent whose name is given as '**Florence Emily Mwero**' on behalf of the party. **PW13** in her evidence admits that the Presiding Officer denied her entry to the polling station because there was already another WIPER agent inside. Regulation 62 (2) of the election Regulations provides: -

***“Notwithstanding sub-regulation (1) the Presiding Officer shall admit to the polling station not more than one agent for each candidate or political party.”***

Therefore where there was already a WIPER agent inside the polling station the Presiding Officer acted lawfully in denying entry to **PW13**. No doubt this provision was in order to avoid overcrowding in the polling station. The insistence by **PW13** that she alone be allowed to represent the WIPER party has no legal backing. In addition **PW13** claimed that the Presiding Officer at Kitoghoto failed to announce the results. However she later states that: -

***“I may not have heard the results being announced since I was outside.”***

It is clear therefore that the only gripe **PW13** had was that another WIPER agent was admitted into the polling station instead of herself. These merely amount to *'turf wars'* and cannot form the basis for invalidating the results declared at that polling station.

**PW14 SARAH MUTIE MUTHIWA** stated that she was a WIPER party agent based at Njukini Primary School polling station. She told the court that she was not able to confirm if the votes assigned to the Petitioner was correct as a problem occurred during counting. However **PW14** readily concedes that she did sign the Form 35 although she claims to have done so merely because other agents were signing. The fact that **PW14** signed the Form 35 is an acknowledgement that she agreed with and accepted its contents. If the witness was uncertain as to what the correct vote tally was, then she ought to have demanded for a recount and/or declined to sign the Form 35. Under cross-examination Mr. Khagram took this witness through various official documents which were required to be signed by the agents. She confirmed having signed all these documents which is proof that she was present during the counting and tallying of votes. On the whole I found the demeanour of this witness to be wanting and her evidence was unreliable. On the one hand she sates: -

***“I cannot confirm the number of votes Mrs. Mwatela got. There was a problem during the counting of votes for Governor.”***

Yet the same witness goes onto state: -

***“After the counting the Presiding Officer announced the results inside the hall. I wrote down the votes as announced. I have not brought my note book with me. I did phone Koplo and I told him the number of votes Mrs. Mwatela garnered. I told him the votes garnered by each candidate ...”***

How can **PW14** on the one hand claim not to know how many votes the Petitioner garnered yet on the other hand admit that she told Koplo the number of votes garnered by the Petitioner. This witness is clearly talking out of both sides of her mouth. She is an untruthful witness. All said and done I find that any failure to hand copies of the Form 35 to each individual agent did not materially affect the results contained therein. No agent can claim to have no knowledge of the results on the basis that he/she was not handed a copy of the Form 35. The results were well publicized by affixing the Form 35's on doors and walls of polling station. Any agent who wished to cross-check with their own figures was at liberty to do so. Indeed **PW5 MSHILA SIO** who testified for the Petitioner admitted in his evidence that: -

***“To the best of my knowledge no agent complained that he was not allowed to verify results in a polling station.”***

The failures of the WIPER agents to verify results cannot be blamed on the IEBC. **PW14** states that she recorded in her note book the number of votes garnered by each candidate. However she had not annexed this note book to her affidavit nor did she avail it in court to enable the court determine whether there existed any discrepancy between what she recorded at the polling station and what appeared in the Form 35. The complaint raised by these witnesses clearly have no basis and must be dismissed. **PW11** the WIPER chief agent stated that some WIPER agents told him that they did not agree with the results as announced from their polling stations. However he goes on to state that: -

***“I have not put this in my affidavit.”***

Why would **PW11** leave out such a crucial piece of information. This is clearly an afterthought and an

attempt to bolster the Petition.

In the affidavit filed by one **ATHMAN MOZE SAFARI** and annexed to the petition the deponent identifies himself as the chief agent of the Restore and Build Kenya Party. In his affidavit he claimed that at Taveta Primary School Polling station only ODM agents were allowed in. All others including himself and WIPER agents were kept out. The said Athman goes on to claim that at St. Peters Nursery School polling station the Presiding Officer instructed agents to sign blank Form 35's. No agent swore an affidavit or came to testify regarding this serious allegation. The said Athman though summoned declined to appear in court for cross-examination. This court can only draw an adverse inference from his reluctance to appear in court. In any event no tangible proof has been tendered of the allegations made in this affidavit.

Allied to the above was a complaint that the IEBC Officials blocked WIPER agents from accompanying ballot boxes from the various polling stations in Taveta to the Constituency tallying centre at Timbila High School. There was no obligation on IEBC to provide transport for party agents. The WIPER chief agent Mr. Koplo **PW11** confirmed that all agents were provided with a transport allowance by the party to enable them to move from place to place. It was therefore the responsibility of each individual agent to get himself or herself from the polling station to the tallying centre. The fact that not even the agent from Timbila Primary School which was said to be barely 1 km away from the tallying centre at Timbila High School was present at the tallying centre speaks volumes about the casual approach these agents had to the discharge of their duties. The IEBC cannot be held to blame for the laxity on the part of the WIPER agents in Taveta. This complaint is baseless and is consequently dismissed.

## **2. FAILURE BY RETURNING OFFICER TO ANNOUNCE TALLY RESULTS AT THE CONSTITUENCY TALLYING CENTRE IN TAVETA**

This as I have indicated earlier is one of the key complaints of misconduct by IEBC officials raised by the Petitioner. This allegation needs to be broken down and considered in two aspects: -

- a. Did the Returning Officer for Taveta breach the law by failing to announce the aggregate tally of the results for Governors contest at the County Tallying Centre and if so
- b. Did such failure materially affect the results of the election.

**PW2 MARGARET MGHOSI** a journalist with the Taita Vernacular Station known as '***Anguo FM***' told the court that on 4th March 2013 she was one of the media correspondents stationed at the Taveta Constituency Tallying Centre at Timbila High School, waiting to receive the results of the elections in that Constituency. She testified that the Returning Officer failed to make any announcement of the aggregate results for the positions of Governor, Senator and Women's Representative. He instead left for the County Tallying Centre in Mwatate at 10.00 pm saying that he would make the announcements there. However **PW2** in her evidence stated "***I did witness all the results being announced. The totals were not announced ...***" thereby conceding that the Returning Officer made an announcement of all the results from each individual polling station in Taveta – what he failed to do was to announce the aggregate for the whole Constituency. **PW2** told the court that she left the Constituency tallying centre at 10.00 pm after the Returning Officer had left for Mwatate. She therefore has no idea what occurred after she left and more specifically is unable to confirm if any other person tallied and announced results after she had departed. **PW11 GODFREY KOPLO MWANDAGHA**, the chief agent for the WIPER party told the court that he was also at the Constituency Tallying Centre at Timbila High School. He confirms that the Returning Officer did read out using a microphone the results from all the polling stations in Taveta but that he failed to announce the aggregate totals for the post of Governor, Senator and Women's Representative. **PW11** later declined to sign the Form 36 prepared at Timbila as he was unable to

confirm the correctness of the results since his agents had not handed to him copies of the Form 35. Regulation 83 (1) (a) of the Election Regulations provides: -

***“83 (1) Immediately after the results of the poll from polling stations in a Constituency have been received by the returning Officer, the Returning Officer shall, in the presence of candidates or agents and observers, if present***

***(a) .....***

***(b) In the case of an election publicly announce to persons present the total number of valid votes cast for each candidate in respect of each election in the order provided in regulation 75***

***(2) .....***” [my emphasis]

From this regulation it is clear that an obligation is placed upon the Returning Officer to make a public announcement of the valid votes cast for each candidate. **PW1 ISAIAH SAHA** was the Constituency Returning Officer for Taveta. He stated that as he was announcing the results from the various polling stations one of his data entry clerks was feeding the figures he was reading out on to the Form 36 for purposes of tallying. Unfortunately as it transpired the said data entry clerk was unable to keep up with his speed of announcement and was therefore unable to capture all the data. **PW1** stated that due to the fact that results from Taveta had been delayed, he was under immense pressure to travel to the County Tallying Centre at Mwatate and deliver the results there. As such he left for Mwatate without making the announcement of the final tallies, a task which he left to his Deputy to perform using scanned copies of the Form 35's as he had carried the original copies with him. The fact that the Returning Officer was under immense pressure to travel to Mwatate to avail the results is not in any doubt. Evidence from all witnesses including the Petitioner's witnesses is that due to the delay in receiving results from Taveta **'tensions were high'** and everyone was on edge. The County Returning Officer did confirm that he made several calls to the Taveta returning Officer enquiring about the results. It could be argued that the Taveta Returning Officer ought not to have capitulated to the pressure and ought to have remained and completed the tally and announcement in Taveta. However as it was he made the decision to travel to Mwatate leaving his Deputy to complete the task. **DW9 JOASH KAKA MALIMALI** was an agent at the Timbila polling station and was also the ODM chief agent in Taveta. He told the court that he was based at the tallying centre at Timbila High School to await the announcement of the results. He states that the results from all 58 polling stations were announced and confirms that the Returning Officer did not make any announcement of the totals for Governor, Senator and Women's Representative. **DW9** told the court that after the Returning Officer left for Mwatate, he remained at the Constituency Tallying Centre. He confirms that the Deputy Returning Officer filled the Form 36, which he and the TNA agent signed after which the totals were publicly announced. **DW9** states that: -

***“After Cornel [the TNA agent] and I signed the Form 36 the Deputy Returning Officer made announcement of the totals in Taveta. The agents of candidates and members of public were present and were asking to know the totals of the results.”***

It therefore appears that the tally of results at Taveta was announced not by the Returning Officer but by his Deputy. Both **PW2** and **PW11** who were at the tallying centre at Timbila High School testified that they left when the Returning Officer left for Mwatate. They did not remain to see what transpired after they left. They cannot therefore deny that the Deputy Returning Officer made the announcement later that night. Regulation 3 (5) of the Elections Regulations provides: -

***“(5) a deputy Returning Officer shall subject to the general direction and control of the Returning***

***Officer to whom he or she is a deputy, have all the power and may perform all the duties of the returning Officer under these regulations.*** [my emphasis]

Therefore an announcement made by the Deputy Returning Officer fulfills the legal requirement that the results be tallied and announced at the Constituency level.

Even if it is shown that no announcement was made at Timbila High School the Petitioner has not shown how this failure would have materially affected the final tally of the results. It is unfathomable that the Petitioner, who was a candidate for so senior an elective post as Governor sat in Mwatate waiting for results from Taveta and made no effort to enquire from her agents what her tally of votes was - it is not logical that she would choose to rely entirely upon the announcement made by the Returning Officer. **PW11** being a prudent chief agent would have taken steps to obtain results from his agents. His declaration that he did not do so rings hollow. **PW11** even admits that he did not bother to make enquiry about the results from Timbila Primary School which was hardly 1 km away from the tallying centre. As it is there has been no credible challenge to any of the results contained either in the Form 35's or the results from each polling station as announced at the tallying centre. There is nothing to indicate that the results of any polling station were altered and/or interfered with in any manner. The Petitioner had not by evidence or otherwise challenged the results contained in any Form 35 as being different from what was obtained and announced at any particular polling station. In sum the Petitioner and her agents have not presented to court any evidence that the figures announced by IEBC were in any way either fictitious or inaccurate. They have not presented their own personal tally showing different figures from those announced by the IEBC.

I find that a failure to announce the results at the Constituency tallying centre would have no material impact on the outcome of this election and I therefore dismiss this ground.

The Petitioner also took issue with the failure by the Taveta Returning Officer to electronically transmit the results from Taveta to the County tallying centre in Mwatate. This option could not be exercised as the electronic transmission system had failed. This failure did not plague Taveta alone. The electronic transmission system failed country wide. Did this failure seriously compromise the validity of the election process in Taita-Taveta" The question of electronic facilitation of the electoral process was addressed by the Supreme Court in the case of **RAILA ODINGA & 5 OTHERS – VS – IEBC & 3 OTHERS [2013] eKLR** where it was held: -

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

Therefore from this decision of the Supreme Court it is clear that the failure of the electronic transmission system did not in any way invalidate the election in Taveta-Taveta. Neither has it been shown how this failure affected the results from Taveta.

### **3. USE OF A PRIVATE MOTOR VEHICLE TO TRANSPORT THE RETURNING OFFICER AND ELECTION MATERIALS**

The Petitioner alleged that the Taveta Returning Officer made use of the private motor vehicle

Registration KBT 940C to travel from Taveta to the County Tallying Centre in Mwatate. It was alleged that the said vehicle belonged to a known associate of Mr. Mruttu the 4th Respondent and that the vehicle was not searched at the gate before entering the compound of the tallying centre. The claim therefore is that for all these reasons the integrity of the election materials ferried inside that vehicle could not be guaranteed as there existed room to alter and/or interfere with the election documents mainly the Form 35's from Taveta. The Respondents denied that there was anything sinister or untoward regarding the use of this vehicle. **DW1 MR. SAHA** the Taveta Returning Officer confirms that he did indeed use the said vehicle to transport himself and the Form 35's from Taveta to Mwatate. However he clarifies that this was a vehicle which had been hired by the IEBC for use during the election period. No party bothered to conduct a search with the Register of Motor Vehicles to ascertain the true ownership of the vehicle. However documents identified by **DW1** eg certificate of Insurance for the vehicle, provide persuasive evidence that the vehicles belonged to one '**Paul Gathura Gachau**'. A Sale agreement dated 24th September 2013 was also produced as evidence of the fact that the IEBC had hired this vehicle from the said Paul Gachau. Although the paper work and the record keeping with regard to this transaction may not have been the best, I am satisfied that there exists sufficient evidence that this vehicle though a private vehicle had been hired by IEBC and as such there was nothing sinister in its use by the Returning Officer. The allegation had been made that the vehicle belonged to an associate of the 4th Respondent and had been used to campaign for the 4th Respondent but no evidence was adduced to prove this allegation at all. **PW5 MSHILA MWAKAI SIO** a nephew to the Petitioner and **PW8 PETER CHOZI SHOLIO** one of the Petitioner's agents both alleged that the motor vehicle registration No. KBT 940C had been used to campaign for Mr. Mruttu the 4th Respondent. Neither was able to substantiate this claim. **PW8** in his evidence said: -

***"I had seen that vehicle being used in the campaign of John Mruttu. I saw the vehicle with speakers being used in the campaign. I did not remember at the time. I have remembered now ..."***

**PW8** admitted that he did not include this particular piece of information in his affidavit as he has '**forgotten**' to do so. I do not buy this at all. The reason **PW8** did not include this in his affidavit is because no such incident occurred. This is clearly an afterthought and an attempt to link the 4th Respondent to the vehicle in order to boost the Petitioner's claim. I find that **PW8** was being less than candid in this regard. All in all no connection has been shown to exist between Paul Gachau the owner of motor vehicle Registration No. KBT 940C and the 4th Respondent.

Several of the Petitioner's witnesses felt that the fact that the vehicle drove straight into the tallying centre without being stopped and inspected by guards at the gate was suspicious. The implication here is that the vehicle could have been used to ferry in unauthorized persons or documents. However this remains a mere allegation with no proof offered that this did in fact happen. **DW1** told the court that he identified himself to the guards and that is why the vehicle was let in. He also identifies the security officer who accompanied him inside that vehicle as '**Mukundi Gathemi**', and the driver as one '**Amos Kirugu Kariuki**'. The issues raised in relation to this motor vehicle amount to '**mere suspicion**' and no tangible proof has been tendered of any wrong doing and/or breach of electoral laws.

#### **(4) TWO SEPARATE ANNOUNCEMENTS MADE OF THE WINNER AT THE COUNTY TALLYING CENTRE IN MWATATE.**

This was one of the key complaints raised by the Petitioner. She submitted that due to the fact that two separate announcements were made of a winner at the County tallying centre in Mwatate, it was not possible to know exactly who had won the election and for this reason, the 4th respondent's election ought to be nullified. On this point, the court heard evidence from several witnesses. Both the petitioner

as well as the Respondent's witnesses agreed that there were two announcements made regarding the election results from Taveta Constituency. Taveta was the last constituency to deliver its results to the tallying centre. As indicated earlier in this judgment, the petitioner was clear that she had no issue at all with the results as announced from Voi, Wundanyi and Mwatate constituencies. Her only problem was with the result as read out from Taveta. The procedure used to announce the results from Taveta is not in dispute. All parties agree that on 6<sup>th</sup> March, 2013 at about 9.00 am, the Taveta Returning Officer began announcing the results from Taveta constituency. After the first tally, it was announced that the petitioner had garnered **4,143** votes in Taveta Constituency whilst the 4<sup>th</sup> Respondent was announced as having garnered **8,200** votes. This put the Petitioner's total vote tally at **32,297** whilst the 4<sup>th</sup> Respondent's total vote tally came to **29,097**. As such by this 1st announcement, the Petitioner was in the lead and ought to have been declared as the winner. However, no declaration of winner was made because the 4<sup>th</sup> Respondent **immediately** objected to the tally as announced. In his evidence, the 4<sup>th</sup> Respondent stated

***“This is what I witnessed in Mwatate. I can only testify as to what I saw. I saw the results being entered into the laptop and being beamed onto the wall. I objected to the total which was read out. I compared this to the figure I had on my own laptop and there was a clear difference. There was an error in addition, that is, in the arithmetic. The figures in each Form 35 were correct. I made an objection when the total was read out I had a laptop with me at the tallying centre.....”***

The 4<sup>th</sup> Respondent therefore raised an objection that the figures as read out by the Returning Officer were not correctly totalled. The 4<sup>th</sup> Respondent went on to testify as follows:

***“...Anyone running an election will be getting results from his agent. I had entered the results I had been given from my agents into my laptop. I was also noting down the results for each polling station as being read out by the Returning Officer Taveta.....the total I got from the figures sent by my agents was 12,626. The total I got by adding the figures announced on that day was 12,513.....”***

The 4<sup>th</sup> Respondent was well within his rights to dispute the figures being announced. Even the Petitioner conceded in her evidence that the 4<sup>th</sup> Respondent as a candidate had a right to raise an issue on this. Following the objection by the 4<sup>th</sup> Respondent and after discussion by all parties, it was decided that the Taveta results be re-tallied. In her evidence the Petitioner also gave a narration of the manner in which this re-tally was conducted. She stated: -

***“Once Mr. Mruttu objected the Constituency Returning Officer proceeded to read out the figures from each Form 35. As the Returning Officer read out the figures were being beamed onto the wall and I could see them.”***

It is clear that the procedure adopted was transparent and verifiable by all parties in the tallying hall. After this was done a second announcement was made. In this re-tally, the Petitioner's votes tally from Taveta Constituency was put at **4,736** and those of the 4<sup>th</sup> Respondent totalled **12,513**. This gave the Petitioner a total vote tally of **32,890** and gave the 4<sup>th</sup> Respondent a total vote tally of **34,290** placing the 4<sup>th</sup> Respondent in the lead by **1,400** votes. After this second announcement, no party objected. The Petitioner concedes that even she did not raise any objection after this second announcement. The County Returning Officer then proceeded to declare the 4<sup>th</sup> Respondent the winner of the Governors contest and later issued him with the winners certificate.

Although the petitioner objects to tally as per the 2<sup>nd</sup> announcement, she has not given any basis for that

objection apart from the fact that she was not the winner. It is pertinent that the Petitioner did not have any independent figures either given to her by her agents in Taveta or her own figures as recorded in the tallying centre as a basis upon which to challenge this result. I find it hard to believe that the Petitioner being a serious candidate for Governor and a front-runner at that, chose to sit in that tallying centre at Mwatate, listen to the results from Taveta being read out, view the individual results beamed on the wall, yet she did not bother to take down the figures being announced and do her own personal tally as the 4<sup>th</sup> Respondent did. Even if the Petitioner did not personally want to bother herself with the mundane task of adding up the figures, as they were being announced, she could (and in my view ought to) have delegated this task to one of her agents who were with her in the tallying centre. **PW7 JOSEPH MWANDAU MWIKAMBA** who states that he was with the petitioner inside the tallying hall stated that he had obtained figures for votes garnered by the Petitioner from some of their agents in Taveta. However **PW7** goes on to contradict his own testimony when he states: -

***“After the figures were read out by the Taveta Returning Officer and the Petitioner took them down, we did the totals. I cannot recall what the totals we got were. The Petitioner took the totals. I cannot recall if she took the totals ...”***

It is pertinent to note that the Petitioner herself stated that she did not bother to add the totals of the figures being read out. The Petitioner and her agents seem to have adopted a rather lackadaisical approach to the tally of votes. They behaved like mere bystanders instead of participants in the election. The Petitioner and her whole team decided to sit placidly and rely on the announcement by the IEBC officials. I am not persuaded that this was what actually happened. I have no doubt that the petitioner and her team did tally the figures. They remained silent after the first announcement because the petitioner was placed in the lead and have only now chosen to object through this Petition because through second tally, she lost the election. Neither the Petitioner nor her agents have impugned any of the figures contained in the Form 35's which were used as the basis of the tally. **PW10** who was also part of the Petitioner's team at the County tallying centre stated: -

***“Nobody objected to the figures read out for each polling station.”***

There is no evidence to prove that any of the figures being read out from Taveta were incorrect.

In order to put to rest this issue, I did as a court conduct a thorough and critical examination of all the Form 35s from Taveta Constituency. I went further and added up the totals contained therein for the Petitioner and the 4<sup>th</sup> Respondent. The total which this court obtained was the exact same total which was obtained after the second tally. The results which this court obtained were as follows:

**Total of votes from Taveva Constituency**

Jacinta Wanjala Mwatela - **4,736**

(Petitioner)

Johnson Mruttu - **12,513**

(4<sup>th</sup> Respondent)

**Total votes garnered/arrived at by adding up the totals from each of the four (4) Constituencies**

Jacinta Wanjala Mwatela - **32,890**

(Petitioner)

Johnson Mruttu - 34,290

(4<sup>th</sup> Respondent)

From my own calculation, there can be no doubt that the 4<sup>th</sup> Respondent garnered the highest number of total votes in the election.

It is clear from this analysis that an error must have occurred during the first addition of the figures leading to an error in the first announcement of the totals from Taveta. The question is what was the cause of this error – **DW2 BEJA KALIMBO** who was the Returning Officer for Taita Taveta County explained that as the results from Taveta were being read out – they were being entered into an Excel spread-sheet. After entry, the computer was instructed to yield the totals. The 4<sup>th</sup> Respondent who did the same on his own laptop obtained totally different results. The error could have arisen either from a mis-posting of results by the data entry clerks, the use of a faulty Excel formula in the Form 36 spread sheet or another operational challenge in managing the computer generated Form 36 spread sheet. The 4<sup>th</sup> Respondent who told the court that he is a mechanical engineer and is conversant with the use of computers explained that: -

***“It is very possible for an Excel spread sheet to give a wrong total. It will all depend on the instructions given to the computer ...”***

It is quite conceivable that due to fatigue the clerk operating the IEBC computer may have entered an erroneous command leading to erroneous results. In the circumstances in which the elections were being held such errors and/or mistakes were bound to occur. In his evidence, DW2 stated that:

***“I am a Christian. The duties of a Returning Officer were enormous and was very stressful we went for several days without sleep. We were very fatigued. We were overseeing election for six posts....”***

Several of the Petitioner's own witnesses also stated that they went for several days without sleep. For an officer to work under such tense sleep-deprived conditions means they are bound to make mistakes. In the case of **WAVINYA NDETI VS IEBC & 2 OTHERS** Hon. Majanja J held that:

***“An election is a human endeavour and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error.”***

I would go on to posit that perfection in the conduct of elections has not been achieved anywhere in the world. There is no evidence and indeed no allegation has been raised at all by the Petitioner that this error was malicious, mischievous or intentional in any way. The fact of the matter is that, the error affected all candidates across the board. The Petitioner conceded in her evidence that the vote tally of every single candidate was affected. After the re-tally, each candidate's votes went up. **PW8 JOHN SHOLO** and **PW10 REMI MWASI ALEX** both of whom were at the County tallying centre in Mwatate claim that the vote tallies were inflated in favour of the 4<sup>th</sup> Respondent during the re-tally. However both admit that they did not personally bother to record and add the figures being read out by the Taveta Returning Officer. **PW8** says: -

***“I was not recording the results as they were being read out. I am not in a position to say what the totals were.”***

If neither witness bothered to tally the results how then can they claim that the votes were being inflated in favour of one or other candidate. The fact of the matter is that during the re-tally the vote count went up for each of the six (6) candidates in the election. The only logical explanation for this is that there must have been an error in feeding results into the IEBC laptop and the instructions given to the Excel Program. Allowance must be made for human error. This is exactly what occurred here. Did this error materially affect the result of the election – I think not. The error was merely an arithmetical error which only affected the process of tallying results. This error had no effect on the integrity of the result as contained in the Form 35's. Indeed the results contained in the Form 35 for Taveta have not been effectively challenged at all. Thus there is no error or mistake in the figures in the Form 35's. The error is only with regard to the addition of those figures. The will of the voter as manifested in the votes cast has not been affected at all. The IEBC being the body mandated to conduct elections, may in future consider having their officers work in shifts. This would allow an officer to take a break and rest and would avoid having them to work continuously for several days on end. However this is a discussion for another day. Notwithstanding this arithmetical error, I find that the will of the voters of Taveta and by extension, those of Taita-Taveta with regard to their choice for Governor is clearly discernible. There can be no question about this. Therefore, I find that the fact that two different announcements were made by the Constituency Returning Officer, had no material effect on the outcome of the election for Governor.

(5) **PRAYER FOR SCRUTINY AND RECOUNT**

At this point, it is pertinent to note that one of the prayers contained in this Petition was a prayer for 'scrutiny and recount' of votes cast. At the pre-trial stage, it was directed that this prayer be canvassed once the hearing was in progress. Mr. Kithi for the Petitioner did not pursue this prayer at all. He did not file any substantive motion seeking scrutiny and recount. In the case of **NDOLO-VS MWINYI & 2 OTHERS MOMBASA HC EP 1 OF 2013** this court held that:

***“Where a request is made for scrutiny and/or recount, the application must be clear, concise and more importantly specific. An application couched in general terms ought not be permitted as this is tantamount to requiring of the court to go through the whole exercise of tallying once again...”***

I find that the present application made for scrutiny and recount was of a general nature – no specifics were advanced as to why such a prayer was merited. In other words, no sufficient basis has been laid to warrant such orders. I am mindful that section of 82 (1) of the Elections Act, 2011 empowers a court to make an order of scrutiny and/or recount '***suo moto***' or on its own motion. For the reasons cited in this judgment I found no reason to make such order. This prayers therefore fails.

**6. FAILURE TO ISSUE THE PETITIONER WITH A WINNER CERTIFICATE DESPITE DEMAND.**

The Petitioner faulted the county Returning Officer for failing to issue her with a winners certificate despite her demand to be so issued. As has been explained above, the Petitioner not having garnered the winning number of votes could obviously **not** be issued with a winners certificate. No more needs be said on this.

Allied to this is prayer (b) of the Petition that **“your Petitioner do and is hereby returned as duly elected Governor of Taita-Taveta County on the basis of the election results from Voi, Mwatate and Wundanyi Constituencies only.”**

In effect by this prayer, the Petitioner seeks to exclude the results from Taveta Constituency. As

submitted by counsel for the Respondents this would be tantamount to disenfranchising the voters of Taveta Constituency. As a person seeking leadership one wonders why the Petitioner would seek to exclude an integral part of the voters from that County. Are their vote less important or less valuable than those of their brothers and sisters in Voi, Wundanyi and Mwatate, or are they to be excluded merely because they gave victory to her opponent. The fact that this was the real motivation for this prayer is evidenced by the Petitioner's own evidence that: -

***“I do pray that the votes from Taveta be excluded from the results. The votes in Voi, Mwatate and Wundanyi gave me the lead ...”***

This politics of exclusion is a dangerous trend and cannot be countenanced by any court worth its name. Such an act would be in direct contradiction of Article 81 of the Constitution and would make a nonsense of Article 21(1) of the Universal Declaration of Human Rights which provides for universal and equal suffrage by stating: -

***“everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”***

The Governor of Taita-taveta is elected to represent voters in the whole county and it would be absurd to exclude the voters of Taveta. Needless to say this prayer fails.

## **7. ABSENCE OF A FORM 36 FOR TAVETA CONSTITUENCY**

On this ground the Petitioner raised two complaints. Firstly that Regulation 83 of the Election Regulations which require that results be announced at the same venue where tallying was conducted was not adhered to. Secondly it is submitted that the 1st Respondent had no legal authority under Regulation 87 (2) to read out the Taveta results at the County tallying centre Mwatate as he did not have in his possession the duly filled Form 36. As such it is submitted by the Petitioner that the results as announced from Taveta Constituency were a nullity.

On the first argument I have already found that the Deputy Returning Officer at Taveta had legal mandate under Regulation 3 (5) to perform **all** acts which the Returning Officer was required to perform. There is evidence that the tallying and announcing of the Taveta result was done in Taveta by the Deputy Presiding Officer. The argument that at the time the declaration of Taveta results was made at the County tallying centre in Mwatate, no Form 36 was in existence does not hold water. In his evidence Mr. Saha the Taveta Constituency Returning Officer stated that: -

***“In my paragraph 26 [of his affidavit] I did state that whilst in Mwatate I called my Deputy and confirmed the figures in the Form 36. The Deputy had verified the Form 36 and had it signed by the agents. There is only one Form 36. I was not present when the agents signed the Form 36. By the time I signed the Form 36 the agents had already signed ....”***

The court was able to peruse the Form 36 for Taveta Constituency. It was duly filled out and bore the exact same figures as announced in the second announcement at the County tallying centre in Mwatate. More importantly the Form 36 is duly signed by the TNA and ODM agent and is dated **5th March 2013**. Therefore by **6th March 2013** when the results were being announced at Mwatate the Form 36 had already been completed and signed. **PW11** Mr. Koplo, the chief WIPER agent stated in his evidence: -

***“I declined to sign the Form 36. Other chief agents signed the Form 36. They signed to confirm***

***that the results were true and correct. This is the Form 36 which was used to declare the results at Timbila which I refused to sign. Other agents have signed.***

Therefore **PW11** does not dispute the existence of the Form 36 neither does he dispute the figures contained therein. He maintains that he refused to sign it because he had not received Form 35's From his agents in a order to enable him verify the results in the Form 36. However even at the date of his appearance in this court **PW11** was still unable to provide a credible challenge to the Form 36. Therefore the failure by the chief WIPER agent to sign the Form 36 does not invalidate the results contained therein. I therefore find that there was in fact a Form 36 in existence by the time the County Returning Officer read the final results at Mwatate. It must be remembered that the Form 36 is but a summary of the results contained in the Form 35's. In other words the Form 35's are the primary documents used to compile the Form 36. As I have stated there has been no credible challenge to the figures contained in the Form 35's from Taveta Constituency. It follows therefore that the Form 36 cannot be faulted. The County Returning Officer **DW2** stated in his evidence that: -

***"I am sure the results I announced for Taveta were correct. I used the raw data. I was not conspiring to assist Mr. Mruttu to win the election ..... The Form 35 is the primary document. I have no doubt about the figures which I announced. I complied with the law. I am not a lawyer. I did fulfill my mandate as County Returning Officer in accordance with the law. The fact that I did not have the Form 36 did not affect in any way the results of Taveta. [My emphasis]***

I do agree with this witness that the absence of the Form 36 at the County tallying centre could not impact the results contained in the Form 35's. It is on evidence that the results were called out and announced based on the Form 35's. No party challenged the figures in the Form 35's. As a court I did examine each Form 35 from Taveta and I did add up the figures. The figures contained in the Form 36 conform exactly the totals that this court obtained by its own addition. Thus the failure to rely on the Form 36 as a basis for tallying the results in my view did not affect the results as announced and this limb of the Petition must fail.

## **8. FAILURE TO EXHAUST LAID DOWN STATUOTRY REMEDIES BEFORE DECLARING A WINNER**

The Petitioner submitted that the declaration of the 4th Respondent as the winner of the Governors contest was both premature and irregular since in her submission there was an election dispute pending in terms of Section 74 (2) of the Elections Act. Section 74 of the Elections Act, 2011 provides as follows:

***"74 (1) Pursuant to Article 88 (4) (e) of the Constitution, the Commission shall be responsible for settlement of electoral disputes including disputes relating to or arising from nominations but excluding election petitions and disputes, subsequent to the declaration of election results***

***2. An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the commission.***

***3. ....***

Mr. Kithi submitted that the Petitioner letter of complaint dated 6th March 2013 by which she demanded to be issued with a winners certificate after the first set of results were announced constituted an election dispute which IEBC officials ought to have addressed and determined before proceeding with the process. Section 74 (2) of the Election Act empowers IEBC to settle disputes arising from nomination and any other dispute that arises before results are declared. It is true that the Petitioner authored this

letter before a final announcement of winner was made. However the County Returning Officer stated that the dispute was adequately addressed by way of the re-tally which was done at Mwatate. **DW2** stated : -

***“By doing a public re-tally all the queries of the Petitioner were addressed.”***

I would tend to agree. The Petitioner demanded to be declared the winner – the 4th Respondent on his part disputed the result as announced. The only logical course was to do what the Returning Officer did which was to order a re-tally. Once this was done the 4th Respondent emerged victorious. The evidence is that after this second announcement the Petitioner did not raise any complaint. She simply left the tallying centre. The remaining issues raised in the Petitioner's letters of complaint dated 6th March 2013 bearing the heading **Irregularities in Polling and Tallyng: Taveta Constituency, Taita-Taveta County** and the letter dated 7th March 2013 headed **Election for Governor, Taita-Taveta County** are matters that would require investigation and could only properly be addressed within the context of an Election Petition as is being done now. In her evidence the Petitioner did suggest that the IEBC officials were biased against her on the basis of gender – i.e. because she was a female candidate. However this allegation was not seriously canvassed much less proved. The Petitioner's claim that the Returning Officer called in police to harass her is not proved. No other witness present at Mwatate (not even her own witnesses) spoke of police being called in to harass the Petitioner. This particular allegation is clearly unproven.

## **CONCLUSION**

Based on the foregoing I find that though certain irregularities were proved to have existed, my considered view is that none of the irregularities had a material effect on the outcome of this election. In the case of **MORGAN – VS – SIMPSON (1975) 1 QB 151** the court cited the finding in **MARSHALL – VS – GIBSON DIVISIONAL COURT 14TH DECEMBER 1995** where it was stated: -

***“an election will not be declared invalid merely because there has been a breach of official duty in connection with the election or of the Rules by the Returning Officer or any other persons.”***

Similarly in this case the breaches of Rules attributable to the Taveta Constituency Returning Officer do not constitute sufficient grounds to invalidate the election. The will of the voters of Taita-Taveta County was clear and discernible from the votes which they cast on 4th March 2013. It is the duty of the Election Court to uphold that will. Section 83 of the Elections Act provides: -

***“No election shall be declared void by reasons of non-compliance with any written law relating to that election, if it appears that the election was conducted in accordance with the principles laid down in the Constitution and that written law or that non-compliance did not affect the result of the election.”***

Similarly in **RT COL DR. KIZZA BESIGYE – VS – ELECTORAL COMIISION and MUSEVENI PRESIDENTIAL PETITION NO. 1 OF 2006**, Hon. Odoki, Chief Justice of the Republic of Uganda noted that: -

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

My finding is that the irregularities noted in this election did not have any material effect on the will

of the people as manifested by their vote. To answer the questions framed for determination I hereby state as follows: -

- i. Were the elections held on 4th March 2013 for the position of Governor in Taita Taveta County free, fair and credible"

The answer is YES.

- ii. Were the elections conducted on 4th March 2013 for the position of Governor of Taita-Taveta County carried out in compliance or substantial compliance with the principles laid out in the Constitution and other governing written law"

The answer is YES.

- iii. Should an order for scrutiny and recount of ballot papers for the elections held on 4th March 2013 for the position of Governor of Taita-Taveta County be ordered"

The answer is NO.

- iv. Was the 4th Respondent Johnson Mtuta Mruttu validly elected for the position of Governor of Taita-Taveta County"

The answer is YES.

- v. Was any election offence shown to have been committed by any person(s) in connection with the elections held on 4th March 2013 for the position of Governor in Taita Taveta County.

- v. The answer is NO.

I find no ground upon which the election of the 4th Respondent as Governor ought to be nullified. I hereby declare that the 4th Respondent **JOHNSON MTUTA MRUTTU** was validly elected as Governor of Taita Taveta County. This petition fails in its entirety and is hereby dismissed.

### COSTS

The general rule in law is that '**cost follow the cause**' – costs are normally awarded in order to compensate a party who has had to appear in court to answer to a suit filed against them. In this Petition however the IEBC cannot claim to have been dragged into court without any justifiable cause. From the evidence it is clear that the circumstances which leading to the irregularities and confusion complained of were perpetrated by IEBC officials. Their failure to adhere strictly to laid down regulations and rules were a contributory factor to the filing of this Petition. Though the court has found that the lapses committed by IEBC officers did not suffice to meet the threshold required to nullify the election I do feel that due to their culpability neither the 1st, 2nd nor 3rd Respondents are entitled to any award of costs. I therefore direct that the 1st, 2nd and 3rd Respondents shall meet their own costs for this Petition. The 4th Respondent in my view is entitled to costs and I do hereby direct that the Petitioner shall pay the costs of the 4th Respondent as taxed upto but not exceeding Kshs.2.0 million. The security for costs which had been deposited in court will remain so held pending such taxation and thereafter said security deposit to be utilized to pay the costs of the 4th Respondent.

A certificate of determination of this Petition shall henceforth be issued in accordance with Section 86 of the Elections Act 2011.

I wish to end by expressing the court's appreciation to all counsel for their diligence in the conduct of this Election Petition and their co-operation in ensuring that the Petition has been finalised within the six (6) month constitutionally allowed period.

**Dated and Delivered this 3rd day of October 2013.**

**M. ODERO**

**JUDGE**

**In the presence of: -**

Mr. Kithi Advocate for the Petitioner

Mr. Khagram Advocate for the 1st, 2nd & 3rd Respondent

Mr. Kemboy Advocate for the 4th Respondent

Mr. Mutisya - Court Clerk



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