



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
KAKAMEGA LAW COURTS
PETITION NO: 9 OF 2013

PAUL POSH ABWORA..... PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE RETURNING OFFICER

MICHEAL KOSGEI.....2ND RESPONDENT

DAVID AOKO WERE.....3RD RESPONDENT

JUDGMENT

Background

1. The Petitioner, Paul Posh Abwora and the 3rd Respondent David Aoko Were, were contestants for the seat of Member of National Assembly, Matungu Constituency in the General Elections held on 4th March 2013. The 3rd Respondent has been the Member of Parliament of Matungu Constituency since the year 2002 when he was elected on a National Rainbow Coalition Party (NARC) Ticket and in 2007 when he was elected on an ODM Ticket. In 2013, the 3rd Respondent sought nomination from his then political party, Orange Democratic Movement (ODM). Among the competitors in the said nominations was the Petitioner. In that contest, the Petitioner won with over 10,000 votes beating the 3rd Respondent who had garnered 7,000 votes. Being dissatisfied with the results of the said nominations, the 3rd Respondent defected to the New Ford Kenya Party of the Amani Coalition, on whose ticket the 3rd Respondent contested the elections under challenge before this Court.
2. On 4th March 2013, the race for the Member of National Assembly, Matungu Constituency, attracted nine contestants, where the 3rd Respondent emerged winner with 13,427 votes, and the Petitioner came in second position with 12, 128 votes. Being dissatisfied with the results, the Petitioner filed a Petition dated 8th April 2013 challenging the said results. The Petition was supported by an affidavit sworn by the Petitioner on the same date of the petition. In compliance with Rule 12 of the Election (Parliamentary and County Elections) Petition Rules, 2013

(*hereinafter referred to as the Election Rules*), the Petitioner filed affidavits by intended witnesses in support of the Petition. The Petitioner was represented at various stages of the Petition by Merss Nyaundi, Kasamani, Ndiku and Ms. Mutuku. However, it is only Merss Kasamani and Ndiku who remained throughout the life of the Petition.

3. The Petitioner prayed for the following orders in the Petition:

- a. There be a scrutiny of the votes recorded as having been cast in the 4th March 2013 National Assembly Elections in Matungu Constituency.
- b. There be a recount of the ballot papers cast at the elections in the Constituency.
- c. There be a scrutiny of the valid, rejected, disputed and spoilt papers.
- d. There be a scrutiny of counterfoils of the votes cast, and a scrutiny of the tallying sheets from each and every one of the polling stations in Matungu Constituency.
- e. A declaration that the Petitioner be determined and declared as the validly elected member of the National Assembly for Matungu Constituency
- f. IN THE ALTERNATIVE the National Assembly elections held on 4th March 2013 be determined and declared null and void.
- g. The 3rd Respondent was not validly elected as the Member of the National Assembly for Matungu Constituency.
- h. An order be made for the holding of fresh election for the position of Member of National Assembly for Matungu Constituency,
- i. It be ordered that the Respondents be condemned to pay costs of this Petition to the Petitioner
- j. Such further or other relief as the Court may deem just to grant.

4. In response to the Petition, the 1st and 2nd Respondents both represented by Mr. Morara Apiemi, filed a joint response to the Petition dated 2nd May 2013. Counsel also filed affidavits by witnesses mainly the Constituency Returning Officer and Presiding Officers of various polling stations. The 1st and 2nd Respondents prayed that the Court does find that the 3rd Respondent was duly elected and that the elections were valid. Secondly, the Parliamentary results for Matungu Constituency as declared by the 2nd Respondent be upheld and thirdly, the Petition be dismissed with costs.

5. The 3rd Respondent, represented by Merss Masinde, and Wasilwa, also filed a response to the Petition dated 30th April 2013 together with affidavits by witnesses they intended to call in support of the 3rd Respondent's defence to the Petition. The 3rd Respondent prayed that the Petition be dismissed with costs and a declaration made that he was validly elected as a Member of Parliament for Matungu Constituency.

Pre-Trial Application

6. Prior to commencement of the hearing, both parties filed applications seeking various pre-trial orders. The 1st and 2nd Respondents filed an application dated 2nd May 2013 seeking orders that expunge several paragraphs of the petition and also expunge several affidavits listed in the application. This application was opposed by the Petitioner who filed Grounds of Opposition dated 13th May 2013. The application was canvassed by way of oral submissions in Court on 22nd May 2013. The Court delivered its considered ruling dated 29th May 2013 dismissing the 1st and 2nd Respondent's application in its entirety. The Petitioner also filed an application dated 21st May 2013 seeking orders, *inter-alia*, scrutiny and re-count of ballot papers cast at the elections. The Court directed that the Petitioner's application be shelved and be revisited at a time when all, or some of the witnesses, would have given their evidence.

7. To set the petition in motion, the Court conducted a pre-trial conference on 10th June 2013, where the Court and counsel for all the parties agreed on the issues outlined in the pre-trial. The Court issued directions in terms of issues for determination, the method of resolving the said issues, and the date and time allocation for each party in prosecuting and defending the petition as well as for submissions.
8. Mr. Kasamani, counsel for the Petitioner began by giving an opening statement. Counsel stated that the gist of their Petition was that the election for Member of National Assembly, Matungu Constituency, was not free and fair during the campaign, voting, tallying and the declaration of results. Counsel stated that the Petitioner moved the Court, and would adduce evidence to demonstrate the following three grounds: there was bribery of voters by money and other gifts, there was violence and lastly, the officials of the 1st and 2nd Respondents were compromised, hence the elections were not free and fair.

Allegations in the Petition and Evidence Adduced

i. Bribery

9. The Petitioner in the Petition pleaded that the 3rd Respondent, either personally or through proxies, engaged in acts of treating, inducement and bribery of voters for the purpose of influencing them to vote for him contrary to Sections 62 and 64 of the Elections Act, 2011. The Petitioner deposed in his affidavit in support of the Petition that on the day of the polls, he saw Wilberforce Were at Namalenge Primary School Polling Station giving out money to a group of about 100 people. The Petitioner deposed that he saw the people distributing money amongst themselves and he immediately made a report to the security officer at the polling station.
10. In response to these averments, Wilberforce Were (RW13) testified and denied the allegations made by the Petitioner, stating that he did not bribe any voter. He denied being in Namalenge on the day of the polls. RW13 confirmed that the 3rd Respondent was his brother. On cross-examination, RW13 stated that he lives in Mumias town but that he registered to vote in Busambi Polling Station because he wanted to support his brother and also a friend who was vying for a County Representative position in Matungu constituency. It was his evidence that on the voting day, he was driven to the polling station in his brother's motor vehicle KAW 150K. He stated that he was dropped home after he voted and the vehicle left. RW13 admitted to be part of the 3rd Respondent's campaign secretariat and that his major role was to print stationery and run errands. He stated that the secretariat was set up in February 2013 with about 10 people. It was his evidence that Samson Were Bukachi (RW10) was part of the secretariat tasked with training the 3rd Respondent's agents.
11. The Petitioner called the following witnesses; Mariciana Auma Kunguru (PW5), Peter Wafula Barasa (PW8), Gilbert Omoto Oduya (PW13) and Collins Mukhwana (PW15) to give evidence in respect of the allegation of bribery. PW5 swore a Witness Affidavit on 8th April 2013 and testified that she witnessed the 3rd respondent giving bribes on two occasions. First, she testified, was sometime in February 2013 at the home of one Corneli Opemi at about 2:00pm, she witnessed the 3rd Respondent giving out money while asking the congregation to vote for him. The second time was in Mungore Anglican Church where the 3rd Respondent gave the congregation Kshs. 50,000/-. On cross-examination PW5 stated that Corneli Opemi is her step brother-in law and that he announced that the 3rd Respondent has left him with Kshs. 24,000/- and in church, the 3rd Respondent gave an official the money.

12. In response to the allegation of bribery, the 3rd Respondent testified that he attended a church service at Mungore ACK church on 3rd March 2013. It was his evidence that he had previously promised to give cement for flooring the church. The 3rd Respondent testified that on the said date, the church reminded him of his previous promise and that he told them that he would honor it in due time. The 3rd Respondent contended that promise was not pegged on the Church voting for him but to get blessings from God.
13. Augustine Barasa Ochieng (RW7) echoed the 3rd Respondent's testimony and confirmed that the 3rd Respondent came to Mungore Anglican Church on 3rd March 2013 but that this was not his first time as he had been there previously, a number of times. RW7 testified that he conducted the church service on that day and that he allowed the 3rd Respondent to greet the congregation, which he did and stated that he would keep his earlier promise of supporting church development. RW7 testified that the 3rd Respondent did not give out any money to the congregation. On cross-examination, RW7 stated that the 3rd Respondent came into church at 11:00am after the service had begun and that he left after he spoke. He also confirmed that the 3rd Respondent contributed to the offering kitty. It was his evidence that he did not know what transpired outside the church after the 3rd Respondent left.
14. Cornel Kunguru Opemi (RW8) corroborated the evidence of RW7. He testified that Marciana Auma Kunguru (PW5) is the wife of his brother Thomas Makokha Kunguru and so he knew PW5 very well, and also that they were next door neighbours. It was his evidence that he attended the Mungore Anglican Church service on 3rd March 2013 when RW7 presided over the service and the 3rd Respondent was present. He testified that the church had a relatively small number of worshippers that day and that PW5 was not among them. On cross-examination RW7 stated that himself and PW5 were not enemies but that they were also not in talking terms. He stated that the 3rd Respondent spoke to the congregation asking for prayers, and reiterated the promise he had made in 2010, but which to date has not been fulfilled. It was his evidence that the 3rd Respondent gave no money except the offering and that he left before the service was over.
15. The 3rd Respondent in his evidence referred to Mungore Polling Station stating that this area was his stronghold. It was his evidence that he needed not, and did not bribe, harass or intimidate any voter so as to get votes. The 3rd Respondent stated that in 2007 he garnered 560 votes in that Mungore Polling Station and the closest challenger got 60 votes. In 2013 he garnered 595 votes and the nearest competitor got 130 votes.
16. In the final submissions, Counsel for the 3rd Respondent submitted that PW5 asserts in her Witness Affidavit dated 17th February 2013 as the date of alleged bribery at Mungore ACK, while her testimony in Court avers to the 2nd March 2013 as the date the alleged bribery might have occurred. It was their submission that the two different dates in respect of the same incident casts doubt on the veracity of such a serious claim of bribery.
17. Peter Wafula Barasa (PW8) a motorcycle taxi operator swore a Witness Affidavit on 8th April 2013. He testified that on 1st March 2013, at around 4 pm - 5pm he saw Samson Were and Emmanuel Oyula campaigning for the 3rd Respondent in the home of Ernest Makokha. PW8 testified that they were about 300-400 people in the said homestead and that the said persons told the congregation that Mr. Were's policies were good and if elected he would bring development. After this the two gave money as follows: Ksh. 6000 to the youth, Ksh. 6000 to the men, and Ksh. 10,000 to the women. It was his evidence that the representatives of the youth, men and women were chosen from the congregation who received the money which was in denomination of Ksh. 1000. On cross-examination, PW8 stated that he attended the campaign

rally because he was done with the day's work and that the woman representative who took the money was Mary Chuma, for the youths, William Wanyama and for the men Isaak Yakobo. He also stated he knew Samson Were but that it was his first time to see Emanuel Oyula. It was his evidence that at Ernest Makokha's home, there is enough space to accommodate up to 1,000 people.

18. In response to the allegations by PW8, Samson Were Bukachi (RW 10) testified that he did not take part in the 3rd Respondent's campaign at all. It was his evidence that he did not know Peter Wafula Barasa (PW8) nor Ernest Makokha Buluma (RW9) and that he did not go to RW9's home as alleged by PW8.
19. To rebut the evidence of PW8, the Respondents called Ernest Makokha Buluma (RW9) who swore a Witness Affidavit dated 30th April 2013. PW9 denied that a meeting took place as alleged and stated that his home could only accommodate up to 100 people and not more. He also testified that he did not know PW8, Samson Were and Emmanuel Oyula. On cross-examination, RW9 stated that his farm was about 10 acres which he had given each of his 5 sons 1 ½ acres and that his sons had built up their homes in various portions of the 10 acres save for his last born son who had built his "simba" within his homestead. RW9 further stated that he remained with 1 ½ acres part of which he farms. RW9 stated that his homestead had 3 houses – his house and the kitchen both have iron roof and his son's grass thatched house. RW9 stated that on 1st March 2013, he was at home all day and that he did not invite anybody.

Scene visit

20. After the evidence of Peter Wafula Barasa (PW8) Counsel for the 1st and 2nd Respondents made an application that the Court does visit the home of Mr. Ernest Makokha in Makokhwe village to ascertain the evidence that PW8 had given pertaining the allegations that a meeting took place and that money was given in that compound. Counsel submitted that the scene visit was important because the allegation is an election offence touching on the integrity of a retired head teacher and a sitting Member of Parliament. The Court in reserving its right to visit the scene, stated in its ruling that it would wait to hear the evidence of Ernest Makokha before making a decision as to whether the scene visit was necessary.
21. On 15th July 2013, after the evidence of Ernest Makokha (RW9) the Court revisited the issue of the scene visit and directed that parties do proceed to Makokhwe village in Musamba sub location, to investigate the home of Ernest Makokha (RW9). At the scene, the Court made the following observations:
 - i. The home was more than 1 acre and could accommodate well over 1,000 people. Additionally, the number of persons who had attended the Court hearing at the homestead were about 450 and there was a lot of space left.
 - ii. There were 3 houses in the home and one son had built two houses close to the compound and a latrine at one corner. The other son's houses were not visible from where the Court held its proceedings.
 - iii. The closest polling station to RW9's homestead is Makokhwe Polling Station which has 476 registered voters.
22. In the final submissions, counsel for the 3rd Respondent submitted that the credibility of PW8 failed the test of evidential credibility, veracity and consistency, for reasons that PW8 did not state how he came to know that the persons who are alleged to have given money to the public

were Samson Were and Emmanuel Oyula, whilst he admitted on cross-examination that it was his first time to see Emmanuel Oyula. It was their submission that the rebuttal evidence of Samson Were, Emmanuel Oyula and Ernest Makokha cast doubt on PW8's evidence.

23. Counsel also submitted that in the Court's report dated 1st July 2013, on verification of certain persons status as registered voters, it was established that PW8 was not a registered voter. However, in my view, the fact that PW8 is not a registered voter does not stop him from reporting an election offence which he alleges to have witnessed.
24. Gilbert Omoto Oduya (PW13) swore a Witness Affidavit on 8th April 2013 and testified that on 21st February 2013 in Nambetekeya village at the home of the late Rogers Nabaswa, he witnessed the 3rd Respondent give out Ksh. 25,000 to one of his campaign agents, Mr. Jared Were for "tea" for Community members. PW13 testified that there were about 400 people and each received Ksh. 100/- He stated that he was not given the money as he was identified as a non-supporter of the 3rd Respondent. PW13 also confirmed that he knew Jared Were very well. On cross-examination, PW13 stated that he knew the campaign meeting was called by the New Ford Kenya Party in one of the homes of the late Rodgers Nabaswa, as he had two homes being polygamous. He also stated that he did not speak to Jared Were and did not ask him how much the money was. PW13 however reiterated that Jared Were told the congregation that he had been given that amount.
25. Jared Were (RW 11) testified in response to the allegations made by Gilbert Omoto Oduya (PW13). He stated that he operates a kiosk which serves tea in Mundindi village Munami sub location. He stated that he knew PW13 and they are neighbours. His evidence was that the allegation that he was given money to distribute by the 3rd Respondent is false. According to him, the 3rd Respondent being a person of a high stature could not come to his kiosk. RW11 also testified that he did not know a person called Rodgers Nabaswa.
26. Galcanos Olimwa Ekesa (RW14) also testified in response to the evidence of Gilbert Omoto Oduya (PW13). He testified that he was born, and still lives, in Munami village and that he did not know Rodgers Nabaswa. He stated that he knew Milton Nabaswa who was his relative and was still alive aged between 45 – 50 years. RW14 also stated that he knew RW14 and they are neighbours. RW14's evidence was that there is nobody known as Rodgers Nabaswa, neither alive nor deceased, but there is a Milton Nabaswa who lives in Munami.
27. In the final submissions, Counsel for the 3rd Respondent submitted that the probative value of PW13's evidence was completely diminished as he could not remember who convened the alleged campaign meeting and that he could not tell how he knew that the alleged money was for "tea" yet he had not spoken to Jared Were. Counsel submitted that PW13 could not recall the registration number of the vehicles said to have ferried people to the home to hold the meeting and more importantly, he did not report this action, being an election offence, to the Police. It was their submission that there was no person or home owned by Rodgers Nabaswa and further that PW13's evidence was not sufficient and cogent for the charge of bribery.
28. Collins Mukhwana (PW15) testified that on 4th March 2013 at Koyonzo primary school polling station at 11.30am, the 3rd Respondent gave him, Boniface Baraza, and Suleiman Simboni Ksh. 2000/-. It was his evidence that he refused to take the money and that they reported the matter to the Police Officer who was standing nearby.
29. The 3rd Respondent denied the allegation that he gave out money as alleged by PW15. It was his

evidence that PW15 had on previous occasions sent messages with the aim of extorting money from him in the name of getting the youth to vote for him.

30. Robert Barasa Masika (RW15) who was called to the stand also testified in response to the allegations by PW15. It was his evidence that he believed that the allegations by PW15 were in reference to him and that is why he came to testify. This, he stated, was his conviction even if the name "Robert" was not mentioned either in the affidavit or evidence of PW15. He testified that his name is Robert Barasa Masika but that in the village he is known as Boniface, and further that he knew PW15. It was his evidence that he voted at Koyonzo Polling Station at about 11:15am and that the 3rd Respondent did come to the said polling station and left after 10 minutes. RW15 stated that he saw the 3rd Respondent from a far, they did not speak neither was he given any money as alleged.
31. Clement Omondi Akwany (RW12) also testified in response to the allegations by Collins Mukhwana (PW15). He refuted the allegation that he witnessed the 3rd Respondent giving out money. On cross-examination, it emerged that he was a brother-in-law to the Petitioner, as he married the Petitioner's cousin. RW12 stated that he operated a kiosk in Munami market but did not know who owned the biggest shop in Munami. He also stated that each day was an open market day in Munami, but Wednesdays and Saturdays were most preferred.
32. It is noteworthy that (PW15) is not a registered voter. This is a fact that was established through an exercise conducted by the Executive Officer of this Court. Mr. Wasilwa, counsel for the 3rd Respondent, made an application to establish whether PW15 among other Petitioner's witnesses, were registered voters. Counsel availed to Court copies of the voters' register as gazetted by the 1st Respondent on 20th January 2013. The Court directed that the exercise be conducted on 1st July 2013 by the Executive Officer in the presence of 2 agents nominated by each party. The report from the Executive Officer confirmed that PW15 was not a registered voter of Matungu Constituency.
33. On the allegations of bribery, Mr. Kasamani, counsel for the Petitioner made a collective submission that the Elections Act at Section 110(1) creates an Electoral Code of Conduct (Code) which requires every person participating in the election to subscribe to it. He further submitted that Sub-section (4) thereto is explicit that contravention of the Code amounts to an offence. Counsel referred the Court to Item 6(d) of the Code, set out in the Second Schedule to the Act, which provides that candidates shall, throughout an election period, refrain from campaigning in places of worship such as churches. Counsel submitted that the 3rd Respondent's church attendance and addressing the congregation prior to the election amounted to campaigning. Further, counsel submitted that the promise made by the 3rd Respondent, not being in monetary terms did not matter as Section 64 makes provision for bribery in the form of promising a valuable consideration.
34. In respect to the other allegations of bribery, Counsel submitted that this election was rife with politically colored monetary handouts and vote-buying which was in violation not only of Section 63 of the Elections Act, but in grave violation of the electoral law principles of the Constitution in Article 81(e)(ii). Counsel referred the Court to **Halsbury's Laws of England 4th Edition Vol.15 Pg. 425 Par. 780** which states that one incidence of bribery can nullify an election:

"Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the election."

35. Collectively on the allegation of bribery, counsel for the 3rd Respondent referred the Court to the decision in Election Petition Number 1 of 1983, **Said Hemed Said vs Ibrahim Salim Abdallah Mwaruwa** where the Court held:

“it has been recently reiterated by the Election Court in the Election Court in EP 7/83 Komora vs Daiddo following EP 6/79 Kiano vs Matiba that the more grave the allegation, the more sure must the Court be before indicting a man of it. All acts in ground 6, 7 and 8 of the Petition amount to criminal offence and the same must be proved beyond reasonable doubt.”

36. I have very carefully considered the allegations of bribery. Section 64(1) of the Elections Act describes bribery in great detail, and makes it an offence for a candidate, directly or indirectly, either him/herself or his/her agent, to engage in voter bribery. Sub-section (2) thereof makes it an offence for a person to either vote or refrain from voting as a consequence of his/her acceptance of a bribe. The consequence of an allegation of voter bribery, if proved, is nullification of the elections, however insignificant the action is. Refer to **Harlsbury’s Law of England 4th Ed Vol. 15 Page 534 states:**

37. On the issue of bribery, I agree with Mr. Kasamani counsel for the Petitioner that a single act of bribery which is proved and linked to the 3rd Respondent would be enough to nullify an election such as this. Five of the Petitioner’s witnesses have testified to acts of alleged bribery by the 3rd Respondent or his agents. These witnesses are: the Petitioner (PW16), Marciana Auma Kunguru (PW5), Peter Wafula Barasa (PW8), Gilbert Omoto Oduya (PW13) and Collins Mukhwana (PW15). Any of their evidence, if proved against the 3rd Respondent or his agents, would be sufficient to nullify the election.

38. The Petitioner testified and reiterated the contents of his supporting affidavit that on the day of the polls, he saw Wilberforce Were at Namalenje Primary School Polling Station giving out money to a group of about 100 people. He further stated that the people distributed the money amongst themselves. He reported this matter to the security officer at the polling station. In response Wilberforce Were (RW13) denied the allegations and denied being in Namalenje on the polling day. (RW13) however confirmed that he voted in Busambi Primary School Polling Station in Matungu Constituency. He also confirmed that he is the 3rd Respondent’s brother and that he was in his campaign team. The allegations by the Petitioner that he saw Wilberforce Were giving money may be correct, as Wilberforce being the 3rd Respondent’s brother and in his campaign team, had a direct interest in the outcome of the elections. To fortify this allegation, the Petitioner needed to have provided greater details, that is, atleast one witness out of the alleged 100 people who received the money. The Petitioner also ought to have provided proof that he reported the matter either to the Police or security officer at the polling station. Further, the Petitioner ought to have inquired how much each person was paid and in what denominations. These allegations have been denied by Wilberforce Were (RW13).

39. It should also be noted that on average, polling stations in Matungu Constituency has about 400 – 500 registered voters. Any bribery activity involving 100 people would be a serious affair that would attract a commotion and even disrupt the polling. It is inconceivable that such an activity can take place without attracting the security officers, Police or people who would rush to testify about it. The allegation, as serious as it is, remains unproved and unbelievable.

40. As for Marciana Auma Kunguru (PW5) her testimony on corruption was two-fold. First, she testified that sometime in February 2013 at the home of one Corneli Opemi at about 2:00pm, she witnessed the 3rd Respondent giving out money while asking the congregation to vote for him. In

the affidavit sworn by PW5, the money allegedly given out was Kshs. 24,000/- which was given in denominations of Kshs. 200/-. However, in testimony, she testified that she could not know whether the denomination was Kshs. 200/- as stated earlier. She also testified that she did not see the money but was informed about it by the host. The evidence of this witness on the first allegation of bribing was not confirmed. In fact, when cross-examined by Mr. Wasilwa, she agreed that her evidence that she saw the 3rd Respondent giving out bribes was uncorroborated. The second allegation by the same witness was that on 17th February 2013, at Mungore Anglican Church, the 3rd Respondent gave church members a bribe of Kshs. 50,000/-. On the witness box PW5 changed the date from 17th February 2013 to 3rd March 2013. These allegations were denied by the 3rd Respondent's witnesses Augustine Barasa Ochieng (RW7) and Corneli Opemi (RW8). RW7 was the minister preaching on that day. He stated that he was informed that the 3rd Respondent would worship with them on that day. After he had preached, he gave the 3rd Respondent a chance to greet the congregation. The 3rd Respondent also testified against the allegation and stated that once he greeted the congregation, they reminded him of the earlier pledges he had made to help develop the church. He promised that he would honor the pledges. The allegations are also denied by RW8. He stated that PW8 is his sister-in-law and neighbor, and that on that Sunday, she was not in Church. Whilst they were not enemies, they were however not in talking terms as PW5 had been cutting his tress planted on their common fence.

41. I have carefully considered these allegations. Firstly, I believe that the 3rd Respondent went to the Anglican Church in Mungore Church not only to pray, but also to show his face to the voters who would be electing their Member of Parliament the following day. Since this was not his ordinary church, one would easily conclude that he was there also to psychologically put his Petition to the voters. However, that is purely speculative. I believe the evidence of the 3rd Respondent that he went to that church to pray and seek God's favour in the elections. The allegations that the 3rd Respondent gave out bribes in the sum of Kshs. 50,000/- have not been proved. I also believe the testimony of the said Augustine Barasa Ochieng (the Minister) and Cornel Kunguru Opemi (RW8). Further, and in particular, I do not at all believe the testimony of Marciana Auma Kunguru (PW5). She comes across as not having the proper facts on the allegations. She also comes across as bitter with her brother-in-law Cornel Opemi. Most importantly, I am satisfied that the witness (PW5) deliberately gave false testimony in the matter. I dismiss her allegation on bribery by the 3rd Respondent.
42. Peter Wafula Barasa (PW8) testified that on the 1st March 2013 at around 4 – 5pm he saw Samsom Were and Emmanuel Oyula campaigning for the 3rd Respondent at the home of Ernest Makokha where Kshs. 6,000 was given to the youth, Kshs. 6,000 given to men and Kshs. 10,000/- to women by the said agents of the 3rd Respondent. He gave the particulars of the home, which the Court later on visited. The 3rd Respondent called Samson Were Bukachi (RW10) who denied the allegations. He also denied knowing the home of Ernest Makokha. Ernest Makokha (RW9) also denied the allegations that there was a political meeting at his home as alleged. When the Court visited the home of RW9 to ascertain the particulars of the allegation, the Court was of the view that aspects of the allegation concerning physical attributes of the home were correct. In light of the evidence before the Court, this Court is unable to ascertain as a fact that a political meeting took place in the home of RW9 as alleged. Much more difficult to ascertain is the allegation of the bribery. In fact, there was absolutely no attempt by the Petitioner to prove the bribery allegations. I dismiss the allegations of this witness on bribery.
43. Gilbert Omoto Oduya (PW13) also alleged that at the home of the late Rodgers Nabaswa, he witnessed the 3rd Respondent give out Kshs. 25,000 to one of his campaign agents, Jared Were for "tea" for the community members. He said that there were about 400 people who received

Kshs. 100 each. These allegations were denied by Jared Were (RW11). Galcanos Ekesa (RW14) also testified for the 3rd Respondent and denied the allegations. He in particular testified that there is nobody known as Rodgers Nabaswa either alive or dead but there is a Milton Nabaswa. I have considered the allegations carefully. The said Gilbert Omoto Oduya could in his testimony in court hardly remember who convened the alleged campaign meeting. Further, he could not tell how he knew the alleged money was for “tea” yet he had not spoken to Jared Were. There was also evidence that there is nobody by the name of Rodgers Nabaswa. The evidence produced by the witness to try to prove allegations of bribery falls far below even that of balance of probabilities. I dismiss the witness’ allegations of bribery.

44. Collins Mukhwana (PW15) also alleged that on 4th March 2013 at Koyonzo Primary School Polling Station at about 11:30am the 3rd Respondent gave him and 2 others Kshs. 2,000/-, which he refused to take and he reported the matter to the Police who were standing by. This allegation was denied by the 3rd Respondent who sensationally revealed in his testimony that the said Collins Mukhwana had on previous occasions tried to extort money from him in the name of getting the youth to vote for him. In addition, Robert Barasa Masika (RW15) and Clement Omondi Akwany (RW12), the two people who believed that PW15 had them in mind when he stated that the 3rd Respondent gave him money in the presence of the 2 people, gave evidence denying such allegations. I have carefully considered this allegation and like all other allegations touching on bribery, it must be proved beyond reasonable doubt. The evidence before the Court does not even reach the threshold of the balance of probabilities. More importantly for me, Collins Mukhwana is not a credible witness against the 3rd Respondent. I have believed the evidence of the 3rd Respondent that Collins Mukhwana had on previous occasions tried to extort money from him. Although I declined to admit documented evidence on this issue, the 3rd Respondent’s oral testimony on the issue was credible. I dismiss the allegation of bribery by this witness.
45. I have carefully considered the testimony, evidence and submissions of parties on the issue of bribery. I have also carefully considered the testimony of the above witnesses. I agree with the authority referred to by Mr. Kasamani - **Halsbury’s Laws of England 4th Edition Vol.15 Pg. 425 Par. 780** that *“Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the election.”*

The Departure here is that I find no single allegation of bribery having been proved against either the 3rd Respondent or his agents. I therefore find as a fact that the allegations by the Petitioner that the Matungu Parliamentary elections were marred by bribery and other forms of corruption are incorrect and I dismiss these allegations.

ii. Violence

46. The Petitioner averred that in several places within the Constituency, his supporters were intimidated, threatened and physically assaulted in contravention of Sections 63 and 65 of the Elections Act.
47. The Petitioner called Javan Lubale (PW2) a Form II student who testified that on the night of 3rd March 2013 while he was at his house with Daniel Murunga (PW3) and Elphus Ouma, two people namely; Bakari Wafula and William Wakanda Oduori broke into the house and snatched off the lantern and started to beat them telling them not to support the Petitioner in the coming elections. PW2 stated that he reported the incident to the Police on 4th March 2013 and the report

was recorded in OB14/3/2013. On cross-examination, PW2 stated that by 6th March 2013, he had not received treatment. The P3 Form dated 19th March 2013 reveals that the age of the wounds was 3 days old from the date of assault.

48. Daniel Murunga (PW3) corroborated the evidence of PW2 stating that he was with PW2 on the night of 3rd March 2013 when Bakari Wafula and William Wakanda Oduori broke into the house and started to beat them up because they were not supporting the 3rd Respondent. PW3 testified that he was injured on his head but did not seek treatment until 6th March 2013. It was his evidence that after beating them, they shouted “Ingwe”, “Ingwe” “Were”, “Were”.

49. Ishmael Mutungu Olunga (PW4) a village elder testified that he responded to a distress call from one Patrick Lubao who told him that there were thugs who had entered their home and attacked them. He stated that Lubalo gave him the names of assailants as Bakari Wafula and William Wakanda Oduori. It was his evidence that he rushed to Lubao's home and on his way there he heard people shouting “Ingwe” “Ingwe”, “Were”, “Were”. PW4 testified that when he reached there he found 3 injured boys; Daniel Murunga (PW3), Javan Lubale (PW2) and Elphus Ouma.

50. On an application by Mr. Kasamani, counsel for the Petitioner, the Court ordered the OCS Mumias Police Station to avail Extracts of Occurrence Book Numbers 6/3/3/2013, 14/4/3/2013 and 16/5/3/2013 and for the following dates: 23rd February 2013, 2nd March 2013 and 3rd March 2013. No. 69497 P.C. Morris Ogorro (RW19), an Officer in Mumias Police Station attached to CID Section testified that there is no O.B. report record for 23rd February 2013 and 2nd March 2013 either in relation to election offences or in relation to this petition. RW19 also testified that he had with him the original Occurrence Book and an Extract of O.B. Number 3/3/2013, O.B. 14 4/3/2013 and O.B. 16 5/3/2013, which he presented to Court.

51. RW19 testified that the following were other reports made relevant to this election Petition:

O.B.15 4/3/2013 - One Charles Juma Okuki from Mukuyula village Namamali sub location from Koyonzo location reported that on 3rd March 2013, at around 9:00p.m while in his house with his family he heard people shouting outside warning him against voting against their wish. He has not stated their wish. He reported that matter to the assistant chief who came to the scene and dispersed the youth.

O.B. 44 7/3/2013 - Paul Posh reported that on diverse dates between 5th and 7th March 2013 he went to IEBC offices at Matungu to collect the election results but he was denied the same and informed that it was not there and that he was to apply for it through the IEBC Channel. He went to Kakamega and was authorized to be given the same but was all in vain. He wanted police assistance.

51. A reproduction of the reports captured in the OB in respect to O.B. 14 4/3/2013 and O.B. 16 5/3/2013:

O.B. 14 4/3/2013

To the station are the following 1. LUBALE JAVAN 2. MURUNGA DANIEL 3. OUMA ELFAS all hails from MUKUNYUKU village NAMAMALI sub-location, Koyonzo location within Matungu District and they report that last night at around 10:30pm they were doing studies in the house of LUBALE JAVAN when they heard a knock on the door but before they opened the door someone broke in whom they identified as BAKARI was armed with a stick and started to attack them, he was followed in by another man OPAYI entered and attacked ELFAS with a stick where he sustained injuries on the right hand and buttocks, they went ahead and attacked the third Daniel who sustained a cut in the right side of the head. Now referred to hospital for treatment and investigations are going on.

Signed by PC MUJA

O.B. 16 5/3/2013

To the station is one JUSTUS MURUNGA of P.O Box 14004 – 00100 Nairobi cell phone number 0713900214 a parliamentary seat aspirant on a UDF Matungu Constituency accompanied by MR. PAUL POSHO cell phone number 0722427709 also a parliamentary aspirant of ODM party both now reports that today at about 2:00pm they went to BULIMBO Girls Secondary School in Matungu Constituency vote tallying center but before they could enter the hall they were confronted by a group of hired goons who prevented them from entering the tallying hall, the group has also barricaded the road leading to BULIMBO Girls Tallying Center using busses, lorries and other vehicles. The group consists of about one thousand people and has stationed themselves outside the school with an intention of causing a breach of the peace, they suspect the group is being sponsored by the former Member of Parliament. They now need Police assistance.

Signed by CPL OTIENO

52. On cross-examination, RW19 stated that complaints made through telephone calls are entered into the O.B. then later Police Officers visit the scene. He stated that the report is recorded at the discretion of the recording officer but should the officer not record the same, the only way to find out if such a report was made is to look at the phone records through an independent investigation. RW19 further stated that he personally went to investigate the report captured on O.B. 16 5/3/2013 as soon as it was made, but that he did not find anything amiss. RW19 stated that he did not find crowds as was reported and that there was no breach of peace. In respect of the other reports, RW19 stated that he did not investigate it and therefore he cannot tell what became of them.
53. The 3rd Respondent in response to the OB Extract availed to Court by P.C Morris Ogorro (RW19) stated that reports made by PW2 Ref: O.B. 14 of 4th March 2013 did not mention the name of William Wakanda as an assailant, O.B. 6 of 3rd March 2013 0139 hrs did not mention any of his agents and O.B. 16 of 5th March 2013 3.00pm neither referred to him nor any of his agents.
54. William Wakanda Oduori (RW16) testified in response to the allegations made by PW2. It was his evidence that PW2 and himself were neighbours in Mukunyuku and so he knew PW2 well. He testified that the allegation that he entered PW2's home at night and beat him as alleged is false. He stated that on that night he was at home with his family. RW16 stated that he had not been summoned in Court or at any police station.
55. Counsel for the 3rd Respondent in their final submission, submitted that three days from the date of the P.3 signed on 19th March 2013 was 16th March 2013, and given the clinical opinion in the exhibit, the logical conclusion this court must make is that the injuries alleged to have been suffered by Javan Lubale must have occurred on 16th March 2013, nearly two weeks after the assault on him and his brother as alleged. Counsel contended that the age of injuries in the P.3 is evidentially inconsistent with the date of assault alleged in evidence by the witness, and consequently, this affected the evidence of the other witnesses on this incident with equal force rendering their evidence worthless in evidential terms.
56. Violence is a serious electoral offence. It does not only inflict injury on voters but also negatively affects their constitutional rights to vote in a free and fair democratic election. This means that a party who promotes violence must face the serious consequence set out in the law including, the

nullification of election results where such a party may have benefited from such violence. In Matungu Parliamentary elections, very few allegations of violence have been made. Throughout the Petition, violence has not been a serious factor and this Court takes this opportunity to commend the People of Matungu and their leaders for ensuring that little or no violence took place. However, it is my view that any form of violence, whether widespread or very localized, if proved, is a serious electoral offence which must be punished appropriately.

57. I have considered the various allegations of violence by Javan Lubale (PW2) and Daniel Murunga (PW3). I believe the evidence of these two witnesses that they were attacked on the night of 3rd March 2013. I also believe the evidence of Ishmael Olunga (PW4) a village elder who went to their rescue and established that indeed an attack on three boys, Javan Lubale, Daniel Murunga and Elphus Ouma took place by people singing “Ingwe”, “Ingwe”, “Were”, “Were”. The victims of violence reported this attack to the Police and was recorded as OB.14 4/3/2013. Although there is contradiction on the date when the victims went for treatment being 19th March 2013 which reveals that the age of the injury is only 3 days from the alleged date of attack, making the date of attack as 16th March 2013, there is ample evidence to believe that the said victims were attacked as they allege. I examined the injuries on the victims, the P3 Forms and treatment notes. I am convinced that the village elder also told the truth.
58. My next duty is to find out who carried out the said attack. It is the testimony of the Petitioner that the attacks were carried out by supporters of the 3rd Respondent, and so, the 3rd Respondent must take full liability. Circumstances under which a person becomes liable for a criminal action are very well known. For a legally obtainable criminal act to take place there must be what is known in criminal jurisprudence as *mens rea* (the intention) and *actus reus* (the act). These two aspects meet together to found a criminal action. In other words, the accused person would not only have carried out the alleged act, but he must also have intended it in his mind. This rule makes it difficult to attribute a criminal action of one person to another, unless they acted on a common purpose. In this case it is alleged that the attacker, Bakari Wafula and William Wakanda Oduori were acting on behalf of the 3rd Respondent. Evidence of this allegation is said to be the fact that the attackers were shouting “Ingwe”, “Ingwe”, “Were”, “Were”. The allegation may as well have been the truth. After all, the 3rd Respondent is called Were. He is a member of New Ford Kenya Party whose symbol is *Ingwe* (Leopard) and the period that the attack took place was not during the circumcision period where candidates shout, “ingwe”, “ingwe” as circumcision songs. This was an election period where *Were* was *Ingwe* and *Ingwe* was *Were*. So the allegations that *Were*, the 3rd Respondent was behind the attack was not an idle one, and this court takes the allegation very seriously.
59. The People alleged to have attacked the said victims are Bakari Wafula and William Wakanda Oduori (RW16) who testified in response to the allegations and denied the same. The 3rd Respondent also testified on the allegation and denied the same. This Court, however, notes that the report made to the Police in the said OB report does not name any of the alleged attackers and the 3rd Respondent. Of importance as for now, is the fact that the victims reported the alleged attack to the Police and I believe there is a criminal process afoot. However, William Wakanda Oduori to date has not been arrested. He is a free man and freely testified before this Court. There is no concluded criminal process which has found any of the alleged attackers guilty of any criminal offence. Indeed there is no evidence that the alleged attackers will ever be arrested or charged with the alleged offence. Even if they were to be charged with the alleged offence, and were prosecuted and convicted, it would still have to be shown that they acted on the direct behalf of the 3rd Respondent. To make that conclusion will not be easy. And the 3rd Respondent has not been charged with any offence.

60. I am not impressed with the Petitioner's attempt to paint the 3rd Respondent as a violent man. There is no evidence anywhere in the proceedings that the 3rd Respondent entertained any violence, and an attempt to link him with what happened at Javan Lubale's home is not a fair play in this game. However, more importantly, any such allegation must be proved in the required standard which has not happened here. Those who shouted "Ingwe" "Ingwe" on the alleged night of attack had no link with Were, the 3rd Respondent.
61. The Petitioner also made allegations of violence and reports to the Police and entries in the OB between 5th and 7th March 2013. Some were investigated while others were not. However, all these allegations had nothing to do with the 3rd Respondent. P.C. Morris Ogorro (RW19), an officer in Mumias Police Station attached to the CID Section testified on the issue of violence and recorded reports. He investigated the report captured on OB.16 5/3/2013 as soon as it was made and found it baseless as there was no breach of peace. In his view, the elections in the Constituency were peaceful.
62. I agree with the 3rd Respondent that he was not involved in any violence during the campaigns or voting periods. I find the allegations made against the 3rd Respondent or against any other person on violence baseless and dismiss them all.

iii. Voter Intimidation

63. In connection to violence, the Petitioner averred that there was voter intimidation by the supporters of the 3rd Respondent. The Petitioner called Evans Muchongori Dominic (PW14) to give evidence in relation to this allegation. PW14 an ODM agent at Namalasure Polling Station testified that he saw 3 people: Francis Mutibo, Ekesa Galcanos and Nathan Olire, moving around the polling room. PW14 testified that he knew these people very well as they had grown up together. He stated that he reported this to the Presiding Officer who took no action. It was his evidence that the three people never threatened anybody but their presence in the room as campaign managers was enough threat and intimidation. On cross-examination PW14 stated that there was nothing wrong with tallying of votes in that polling station. He stated further that he knew that intimidation is a criminal offence and so he reported to his Presiding Officer who was supposed to inform the Police. PW14 admitted that he did not write any letter of protest.
64. Francis Namuswa Mutibo (RW17) testified in response to the allegations made by PW14. He stated that he knows Galcanos Ekesa, Nathan Olire and also the PW14. It was his evidence that he voted at Munami Polling Station between 9:00 – 10:00am and left for his home in Nambale, Nambale Constituency. RW17 testified that he voted at Munami because it is 2 km away from his ancestral home and that he just decided to register himself there as opposed to his new home in Nambale. RW17 testified that both the 3rd Respondent and the Petitioner were his cousins and that the 3rd Respondent had employed his elder brother, Jackton Olachi. RW17 contended that the allegations made by RW14 were false.
65. In the final submissions, Mr. Kasamani for the Petitioner submitted that one of the principles central to upholding free and fair elections is reflected in Article 81(c) of the Constitution which states that they must be *'free from violence, intimidation, improper influence or corruption.'* Counsel submitted that the provisions of Sections 63 and 65 of the Elections Act, made it an offence to inflict violence, use force, injure or damage to induce a person to vote for a particular candidate or compel a person to support a certain candidate, regardless of whether such person is a voter or not. Counsel contended that the 'person' referred to in Section 65 of the Elections Act is not simply a voter, as such a person would be any citizen who exercises a wide range of his or her political rights – including supporting a particular candidate or political

party, including a minor.

66. In the same way I have determined violence, the allegations about intimidation are not proved. Further, there is no connection between the alleged intimidation actions of Francis Mutibo, Galcanos Ekesa and Nathan Oire with the 3rd Respondent. In any event, the Petitioner's witness who alleged intimidation is Evans Muchongori Dominic (PW14). In his testimony he affirmed that the 3 he accused did not physically intimidate anybody but that their presence in the room as campaign managers was enough threat. That kind of threat is speculative and subjective and cannot be quantified by this Court. I dismiss the allegation of voter intimidation.
67. There was another allegation of witness intimidation, this time against Jackton Olachi, through the telephone medium. It was alleged that Jackton Olachi who is a supporter of the 3rd Respondent intimidated Collins Mukhwana (PW15). This Court directed an investigation into the ownership of the telephone medium. The Police returned with a report that the said telephone number actually belonged to Mr. Jackton Olachi. This Court is, however, unable to go into the details of the allegations. The process would entail going over telephone records to establish the kind of communication that took place between the parties. This would not only derail the process, but is also clearly outside the mandate of this Court. I direct that the complainant, Collins Mukhwana, to report this allegation to the Police for Criminal investigation if he so desires. I also find that at this stage, there is no connection between the alleged criminal act with the 3rd Respondent.

Irregularities on the Part of 1st and 2nd Respondents

iv. Abuse of the voter register

68. The Petitioner in the Petition pleaded that the 1st and 2nd Respondents allowed gross abuse of the voters register to enable unauthorized persons to vote. In support of this allegation the Petitioner called Mohammed Makokha Murunga (PW1) to give evidence. PW1 testified that on 4th March 2013 he was a voter at Namalenge polling station. He testified that he met a man called Bashir Wanjala Wafula, a student of Kenyatta University, who is his neighbor. PW1 testified that the said Bashir, in the presence of one Samson Oter Ngoni, told him that he had voted using an Identity Card of James Wakhungu. PW1 stated that he knew the said James Wakhungu who had died on 2nd March 2013. PW1 referred the Court to an annexed burial permit which showed that James Lutaso Wakhungu died on 2nd March 2013. PW1 added that he was buried after the elections and that he attended his burial. On cross-examination, PW1 stated that he did not make a report of this incident to the police.
69. Judith Yabibi Opiyo (RW4) the Presiding Officer of Namalenge Primary School Polling Station testified in response to the allegations made by Mohammed Makokha Murunga (PW1). It was her evidence that PW1's allegation was unfounded because the voting process was rigorous and would not admit voting with a dead voter's Identification card. RW4 contended that such a complaint was not brought to her attention at all. On cross-examination, RW4 confirmed that Wakhungu James Loteso of ID No. was 1926894 (the deceased) was a registered voter in her polling station. RW4 expounded however that before a voter was given a ballot paper, a Polling Clerk would have to verify the picture on the ID card and that on the voter register. It was her evidence that the Polling clerks would be committing an election offence if they allowed a person to use someone else's documents to vote, as they had taken an oath.
70. Mr. Masinde, counsel for the 3rd Respondent made an application under Section 80(1) (c) of the

Elections Act for Court to summon Bashir Wafula Wanjala to appear in court to explain how he was able to vote using a dead man's Identity Card. This application was unopposed. The Court deemed it necessary to allow the application and directed the OCS Mumias Polling Station to issue summons to the said Bashir Wafula Wanjala.

71. Bashir Wanjala Wafula (RW6) did show up in Court to respond to the allegations made by PW1. RW6 testified that he knew PW1 as they both came from the same village. It was his evidence that on the day of the Poll he was at Kimilili, Bungoma County and not in Namalenge polling station in Matungu Constituency, Kakamega County as alleged. RW6 confirmed that he is a student of Kenyatta University and that he had gone to Kimilili to meet his sponsor to discuss education funds. RW6 also confirmed that he knew the deceased as a village mate but he did not know when he died.
72. Mr. Kasamani for the Petitioner submitted that RW6 gave false evidence because the copy of his Identity Card presented to the Court indicated that it was issued on the 20th December 2005 whereas the 2005 Referendum was held on 21st November 2005. With no Identification Card, a pre-requisite for voting at the time, there is no way he could have voted. Counsel further submitted that his testimony amounts to an affront to the administration of justice and is perjury under Section 108 of the Penal Code Cap 63 which is punishable under Section 110 of the same statute. Counsel also submitted that his voting with a dead person's Identification details was a violation of the law and therefore RW6 ought to be punished accordingly.
73. I have carefully considered this submission. If there was one witness who satisfied the Court in his testimony, it was RW6 when he said he did not vote using a dead man's Identity Card as alleged. Indeed he did not vote at all. I believe that Mohamed Makokha Murunga (PW1) gave false testimony to this Court. I thought of jailing him, but decided to give him the benefit of doubt. However, I do not believe his testimony and I dismiss his allegation that a dead man voted.

(v) Unqualified Staff

74. The Petitioner alleged that the 2nd Respondent under the influence of the 3rd Respondent employed the 3rd Respondent's relatives or unqualified staff to conduct elections ostensibly to gain support of such persons and to gain assistance in manipulation of the electoral process. In evidence the Petitioner stated the appointment of the Presiding Officers, their deputies and clerks was flawed as persons employed were hired on favoritism and nepotism. The Petitioner testified that he saw the list of the Presiding Officers which was pinned on the wall at the IEBC offices in Matungu, where he saw the name of Samson Were - Presiding Officer at Harambe polling station. He testified that Samson Were is the 3rd Respondent's brother and he is also the same person who Peter Wafula (PW8) testified about coordinating the 3rd Respondent's campaigns in that region. The Petitioner also named Onyango Opembe - Presiding officer, who, according to the Petitioner, was in the 3rd Respondent's campaign team. The Petitioner however confirmed that as soon as he raised the concern with the IEBC officials, the said officers did not get to work for IEBC.
75. The 3rd Respondent in his evidence stated that he did have a campaign secretariat before the elections, comprising of the 10 members, namely: Wilfred Were (Chairman), Gerald Osodo (Secretary), Jackton Olachi (Secretary), Robert Opwora, Michael Onyango (*also known as pembe*), Boniface Adieri Mkanga, Wilberforce Were, Fredrick Were, Willy Obonyo, and Ray Kidula. The 3rd Respondent testified that Samson Were Bukachi (RW10) and Galcanos Ekesa (RW14) were not in his campaign secretariat. He stated that the main role of the secretariat was

to coordinate the agents after their appointments. It was his evidence that he campaigned vigorously between January 1st and 17th February 2013 when he did many rallies and road shows. But thereafter, he slowed down his campaigns.

76. Samson Were Bukachi (RW10) responded to the allegation against the 1st and 2nd Respondents influencing the employment of staff. He testified that he applied for and was shortlisted to be an IEBC Officer. He stated that he passed the interview but on 24th February 2013, he was called by the 1st Respondents officials to be notified that he would not be employed due to complaints raised by other contestants over his relations with the 3rd Respondent. He stated that he stepped down and did not pursue the matter any further. On cross-examination, RW10 confirmed that he is a Principal of Namamba Secondary School since 2009. The school is about 3 km from Makokhwe market. It was his evidence that due to the school's sterling performance, the Matungu Constituency Development Fund purchased a bus for the school in June 2012. CDF also gave the school money to construct a Dining Hall, Library and to complete a dormitory. He stated that with the funds from the Parents Teachers Association, electricity was installed in 2010. RW10 further confirmed that he knew other schools such as Namulungu Secondary School which is older than his school, but did not have a school bus.
77. RW10's evidence of the School Bus courtesy of C.D.F Matungu Constituency was echoed by the 3rd Respondent who testified that through C.D.F. school buses were given to schools based on the performances, and therefore, Namamba Secondary School was given a bus purely based on its performance; it was No. 9 in the entire Republic in 2012 among the District Schools.
78. In respect to unqualified staff, the Petitioner called Protus Okuli Opondo (PW11) who was his agent at Mirere Primary School Polling Station Stream 2. PW11 testified that one of the IEBC clerks called Nancy Okello was not qualified as she did not complete her secondary education. Secondly, PW11 testified, she was a women leader in the 3rd Respondent's team. This, PW11 testified, was in blatant disregard of the IEBC rules. On cross-examination, PW11 stated that the said Nancy was his in-law and that he was not jealous that she was employed by IEBC. PW11 affirmed the fact that the work she was given to do can be done by anybody but insisted that she was unqualified.
79. The allegation that Nancy Okello was unqualified may be true, but the Petitioner did not provide evidence that she was unqualified. Besides, the witness said that this fact alone did not affect the polls. I also consider this allegation, even if proved, too minor for the Court to use the same to nullify the results of the elections.

(vi) Tallying Issues/Scrutiny

80. The Petitioner was dissatisfied with the tallying process that was conducted by the 2nd Respondent. The Petitioner outlined in detail the various actions by the 1st Respondent's Officer and the 2nd Respondent as the Constituency Returning Officer, from paragraphs 28 – 47 of the Petition. The Petitioner called six of his agents of different polling stations witnesses to give evidence demonstrating that the tallying exercise was not properly conducted, as follows: David Olukuru Okuku (PW6) - Namamba Polling Station Stream 1; Alex Ywaya Kwena (PW9) - Namamali Polling Station; Augustine Ouma (PW10) - Lubanga Polling Station Stream 2; Protus Okuli Opondo (PW11) – Mirere Polling Station Stream 2; Rashid Indakwa Omukambani (PW12) - Emanani Polling Station Stream 1; and Billngtone Shiundu Odongo (PW7) the Petitioner's Chief Tally Agent gave evidence in respect to the tallying process at the tallying center.

81. In response to the allegations made hereinabove, the Respondents called the following witnesses: Washington Majoni Magero (RW1) - Namaba polling Station Stream 2; Eveline Shitabule (RW2) - Lubanga polling station stream 2; Lucy Mwanda Wanyangu (RW3) - Emanani Polling Station Stream 1 and Michael Kosgei (RW5) - Returning Officer. Notably, the discrepancies as a result of transfer of figures from Forms 35 to Form 36 highlighted by the Petitioner's witnesses were conceded to by the 2nd Respondent (RW5). It was his evidence that he conducted an audit of the results after the declaration of results and established that there were indeed some errors that occurred when posting figures from Forms 35 to Form 36, and as a result of that audit, he came up with a reconciled document, which was availed to Court, that now showed the correct entries and figures, including those that had been highlighted by the said witnesses. RW5 stated that of significance is that even after the audit, the 3rd Respondent remained the winner of the election.

82. The evidence in support of other allegations made by the Petitioner's witnesses was analyzed in relation to the responses the Respondents' witnesses gave and amply dealt with in the ruling of the Court delivered on 6th August 2013 in respect of the Petitioner's application on scrutiny dated 21st May 2013. Having dealt with the issues substantially in the ruling dated 6th August 2013, going over the same in this Judgment would be repetitive and serve no purpose at all. Respectfully, the Court still holds the finding it made on the said application.

83. In the said ruling of 6th August 2013, the Court allowed in part the Petitioner's application for scrutiny. The Petitioner in his submissions dated 17th July 2013 identified the following Polling Stations in which he sought to have the scrutiny exercise conducted:

- i. Namamali Muslim Polling Station (No. 56)
- ii. Mungakha Primary School Polling Stream 2 (No. 55),
- iii. Mirere Primary School Polling Station Stream 1 (No. 54),
- iv. Mukunyuku Primary School Polling station (no. 53),
- v. Mungore Primary School Polling Station Stream 1 (No. 48),
- vi. Munami Primary School Polling Station Stream 1 and 2 (No. 47),
- vii. Lubanga Primary School Polling Station Stream 1 and 2 (No.46)
- viii. Emanani Primary School Polling Station Stream 1 (No. 38)
- ix. Namamba Primary School Polling Station Stream 1 (No. 28)
- x. Wamukoya Primary School Polling Station (No. 25)
- xi. Namalenge Primary School Polling Station (No. 23)
- xii. Bulimbo Primary School Polling Station (No. 16)
- xiii. Koyonzo Primary Polling Station (NO. 03)

84. In their response, the Respondents conceded, and the Court did find that the Petitioner had established a sufficient basis to warrant and order for scrutiny in Mirere Polling Station Stream 1, Mukunyuku Polling Station, and Mungore Polling Station Stream 1. The Court opined that scrutiny exercise would serve a just purpose, for reasons that:

- a. Mirere Polling Station Stream 1 (No. 54):

At the polling station the registered voters were 556 while votes cast were 558. A scrutiny would resolve the issue, which may also substantially affect the result in terms of the provisions of regulation 83(1) (a) of Elections Regulations as the court would have to disregard the result from that stream.

- b. Mukunyuku Primary School Polling station (No. 53):

Where it was not clear whether entry No. 2 of votes cast for Francis Muka Ometty is 07 or 67. If scrutiny were to establish that Francis Omuka Ometty garnered 67 votes then the provisions of regulation 83(1) (a) would come into play with serious consequences on the number of votes for all the candidates.

c. Mungore Primary School Polling Station Stream 1 (No. 48)

The Form 35 had not been availed either to the Court or the Parties to the Petition. It was only fair to compare the contents of the Ballot Box of that polling station and the entry made in Form 36.

85. The Court then analyzed the evidence by the Petitioner and his witnesses in support of scrutiny of the remaining polling stations in relation to the responses by the Respondents' witnesses. The Court then found that the Petitioner had established a case for scrutiny of other polling stations, namely:

i. Namamba Primary School Polling Station Stream 1 (No. 28):

In this Polling Station, the Court found that the discrepancy arising out of transfer of the Petitioner's vote count from Form 35 to Form 36 had been acknowledged and reconciled by the 2nd Respondent to its satisfaction. In allowing scrutiny, the Court found that there were other issues which, in its view, required further clarity, namely;

- There are several alterations on form 35
- There are allegations that more than one ballot paper was handed over to voters in contradiction to regulation 69.
- There are allegations of threat issued to the complainant or Petitioner's agent by the police.

ii. Lubanga Primary School Polling Station Stream 1 (No. 046):

Scrutiny was granted in respect of this Polling Station to ascertain the number of registered voters, noting that this Polling Station had two streams with a total of 820 registered voters. The evidence adduced by the 2nd Respondent was that in such a case, the polling station would be divided into two streams each having 410 Registered Voters. In Stream 1, however, the Registered Voters were recorded as 820 but Stream 2 was recorded as 410. The effect of such a record would be to have 1230 registered voters thereby exceeding the 820 figure that had been gazette by the 1st Respondent. This record, according to the Respondents was an honest mistake which had no effect at all on the elections. However, the Court found it necessary to order scrutiny so as to erase any doubts.

iii. Munami Primary School Polling Station Stream 2 (No. 047).

Similar to Lubanga Polling Station, this Polling Station had 895 registered voters as per the 1st Respondent's register but whose registered voters exceeded this number at 925. The Court also allowed scrutiny to establish the number of registered voters for that stream and to avoid any lingering doubts thereon as to why it had 30 extra voters as opposed to stream 1.

86. The scrutiny exercise was conducted under the watch of the Deputy Registrar of this Court. The results were as follows:

i. Mukunyuku Polling Station

It was confirmed that Candidate No. 2 Francis Ometty had 7 votes and not 67. This therefore did not

have an effect on the total number of votes cast.

ii. Mungore Polling Station Stream 1

The Form 35 that was affixed on the top of the ballot box had the same contents as that which was inside the ballot box. The contents also corresponded to those that were posted onto the Form 36. The Registered Voters were 502 whilst total votes cast was 445

iii. Lubanga Polling Station Stream 1

It was established that the total number of votes cast was 358 and it therefore did not exceed the number of registered voters of 410 and which then confirmed that the recording of 820 as the number of registered voters was an honest mistake.

iv. Mirere Polling Station Stream 1

The tallying report here established that

- Total valid votes inside the Ballot box was 554
- There were no rejected votes despite the rejected votes having been recorded as 3. Had there been rejected votes as recorded, the votes cast would have exceeded the number of registered voters by 1

The candidates had garnered votes as follows:

I. David Aoko Were	244
II. Francis Muka Ometty	11
III. Godfrey Ouma Faida	02
IV. John Owiti Wasike	00
V. Justus Murungu Makokha	03
VI. Paul Aguttu Achayo	00
VII. Paul Posh Abwora	291
VIII. Thaddeus Anthony Mapesa	03
IX. Zachaeus Owuor Inganga	00

In accordance with the law, I annul the results from Mirere Polling Station Stream 1 to give all the candidates the benefit of doubt so that nobody benefits from the uncertainty established by the scrutiny.

v. Munami Polling Station Stream 2

The candidates had garnered votes as follows:

I. David Aoko Were	326
II. Francis Muka Ometty	02
III. Godfrey Ouma Faida	04
IV. John Owiti Wasike	18

V. Justus Murungu Makokha	03
VI. Paul Aguttu Achayo	01
VII. Paul Posh Abwora	115
VIII. Thaddeus Anthony Mapesa	03
X. Zachaeus Owuor Inganga	00

In this Polling Station, the scrutiny exercise revealed that the total votes cast was 474 while the registered voters 448. Under Regulation 83(1) (a) this Court cancels the results from this Polling Station.

vi. Namamba Polling Station Stream 1

The scrutiny report in this polling station established no anomalies and so the results announced by the 1st and 2nd Respondents after the election stands.

Submissions on the scrutiny exercise

87. Mr. Kasamani for the Petitioner submitted that after the scrutiny exercise, the following issues emerged:

- i. The ballot boxes for Mirere and Mukunyuku Polling Stations had cracked lids, a visible opening that could be used to insert/remove election materials.
- ii. In Namamba Stream 1 the form used to declare the results for the MP results was Form 34 instead of Form 35, which was unsigned by the Presiding Officer, the Deputy Presiding Officer and any of the agents in violation of Regulation 79.
- iii. In Namamba one of the counterfoils in this polling station was ripped off which made it impossible to identify its serial number as linked to the ballot papers. Whereas in Mirere Polling Station, the counterfoils were missing.
- iv. All the six ballot boxes did not have marked registers and election official statements and tallying sheets

88. Counsel submitted that from the Delivery Report made when the ballot boxes in respect to Matungu Constituency was delivered in Court on 19th June 2013, Court should also be cognizant to the fact that numerous ballot seals were changed, broken, or missing upon their delivery a matter which affects the integrity of these elections and violates Regulation 83(1). Counsel submitted that this was evidence of post-election tampering and must not be taken lightly. He referred the Court to the recent decided Election Petition of **William Odhiambo Oduol v IEBC [2013] Election Petition No. 2 of 2013, Kisumu** where the Court made the following observation in respect to integrity of keeping election material safe:

“...the votes in the ballot boxes following an election contain the best, primary and controlling evidence of the votes cast by the electorate. The Commission has, therefore, the responsibility to safeguard those votes by making sure that the ballot boxes in which they are contained are scrupulously secured until any litigation on them is concluded. The results as declared in the election forms should agree with the votes in the ballot boxes, and when they don't agree the Commission has to explain the discrepancy. When the Commission is handing over the ballot boxes to court it should reasonably anticipate that scrutiny and recount may be ordered, at which time the handling of all the election materials may be

inquired into. It is the responsibility of the Commission, at the earliest possible opportunity, to indicate to the court hearing the petition any instance of interference or tampering, or suspected interference or tampering, so that appropriate action or inquiry can be undertaken. All the time, the Commission should bear in mind that it is the custodian of the results as declared in the forms and as evidenced by the votes in the ballot boxes. Indeed Article 86(d) of the Constitution commands the Commission to put in place structures and mechanisms to eliminate electoral malpractices, including the safe keeping of electoral materials.”

89. Mr. Morara Apiemi, counsel for the 1st and 2nd Respondents submitted that the Court in considering the report made by the Deputy Registrar after the scrutiny exercise, should confine itself to issues which it set out in its ruling of 6th August 2013. Counsel submitted that the scrutiny exercise did not reveal any irregularities.

90. I have carefully considered the report on the scrutiny which was ordered by the Court. I have already hereinabove given the results as reported by the scrutiny exercises. In relation to the submissions by Mr. Kasamani, that the lids of the ballot boxes for Mirere and Mukunyuku Polling Stations had cracks. I must note that the said cracks did not indicate any ill intention. This is so because the scrutiny confirmed the results as were declared by the Returning Officer in the case of Mukunyuku Polling Station. In the case of Mirere Polling Station, I have already annulled the results due to an excess vote by 1. The cracks that may have occurred on the lids, if at all, were as a result from stress from handling the boxes and was not intentional mishandling. Although I agree with the counsel that ballot boxes following an election should be handled with great care, I also note that the results as declared in the election forms tallied with the votes in the ballot boxes. It is only when such results do not tally and there is sufficient evidence of crack on the ballot boxes, that the IEBC must explain the discrepancy. In sum, I agree with Mr. Morara Apiemi that the scrutiny exercise did not reveal irregularities material enough to change the results of the election or to nullify the same.

Submissions on the Burden of Proof

91. Mr. Kasamani for the Petitioner referred the Court to the Supreme Court of Kenya decision in **Raila Odinga v The Independent Electoral and Boundaries Commission & 3 Others Petition No. 5 of 2013** which had this to say on the burden of proof in election petitions after traversing numerous Commonwealth authorities:

“There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.”

92. Counsel submitted that to satisfy the legal burden that is upon the Petitioner, the law on what must be proved needed to be examined. Counsel referred the Court to the provisions of Section 83 of the Elections Act, which reads:

“No election shall be declared to be void by reason of non-compliance with any written law relating to that election (1) if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law OR (2) that the non-compliance did not affect the result of the election.

92. In respect of the principles as envisaged in S.83, counsel submitted that one had to refer back to the provisions of Article 38 of the Constitution, which states, in part,:

- (a) freedom of citizens to exercise their political rights under Article 38;
- (d) universal suffrage based on the aspiration for fair representation and equality of vote; and
- (e) free and fair elections which are
 - (i) by secret ballot,
 - (ii) free from violence, intimidation, improper influence or corruption,
 - (iii) conducted by an independent body,
 - (iv) transparent and,
 - iv. administered in an impartial, neutral, efficient, accurate and accountable manner.

93. Counsel submitted that the Petitioner discharged the legal burden upon him and demonstrated that the above principles were not followed in the manner the election was carried out and thus they either affected the results or substantially affected the validity and integrity of the election in Matungu Constituency.

94. Mr. Wasilwa and Mr. Masinde for the 3rd Respondent submitted that the allegations made by the Petitioner in the Petition were mere generalization lacking in specificity or particulars thus rendering the Petition fatally defective. Counsels referred the Court to the decision by Maraga J. **Joho vs Nyange & Another (2008) 3 KLR (EP) 500** the Court held that:-

“Elections 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. For instance, where allegations of bribery are made, instances of the bribery should be given.”

95. Counsels further submitted at length on the burden of proof in election petitions and cited a number of authorities, decided locally, within the region and abroad to drive the point that the burden of proof in election Petitions as in civil cases is settled and it lies on the Petitioner to prove his case to the satisfaction of the Court. The counsel culminated the citations with the Supreme Court decision, **Raila Odinga v The Independent Electoral and Boundaries Commission & 3 Others Petition No. 5 of 2013** where the Supreme Court observed:

“The lesson to be drawn from the several authorities is, in our opinion, that this Court should freely determine its standard of proof, on the basis of the principles of the Constitution, and of its concern to give fulfillment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the “national values and principles of governance” declared in the Constitution [Article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfillment to the right of franchise. But at the same time, a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden. 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

standard where criminal charges linked to an election, are in question. In the case of date-specific electoral requirements (such as those specified in Article 38(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.”

96. In concluding their submissions, counsel for the 3rd Respondent referred the Court to Section 39 (1), (2) and (3) which permit the IEBC to determine, announce and declare the election Result for Matungu Constituency giving provisional results and subsequently final results. It was their submission that the election was conducted under unprecedented election edicts, imperatives and regulations consequent upon the promulgation of the new constitution. Counsel submitted that, irregularities if any, are not of the scale, nature or mass as to impugn the Member of National Assembly results.
97. I have carefully considered the allegations in the Petition and the responses thereto. I have listened to the witnesses called by all parties in regard to the various allegations in the Petition and responses to the same. I have already made my finding on each and every aspect of the allegations. The allegation of bribery, violence, and voter intimidation if proved and attributable to the 3rd Respondent would be fatal to his election. In this Petition, those allegations were fairytales, in most cases, or stories conjured up by the witnesses to buttress the Petition. This is not to say that some of those allegations did not actually occur. They could have occurred. However, the Petitioner was at all material times required not only to prove those allegations on a degree higher than the balance of probabilities, but also to connect the allegations with the 3rd Respondent. This was not the case in all the allegations. I found no single allegation of bribery, voter intimidation or violence which was proved and attributed to the 3rd Respondent and which could persuade this Court to reverse the election results.
98. There were irregularities mainly attributable to the 1st and 2nd Respondents on tallying of the results. These allegations were not widespread. Some irregularities on the tallying of results were accepted by the 2nd Respondent who re-tallied the same, and the same results revealed that the 3rd Respondent was still leading. Pages 114 – 117 of the 1st and 2nd Respondents response carried a reconciled tally of all the results after the 2nd Respondent acknowledged the tally errors. The Petitioner has asked this Court not to allow the reconciliation but to find that the errors go to the root of the election.
99. A prudent election Court sitting as I do has serious responsibilities to the parties before the Court, their supporters and the public. For this Court to consider nullifying the election on account of any electoral error, this Court must consider the nature of these errors, the impact it had on the election process and results and the consequences to the constituents or general public if such errors were to lead to a nullification of elections. It is true that the elections under review were the most complex in the history of the country. Voters were voting for 6 different elective posts: President, Governor, Senator, Member of National Assembly, Women Representative and County Representative. The tasks to be performed including over 600 Forms 35 to filled, Polling Day Diaries, Field Note Books etc are enormous. Anomalies and errors would certainly not be avoided under such circumstances. In this case, such errors have been admitted by the 2nd Respondent in the tallying exercise, and reconciliation has been made.
100. However, errors have been admitted and it is still within my discretion to find that those errors are grave enough to nullify the elections. This issue is weighing heavily on my mind. Should I nullify the election of the 3rd Respondent as an elected Member of National Assembly, Matungu Constituency" To answer this question, I will adopt the following principle: If I nullify this election,

is there a guarantee that the noted errors and anomalies will not be found in the ensuing by election" In other words, are we likely to have a perfect election which will exclude all the minor errors and anomalies" It is possible that even if this election is nullified, we are still likely to encounter tallying errors, agents not signing Forms 35, illiterate voters who were not satisfied with the assistance they were given, or such like anomalies"

101. After careful consideration on the above issues, I am persuaded that as long as elections are carried out by human beings, and as long as our technology advancements in elections stagnate, errors, especially minor errors will continue to be part of the electoral process. It will be the duty of an election court to determine the nature and impact of such errors. It is true, however, that if I nullify this election, the ensuing by-election will be less tedious as we shall be dealing with only the Member of National Assembly candidates. Even so, there is no guarantee that other minor electoral errors will be avoided. I find it an exercise in futility to nullify this election due to minor errors and anomalies which will still not be entirely eliminated in the ensuing by-election. I am not persuaded that a prudent court sitting as I do in the light of the evidence adduced before the Court can order the nullification of the Matungu Constituency Parliamentary Election results.
102. I have also considered the prayers in the Petition. The prayers at paragraphs (a), (b), (c), (d) for scrutiny were partially granted and have formed part of these proceedings in this Petition. The rest of the prayers in the Petition are untenable.
103. For the forgoing reasons, and save to the extent to which prayers (a), (b), (c), (d) of the Petition are allowed, this Court finds that the Petitioner has failed to prove the Petition or allegations in the Petition as by the law required.
104. In the upshot, I herewith make the following orders:
 - a. This Court returns a verdict that the 3rd Respondent Hon. David Aoko Were was validly elected and declared as Member for National Assembly for Matungu Constituency during the Parliamentary elections held on 4th March 2013, which was conducted in a free, fair and credible manner, and in compliance with the provisions of the Constitution, Elections Act, the Rules and Regulations thereunder and all other enabling provisions of the law.
 - b. The Petition herein is dismissed with costs to the Respondents.
 - c. The costs of the Petition shall not exceed Kshs. 2 Million out of which the 3rd Respondent's costs shall not exceed Kshs. 1 Million and those of the 1st and 2nd Respondents shall not exceed Kshs. 1 Million.
 - d. It is hereby directed that a Certificate of determination be issued to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly as provided under Section 86 (1) of the Elections Act.
105. I take this opportunity to express my sincere gratitude to the counsel in this petition, for they quoted and availed to the Court numerous authorities from within and without this jurisdiction, all with the aim of assisting the Court to return with a better judgment. If I have not cited them, it is not because they are not relevant but because others are distinguishable from the circumstances prevailing in this Petition. In addition, the counsel exhibited a great deal of maturity and professional restraint and decorum towards each other and the Court and it is my duty to commend the counsel for that.
106. That is the Judgment of the Court.

Dated, Signed and Delivered at **Kakamega** this **7th** day of **October** 2013

E.K.O. OGOLA

JUDGE

In the Presence of:-

KASAMANI ADV..... - For the Petitioner

AND NDIKU ADV

MASINDE ADV H/B FOR MORARA ADV.. For the 1st and 2nd Respondents

MASINDE ADV..... - For the 3rd Respondents

Paul - Court Clerk



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