



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NO. 6 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ELECTIONS ACT, 2011 SECTIONS 75; 76; 77; 79; 80; 82; 86 AND 87

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION

RULES 2013: RULES 3; 4; 5; 6(1)(A); 8; 9; 10; 11; 12; 13; 21; 32; 33 AND 38

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATION, 2012

AND

IN THE MATTER OF THE ELECTION FOR MIGORI COUNTY WOMEN REPRESENTATIVE HELD ON

THE 4TH DAY OF MARCH 2013

FATUMA ZAINABU MOHAMEDPETITIONER

-VERSUS-

GHATI DENNITAH.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)2ND RESPONDENT

BENSON NJAU (KURIA EAST RETURNING OFFICER) 3RD RESPONDENT

LILIAN LILUMA (RETURNING OFFICER AWENDO CONSTITUENCY)..... 4TH RESPONDENT

MOSES OMONDO DAULA (RETURNING OFFICER NYATIKE CONSTITUENCY) 5TH RESPONDENT

JACKTON NYONJE (RETURNING OFFICER ORIRI CONSTITUENCY)	6 TH RESPONDENT
NOAH BOWEN (RONGO CONSTITUENCY)	7 TH RESPONDENT
ALEX OYUGA (RETURNING OFFICER SUNA EAST CONSTITUENCY)	8 TH RESPONDENT
MARTIN CHENGERE (RETURNING OFFICER SUNA WEST CONSTITUENCY	9 TH RESPONDENT
JAIRUS OBAGO (RETURNING OFFICER MIGORI COUNTY)	10 TH RESPONDENT
ADAM MOHAMED (RETURNING OFFICER KURIA WEST CONSTITUENCY)	11 TH RESPONDENT

JUDGMENT

1. The petitioner herein Fatuma Zainabu Mohammed filed this petition on the 08.04.2013 against the 1st respondent Ghati Dennitah, and the Independent Electoral and Boundaries Commission and its officers as the 2nd - 11th respondents herein challenging the declaration of the former as the duly elected Women Representative for Migori County following the General Elections held on the 4th March 2013.
2. In the Petition, the Petitioner sought relief as follows:
 - a. ***A declaration to nullify the election for Migori County Women Representative held on 4th March 2013 for not being free, fair and transparent and for lacking credibility.***
 - b. ***A declaration that the said election did not produce credible results or a credible winner and therefore the 1st Respondent was not validly elected.***
 - c. ***That there be a re-tallying/recounting of all the votes cast in respect of the Women Representative for Migori County.***
 - d. ***That the declaration of results and the certificate issued pursuant thereto and the subsequent Gazette Notice No. 3157 of 13th March 2013 declaring the 1st Respondent as Women Representative for Migori County be quashed and nullified.***
 - e. ***That there be a fresh election for Women Representative Migori County.***
 - f. ***That the Respondent bears the costs of this petition.***
3. The petitioner disputed the entire results of the Migori County Women Representative on the following grounds:
 - a. ***That the Election data is not credible or accurate and therefore the entire results are highly questionable for the reasons that the form 36 contains different conflicting and contradictory figures, they show glaring irregularities with notable differences between figures shown in various constituencies, other figures are sharply at variance and marked differences with the form 35***
 - b. ***That some constituencies and polling stations strangely recorded over 100% voter turnout and others had 100% voter turn out***
 - c. ***Various electoral documents in particular the forms 35 contain curious cancellations and alterations which are neither countersigned nor justified***

- d. ***The form 36 wrongly and inaccurately indicates the number of Registered Voters in Migori County as 283,862 while the correct and official number of Registered Voters for Migori County are 562,650***
 - e. ***Most of the electoral documents in particular forms 35 and forms 36 are returned incomplete as they don't have statutory comments by presiding officer, they are not signed by the Deputy Presiding Officers and Agents***
 - f. ***The form 36 was also incomplete as it did not show the breakdown of results for rejected votes. In Uriri (Karondo Primary) and Kuria East (Nyakehomo Primary) results were not declared in the form 36 and therefore the same were not verifiable.***
 - g. ***That in virtually all polling centers authorized party agents not allied to the Orange Democratic Movement Party (O.D.M) were harassed, obstructed or totally hindered by the Presiding Officers and Returning Officers from performing their duties.***
 - h. ***That there was rampant bribery of voters by known proxies of the 1st Respondent who also corrupted the officials of the 1st Respondent herein in particular the 3rd to 11th Respondents.***
 - i. ***That in some polling centers like Kuria East, Chinato Primary O.D.M agents and even the presiding officer openly guided voters to vote for the 1st Respondent***
 - j. ***That the election was neither free nor fair as it was meant to ensure that the 1st Respondent won at all costs.***
 - k. ***That to allow the 1st Respondent to assume the office of Women Representative Migori County would be a grave violation of the will of the electorate in Migori County and a serious travesty of justice and mockery of democracy***
 - l. ***That the petition raises serious integrity issues with regard to the conduct of the 1st Respondent making her unsuitable to assume office of Women Representative Migori County and it is in the interest of justice as well as in the public interest that the prayers sought therein***
4. The Petition was supported by the annexed affidavits of Fatuma Zainab Mohammed, Leah Awuor Obago, Nelson Sagia and Kennedy Otieno Opiyo, the last of whom did not testify before the court.

The Response

5. In her response to the Petition dated the 22nd April 2013, the 1st Respondent herein Ghati Dennitah states principally that she won the election of Women Representative for Migori County in an Election that was free, fair and transparent and which reflected the will of the people of Migori County conforming to the provisions of Section 83 of the Election Act, 2011.
6. She states that the election data was credible and its integrity and accuracy is not questionable or suspect she has denied in toto the allegations contained in the Petition at paragraph 17 adding that the figures by the Petitioner's agents are not factual. She further states that alterations and cancellations are not an indication of interference but corrections and that the Petitioner is not in a position to know the

number of registered voters in Migori county and the said number did not affect the end result. The forms 35 and forms 36 in Migori county were duly stamped and signed by the relevant officials and same were properly filled by the I.E.B.C officials. She states that the form 36 was accurate and it reflected the will of the people of Migori County. It was complete and if there were errors on the form the same did not affect the final results.

7. She has denied bribing any voters and states that if the Petitioner had any proof of bribery then she should have reported the same to the Police. She adds that agents from all particular parties were present during the election process and it is not true that PDP Agents were ejected from polling centers as is being alleged in the petition.
8. She states that the results are not disputed and maintains that she won the elections fairly having not compromised and/or corrupted the any I.E.B.C officials who were conducting the election. She concludes by reiterating that it will not be in the interest of democracy, justice and fairness to grant the prayers sought by the Petitioner and she wants the court to dismiss the petition and declare her as the Women Representative for Migori County with costs.
9. In the answer to the petition the 2nd – 11th respondents denied each allegation in the petitioner's petition together with the assertions in the supporting affidavits of the petitioner and her three witnesses. The respondents stated that the 4th March 2013 General Elections for County Women Representative in Migori was conducted as provided for by the Constitution and provisions of the law, rules and regulations. There was no breach of the Constitution or any statute during the process. The elections as such did not deviate from the normative process and procedures of elections and it was neither a sham nor travesty.
10. The petitioner called three witnesses; the 1st respondent testifying and calling three witnesses and the 2-11 Respondents called nine witnesses, after which final submissions were made on 30th September 2013 and judgment reserved for the 7th October 2013. The prayer for a re-tallying/recounting of all the votes cast in respect of the Women Representative for Migori County was not urged in the course of the hearing and it must be taken to have been abandoned as the matter is coming for final judgment.
11. Accordingly the issues before the court are:
 - a. **Whether the allegations of irregularities and breaches of election law have been proved;**
 - b. **Whether any election offences have been proved; and**
 - c. **Whether the irregularities and election offences and breaches of election law if proved affect the results of the election.**
12. There was no dispute as to the jurisdiction of the election court and the criteria for the nullification of elections. The parties were agreed that the court's jurisdiction to nullify an election existed under section

83 of the Election Act. What differed is the emphasis placed on the various principles extracted by the courts in the application of the statutory provision. The parties variously cited the following decisions of the courts in interpretation of the legal provision on elections:

1. **William Odhiambo Oduol vs. IEBC 2 Others** [2013] eKLR. Justice Muchelule stated as follows:

“Once again, an election is a process and not an event. Sections 56 to 72 of the Act create election offences. It is clear that some of the offences relate to what happens during voting but others deal with what happens during campaigns. For instance, under section 67 (1) it is an offence to print, publish, distribute or post up or cause to be printed, published, distributed or posted up, any advertisement, handbill placard or poster which refers to any election and which does not bear upon its face the name and addresses of the printer and publisher. Under section 67 (1) (g) (iii) it is an offence to create a material disruption with the intention of preventing a political party from holding a public political meeting. It follows that what happens during campaign is the legitimate business of a court hearing a petition concerning that election.”

2. **Ferdinand Ndung’u Waititu vs. IEBC & 8 Others** [2013] eKLR setting out the general principles for the determination of an election petition:

1. The sovereignty of the will of the people.
2. Election petitions are not ordinary civil suits governed by the Civil Procedure Act and Rules.
3. Burden and Standard of proof.
4. Irregularities and non-compliance with the electoral law will not necessarily lead to invalidity of an election unless they affect the result of the election.

3. **Richard Kalembe Ndile and Another vs. Patrick Musau & Others**, Machakos High Court Election Petition No. 1 (consolidated with petition no. 7 of 2013) [2013] eKLR where Majanja, J. said:

“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 bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible.”

4. **Benjamin Ogunyo Andama vs. Benjamin Andola Andayi**, Court of Appeal Civil Application No. 24 of 2013 (UR. 11/13) observed thus:

“In our view, as has been said time and again, Election Petitions form their own category and are neither controlled by Civil Procedure Act and Rules made thereunder, nor are they controlled by the Criminal Procedure Rules. They are neither Criminal nor Civil in nature. We may say there is an element of

public law in them but even they are not all correct. They are a class of their own.”

5. **Mbowe vs. Eliufoo** (1967) EA 240, the court held that:

“There has been much argument at the meaning of the term ‘proved to the satisfaction of the court. In my view it is clear that the burden of proof must be on the petitioner rather than the respondents because it is he who seeks to have this election declared void.”

6. **Joho vs. Nyange & Another** (2008) 3 KLR (EP) 500, Maraga J. (as he then was) said:

“The burden of proof in election petitions lies with the petitioner as he is the person who seeks to nullify an election. While the proof has to be done to the satisfaction of the court, it cannot be said that the standard of proof required in election petitions is proof beyond reasonable doubt. Like in fraud cases, the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences a very high degree is required.”

7. **Islington West Division Case, Medhurst vs. Lough and Gasquet** (1901) 5 O’M & H 120, 17 TLR 210, 230 where Kennedy J, held that:

“An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election, where the court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, i.e the success of the one candidate over the other, was not, and could not have been, affected by those transgressions. If, on the other hand, the transgressions of the law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether these transgressions may not have affected the result, and it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void. It appears to us that this is the view of the law which has generally been recognized, and acted upon, by the tribunals which have dealt with election matters.”

8. **RTD Col Dr. Kiiza Besigye vs. Yoweri Kaguta Museveni and Electoral Commission**, Uganda Presidential Election Petition no. 1 of 2001, where Odoki CJ defined “free and fair elections in the following terms:

“To ensure that elections are free and fair there should be sufficient time given for all stages of the elections, nominations, campaigns, voting and counting of votes. Candidates should not be deprived of their right to stand for elections, and citizens to vote for candidates of their choice through unfair manipulation of the process by electoral officials. There must be a leveling of the ground so that the incumbents or government ministers and officials do not have unfair advantage. The entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended

to subvert the will of the people. The election procedures should guarantee the secrecy of the ballot, the accuracy of counting and the announcement of the results, in a timely manner. Election law and guidelines for those participating in elections should be made and published in good time. Fairness and transparency must be adhered to in all stages of electoral process. Those who commit electoral offences or otherwise subvert the electoral process should be subjected to sever sanction. The electoral commission must consider and determine election disputes speedily and fairly.”

9. **Mohamud Muhamud Sirat vs. Ali Hassan Abdirahiman & 2 Others** Nairobi Petition No. 15 of 2008 [2010] eKLR where Kimaru J. stated:

“From the onset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of the petitioner’s case [on] which he adduced evidence, but which were not based on the pleadings that he filed in court and in particular the petition.” [Emphasis ours]

10. **Ferdinand Ndungu Waititu vs. IEBC** Nairobi Election Petition no. 1 of 2013 [2013] eKLR:

“The third (3rd) principle is that, as in all litigation, a petitioner is bound by his pleadings. It is common that a petitioner will file a petition and will in the course of the proceedings veer away from the initial track. This puts the opponents into a difficult position in knowing what the real case they must answer is, and what it is the court must determine.”

11. **John Oroo Oyioka vs. IEBC & 2 Others** Kisii Election Petition no. 2 of 2013 as consolidated with Election Petition no. 4 of 2013 where Sitati, J. observed:

“Both Oroo and Nyabaro also complained that Resa failed to make statutory comments on form 35s and that such failure resulted in a negative effect on the results of the election, since the results contained on the improper forms are not verifiable and cannot therefore be authenticated as to their accuracy. Upon evaluation of all the evidence on this issue, there is indeed evidence that Resa and some presiding officers did not give statutory comments. The question that the court must answer is whether these irregularities or any of them materially affected the outcome of the result. Section 83 of the Act provides that no election shall be declared void by reason 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 in what written law or that the non compliance did not affect the result. Applying the principle in Morgan vs. Simpson (supra) I am of the considered view that the failure to give statutory comments on the form 35s did not materially affect the result.”

12. **Munyao vs. Munuve & 4 Others** [2008] 2 KLR (EP) 20, where O’Kubasu, Mbito & Mwera J. (as they

then were) held:

“We however find the complaints raised were minor and could not have affected the results of the election. The grounds on which the petition was based was very weak and have not in our view been proved....in our judgment, whatever little deficiencies that may have occurred in the conduct of the elections have not been shown to have affected the outcome of the results thereof. Accordingly we hereby dismiss the petition.”

13. **Joho vs. Nyange & Another** (No. 4) [2008] 3 KLR (EP), the court making observations:

“In respect of the first category I would like to say this. Error is to human, some errors in an election like this conducted under a frenetic schedule are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental they should always be excused and ignored. But where deliberate irregularities or forgeries are committed different considerations come into play. In either case, however, serious consideration should be given as to what effect, if any, that those errors, whether innocent or deliberate, have on an election before the same is vitiated. If they do not affect the election or its results then it should be ignored.”

14. **Charles Oigara Mogere vs. the IEBC & 2 Others**, Kisii Election Petition No. 9 of 2013 citing the case of **Mbowe vs. Eliufoo** [1967] EA which defined the term “affected the results”:

“In my view, the phrase affected the result; the word result means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non compliance of the rules.”

15. **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] eKLR, the court quoting **Kiarie Waweru vs. Beth Wambui Mugo & Others** [2008] eKLR where the court at p.10 stated:

“This court is aware of its duty to consider and determine the evidence adduced by the parties to this election petition after putting in mind the fact that the election that is sought to be nullified is in respect of an exercise of the right of the voters of Dagoretti Constituency to elect a representative of their choice. This court will not interfere with the democratic choice of the voters of Dagoretti Constituency unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and therefore subject to nullification. It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did occur: he must establish that the said electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the elections held on 27th December, 2007.

16. **James Omingo Magara vs. Manson Onyongo Nyamweya & 2 Others** Civil Appeal No. 8 of 2010 per Githinji JA (dissenting):

“Those anomalies were in counting or rather in the reconciliation or tallying process. They are post election anomalies which in my view did not affect the final vote. The anomalies in some form 16As and 17As were in any case cured by the recounting and scrutiny of the vote which verified that the appellant had won the election for it will be remembered that the object of scrutiny is to ascertain by striking out votes of recounting is to eliminate any mistake made in the counting of votes. On analysis, I have come to the conclusion that the election was conducted in accordance with principles laid down by the electoral law and that the anomalies found in some form 16A and 17A were not so persuasive or so serious as to affect the entire election. I am satisfied that those were post-election procedural anomalies and were cured by both scrutiny and counting and by section 28 of the Act. I find, indeed that the election court misconstrued section 28 of the Act.”

13. It is clear that there is a common understanding of the jurisdiction and principles of the court in considering a petition for the invalidation of an election, and only the facts of a case and the perceptions of those facts by the different courts differ. Accordingly, the outcome of the petition will depend on the facts of the case as proved before the court by the petitioner.

General Observations

14. The Rule Against Hearsay

Although the petition raised serious constitutional and legal issues relating to elections ranging from intimidation, bribery, proper management of record of votes and free and fair campaigns during electioneering, the evidence offered in proof was mainly if not wholly hearsay. Under section 63 of the Evidence Act, Hearsay is inadmissible save in well-known exceptions under section 33 of the Evidence Act which were not applicable here. Section 63 of the Evidence Act is in the following terms:

“63 (1) Oral evidence must in all cases be direct evidence.

(2) For the purposes of subsection (1), “direct evidence” means:-

- (a) With reference to a fact which should be seen, the evidence of a witness who says he saw it;*
- (b) With reference to a fact which could be heard, the evidence of a witness who says he heard it.*
- (c) With reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner.*
- (d) With reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds:*

Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the

grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

(3) If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.”

Accordingly, much of the petitioner’s case collapsed on the hearsay rule.

15. Notice to Produce Documents

The petitioner gave a notice to produce date 6th April 2013 and it was the subject of some push and pull with the Petitioner accusing the Electoral Commission of failing to honour the Notice to Produce and the commission saying it was doing its best to supply such document as it could supply [with the marked register being said to be in the presidential ballot box which could not be opened without a court order] within the speed and efficiency of the overworked staff of the Commission, some of the forms 35 being produced just a day or two before hearing. The controversy was, I think, caused by a misapprehension on the part of the petitioner that the Notice to Produce entitled her to the production of the documents sought therein. A notice to Produce is not and cannot be equivalent to an order of the court to produce documents or thing required in evidence. It is a device for giving notice to the party to whom it is issued that the applicant will require him to produce the document or thing in default of which the party applying would be entitled to give secondary evidence of the document or thing. See the court ruling of 5th September 2010 herein which I set out in full herein-below:

- 1. A Notice to Produce is device by which a party to a litigation informs another of his intention to use the information contained in the document sought to be produced and therefore requires the party who has the original of that document as the primary evidence thereof to produce it, in default of which the party giving notice will be entitled in accordance to the rules of evidence to use secondary evidence of it by way of a copy thereof. See sections 68 and 69 of the Evidence Act. The notice must have been previously given to the party in whose possession or power the document is, giving such notice as required by law or as the court considers reasonable.*
- 2. Notice to Produce is not an avenue to compel the production of any document; it is merely a notice that should the original not be produced by the person legally bound to produce it, the party giving a notice will be at liberty to adduce secondary evidence of the existence, condition or contents of the document. The types of secondary evidence that may be given are set out in section 66 of the Evidence Act.*
- 3. If it is sought to compel the production of a document, the correct and most appropriate procedure might be to file an application for the enforcement of the right of access to information held by the State or another person under Article 35 of the Constitution.*
- 4. However, in the course of the Petition proceedings, there is procedure for production of documents*

under section 80 (1) (a) of the Elections Act, which provides that the election court shall have the same power as a court in exercise of its civil jurisdiction to summon witnesses. Order 16 Rule 6 of the Civil Procedure Rules provide for summons to any person to produce a document without being summoned to give evidence and such a person shall be deemed to have complied with the summons if he causes such a document to be produced instead of attending personally to produce the same. There is also the procedure for discovery, inspection and production of documents under Order 11 of the Civil Procedure Rules.

5. *The objection taken by the counsel for the petitioner that document sought by the Notices dated 6/4/2013 and 4/9/13 cannot therefore technically be enforced by directing that the 2 – 11 Respondents produce the documents listed in the notices. However, in accordance with the Article 159 provision for substantial justice without regard to technicality of procedure I will consider the merits of the application by the Petitioner.*
6. *The notice to produce given on 4/9/13 is unreasonably short taking into account the nature and volume of some of the documents sought particularly the copies of oaths of secrecy taken by the agents in the entire Migori County for the election of Women Representative. However, I consider that the lists of agents presented by the petitioner's People's Democratic Party and all the other parties for the said election are not bulky and may be easily produced.*
7. *The Notice to Produce dated 6/4/2013 has been substantially complied with although lately with explanation that the 2nd respondent is overwhelmed by the sheer numbers and other requests for other petitions. The remaining documents being the register and the polling station form 33s are said to be in the presidential ballots boxes for entire County and constituency ballot boxes for the election of Women Representatives and to reopen the ballot boxes would take a lot of time which the court cannot afford in view of the short period remaining to the end of the constitutional time limit of six months after filing of the petition on the 8th April 2013. The production of the oaths of secrecy and the PDP party list is objected to on the grounds respectively that the oaths were given to the agents upon swearing so that they could be used in accessing the polling stations and that the petitioner had the list with her at the time of the filing of the petition and she could have attached it to the affidavit. It is countered for the petitioner that the issue of missing PDP agents and excessive representation of agents for other parties was discovered late only after the supply of F35s upon the Notice to Produce of 6/4/13.*
8. *Having considered respective submissions by the counsel for the parties, I consider that although the petitioner could have presented her list of agents through an affidavit filed with the Petition, that she only discovered the absence of her agents and presence of more than 3 agents (corresponding to the number of the contestants) on F35s after these were supplied by the 2nd respondent would justify the request for the production of the party agents lists. No basis has been shown for the production of F33, in view of the production of the primary document of F35. The F33 would only be examined upon an order for scrutiny and recount made by the court. In the absence of the Register which the IEBC submits is in the presidential ballot boxes, the petitioner is entitled in terms of section 69 of the Evidence Act to rely on secondary evidence.*

9. *In my view, that the justice of the case will be served by directing the production by summons under section 80 of the Elections Act and Order 16 rule 6 of the Civil Procedure Rules to the **Returning Officer Migori County** to produce on **Monday the 9th September 2013** the party agents lists for all the parties participating in the elections of 4th March 2013 in the County of Migori. I do not make any order for the production of the Election Register and the Form 33s sought in the Notice to Produce dated 6/4/2013 and oaths of secrecy requested in the Notice to Produce dated 4/9/2013. Counsel for the respondents will have opportunity to cross examine the petitioner on the basis of the lists produced and to adduce any evidence in rebuttal, as may be necessary. Costs in the cause.”*

The Notice to Produce dated 6/8/13 could not order the production of the documents named herein. —

16. Scope of the Petition

There was an attempt to canvass matters taking place before the Party Nominations leading the General Election of 4th March 2013. The petitioner and the 3rd respondent were in the same party ODM before the party nominations after which the petitioner took up a People’s Democratic Party (PDP) ticket under which she contested the election. I took the view that the matter of pre-nomination disputes are the proper province of the Resolution Committee of the Independent Electoral and Boundaries Commission and not for the electoral court. I have noted the statement of Muchelule J. in **William Odhiambo Oduol vs. IEBC 2 Others**, supra, that the election court can properly deal with the campaigns, as opposed to nominations, and I respectfully agree. The Ugandan case of **Besigye**, supra, appears to suggest that the court could deal with nominations. That would appear to be the position that obtained during the period before the constitution of Kenya 2010. Under Article 88 (4) (e) of the Constitution of Kenya 2010, the Independent Electoral and Boundaries Commission has the mandate over nominations as follows:

“(4) *The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for -*

- (e) *The 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,” _____*

The election court could not deal with party nomination disputes which is the proper province of the IEBC.

Intimidation, Bribery and unfair campaign practices:

17. The petitioner PW1 gave evidence to the effect that her campaign was marred with unfair practices, bribery, intimidation, damaging of campaign materials and threats to her life necessitating her to acquire security during the campaign period. When during cross-examination she was asked whether she made

any formal reports of the complaints, she said she had made so many reports orally without action being taken by police officers who alleged said they feared for their jobs. In some instances of destruction of campaign materials, she said that the police asked her to produce video evidence as proof before they could take action. On account of the high standard of proof in election petitions, the allegations have not been proved by the mere statement of the petitioner.

18. Six Piece voting pattern

There is no legal prohibition against a political party urging voters to voters for all of its candidates in the various positions in a General Election where elections to several elective posts are being held. It may only be an unfair practice as between members of a political coalition who have entered into a pre-poll election pact but that would be a matter to be dealt with politically by the parties in negotiating the coalition. I do not find that this was an election irregularity.

19. The petitioner complained that the 1st Respondent's party (ODM) leader Raila Odinga or Jakom, as he was alleged to be popularly known, did during two campaign rallies discriminate in providing an opportunity for all the candidates to campaign by giving a chance only to those candidates like the 1st respondent who belonged to the ODM party while the others in the CORD coalition like the petitioner were not allowed to speak. At some other areas the petitioner said she could not talk to the electorate: *"I encountered some problems. In some places I could not talk to the people. I could not speak at Awendo urban as I was labeled Uhuru's project. At Awendo, I visited on the 11/2/2013. I had placed a rally there scheduled for 12.00noon. My opponent said that I had stepped down for her. I have not put it in an affidavit."*

The petitioner did not prove that the failure to hold rallies at certain places was part of a strategy by the 1st respondent party with or without collusion with the other respondents to keep her way form public platform to campaign. I am not able to hold that there was established an irregularity or breach of any election law.

20. There was contradiction between the witnesses as to whether the Petitioner was allowed to speak at the meetings organized by Coalition for Restoration of Democracy (CORD) at Kuria and Migori. PW2, the chief agent for the petitioner's party, said:

*"I did not witness Raila coming to Uriri, Raila came to campaign in Isibania, Kuria and Migori, in Suna East. I attended both meetings. The turnout was big. During the tallying in Isibania some of the candidates were not allowed to address. They were the one who were for other parties. **Fatuma was not given a chance to talk. The governor for Migori Obando was also not allowed to talk. In Suna East it was the same. It was the ODM candidates who were given a chance to talk.** I do not remember the master of ceremony. It was Raila who ushered the candidates to talk. Fatuma did not talk in Kuria East."*

DW2 Eric Opany, the 1st Respondent's Chief Manager: *"I attended the CORD meeting at Isibania,*

Kenya. In Isibania all the parties were given a chance to speak. The 1st respondent and the petitioner were given a chance to talk. In Migori, Ghati talked, the petitioner did not talk. At Migori station, the women representative Ghati talked. Because of time only Ghati spoke for the women representative. It was a CORD meeting. Other dignitaries who attended were Johnstone Muthama for wiper, Moses Wetangula Ford Kenya, Raila. This was at Isibania. At Migori, it was only Raila the others had left. Migori is central. In each and every constituency, I had one agent who coordinated with ODM agents in the constituency.” **PW3 also confirmed that the petitioner did not speak I attend a rally when Jakom came to Migori and Kuria. At Kuria, the candidates were asked to meet the people. Jakom called only ODM. Fatuma only greeted the people. She did not speak. At Kuria, the petitioner was still in ODM, the nomination, had not been done. Even at Migori the nominations had not been done. Jakom called out Ghatti but he did not call the petitioner and the current governor. Fatuma was in the convoy of Jakom. Fatuma would come out at the different centre where the convoy passed. At these centres only a few people spoke. They only spoke at the rally.”**

DW3 George Nzalani Mwita, the Kuria West coordinator for the 1st Respondent said: “I was at the meeting at Migori Stadium. I did not arrange the meeting. I do not attend meetings. It was attended by all candidates because a presidential candidate was coming to the meeting. There were a lot of people. At this meeting, my candidate waved to the people. She did not speak. The petitioner also waved. I do not know who gave them a chance. There was a master of ceremony. There were many candidates at the stadium. I was in the crowd at the back. I saw Raila. I did not get to know the dignitaries who were there. I do not know who the master of ceremony was. The meeting was not organized by my candidate.”

DW4 Doris Achieng Odhiambo, the 1st respondent constituency coordinator for Awendo: “I attended Migori Stadium Meeting where 1st respondent spoke. There were all none representative candidates. All the candidates were given a chance to wave. Then the Jakom’s team was called to speak. Denittah Ghatti was one of them; the MP for Suna East was also called; Engineer Kobando. It was Denittah Ghati who spoke on women representative. Those who waved were candidates for CORD. Then Jakom called his team. He did not say they were his people. He said “Hawa ndio wame nizingira” (gesturing on embrace). I was a coordinator. I was trying to bring the people together for a meeting and the 1st respondent would come and address them after which she would leave.”

The preponderance of evidence is that the petitioner did not speak at the meetings but it is noted that it was not clear whether it was before or after the party nominations. If it was after the nominations, the head of the ODM party may have been right in giving preference to candidates of his party at a rally organized by his party. I do not find that any allegation of discrimination and unfair practice has been proved.

Bribery and compromising voters

21. PW3 the Petitioner’s Constituency Coordinator for Nyatike in asserting there was bribery said:

*“There was bribery. **I did not see it myself.** Our agent called me and told me that there were people bribing. I went to report and I found that they had been arrested. There was one Mauko. I refer to paragraph 15 I do not remember the other who were arrested. They were held until 5.00pm when they were released without charge.*

The person referred in paragraph 15 (b) is deceased recently. I did not see any person being compromised. Members of the public were saying so. No member of the public has sworn affidavit. They did not make a report to the police. Illiterate voters. I did not see with my eyes anyone being forced to vote in a certain way.”

In further cross-examination:

*“**Bribery allegations. I did not see the person giving the bribe.** I saw them at the police station after they had been arrested. I do not know why they were released. I did not see the chief being used to bribe the voters. I saw the 1st respondent for the first time today. I used to see her on posters. I did not see the 1st respondent but I heard Jakom calling the 1st respondent to come.*

[Paragraph 16 – 1st respondent bribed the officials of IEBC]

***I did not see 1st respondent bribing the voters.** I told my advocate that ODM people were giving 500/= to vote six-piece. I think the advocate got it right. Ghatti was not with the people who were bribing people.”*

This allegation as based on pure hearsay and it is therefore rejected. The witness could also not prove allegations of bribery or impropriety against the Nyatike Returning Officer, Moses Duala DW6.

22. Forms 35 and Form 36

PW3 said:

“I have never seen the form 35 before. It is my first time to see the forms. I read my affidavit before saying I know everything in the affidavit. When I signed the affidavit, I had not seen the form 35. I have not seen the form 36s before. I did not see them when I was signing the affidavit.

[paragraph 7 of the affidavit]

***Discrepancy between form 35 and form 36.** I told my advocate that I had not seen form 35 and form 36. The advocate wrote something that I do not know. The contents of paragraph 7 is not my evidence. I do not know anything about it before the court and my God.*

[paragraph 12 of my affidavit]

It was the agent who should have countersigned. As a coordinator, I could not have signed. I did not see the forms. The contents of paragraph 12 is not my evidence. I say this before God. I did not say this.

[Paragraph 13 of witness's affidavit]

My agents telephoned me. *When I went to the polling station, the presiding officer did not listen to me and he did not write in his comments. This was Nyakondo. I have said that I did not see form 35. The truth before my God is that I was the coordinator, I did not stay at the polling station. I got information from the agents and when I went to report this he chased me away. I went to Nyakondo at 12.00noon.*

[Paragraph 13 of affidavit] - I have not stated where the matters happened. I was a coordinator for Nyatike. I did not go to other constituencies.

23. During the cross examination of the parties witnesses, the court examined at least 50 [and sometimes 100] polling stations in each of the county eight constituencies. The court found in the great majority of them, the figures posted from Form 35 to Form 36 were consistent. All the forms were signed, dated and stamped by the Presiding Officers. In a few of them the Deputy Presiding Officer had not dated or signed. The court also noted some errors in the Constituency Form 36s as well as on the County Form 36 with respect to the capture of rejected votes.

24. Petitioner's PDP not represented by Agents

The court confirmed from at least 30 Poll Day Diaries each constituency from all the eight constituencies that the petitioner's PDP party were represented in the majority of the polling stations. Many of them also signed the statutory forms 35. However, the agents had not signed the Constituency Form 36, and most of the returning officers who testified explained that the Form 36 which they had did not have a section the agent signature. _

25. I consider that the Form 36 being a secondary document, the agents' signification of approval was more necessary in the primary Form 35 documents. However, even in these primary documents, the law under Regulation 79 (6) and (7) of the General Regulations provides that no election will be invalidated for failure of an agent to sign a statutory document for the absence of an agent at the declaration of results.
26. Regulation 79 of the Election (General) Regulations 2012 under the Elections Act is in the following terms, so far as material –

“(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.

- (4) Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.
- (5) Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence.
- (6) *The refusal or failure of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation (2)(a).*
- (7) *The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under subregulation (2) shall not by itself invalidate the results announced.*”

27. **More agents than commensurate to the number of candidates signing Form 35**

I recently dealt with a similar objection the Kisii Election Petition No. 8 of 2013, **Paul Gitenyi Mochorwa v. Timothy Bosire**, as follows:

“If non-signing of the forms by the agents cannot invalidate an election, the signing of the forms by agents whether in more or less than the number of the candidates in the particular election should invalidate the election. It is an issue of first principles: the object of agents signing the Form 35 is to confirm the results contained therein. If it is signed by agents in other elections taking place alongside the particular election, there cannot be a valid objection to such ‘over-confirmation’ unless it can be shown to have affected the result adversely in some way.

The Returning Officer DW4 testifying in court gave the purpose and practice of agent signature in elections and said:

“Those agents who were duly appointed by their parties or candidates and who came late may have been allowed into the polling station without their names being recorded in the poll day diary....

There were 14 candidates, each party or candidate was supposed to include one agent at any given time because on the only one agent would be allowed to replace the other. At any given time, there were supposed to be more than 14 agents because of the various elective positions. It is not correct that the signing of form 35 was restricted to the 14 agents. Any agent present representing any party or any candidate present at the time of signing of form 35 could have been signed by any candidate or agreement in the elective positions without discriminating as to the elective post. If there was any reason for not signing form 35 the agents were allowed to give the reasons. It is the agent who would give the reason for refusal to sign....

The purpose of signing form 35 by agents is to authenticate the contents of the forms as agreed by all who have signed. It should be signed after all the entries have been made on the forms. The entries are made after the counting and tallying at the polling station. Those who sign are those who are present at the stage of concluding the exercise.

*I would agree that if the purpose is to confirm the contents of the Form 35, all accredited agents present at the time the results are announced, whether representing the candidates in the particular election or other candidates in other elections may sign the Form 35. It must be observed that the 2013 General Election involved election for 6 positions with some elections as here having over 10 candidates. If all the political parties appointed agents and the various candidates also appointed their personal agents as they were entitled to there would be over 20 agents per election. If the both agent for the candidate and the agent for the party signed to express their concurrence with the result there would understandably be a huge turnout of agents signing the Form 35. This would still accord with the Regulation 62 (2) that “the presiding officer shall admit to the polling station not more than one agent for **each candidate or political party.**” I do not therefore find that any irregularity has been proved in this regard.”*

28. **Harassment of PDP Agents**

PW3, the Petitioner’s coordinator for Nyatike denied any knowledge saying:

“[Agents from other parties other than ODM were harassed] I did not see the agents being harassed. I do not recall the returning officer who was at the polling station. I am not aware that the returning officer was at the polling station. I said the returning officer is at the constituency. My advocate may have written the wrong thing because I was speaking in Kiswahili. I have only gone up to standard 7. When I signed the affidavit, the advocate did not read the affidavit back to me.”

No agents were called to testify on the alleged harassment of the petitioner’s agents. The witness said the information in his affidavit was reported to him by agents who had not sworn affidavits to confirm the allegation. This is obviously hearsay.

29. **Dead Voters**

While the petitioner (PW1) alleged that persons voted using the Identity cards for dead voters she was not able to produce evidence that such incidents happened. She did not produce any document to show that a particular dead person was shown on the register as having voted. **PW3**, who also testified on this issue, clearly relied on hearsay evidence of his agents as follow:

“Deceased persons voted for – my agent called me that there was a person with ID of John Odhiambo Auma. I was informed by my agent. I cannot tell that the person who used the ID for John Odhiambo Auma voted for the 1st respondent. It is not my evidence that the vote was for the 1st respondent. It is the advocate’s mistake. The affidavit has errors. There are places where I do not accept. Others are my statements.

John Odhiambo Auma – deceased

The affidavit refers to John Adhiambo Auma. The name John Adhiambo Auma and John Odhiambo Auma are different names. Burial permit for Lawrence Otieno has been altered from Boniface. I got it from the agent. I do not know whether it was the agent who cancelled.

[Paragraph 9] 1st respondent lied to people to obtain ID's for dead voters. I heard this incident happened I did not witness it."

There is no direct evidence of the allegation that dead persons were voted for, and the court must reject the complaint as unproved.

30. **Illiterate voters**

There was a an allegation that the officers of the electoral commission were directing the illiterate voters to vote for the ODM candidates, a fact which was sought to be established by PW2 who claimed to have upon receiving he complaints from her agents pretended to be illiterate to see the treatment of illiterate voters, and she reported as follows:

"I was given two ballot at Lwala. I returned one. I used only one. I consider that it was done intentionally. When I returned it, the officer did not insist that I take two. The other ballots were given not in ones.

Section 58 of the Elections Act – offence for a person who pretends to be illiterate so that he may be assisted to vote. [paragraph 4 of the affidavit] – I pretended to be an illiterate voter."

On reexamination PW2 said: *"I was the coordinator in Awendo and Uiri constituency. I voted at Lwala primary school. Yes. I pretended to be an illiterate voter. I was given 2 presidential ballot papers. I took one ballot and I left the other with the clerk. I pretended because I had received phone calls from my agents that those who did not know how to write were being shown to vote ODM for all the candidates. I had to pretend because that was the only way to establish the truth. I was told to vote for ODM for all the six candidates."*

The agents who allegedly informed the PW2 about the irregularity did not swear any affidavits and the witness did not report the matter to the police. Counsel for the respondents asked the court to convict the witness for an offence under section 58 of the Elections act for pretending to be an illiterate vote. The Court ruled at the time that it would consider making the report to the Director of Public Prosecutions in the final judgment of the court under section 87 (1) of the Elections Act which is in the following terms:

"87. (1) An election court shall, at the conclusion of the hearing of a petition, in addition to any other orders, send to the Director of Public Prosecutions, the Commission and the relevant Speaker a

report in writing indicating whether an election offence has been committed by any person in connection with the election, and the names and descriptions of the persons, if any, who have been proved at the hearing to have been guilty of an election offence.”

Under section 9 of the Penal Code it matters not the good intentions or motive with which a criminal act is committed. The witness clearly committed the offence and having heard the witness before the court admit that she pretended to be an illiterate voter, it the duty of this court to report the election offence to the Director of Public Prosecution with a hope only that the court that finally deals with the matter will consider the unwitty motivation of the witness to ‘catch’ the officials who were alleged to be making breaches of the election law.

As regards, the alleged irregularity of giving more ballot papers and directing voters to vote in a particular way being themselves offences require a higher standard of proof than mere preponderance of evidence. Significantly, the County Returning Officer DW5 for the area in question denied the allegations as follows and there is no further evidence to counterweight the rebuttal:

“The illiterate must have been assisted. I am not aware of any person who pretended to be illiterate and was not assisted. The person may also have pretended in the evidence before the court. The information in my affidavit was partly obtained from my officials on the ground.”

The Petitioner did not produce independent testimony from voters to prove the allegation.

31. Over-voting

The petitioner alleged that in certain station there was over voting with the number of the votes cast exceeding the registered voters. In this contention, the petitioner relied on a register attached to her petition which she alleged to have obtained from officials of the Electoral Commission at the Tallying Centre. Although its authenticity was doubted by the counsel for the respondents, the petitioner’s list had some entries in agreement with the Registration Centre Reference Books for several Polling stations examined by the court. It would appear that although the petitioner’s register was not wholly accurate, the same had some valid entries as compared to the official IEBC register. The parties are bound by the Register presented by the IEBC as the constitutional body charged with the management of election under Article 188 of the Constitution

32. However, on the primary documents of form 35 there were no instances of over-voting or even 100% voting despite high turnouts generally. As observed by the Supreme Court in the Presidential Petition Nos. 3, 4 and 5 of 2013, *Raila and Ors v. IEBC and Ors*. the register of voters in Kenya existed in the form of three registers which the commission could use separately to ensure the enforcement of voting rights of the voters. The Court said:

[248] The 1st and 2nd Petitioners’ cases turn on the validity or invalidity of the “Principal Register of Voters.” The point was taken up in evidence, and was substantially canvassed in the submissions. What is the

“Principal Register of Voters”” In the light of the provisions of the Constitution [Articles 38(3) and 83] and of the Elections Act, 2011 [Sections 2, 3, 4], and of the evidence adduced in Court, we must conclude that such a register is *not a single document*, but is an amalgam of several parts prepared to cater for *divers groups of electors*. The number of parts of a register and the diversity of electors for whom it is prepared, is dictated by law, and the prevailing demographic circumstances of the country’s population. The register can also take several forms, as contemplated by Section 2 of the Elections Act, which stipulates that such a register *“includes a register compiled electronically.”*

[249] The multiplicity of registers is a reality of Kenya’s voter registration system which is recognized in *law* and widely acknowledged in *practice*. The register once developed and finalized, is disaggregated and dispersed to various electoral units, to facilitate the process of voting. Such units include the polling stations, the wards, the constituencies, the counties, and even the Diaspora voting centres.

[250] It is plain to the Court that the argument of the Petitioners that the Presidential elections of 4th March, 2013 could only have been based on the BVR element of the Principal Register of Voters, is not tenable; nor is it tenable to contend that the BVR Register all by itself, was the Principal Register of Voters.

[251] To guarantee the credibility of the voter register, the agency entrusted with responsibility (IEBC) for voter registration must ensure as follows:

- (a) *all those who turn out to register are qualified to be registered, in accordance with the constitutional and legal requirements;*
- (b) *all those who turn out to register are actually registered and their particulars accurately captured;*
- (c) *the administrative arrangements put in place to facilitate the registration process are simple, transparent and accessible;*
- (d) *the public and political actors are kept informed of the various steps in the register-preparation process;*
- (e) *the resultant register is verifiable.*

[252] We are inclined to accept the explanations given by the 1st and 2nd Respondents, of the mode of compilation of the voters’ roll. The depositions of the 2nd Respondent and of Immaculate Kassait, and especially when taken alongside the submissions of learned counsel, Mr. Nyamodi, have conveyed a credible account on the manner in which the voters’ register used in the 4th March, 2013 Presidential election, was prepared. The *legal burden of showing* that the voters’ register as compiled and used, was in any way in breach of the law, or compromised the voters’ electoral rights, was not, in our opinion, discharged by the Petitioners.”

33. The Petitioner objected the creation of one Green Books for two stations is part of the discretion of the

IEBC recognized by the Supreme Court as shown in the **Raila** decision, above. It is understandable in view of the explanation by the Returning officers who said they were forced to combine two registration centres into one Green Book after they were only issued with half their necessary allocation of the registration kits, the Biometric Voter Registration machines. In view of his fact, the petitioner's objection cannot stand.

Whether irregularities proved

34. Errors and Cancellations in Form 35 and Form 36.

In answer to the questions before the court, it was established that there were errors, cancellations in both Form 35 and Form 36 for the County and for the constituent constituencies and that some of them had not been signed by agents and some were signed by more agents than the number of candidates for the particular election.

35. There were no election offences proved. It has not been established that there were persons who voted using dead voter's cards or that the 1st respondent was involved in any such bribery or intimidation.

36. Whether the irregularities affected the result.

The County Returning Officer and the eight returning officers for the constituencies in the County testified and no material differences in the results that would affect the outcome were established. Indeed DW9 in admitting an error in failing to post votes for the candidates for 11 stations in Awendo Constituency showed that the margin of difference between the petitioner and the 1st Respondent would widened after taking into account the error. She said: *"The loss for the petitioner 1436; the 1st respondent 3445. The margin of difference is widened. It could not have affected the results."*

37. The margin of difference in votes between the 1st respondent and the petitioner is in the region of 130,000 votes, the 1st Respondent garnering 189,145 and the Petitioner runner-up 58,976. The dictum of Georges CJ. In **Mbowe vs. Eliufoo** [1967] EA is most apt in this case:

*"In my view, the phrase affected the result; the word result means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. **But when the winning majority is so large that even substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non compliance of the rules.**"*

38. It has not been shown that the irregularities amount to substantial non-compliance with the election law set out in the constitution and the Elections Act or that the irregularities would affect the result of the election as required under section 83 of the Election Act.
39. In accordance with Article 105 of the Constitution, this court determines and confirms that **DENNITAH GHATI** was at the General Election of 4th March 2013 validly elected as the Women Representative for Migori County. **Accordingly, the Certificate of the Court as to the validity of the election will, pursuant to section 86 of the Elections Act, issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly, forthwith.**
40. A further certificate shall issue pursuant to section 87 (1) of the Elections Act to the Director of Public Prosecutions for his further action in relation to the Petitioner's Witness No. 2 (PW2) **Leah Awour Obago** who admitted that she pretended to be an illiterate voter contrary to section 58 (o) of the Elections Act, which reads as follows:
- "58. Any person who –*
- (o) Pretends to be unable to read or write so as to be assisted in voting;...*
- commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding six years or to both."*
41. The petitioner has established that there were irregularities in the election management by the Independent Electoral and Boundaries Commission. The irregularities were however not of such magnitude as to affect the result. No irregularities or electoral offences were proved against the 1st respondent. The 1st Respondent will therefore be entitled to costs of the petition to be paid in equal shares by the Independent Electoral and Boundaries Commission and the Petitioner in such sum as shall be agreed or taxed by the taxing master of the court not exceeding Kenya Shillings Two Million (Ksh.2M).
42. The court thanks counsel for the parties Mr. Nyangoro for the Petitioner, Mr. Ondieki for the 1st Respondent and Mr. Odhiambo for 2nd – 11th Respondents, for their diligent presentation of the brief before the court and for their assistance to the court by way of statutory and case authorities.

Dated, signed and delivered this 7TH day of OCTOBER 2013.

.....
EDWARD M. MURIITHI

JUDGE

In the presence of: -

N/A

- for the Petitioner

Petitioner Absent

Mr. Odhiambo H/b for Ondieki - for the 1st Respondent

Mr. Odhiambo - for the 2nd - 11th Respondent

Mr. Edwin Mongare

- Court Clerk



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