



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT CHUKA

ELECTION PETITION NO. 1 OF 2013

CHARLES NYAGA NJERUPETITIONER

=VERSUS=

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST RESPONDENT

NEVERT NTWIGA.....2ND RESPONDENT

JUDGMENT

Introduction

1. When the country's General Elections were held on the 4th of March 2013, voters in Mitheru Ward, Maara Constituency within Tharaka Nithi County, went to the polls to elect their representative to the County Assembly. There were 8 (eight) candidates including the petitioner and the 2nd respondent. The Independent Electoral and Boundaries Commission (hereinafter referred to as the 1st respondent) which was responsible for conducting the elections, declared the 2nd respondent as the duly elected County Assembly representative for Mitheru Ward, Maara Constituency and was gazetted as such on the 13th March 2013. The election results were as follows;

1. Charles Nyaga Njeru	- 2174 votes
2. Ireri Gitonga Njeru	- 839 votes
3. Joshiah Jackson Njeru	- 60 votes
4. Lucy Muthoni Ndiga	- 681 votes
5. Nevert Ntwiga	- 2294 votes
6. Oswald Njagi Mbogo	- 314 votes
7. Patrick Micheni Njeru	- 190 votes
8. Simon Jonah Mugambi	- 394 votes

The petitioner being aggrieved by the results, filed the present petition and of course, the respondents filed their respective responses.

Pleadings filed by the parties

2. The petitioner filed his petition on 5th April 2013 through his Advocates Wambugu Kariuki & Associates. His claim in brief is that had the 1st respondent's officials recorded the correct votes he got at Kamachuku primary School that is 176 votes and not 17 votes he would have received

a total of 2333 votes and emerge the winner instead of the 2nd respondent who is alleged to have received a total of 2294 votes which figure was improperly tallied as he ought to have received 2289 votes. He would have been therefore ahead with a margin of 44 votes. In his petition he has sought for the following orders.

- a. **The total votes for Mitheru Ward be retallied to establish the total votes in all the 28 polling stations received by the petitioner and the 2nd respondent.**
- b. **The election of the county representative for Mitheru Ward be declared null and void.**
- c. **The subsequent gazettement of the 2nd respondent as the elected county representative for Mitheru ward be nullified.**
- d. **That there be an order declaring the petitioner as the validly elected Mitheru Ward County Representative and not the 2nd respondent and/or order for fresh election of the Mitheru Ward county representative to be conducted.**

The petition is supported by his supporting affidavit sworn on 5th April 2013. He further claimed that 11 votes were not accounted for at Mugona primary polling station. Two voters could not vote as they could not find their names in the register of voters or in the Biometric Voter Registration Identification. He has averred that there were massive irregularities making the elections not free and fair. He has annexed to his affidavit the following documents;

- i. "CNN-1" – A copy of form 36.
- ii. "CNN -2" – A copy of a complaint letter to the 1st respondent dated 8/3/2013.
- iii. "CNN3" – His agent's sworn affidavit.
- iv. "CNN4" – A copy of Kenya Gazette dated 13/03/2013.
- v. "CNN5" – His agent's sworn affidavit.
- vi. "CNN6" – His agent's copy of National Identification card.
- vii. "CNN7" –A copy of form 35, Mugona Primary School polling centre.
- viii. "CNN8" – His witnesses' sworn affidavit.
- ix. "CNN9" – His witnesses' copy of National Identification Card and Acknowledgement Slip.
- x. "CNN10" –His witnesses' sworn affidavit.
- xi. "CNN11" – His witnesses' copy of National Identification Card and Acknowledgment slip.

3. The 1st respondent entered appearance and filed it's response on 17/4/2013 through it's Advocates Iseme Kamau & Maema. It's answer to the petition is briefly that the 4th March 2013 elections for Mitheru county representative was conducted in accordance with the principles set out in the constitution. The Independent Electoral and Boundaries Commission Act, the Elections Act 2011 and the regulations thereunder. It maintained that it never discriminated the petitioner and that the petition is speculative and presumptive. It stated that the petition fails to satisfy the evidential threshold to validate the factual assertions made by the petitioner. Lastly that the court must apply the public interest test, the proportionality test and the harm test in hearing and determination of the petition. The affidavit of the 1st respondent's returning officer in charge of Maara constituency in Tharaka Nithi County briefly states in reply to the petition that the elections were conducted in accordance with the governing laws. That the candidates or agents present at the polling station were allowed to verify the results and sign against form 35. She admitted that an error in tabulation at Kamachuku Primary School polling station was discovered and clarified in writing by the presiding officer, vide "HNM1". The error affected all the candidates but did not materially affect the outcome of the election as the 2nd respondent was still leading with 2,344 votes and hence rightfully declared the winner. She stated that the alleged 11 votes unaccounted for are clearly captured in form 36 and that no complaint was raised by any voter to the effect that he or she had been denied to vote particularly at Giampampo and Karimba polling

stations. She denied that there was any violation of the petitioner's constitutional, civil and political rights since the elections were conducted in a free, fair, transparent and impartial manner.

The 2nd respondent equally entered appearance and filed his response on 17/4/2013 through his Advocates Kinyua Murithi & Co. In his response he maintains that he was validly elected as the county representative of Mitheru Ward and that the petition lacks substance in law and in fact as it is premised on self-interest and the wrong principles of law.

4. On 17/5/2013 the petitioner filed a Notice of Motion application seeking to amend his petition on grounds that after receiving forms 35's belatedly it was clear to him that most of the recorded details of the elections in the said forms had alterations in favour of the 2nd respondent. He proceeded to list the polling stations whose form 35's had alterations. The respondents made their respective replies thereto. The application was canvassed on 21/5/2013 and the court gave its ruling on 28/5/2013. The court basically declined to allow the application on the reasons that there is no provision in the Elections Act and all other Electoral laws clothing it with power and discretion to grant an amendment to a petition outside the 28 days provided for in section 76 (1) (b) of the Elections Act and Article 87 (2) of the Constitution. The court proceeded to finalize the pre-trial conference on 28/05/13. At the close of the pre-trial conference the petitioner's counsel expressed his intention to file an application for scrutiny. The respondents did not object to that and were of the view that the application if filed would be heard simultaneously with the petition. The court then directed counsel to file his application any time during the hearing as that is allowed under the rules. The case was then fixed for hearing on 24/6/2013 to 28/06/2013. Before the case was heard the petitioner through his counsel filed a Notice of Motion on 13/07/2013 seeking re-tallying and/or fresh scrutiny of votes in the entire ward and particularly 18 of the polling stations which he alleged had clear visible undisputed evidence of alteration of records. The respondents of course filed their respective responses. The application was heard on 24/6/2013 after the parties closed their cases. The court gave its ruling on 1/7/2013 and directed that there be a recount of votes in all the polling stations for the reasons that the margin was very narrow that is 11 votes utmost. The court will later in this judgement discuss briefly the observations and findings of the scrutiny exercise.

The petitioner's evidence

5. The petitioner testified on 24/06/2013 and called two witnesses in total. His evidence in chief was that he did seek during the 4th March 2013 elections to be voted in as the representative of Mitheru Ward to the county Assembly. On 5/03/2013 the 2nd respondent was declared the winner as indicated at paragraph 8 of his petition. He testified that he had evidence that what was announced as the results of Kamachuku polling station are not the results recorded in form 35 of the said polling station. He further stated that he was not content with the results recorded in several of the forms 35's because several of them had alterations which had not been countersigned and for that reason he wanted the votes cast in Mitheru Ward to be recounted. He testified that he witnessed the delivery of the ballot boxes at the 1st respondents offices situate at Chuka/Igambang'ombe Constituency and observed that some ballot boxes had different serial numbers. Kamachuku and Gaketha polling stations' forms 35s had different serial numbers from the ones supplied to the court. He stated that forms 35s of Gaketha and Kamachuku polling stations affixed outside the respective boxes had been placed upside down. It seemed to him that the forms had been removed and affixed again. He stated that the form 35 for Kamachuku polling station which was supplied to the court had serial number 25820 whereas the box had serial number 175900. He continued to testify that the official announcement of the results was

done on 5/3/13 however a further announcement indicating the correct results of Kamachuku polling station was done on 10/3/2013 in his absence and his agents. He stated that the results announced on 10/3/2013 are indicated in the returning officer's (DW1) affidavit at paragraphs 8,9 and 19 (a-i). He stated once again that he wanted the ballot boxes to be opened and looked at again. He finalized his case by urging the court to grant him orders sought in his petition.

6. The petitioner's witness (PW2) by the name Rose Ntinyari Karimi testified that she was one of the petitioner's agents at Kamachuku Polling Centre and she was certain that the petitioner received 176 votes but only 17 votes were indicated in form 35. She stated that she swore an affidavit and relied on it. The petitioner's second witness (PW3) by the name Martin Mwiti Kaburu testified that he was appointed by the petitioner's party Alliance Party of Kenya to be his agent. His evidence in chief was that 11 votes were not accounted for at Mugona polling station. He stated that he relied on his sworn affidavit.

The respondent's evidence

The 1st respondent called one witness by the name Hellen Ndaki Mutuva (DW1). Her evidence in chief was that she works for the 1st respondent as a constituency coordinator in Maara and that Mitheru Ward is in Maara Constituency. She stated that she swore an affidavit on 17/4/2013 and relied on its contents. The court has highlighted contents of the said affidavit at paragraph 3 herein. There is therefore no need of duplicating the same. The 2nd respondent called no witness. He relied on his replying affidavit. The court has highlighted contents of the said affidavit at paragraph 3 herein. There is therefore no need of duplicating the same. After the case was fully heard I repeat once again that the petitioner's Notice of Motion application dated 13/6/2013 seeking retallying and/or fresh scrutiny of all the polling stations particularly the ones mentioned in the application was heard. The court gave its ruling and directed that there be scrutiny limited to a recount of the votes in all the 28 polling stations. As I have already stated, I will discuss the observations and findings of the scrutiny exercise as I address the issues for determination that were agreed by the parties during the pre-trial conference held on 28/05/2013.

The Courts determination

7. I have carefully considered the evidence adduced by all the witnesses, documentary evidence placed before me, all the pleadings on record, learned counsels rival arguments and submissions on behalf of their respective clients. Lastly I have paid regard to the persuasive authorities placed before me for consideration. The issues which were agreed upon by the parties for determination are as follows;

1. What were the actual election results of the petitioner and the 2nd respondent in Kamachuku primary station"
2. Whether there were any errors of entry of form 35's and 36 in respect of Kamachuku Primary School polling station and Mugona Primary School, and if so, whether the errors materially affected the outcome of the elections"
3. Whether the 2nd respondent was validly elected as the County Assembly representative for Mitheru Ward"
4. What consequential declarations and orders ought the court make"
5. Who ought to bear the costs of this petition"

I will proceed to determine each of the issues as follows;

1. What were the actual election results of the petitioner and the 2nd respondent in

Kamachuku Primary School polling station"

This station had 3 (three) forms 35s as follows;

- i. Form 35 serial number 35 CA 0296 00025820 was supplied to the court by the 1st respondent on 21/05/2013. According to the recording in the said form the petitioner received 17 (Seventeen) votes whereas the 2nd respondent had 5 (five) votes.
 - ii. Form 35 serial number 35 CA 0296 00025817 was supplied to the court by the 1st respondent on 17/4/2013. According to the recording on the said form the petitioner had 176 (one hundred and seventy six) votes whereas the 2nd respondent had 55 (fifty five) votes.
 - iii. Form 35 serial number 35 CA 029600175900 was affixed outside the ballot box. According to the recording on the said form the petitioner had 17 (seventeen) votes whereas the 2nd respondent had 5 (five) votes.
8. The form that was deposited inside the ballot box was of serial number 35 CA 029600025817. The petitioner had 176 (one hundred and seventy six) votes whereas the 2nd respondent had 55 (fifty five) votes. Form 36 shows that the petitioner received 17 (seventeen) votes whereas the 2nd respondent received 5 (five votes). The court did not have the benefit of hearing from the presiding officer to know exactly what transpired. He is the only person who can explain how the form with the correct votes ended up in the ballot box and the form with the incorrect votes used to announce the results. What is before court is a report (annexture "HNM1") purported to be written by the presiding officer explaining the error. The returning officer has admitted in her replying affidavit sworn on 17/4/2013 at paragraph 9 that indeed there was an inadvertent error in tabulation and transfer of figures to form 36. She has admitted that the petitioner was erroneously given 17 (seventeen) votes instead of 176 (one hundred and seventy six) votes. At paragraph 9 (c) she has stated that the error affected all the candidates but did not materially affect the outcome of the election. The petitioner's witness did testify that indeed the petitioner received 176 (one hundred and seventy six) votes at Kamachuku polling station.
9. During the recount the court made the following observations in respect to Kamachuku polling station.
- i. Form 35 was affixed upside down, and looked like it had been fixed more than once since the previous glue used to fix the form or another one was visible.
 - ii. There were 5 (five) broken seals inside the ballot box.
 - iii. The box was sealed with 4 (four) seals. 1(one) seal was missing.
 - iv. Upon recount, the petitioner had 175 (One hundred and seventy five) votes and the 2nd respondent 55 (fifty five) votes.
 - v. There were 4 (four) rejected votes and 3 (three) spoilt votes.
 - vi. Upon recount, the votes of all the candidates varied from what was initially recorded in form 36 and announced as the results.

On this issue the petitioner's counsel has submitted that due to the irregularities noted, there is nothing to call integrity of the election in this polling station. He has also submitted that on cross examination of the 1st respondent's witness it was very clear that the witness did open the ballot box to put inside form 35 of the corrected results where the petitioner received 176 (one hundred and seventy six) votes and the 2nd respondent 55 (fifty five) votes because she had testified clearly that after ballot boxes are sealed they can only be opened by an order of the court. He wondered how the corrected version of the results in form 35 ended up in the ballot box where the petitioner got 176 (one hundred and seventy six) votes and the 2nd respondent got exactly 55 (fifty five) votes as had been declared on 5/3/2013. He stressed that the returning officer Helen Mutava committed an election offence by directly opening the said ballot

box without the order of the court. He stated that, that is what exactly happened at Giampampo polling station. He maintained that the petitioner truly got 176 (one hundred and seventy six) votes and if that had been declared he could have been ahead of the 2nd respondent. He stated that there was interference of reducing the petitioner's votes by 1 vote and adding the 2nd respondent 50 (fifty) votes. According to him the petitioner received 176 (one hundred and seventy six) votes and the 2nd respondent 5 (five) votes.

10. The 1st respondent's counsels submission on the issue is that the petitioner garnered 175 (one hundred and seventy five) votes whereas the 2nd respondent obtained 55 (fifty five) votes in Kamachuku polling station. He stated that the said results were verified by both parties in the presence of the court and advocates for the parties. In respect to the irregularities noted in some of the stations particularly the missing seals, he submitted that the regulations which govern the sealing of ballot boxes are set out in regulation **81 (3) of the Elections (General) Regulations**, which provides as follows;

"After the procedure in sub regulation (2), the presiding officer shall seal the box with the seal of the commission and allow the candidates or their agents to fix their own seals on the ballot box, if they so wish". He submitted that there is no provision prohibiting or requiring the 1st respondent to put 5 (five) seals to the ballot boxes and further that it has not been contended that the seals which were put on the ballot boxes at the time of receiving the ballot boxes by the court or at the time of re-opening the ballot boxes for re-count were different. He further submitted that the boxes are not opened from the time of the sealing of the ballot boxes at the polling stations until the court opens them, unless they are opened pursuant to regulation **86 of the Elections (General) Regulations, 2012** and that scenario did not happen in the instant case.

11. With respect to the issue of broken seals findings their way into the box, he submitted that so long as there is no dispute that the seal placed by the presiding officer and the seals of the agents have been broken cannot be used to mean that the ballot boxes were tampered with because during the actual voting, the ballot boxes have seals, before counting exercise begins, the seals are broken. He stated further that there is no requirement to place the broken seals in the ballot boxes. Yet because of the lacuna in regulating how the broken seals are treated, some presiding officers place them in the ballot boxes while others do not. He further submitted that there was no irregularity on the part of the 1st respondent in handling the ballot boxes. The 2nd respondent's submissions on issue number one is that the petitioner's evidence and that of his witness (PW2) is that he received 176 (one hundred and seventy six) votes. She submitted that indeed there was an error in the results that were announced but after scrutiny it was clear that the 2nd respondent had 55 (fifty five) votes and the petitioner 176 (one hundred and seventy six) votes and not 5 (five) and 17 (seventeen) votes announced at the tallying centre. I have considered the parties rival positions on this issue. The petitioner has maintained that he received 176 (one hundred and seventy six) votes. At paragraph (f) page 3 of his submissions he has stated that the returning officer (DW1) committed an election offence by directly opening the ballot box for Kamachuku without the order of the court and should therefore be summoned.
12. It is trite that he who alleges bears the burden of proof. The petitioner has to prove that the 1st respondent's witness opened the Kamachuku polling station ballot box without the order of the court for the court to find that an election offence was committed and act accordingly. When it comes to statistical facts or facts intended to establish election offences thereby imputing criminal offences, the standard of proof must be beyond reasonable doubt because such offences attract serious sanctions. **(See, Onalo vs Ludeki & others [2008]3 KLR 614)**. The petitioner never swore an affidavit stating that the returning officer did open any of the ballot boxes in the entire Mitheru ward without a court order. He never gave such evidence when testifying. None of his

witnesses testified so. There was no evidence from his part that the seals which were used to seal the ballot box for Kamachuku after the results were announced were not the ones on the ballot box before the court. There is no evidence that 5 (five) seals were used to seal the box after the results were announced so that one can certainly say that by virtue of the fact that 1 (one) seal on the ballot box was missing and the fact that there were 5 (five) broken seals inside the box, the ballot box had been tampered with. If the court would have come to such a conclusion, then definitely it would have taken action against the presiding and returning officers. Unfortunately there is no cogent and credible evidence to show that the returning officer did indeed open the ballot box without a court order. There is no evidence that what was put in the ballot box when counting was over is not what was in the box when it was opened for re-count purposes.

13. This court did oversee the scrutiny exercise, since all witnesses had been heard. What the court observed is that all the ballot boxes had 5 (five) points where the seals are meant to be fastened. I therefore do not agree with the 1st respondent's counsel's submissions that there is no provision prohibiting or requiring the 1st respondent to put 5 (five) seals in the ballot boxes. At this point I am constrained to state that it is common sense that, the ballot boxes were not given a design for decoration. There must have been a valid reason why each ballot box has 5 (five) points for placing and fastening the seals and not 4 (four) or any other number even if the Act is silent. Unfortunately in the instant case as I have already stated, there is no evidence showing that the presiding officer sealed the box with 5 (five) seals after the counting was over. Again as all the parties who were in attendance during the scrutiny exercise can bear this court witness, some of the seals were so brittle that they broke easily while being fastened. The seal numbers on some of them were illegible. All I can say at this point and with tremendous respect is that the 1st respondent should find a more reliable way of sealing the ballot boxes alternatively to do away with them completely by going electronic. Another observation that was made was that it was possible for a person to put his hand in the ballot box and even open the sealed envelope when one seal is missing. It is therefore very important that measures are put in place to avoid any mischief.
14. All the same despite the fact that a few flaws were noted here and there during the scrutiny exercise, none of the parties raised any objection or expressed any dissatisfaction as to the way the exercise was carried out. Both the petitioner and the 2nd respondent signed the courts election recount and incidence form confirming that the results recorded therein were correct as per the re-count. The petitioner's witness PW 2 testified that she was an agent at Kamachuku polling station and the petitioner received 176 (one hundred and seventy six) votes. Though this witness might have gotten the correct number of votes, while giving evidence, it became apparent that she never attended any training and infact she never knew the work of an agent. My observation was that she was not a truthful witness. She lied that she attended a training at Chogoria but could not tell the venue of the training and the date it was conducted. She denied knowledge of the petitioner's annexure "CNN-3" an affidavit purportedly sworn by her. The court requested her to give her sample signature for comparison purposes. The courts observation was that the sample signatures were quite different from the one on annexure "CNN-3". The sample signatures however resembled the one on her supporting affidavit sworn on 5/04/2013. Be that as it may, I dismiss her evidence having made the court form an opinion that she was not a truthful witness and secondly she was not qualified to be an agent having not received any training or taken any oath.
15. At the end of the scrutiny exercise the following were the results of Kamachuku polling station;
 1. Charles Nyaga Njeru - 175 votes
 2. Ileri Gitonga Njeru - 107 votes
 3. Joshiah Jackson Njeru - 6 votes

- | | |
|--------------------------|------------|
| 4. Lucy Muthoni Ndiga | - 28 votes |
| 5. Nevert Ntwiga | - 55 votes |
| 6. Osward Njagi Mbogo | - 8 votes |
| 7. Patrick Micheni Njeru | -7 votes |
| 8. Simon Jona Mugambi | - 8 votes |

There were 4 (four) rejected votes and 3 (three) spoilt votes. The 1st respondent's witness admitted that there was an error in the results that were announced. They were as follows

- | | |
|--------------------------|-------------|
| 1. Charles Nyaga Njeru | - 17 votes |
| 2. Ireri Gitonga Njeru | - 183 votes |
| 3. Joshiah Kackson Njeru | - 8 votes |
| 4. Lucy Muthoni Ndiga | - 2 votes |
| 5. Nevert Ntwiga | - 5 votes |
| 6. Osward Njagi Mbogo | - 17 votes |
| 7. Patrick Micheni Njeru | - 148 votes |
| 8. Simon Jona Mugambi | - 10 votes |

There were 2 (two) rejected votes and 1(one) spoilt ballot paper. When both results are compared it came out clearly that each candidate was affected after the recount. Infact most of them lost some votes except Charles Nyaga Njeru, Lucy Muthoni Ndiga and Nevert Ntwiga who gained. The 1st respondent has annexed to its replying affidavit a report purportedly written by the presiding officer acknowledging the erroneous entry due to a mix up during reproduction of extra copies from the original copy. He further explains that the presiding officer by mistake entered results for the women representative in some of the form 35's meant for the member of County Assembly Ward. The author of the said report, did not swear any affidavit or give evidence in court. It is therefore difficult to weigh the truthfulness of the contents of the said report. All the same he gave the valid results as follows;

- | | |
|--------------------------|-------------|
| 1. Charles Nyaga Njeru | - 176 votes |
| 2. Ireri Gitonga Njeru | - 107 votes |
| 3. Joshiah Jackson Njeru | - 6 votes |
| 4. Lucy Muthoni Ndiga | - 28 votes |
| 5. Nevert Nwiga | - 55 votes |
| 6. Osward Njagi Mbogo | - 8 votes |
| 7. Patrick Micheni Njeru | - 7 votes |
| 8. Simon Jonah Mugambi | - 4 votes |

There were 3 (three) rejected votes.

16. The purported valid results are similar with the results of the recount save for Charles Nyaga Njeru who lost one vote and Simon Jonah Mugambi who gained 6 (six) votes that is after the recount. There is no evidence that the votes lost after recount by the said candidates particularly the petitioner were given to the 2nd respondent. There is also no evidence from the petitioner's part that the 2nd respondent did not get 55 (fifty five) votes at Kamachuku polling station. Both PW 2 and PW 3 who were the petitioners agents testified that they did not know what the other candidates received at Kamachuku, Mugona and indeed all the other polling stations. PW 2 testified that she was only interested in knowing what the petitioner had received. At this point, I have to state that it is crucial for the candidates to ensure their agents get proper training so that they can be represented ably. During the recount none of the parties expressed any dissatisfaction to the way the exercise was conducted. Any issue raised with

respect to rejected and spoilt ballot papers was dealt with there and then by this honourable court. Having said that I am inclined to go by the results of the recount and do make a finding that the parties election results at Kamachuku polling station were as follows;

- i. The petitioner, Charles Nyaga Njeru 175 (one hundred and seventy five) votes.
- ii. the 2nd respondent, Nevert Ntwiga 55 (fifty five) votes

2. Whether there were any errors of entry of form 35s and 26 in respect of Kamachuku Primary Polling Station and Mugona Primary School, and if so whether the errors materially affected the outcome of the elections"

The 1st respondent's counsel submission on this issue is that the first form 35 which was filled at the station being serial number 35 CA 00025817 had correct votes. The same entries also appear in form 35 which was deposited in the ballot box being serial number 35 CA 029600025816. A comparison of these two forms with the actual results realized following the recount indicates that the above forms had correct entries save for the entry of Charles Njeru which indicated 176 (one hundred and seventy six) votes.

He further submitted that form 35 in court, serial number CA 35 0296 00025820 and form 35 posted outside the ballot box serial number 35 CA 0296 00175900 had errors of entry. In respect to Mugona Primary School, counsel submitted that form 35 in court being serial number 35 CA 0296 00025781 reflected 11 rejected votes. On opening the ballot box, all the figures indicated in the form were confirmed. It was however discovered that 8 votes indicated as rejected were improperly rejected as they were apparently marked in favour of the petitioner. He submitted further that the errors aforesaid were made in good faith due to pressure of work and the extremely exhausting circumstances surrounding the elections and in any event they do not affect the outcome of the elections because if the errors committed at Kamachuku and Mugona polling stations are rectified the petitioner ends up with a total of 2319 votes against 2348 votes obtained by the 2nd respondent hence leading with 29 votes. He relied on the case of Joho v Nyange (No.4) where the court stated as follows;

"Some errors in an election are nothing more than what is always likely in the conduct of human activity. If the errors are not fundamental, they should be excused or ignored"

The petitioner's counsel's submissions are that the evidence of the returning officer (PW1) was that the petitioner had gotten 17 votes and the 2nd respondent 5 votes as at the time of announcing the results on 5/3/2012 which are reflected in form 35 in court serial No. 34 CA 0296 00025820. Her further evidence was that after declaring the results either the petitioner or his agent for 3 days kept following her on phone to tell her there was a mistake in the votes obtained by the petitioner. She then made a follow up with the presiding officer and established that indeed there was a mistake and that she rectified the mistake so as to give the petitioner 176 votes and the 2nd respondent 55 votes.

18. She tallied the results and made a conclusion that the 2nd respondent was still ahead and hence no need for her to recall the results. He submitted that on cross examination it was very clear that the witness did not open the ballot box to insert/put inside form 35 of the correct results because she stated clearly in her evidence that after the boxes are sealed, they can only be opened by an order of the court. That being the position the petitioner wondered how the corrected version of the results got inside the box because the form 35 that was inside during recount was for the corrected results where the petitioner got 176 votes and after recount reduced to 175 and the 2nd respondent got exactly 55 votes as in the corrected version not the 5 votes that had been declared on 5/3/2013. He further submitted that after recount it was established

that he had lost 8 votes that were valid but had been considered together as 11 votes that were valid but had been considered together as 11 votes that had been previously rejected. The 2nd respondent's counsel acknowledged that there was an error in the initial results declared but after scrutiny it was clear that the 2nd respondent had 55 votes and the petitioner had 175 votes and not the 5 and 17 votes initially announced at the tallying centre. It was therefore a confirmation of what the 1st and 2nd respondents told the court that there was an error which was later rectified after DW1 learnt of the said mistake from the petitioner and/or his allies. In respect to Mugona Primary School, she submitted that upon scrutiny it was clear that the 11 votes were rejected votes though 8 of them had been marked in favour of the petitioner and parties agreed unanimously that they be counted as valid votes for the petitioner. She further submitted that there was nothing peculiar in them having been marked in favour of the petitioner but marked rejected as during the exercise it was noted there were other similar cases. It therefore became clear that some presiding officers would mark some votes as rejected where a mark had not been indicated in the box or where it was illegible. She finally submitted that the errors did not affect the outcome and relied on the cases of **Wavinya Ndeti vs Alfred Nganga Mutua and Stephen Kemuki vs George Mike Wanjohi Mumbi Election petition No. 2 of 2013.**

19. The court has considered learned counsels opposing submissions. It is not in dispute that all counsels admit there were errors of entry in form 35s in respect of Kamachuku and Mugona polling station. Form 36 is a product of form 35 and if there were errors of entry in form 35s then they were definitely transferred to form 36. Indeed as the court observed and as counsels submitted form 35s for Kamachuku polling station had different results. There were three form 35s. Two with the same results and the other one with a different result. The two form 35s which had similar results were used to transfer the results to form 36. It then comes out that the form that had a different result was the correct one but after recount the petitioner lost 1 (one) vote. At this point I must state that the idea of having form 35s with unique serial numbers could be good but very confusing even to the election officials. If there could be one original form 35 to be filled in triplicate or whichever number perhaps it would have been easier for anyone scrutinizing the results and even for the election officials because any mistake that would appear in the original form would appear on all the other carbon copies. That said, it is up to the 1st respondent to come up with a reliable method of filling form 35s. There were two forms 36 with almost similar results except the one relied upon by the petitioner which he claimed was an original copy supplied by the 1st respondent was signed by the agents, whereas the one the 1st respondent claimed he relied on to announce the results was not signed by the agents.
20. In the form 36 relied upon by the petitioner the 2nd respondent had 232 (two hundred and thirty two) votes at Karimba Primary School and his total votes in the entire ward were recorded as 2294 (two thousand two hundred and ninety four) votes. When the court added up the figures the total came to 2289 (two thousand two hundred and eighty nine) votes. The petitioner has mentioned that discrepancy at paragraph 8 of his petition. The unsigned form 36 relied upon by the 1st respondent shows that the 2nd respondent received 237 (two hundred and thirty seven) votes at Karimba Primary School and a total of 2294 (two thousand two hundred and ninety four) votes in the entire ward. In the same form the total votes of Joshiah Jackson Njeru in the entire ward are recorded as 60 (sixty) votes whereas in the form 36 that is signed by the agents and relied upon by the petitioner he had 80 votes. From the court's analysis there is no doubt that there were errors of entry of form 35s and 36s. Form 35 of Mugona polling station showed the number of rejected votes as 0(zero) whereas form 36 shows that the rejected votes were 11 (eleven). After recount it emerged that there were slight changes in the votes garnered by some of the candidates and even the margin between the petitioner and the 2nd respondent varied. It actually widened.
21. Now that it is clear that there were errors of entry, did the said errors materially affect the outcome of the election"

The petitioner's counsel submits that it is only the petitioner who has suffered the blunt of the calculated irregularities to diminish his votes as follows;

- a. **Mugona Primary School**- by having rejected his 8 votes to include them together with the other 3 validly rejected votes.
- b. **Giampampo** – the petitioner had been declared as having gotten 325 votes but after breaking the seals and doing a recount he lost 26 votes that were added to Simon Mugambi's votes while those of the 2nd respondent remained intact. The correct results ought to be as in form 35 in court since there was no other form 35 outside or inside the ballot box.
- c. **Kamachuku Primary School** –The petitioner got 176 votes but in attempts to salvage the loss to the 2nd respondent who had gotten 5 votes, the ballot box was broken into and 50 votes were added to the 2nd respondent and in the process reduced the petitioners votes by one. He relied on the case of **Raila Odinga vs I.E.B.C and 2 others** where the supreme court dismissed the petitioner stating “.....although there were many irregularities in the data and information captured during the registration process they were not so substantial as to affect the credibility of the electoral process and besides, no credible evidence had been adduced to show that such irregularities were premeditated and introduced by the 1st respondent for the purpose of causing prejudice to any particular candidate”.

He stated that the exact opposite is what happened at Giampampo, Kamachuku and Mugona. The irregularities as demonstrated during recount affected only the petitioner thus causing prejudice to him alone and not any other candidate.

Counsel also relied on the case of **Wabuge vs Limo and another [2008]IKLR 417** where the court ordered that a fresh poll be conducted because of a number of glaring anomalies in the way the election was conducted.

22. He also relied on the case of **William Maina Kamanda vs Margaret Wanjiru Kariuki & 2 others [2010] KLR** where the court declared the election as null and void because during scrutiny and recount it emerged that there was serious manipulation with the ballot papers and other election materials. The 1st respondent's counsel has submitted that the errors of entry and their resultant correction do not affect the outcome of the election because the 2nd respondent has a lead of 29 votes over those of the petitioner and has relied on the case of **Joho vs Nyange (No. 4)** where the court stated as follows;

Some errors in an election are nothing more than what is always likely in conduct of human activity. If the errors are not fundamental, they should be excused or ignored”. The 2nd respondents counsel has submitted that indeed from the scrutiny there were errors as compared with the results but the errors did not affect the will of the people. She relied on the case of **Wavinya Ndeti vs Alfred Nganga Mutua** (already mention at paragraph 18 herein) and further submitted that Justice Manjanja observed “**that perfection is an aspiration but the election process is a human endeavor carried out in the background and therefore errors are bound to occur but the question day is did the errors affect the will of the people**” She stated the errors did not substantially affect the will of the people. In any case upon scrutiny and recount the 2nd respondent still emerged as the winner.

In dealing with this issue I first acknowledge and as we all do that the recent election was a very important exercise and the first of its own kind in the country's history. Voters were required to elect six candidates at ago from the country's leader down to the County representative and due to the extraneous working conditions mistakes were bound to occur.

23. In respect to the issue of errors I associate myself with the courts sentiments in the case of **Joho v Nyange (NO.4)** mentioned at paragraph 22 herein and Wavinya Ndeti vs Alfred Ngangu Mutua mentioned in the same paragraph. That does however not mean that principles entrenched in the constitution governing elections should be trampled upon. **Article 81** of the constitution requires that the electoral system complies with principles "inter-alia" ***freedom of citizens to exercise their rights under Article 38, universal suffrage based on the aspiration for fair representation and equality of vote; and free and fair elections which are by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient and accountable manner.*** The 1st respondent having the legal mandate to conduct elections is required under **Article 86** of the constitution to ensure that;
- a. **Whatever voting method is used the system is simple, accurate, verifiable, secure, accountable and transparent;**
 - b. **The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;**
 - c. **The results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and**
 - d. **Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safe keeping of election material.**
24. The 1st respondent has submitted that the errors mentioned herein were made in good faith due to pressure of work and extremely exhausting circumstances. Human error is excusable, but taking an example of Giampampo Primary School, were the officials so tired that they had to tie some of the ballots with bread wrapping polythene papers or did they ran out of presentable strings to tie the ballots" Were they also so tired that they forgot to affix form 35 outside the box and place another one inside the box. Does it mean only one form 35 for that station was filled that is the copy availed in court" The petitioner has submitted that the only conclusion that can be made with regard to this polling station is, since the petitioner lost 26 votes upon recount, someone broke into the ballot box and reduced the petitioners votes but still concealed the involvement of the 2nd respondent whose votes appear intact at 37 and gave the votes to Mugambi who was a distant 3rd in the elections. Counsel submitted well, but the question is, what evidence is supporting the said allegations" Neither the petitioner or his witnesses testified that the 2nd respondent, Simon Jonah Mugambi or any of the other candidates did not get the votes that were indicated in the form 35 supplied to the court. No contrary results were tabled before the court for comparison.
25. In my own assessment there are indications that the ballot box for Giamampo Primary School was most likely tampered with. I cannot say that with certainty because there is no evidence. Nonetheless it can be argued, that is it was tampered with, the intention was either to give the petitioner more votes than he actually got or reduce what he actually got. Whichever the case the petitioner did not adduce any evidence linking anyone to the alleged tampering. It is therefore impossible to ascertain who interfered with the election materials and at what point. In the absence of any contrary results by the petitioner, it is not possible to say for certainty that any error or malpractice worked to his disadvantage and in favour of the 2nd respondent. The court as well as the parties did observe there were 2 forms 36. At this juncture, it is important to point out that under **Regulation 83 of the Election Regulations**, the 1st respondent was required to fill one form 36 setting out the results of the various polling stations. There is no provision for a returning officer to prepare two forms 36. The regulation requires one form 36 to be prepared to obviate disputes by contestants. The court finds that the 1st respondent breached **Regulation 83**

of the Election Regulations when she prepared two (2) form 36s. However the court quickly notes that from the results recorded in the two forms, there was no intention by the 1st respondent to subvert the democratic exercise by the voters of Mitheru Ward to elect the person of their choice. Besides the petitioner never demonstrated how the preparation of two form 36s affected the outcome of the results or prejudice him.

26. As I have already stated it is not enough for the petitioner to point out irregularities that took place during the elections or were discovered later, he must establish that the irregularities were of such a nature that it affected the exercise by the voters of the particular electoral area of their will to choose a candidate of their choice. I have considerably compared and analyzed the totals received by the petitioner, 2nd respondent and indeed all the other candidates at the time when the results of the general election were announced and those of the recount carried out by this Honourable court. I hold the view that while there were slight errors and a few malpractices in some of the polling stations whether by design, negligence or mere incompetence, that did not affect the outcome of the election materially. I say that because after the recount all the candidates occupied the same positions they held when the results were announced on 5/3/2013. The irregularities that the petition was able to establish are not of such a magnitude that can lead this court to make a finding that they were so material that they affected the overall standing of the candidates. Even if the court was to consider the 1(one) vote the petitioner lost at Kamachuku polling station, the 26 (twenty six) votes he lost at Giampampo polling station and the 8 (eight) votes he recovered from the 11 (eleven) rejected votes at Mugona he would end up with 2346 (two thousand three hundred and fourty six) votes. The 2nd respondent would still lead with 2348 (two thousand three hundred and fourty eight) votes.
27. It is public knowledge that most of the election officials if not all of them worked under a lot of pressure and in extremely exhausting circumstances. It is therefore understandable that mistakes were likely to be made by the officials. Having said that, I humbly suggest through this judgment that the 1st respondent does make a provision for more officials and increase polling stations in areas with huge population so that future elections are handled with less difficulty. It should also invest in training it's staff agents and even candidates for more efficient and reliable results so that litigation ceases to be a choice for many. I would also suggest that if it is possible or practical counting of votes should be done on a fresh day and in broad day light to avoid mistakes or mischief. The 1st respondent should have enough staff to preside the polls and a different group of staff to do the counting so that issues of exhaustion are minimized or do not arise.

3. Whether the 2nd respondent was validly elected as the County Assembly representative for Mitheru Ward"

I have analyzed the submissions before me in regard to this issue. Whereas the 1st respondents counsel has specifically and separately responded to this issue and indeed all the other issues agreed for determination, the petitioner's counsel jumbled up his submissions. He has not responded to each issue separately. The court has therefore to pick from the entire submissions what it thinks best answers a particular issue. The 2nd respondent's counsel adopted a similar manner of submitting though at the end of the submissions she has briefly given her view on each and every issue separately. All the same what I comprehend from the petitioners submissions is that the elections in question lacked integrity. Though I have addressed most of the integrity issues raised while addressing issues 1 and 2 I will nevertheless once again brush through the same. Counsels submissions state that some of the ballot boxes did not have all the five seals. They only had four seals. He has given examples of Giampampo Primary, Ndumbini and Iriani polling stations. Kagunjo polling station had all the five seals but were all broken meaning the box had not been closed legally or factually.

28. He has argued that sealing of the ballot boxes was the responsibility of the 1st respondent. He took great exception with the integrity of the ballot boxes at Giampampo and Kamachuku. He states the ballot box containing Giampampo votes had only four seals, there was no form 35 inside or even outside the ballot box and wondered where the form 35 which was in court came from. He further stated that the votes by each candidate were tied together with different nature of strings some with bread wrapping polythene papers and after the recount the petitioner's votes reduced by 26 (twenty six) votes whereas the 2nd respondent's votes remained intact. He went further to submit that at Kamachuku, the box had four seals only. There were marks on top of the ballot to show that form 35 must have been fixed more than once. There were also broken seals inside the box and finally that the correct version of form 35 where the petitioner was recorded as having received 176 (one hundred and seventy six) votes and the 2nd respondent 55 (fifty five) was inside the box. He wondered how the form got in the box because the form that was used to declare the results showed that the petitioner had recovered 17 (seventeen) votes and the respondent 5 (five) votes. He added that at Mugona the petitioner recovered 8 votes which had been counted as rejected votes. He has argued that it is only the petitioner who has suffered the blunt of the irregularities. He has relied on the case of **Raila Odinga vs IEBC & 2 others** already mentioned. The case of **Wabuge vs Limo & another [2008] IKLR 417** and **William Maina Kamanda vs Margaret Wanjira Kariuki & 2 others [2010] KLR**. I will touch on the cases when giving my views in respect to this issue.
29. At the end of his submissions he has urged the court to declare the petitioner as the winner based on the evidence on record viz -a-viz the law alternatively order for a by election because of the irregularities and committed election offences he has mentioned. The 1st respondent's counsel has submitted that the question as to whether the elections conducted by the 1st respondent in respect of Mithuru Ward County Assembly representative seat must of necessity entail an examination of the 1st respondent's conduct in the said election as alleged in the petition filed by the petitioner against the laws and relations which govern the 1st respondent's mandate in conducting the elections. He stated that the guiding principle in the said examination is **Section 83 of the Elections Act** which states as follows; ***"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 to the principles laid down in the constitution and in that written law or that the non compliance did not affect the result of the outcome"***. He stated that the principle was also captured in the case of **Joho v Nyange (No. 4)** by Justice Maraga. He has further argued that under **rule 10 (1) (e) and 10 (3) (b) of the Elections (Parliamentary and County Elections) Petition Rules, 2013** the petitioner was obliged to put all the facts and grounds he intended to rely on in challenging the validity of the elections in the petition and supporting affidavit. He submitted that the only complaint raised in the petition is in respect of Kamachuku Polling Station where he alleges he received 176 votes and even if the said votes were taken into account he would have received 2333 votes as against the 2nd respondent's 2294 and therefore emerge the winner. He has maintained that the minor errors made or noted at Mugona Primary School where 11 votes had been marked as rejected whereas they had been properly marked for the petitioner, Ciampampo where the petitioner was awarded 325 votes in form 35 instead of 299 votes and Simon Mugambi awarded 105 votes even though he had garnered 131 votes, Muthenge Apostolic Church where Lucy Muthoni was awarded 2 votes in form 35 instead of 3, Miungu Primary School where the petitioner was awarded 138 votes in form 35 instead of 137 votes and Simon Mugambi awarded 79 instead of 80 counted in his favour, did not affect the outcome of the election because once corrected the petitioner's position as a runner up is confirmed with 2319 votes whereas the 2nd respondent emerges the winner with 2348 votes.
30. In support of his submissions counsel has relied on the Nigerian court of Appeal decision **Olusola Adeyeye v Simeon Oduoye (2010)** and **John v Nyange (No. 4)** I will touch on the

cases while making my findings on this issue. He urged the court to find that the 2nd respondent was validly elected as the Mitheru Ward County Assembly representative.

The 2nd respondent's counsel has submitted along the same lines. I need not repeat the same. She has relied on the cases of John Kiarie Waweru vs Beth Wambui Mugo & 2 others [200]eKLR, Wavinya Ndeti vs Alfred Nganga Mutua and Steven Kariuki vs [George Mike Wanjohi Nairobi Election Petition No. 2 of 2013]. She has urged the court to find that the 2nd respondent was validly elected as the same had been determined during the recount. I will touch on the authorities cited later while making my determination on this issue. From the outset I have to state that the burden of proving that the 2nd respondent was not validly elected lies upon the petitioner. I therefore totally agree with the respondent's counsels submissions on the burden of proof. The petitioner got aggrieved with the outcome of the elections and decided to come to court to seek redress. His grievances ought therefore to be clearly stated in the plaint as provided for under **rule 10(1) (e) and 10 (3) (b) of the Elections (Parliamentary and County Elections)Petition rules 2013.**

31. The gist of the petitioner's complaint is that he was not given the correct votes at Kamachuku being 176 (one hundred and seventy six) votes and had the same been given to him, he would have emerged the winner. Of course there are other complaints that 11 (eleven) votes were not accounted for at Mugona polling station and two voters at Giampampo and Karimba respectively did not vote because their names were not in the register. Based on the said complaints he has sought orders that there be a retally of all the votes cast in the 28 polling stations, the election of the county representative of Mitheru Ward be nullified and the nullification of the gazette notice wherein the 2nd respondent was gazzetted as the duly elected County representative. The petitioner being the one alleging irregularities and malpractices bears the burden of proving the same and to the required standard. It is now appreciated that in Election Petitions the burden of proving the allegations lies with the petitioner. In **Raila Odinga vs IEBC & 3 others, Election Petition No. 5 of 2013**, the Supreme Court stated; ***"where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges for a long standing common law approach in respect of alleged irregularity in the acts of public bodies –Omnia Praesumuntur rite Solemniter esse acta: all acts are presumed to be done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law"***.
32. Similarly in the case of John Kiarie Waweru v Beth Wambui Mugo & 2 others (2008) KLR relied upon by the petitioner, the court expressed itself as follows;

"The burden of establishing all these allegations regarding the conduct of the election and the result announced thereafter is on the petitioner".

In the case of John v Nyange also relied upon by the 1st respondent Maraga J held as follows:

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

As regards the standard of proof the court associated itself with the case of John Kiarie Waweru v Beth Wambui Mugo & 2 others [2008] eKLR relied upon by the both respondents. The court stated at page 5 that

“As regards the standard of proof which ought to be discharged by the petitioner in establishing the allegations of electoral malpractices, there is consensus by electoral courts that generally the standard of proof in election petition cases is higher than that applicable in ordinary civil cases i.e that of proof on a balance of probabilities. The standard is higher than proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases”.

The standard was also applied in the case of John v Nyange quoted by the 1st respondent. The court had this to say;

“Election petitions are no ordinary suits but dispute 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 must be proved by cogent, credible and consistent evidence”.

This court also takes cue from the holding by Lenaola J in the case of Bernard Shinali Masaka vs Bonny Khalwale & 2 others [2011] eKLR where the learned judge held that;

“Further, I agree with the preposition grounded on the decision in Mbowe vs Eliufuo [1967]EA 240 that any allegations made in an election petition have to be proved to the “satisfaction of the court” like Rawal J in Onalo, I am certain that the standard of proof, save in matters where electoral offences are alleged, cannot be generally beyond reasonable doubt, but because of the quasi criminal nature of some election petitions, it almost certainly on a high degree than merely on a balance of probabilities, the latter being the standard in civil cases”.

33. From the above holdings the petitioner is therefore required to prove the allegations of electoral malpractices to the standard that is higher than that of a balance of probabilities that is applicable in civil cases but lower than that applicable in criminal cases i.e that of proof beyond any reasonable doubt. The petitioner has alleged that the 1st respondent's officer returning opened the Kamachuku ballot box without a court order. He however never adduced any evidence to the required standard linking her to such an offence. None of his witnesses stated that, they saw her commit the offence. The petitioner testified that he had agents at all the polling stations. His agent (PW2) never testified that she saw what was put in the ballot box before it was sealed. She did not note down the serial numbers of the seals that were used after the counting so that the same could have been compared with the ones that were broken by the court. She did not say how many seals were put on the box. In the absence of that, the petitioner's contention remains to be mere allegations. The petitioner also alleged that most alterations in form 35s were made in favour of the 2nd respondent but never gave the number of votes he thought or knew the 2nd respondent and indeed all the other candidates received in each polling station for the court to arrive at an informed finding. In any event, the issue of alterations was cleared upon recount. During the recount of the votes cast at Giampampo, the petitioner never raised any objection or express any dissatisfaction and ask the court to make a finding. He signed the courts recount incidence form meaning that he was in agreement with the votes he received at that station. Though no objection was raised the court noted and indeed all the parties that the box had been handled differently in the sense that some of the ballot papers were tied with bread wrapping polythene papers and not the standard strings.
34. The box had no form 35 stuck on the box or inside unlike the other boxes. It had broken seals and several election material inside. The question is, who is responsible for all these strange actions! The petitioner never called any of his agents from Giampampo to tell the court the state of the box at the time of sealing. In the first place the petitioner never raised any other

issue with Giampampo apart from the voter who was denied to vote. Even with that one, the said voter never testified neither was there proof that she was not allowed to vote because her name was to in the register. There is also no evidence that the respondent reduced the petitioners votes at Kamachuku by 1(one) vote. In essence the petitioner has not proved his allegations. The petitioner failed to lead evidence that would leave a trail of events clearly demonstrating that there was noncompliance of the law to warrant the invalidation of the election results. The Nigerian supreme Court in **Buhari vs Obasanjo (2005) (LRTK)** held ***“He who asserts is required to prove such a fact by adducing credible evidence. If the party fails to do so it’s case will fail. On the other hand if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have to the party’s adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result into the court giving judgment in favour of the party.***

35. The cases relied upon by the petitioners have elaborated quite well on the standard of proof and when or circumstances that can warrant an election to be annulled. The holding in the case of **Raila Odinga vs IEBC & 2 others** cited by the petitioner, the court noted that although there were many irregularities during the registration process they were not so substantial as to effect the credibility of the election. In the case of **Wabuge v Limo** and another cited by the petitioner, the court noted during scrutiny and recount glaring anomalies and inconsistencies. From the evidence led they were convinced that he ballot boxes had been tampered with. The court further stated that upon recount the 2nd respondents votes drastically reduced so that at the end the petitioner led by 479 votes. The court at holding 25 stated that.....” ***it is for the court to make up it’s mind on evidence as a whole whether there was a substantial compliance with the law as to the election or whether the act or omission affected the result***”. In this case I have already made a finding while addressing issue number two. Though there were errors committed at Kamachuku and Mugona, that did not affect the election results. Besides as submitted by counsel for the 2nd respondent **Section 83 of the Elections Act 2011** states that “***no election shall be declared to be 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 that written law or that the non-compliance did not affect the result of the election***”. This was the holding indeed in the case of **Steven Kariuki vs George Mike Wanjohi Nairobi Election Petition No. 2 of 2013** at paragraph 18. In the case of **Benard Shinali Masika& Dr. Boni Khalwale & 2 others Election Petition No. 2 of 2008**, the court stated at paragraph 47 ***“It must be bone in mind that in editing an electoral process to be determine whether the result as declared in an election ought to be disturbed, the court is not dealing with the mathematical puzzle and its task is not just to consider who got the highest number of votes. The court has to consider whether the grounds as raised in the petition sufficiently challenged the entire electoral process and lead to a conclusion that the process was not transparent free and fair”***. After analyzing the evidence before me, I am persuaded that the electoral process in question has not been challenged.

36. I find the circumstances in the case of **William Maina Kamanda vs Margaret Wanjiru Kariuki& 2 others [2010]eKLR** to be different. In the said case Justice Kihara (as he then was) declared the election to be null and void as the results of the scrutiny revealed serious manipulation with the ballot papers and other election materials. There was a huge gap between the return announced by the returning officer in respect of both candidates and the results on retally. In the instant case the margin upon recount was 29 votes up from 11 votes. The 2nd respondent still led and the petitioner came in second. There was no material discrepancy in the results declared by the 1st respondent and the finding made by the court on scrutiny. There is no doubt as I have said that, the petitioner was able to establish that the 1st respondent committed some

irregularities in the tallying of the results but on the other hand he failed to prove that they were of such a magnitude that the outcome of the results was affected. Having said that, this court cannot in the circumstances interfere with the choice of the people of Mitheru. They democratically elected the 2nd respondent as their county representative and as such I make a finding that the 2nd respondent was validly elected.

4. What consequential declarations and orders ought the court make

From the foregoing, I make a finding that the petitioner has failed to make his case, I decline to grant him orders (b) (c) and (d) sought in his petition order (a) having been taken care of by the recount. The petition is hereby dismissed.

5. Who ought to bear the costs of his application

The respondents counsels have submitted that the petitioner should pay for

the costs. The petitioner was silent on the issue of costs. Nevertheless it is

well established that costs are in the discretion of the court. In as much as the principle is established that costs abide the cause, where the court feels that a petition was filed which was not strictly speaking in the private interest but also advanced the public interest and that it was not filed maliciously the court should not burden the party who sought justice with costs of the petition see **Harun Mwau vs AG Constitutional Petition 65 of 2011**. The petitioner in the said case succeeded in part because he managed to prove irregularities on the part of the Independent Electoral and Boundaries commission which were admitted. In the instant case the petitioner came to court because he believed he was not given the votes he garnered at Kamachuku. Had it not been for that error he would have perhaps been content with the results. He even wrote a complaint to the 1st respondent annexure "CNN-2". The 1st respondent admitted that the presiding officer made the mistake while transferring the votes of the women representative. I am convinced that the petitioner did not file this petition with any malice. He came to court to seek justice. I hold the view that costs are an issue of access to justice and parties should not be discouraged from filing a petition by award of costs. Rule 34 allows for the costs awarded to be deducted from the security for costs. Having said that it appeals to me that, it is proper each party bears own costs. However for the costs awarded in the interlocutory application dated 17/05/2013 I direct that the same which should be reasonable be deducted from the security deposited and the balance if any be refunded to the petitioner.

As I come to the conclusion of my judgment, I take this opportunity to appreciate the exemplary input and cooperation by all learned counsels in seeing that this case is determined fairly and within the stipulated period of six months. I also wish to thank the petitioner and the 2nd respondent together with their supporters for remaining calm and patient all through.

From the evidence tabled before me I find that none of the parties committed an election offence. A certificate to issue forthwith and be served upon the speaker of the senate, National County Assembly and Tharaka Nithi County Assembly in accordance with Section 86(1) of the Elections Act 2011 having found that the 2nd respondent was validly elected as the County Assembly representative of Mitheru Ward, Tharaka Nithi County.

C. K. OBARA –SRM

31/7/13

Court - Judgment, read, signed and dated in open court on 31/07/13. Ms. Muthoni present for the 2nd respondent and holding brief for Mr. Nyaburi for the 1st respondent. No appearance on the part of the petitioners counsel. Petitioner however present. Court clerk Mutua.

C. K. OBARA – SRM

31/7/13



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