



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**KAKAMEGA LAW COURTS**

**ELECTION PETITION NO: 7 OF 2013**

**ARTHUR KIBIRA APUNGU.....1<sup>ST</sup> PETITIONER**

**JULIUS ABRAHAM SIKALO.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE RETURNING OFFICER**

**LUANDA CONSTITUENCY.....2<sup>ND</sup> RESPONDENT**

**CHRISTOPHER OMULELE.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. The Petitioners, Arthur Kibira Apungu and Julius Abraham Sikalo being aggrieved with the declaration of the 3<sup>rd</sup> Respondent Christopher Omulele as the elected member of the National Assembly for Luanda Constituency, filed a Petition dated 4<sup>th</sup> April 2013 together with Affidavits in support of the same sworn on the same date. They were represented by Mr. Muyundo. Both the Petitioners were candidates in the Parliamentary election having been nominated by different political parties to contest for the said seat. The Petitioners averred that the election was not conducted in accordance with the provisions of the Constitution, the Elections Act and the Regulations thereunder, which seriously affected the said election to their detriment. The Petitioners thus prayed for the following orders in their Petition:

1. There be a scrutiny of the votes cast and recorded as having been cast in the said election in Luanda Constituency.
2. There be a scrutiny of the rejected, void and spoilt ballot papers in the election.
3. There be a scrutiny of the counterfoils of the votes cast and the counterfoils of all other ballot papers used, rejected or spoilt in the election
4. There be a scrutiny of the register of voters

5. There be an inspection of the ballot boxes
  6. There be a recount of the ballot papers cast at the said election and the re-tallying of the totals of votes cast in all the polling stations in the said election.
  7. The said parliamentary election held on 4<sup>th</sup> March 2013 in Luanda Constituency be determined and declared null and void.
  8. It be determined that the 3<sup>rd</sup> Respondent was not and has not been validly elected as the Member of the National Assembly for Luanda Constituency
  9. The said election of the 3<sup>rd</sup> Respondent as the Member of the National Assembly for Luanda Constituency be determined and declared null and void.
  10. The Respondents be condemned to pay the Petitioners' costs and costs of the Petition.
  11. Such further, other and consequential orders as the Court may lawfully take.
2. In response to the Petition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents both represented by Mr. Mungai filed a joint response to the Petition dated 3<sup>rd</sup> May 2013. Counsel also filed affidavits by witnesses mainly the Constituency Returning Officer and Presiding Officers of various polling stations. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents prayed that the Court does find that the 3<sup>rd</sup> Respondent was duly elected and that the elections were valid. Secondly, the Parliamentary elections for Luanda Constituency as conducted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be found credible, and the Petition be dismissed with costs.
3. The 3<sup>rd</sup> Respondent represented by Mr. Tollo also filed a response to the Petition dated 2<sup>nd</sup> May 2013 together with affidavits by witnesses he intended to call in support of the 3<sup>rd</sup> Respondent's defence to the Petition. The 3<sup>rd</sup> Respondent prayed that the Petition be dismissed with costs and a declaration made that he was validly elected as a Member of Parliament for Luanda Constituency.

### **Pre-trial Applications**

4. Rule 12 of the Election Rules mandates a Petitioner at the time of filing a petition to file affidavits sworn by each witness whom the Petitioner intends to call at the trial. The Petitioners in this case did not file enough Witness Affidavits together with the Petition and which led to their filing of the first application dated 3<sup>rd</sup> May 2013. In the said application, the Petitioners sought leave of Court to file Witness Affidavits out of time. The Petitioners averred that they encountered logistical challenges in locating their witnesses and as such they opted to file the Petition so as not to be locked out of the stipulated timeframe within which to file a Petition. The Petitioners averred that the Witness Affidavits were now drawn and sworn and ready to be filed.
5. In the meantime, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed an application dated 13<sup>th</sup> May 2013 seeking to have the entire Petition dismissed for being filed out of time. It was their averment that the Constitution at Article 87(2) requires that petitions be filed within 28 days from the date of the declaration of the results. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended that the results were declared on 5<sup>th</sup> March 2013 and not 13<sup>th</sup> March 2013 and so the calculation of the 28 days as provided for in the Constitution ought to have commenced on 5<sup>th</sup> March and not 13<sup>th</sup> March 2013 as was contended by the Petitioners.
6. Both these applications were canvassed by way of written submissions and highlighted in court on 3<sup>rd</sup> June 2013. Thereafter, the Court delivered rulings for both the applications on 10<sup>th</sup> June 2013, dismissing the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's application and allowing the Petitioners to file 10 Witness Affidavits out of the 20 they had annexed in their application for leave. The Court then set the matter down for pre-trial conference for 27<sup>th</sup> June 2013.

7. On the date of the pre-trial conference, Counsel for the Respondents brought it to the attention of the Court that the Petitioners had filed 20 affidavits as opposed to the 10 that the Court had earlier ordered. In response, counsel for the Petitioners stated that he had misunderstood the orders of the Court which led to the filing of 20 affidavits. Counsel then made an application under Rule 17 of the Election Rules that the Court does allow 4 out of the 10 extra affidavits, which application was strongly opposed by counsel for the Respondents. The Court declined to grant the prayer sought by the Petitioners and in effect, it struck out the affidavits of:

1. Benjamin Oyungu Samba
2. Racheal Ondechu Okumu
3. Tom Amatalo Wambima
4. Jeremiah Atindo Asikoye
5. Margret Oundo Juma
6. Eliphas Ngota Oluponde
7. Benson Amukowa Anduli
8. Ishmail Otieno
9. Rose Ambesa

10. David Etole Otieno

8. The Court then proceeded to issue directions in terms of issues for determination, the method of resolving the said issues, and the date and time allocation for each party in prosecuting and defending the petition as well as for submissions. The hearing of the Petition was slated for 9<sup>th</sup> July 2013.

9. On the first date of the hearing, the Petitioners had an application to make. This time, they wanted the responses sworn by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents witnesses to the 10 Witness Affidavits sworn by the Petitioners' witnesses be struck out for being filed out of time. In the alternative, the Petitioner prayed that the hearing be deferred to 10<sup>th</sup> July 2013 to enable their Counsel read through the said responses. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did concede that he filed the said responses one day late due to the last date of filing falling on a weekend. Counsel however mitigated that he had served the Petitioners' advocate through e-mail on Saturday 6<sup>th</sup> July 2013 before he filed it on Monday 8<sup>th</sup> July 2013. The Court delivered its ruling by stating that filing the responses one day late did not occasion injustice. The Court further directed that the hearing commences on 10<sup>th</sup> July 2013 at 10:00am

10. When the Court resumed on 10<sup>th</sup> July 2013, it found another application from the Petitioners dated 9<sup>th</sup> July 2013 before it. The nature of the application was an attempt by the Petitioners to re-introduce 4 of the 10 affidavits that had been struck out by the Court in its ruling of 27<sup>th</sup> June 2013. The 4 affidavits had been sworn by Benjamin Oyungu Samba, Rachael Ondechu, Tom Amatala Ombima and Jeremiah Otindo Asikoye. The Petitioners had filed an application for review of the Court Order of 27<sup>th</sup> June 2013. Counsel for the Petitioner submitted that he wrongly interpreted the said Court ruling and they pleaded with the Court to review its order and allow the 4 affidavits. It was his submission that the said affidavits contained evidence that was crucial to the Petitioners' cases. This application was opposed by both counsel of the Respondents. It was their submission that the grounds for review of Court Order have been settled; the applicant needs to demonstrate that there is new evidence or that there is an error on the face of the record. None of this had been established.

11. The Court gave its ruling disallowing the Petitioners' application. The Court found that the

grounds for review of a Court Order had not been met and that the Petitioners' were the authors of their own misfortune as they had an opportunity to file additional affidavits and they let it slip through their fingers.

12. The last application made by the Petitioners was in respect to the 3<sup>rd</sup> Respondent's representation. This application was made within the application for scrutiny and re-count of votes. It was their application that the Advocates presently on record, M/s Munyao Muli & Company Advocates, is irregularly on record as they had no authority to act for the 3<sup>rd</sup> Respondent as they had not been properly appointed. The Petitioners based their application on the provision of Rule 7 of the Election Rules. This application was vehemently opposed by both counsel of the Respondents stating that it was an interlocutory application which ought to have been canvassed during or before the pre-trial conference and, secondly, a procedural technicality which was curable under Article 159 (2) (d) of the Constitution. The Court agreed with the Respondents and dismissed the said Application.

### **Issues for Determination and Analysis of Evidence 1<sup>st</sup> Petitioner's sir-name and Voter Intimidation by Presiding Officers**

13. The Petitioners pleaded that the 1<sup>st</sup> Petitioner's name was not captured on the ballot paper as his name "KIBIRA" was missing and consequently, denying the 1<sup>st</sup> Petitioner votes. The 1<sup>st</sup> Petitioner alleged that many voters opted not to vote or voted for other candidates because the Presiding Officers, deliberately and mischievously, informed the said voters that there was no parliamentary candidate by the name "KIBIRA" on the ballot paper. In effect, the Petitioners contended, those voters were disenfranchised and their right to vote for a person of their choice curtailed.
14. In evidence, the 1<sup>st</sup> Petitioner (PW1) testified that on 31<sup>st</sup> January 2013, he was issued with a certificate by the 1<sup>st</sup> Respondent clearing him to vie for the seat of the National Assembly and the said certificate had all his names spelt correctly. However, he testified, that when he went to vote at Kima Polling Station at 8:00am on the voting day, he noticed that his sir-name "Kibira" had been written as "Kibara". The PW1 stated that he proceeded to vote despite the anomaly and when he stepped out of the polling room, he met a number of voters who alerted him that they had difficulty with his name and that the illiterate voters had even a bigger problem as when they asked the 1<sup>st</sup> Respondent's officials for "Kibira" they were told there was no candidate with that name. PW1 testified that he was informed that illiterate voters were told they could choose to vote for someone else because "Kibira", was not in the list of candidates. PW1 testified that when he left the polling station he received telephone calls from all his agents that the polling officers were telling the voters that there was no candidate called "Kibira".
15. PW1 alleged that he learnt that his competitors took advantage of the situation and started spreading rumours, which spread very fast throughout the Constituency, that he had been arrested and therefore disqualified from the race. It was his evidence that his competitors were persuading voters not to vote for him as they would be wasting their votes. PW1 cited Essongolo Polling Station as an example where he was informed by one of his supporters one Mr. Jeremiah Asikoye that he had met 14 elderly voters going back to their homes having been sent away harshly by the Presiding Officer who refused to attend to them when they asked him why PW1 had been disqualified. PW1 testified that Mr. Jeremiah Asikoye visited about 12 polling stations and reported to him that a similar situation existed. PW1 stated that he informed his supporter Mr. Asikoye to encourage the voters to vote despite the misspelling of his name.

16. PW1 testified that he personally visited Epanga Polling Station where he found 24 illiterate voters and that he encouraged them to go to vote. PW1 stated that he was not campaigning on the voting day but that he was merely assuring the voters that he had not been disqualified from the race.
17. PW1 also alleged that Presiding Officers of various polling stations were authoritarian and dealt very harshly with illiterate voters who required assistance to vote. PW1 cited Essongolo, Epanga, Ebusakami Stream 2 and Mungoha Polling Stations as examples of stations he visited and witnessed voters being intimidated by the Presiding Officers. PW1 further alleged that he noticed that in some Polling Stations, for example Essegami, all agents were ordered to sit at the corner of the room.
18. PW1 further testified that he took action at about 8.30am after leaving the polling station and wrote a letter dated 4<sup>th</sup> March 2013 at 0830 hours addressed to the Returning Officer complaining about the misspelling of his name. PW1 testified that he expected the Returning Officer to inform the Presiding Officers to advise the voters that the name had been misspelled as opposed to them telling voters that there was no such candidate. PW1 testified that he also asked the Returning Officer to restrain the Presiding Officers from threatening party agents. PW1 testified that he wrote two other letters in respect to election offences and they were all delivered at the 1<sup>st</sup> Respondent's Constituency office. The 2<sup>nd</sup> Petitioner (PW7) also testified that he wrote a protest letter to the 1<sup>st</sup> Respondent which he had to deliver to their offices in Nairobi on 12<sup>th</sup> March 2013 as the officers at the County Office declined to acknowledge service.
19. It was PW1's evidence that majority of the Luanda Constituency voters are illiterate and therefore the misspelling of his name and the rumours that he had been disqualified from the race due to his arrest cost him the Member of National Assembly seat.
20. On cross-examination, PW1 was shown the Kenya Gazette in which the 1<sup>st</sup> Respondent had published the names of all the candidates. The 1<sup>st</sup> Petitioner admitted that his name was written as "Apungu Arthur Kibara". PW1 stated that he did not see the Kenya Gazette and he therefore did not make any complaint to the 1<sup>st</sup> Respondent.
21. To rebut the 1<sup>st</sup> Petitioner's evidence that the misspelling of names cost him victory, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents called Lilian Ongachi Okalo (RW12), a Presiding Officer of Kima Polling Station. RW12 testified her station was the 1<sup>st</sup> Petitioner's stronghold where he garnered 259 votes while the 3<sup>rd</sup> Respondent only had 34 votes. It was her evidence that she only assisted a handful of illiterate voters all of whom asked for "Apungu" and not for "Kibira."
22. The 2<sup>nd</sup> Respondent (RW13) did admit that there was a mistake in printing of the 1<sup>st</sup> Petitioner's name on the ballot paper. RW13 testified however that the 1<sup>st</sup> Petitioner ought to have looked at the Kenya Gazette to know that his name was misspelled and ought to have taken a corrective action with the 1<sup>st</sup> Respondent before-hand.
23. The Petitioners called John Akhwale (PW2), the 1<sup>st</sup> Petitioner's agent at Wanakhale Polling Station to give evidence in respect of the allegation of voter intimidation. PW2 testified that he noticed that illiterate voters were mistreated by the Presiding Officer who was treating them harshly. It was his evidence that the Presiding Officer would insist on reading all the names of the candidates while at other times the Presiding Officer would ask the voter to go by the names of the Political Party. PW2 testified that some voters asked the Presiding Officer that they wanted to

vote for “Kibira” but that the Presiding Officer told them that there was no such name but there was “Kibara” and that they had an option of voting for any other candidate.

25. PW2 also testified that at about 10:00am there was also a confrontation which led to an argument between the Presiding Officer and his deputy on voter assistance. PW2 stated that in their trainings, illiterate voters were to be assisted by the Presiding Officer in the presence of 3 or 4 agents but that the Presiding Officer decided to do it alone. PW2 stated that the Deputy did not like the manner in which the Presiding Officer was conducting voter assistance but that in response the Presiding Officer told his deputy that it was he who had the final authority of how things were to be done. Thereafter, PW2 stated that the Presiding Officer then called the Returning Officer informing him of the confrontation.
26. On cross-examination PW2 admitted that he did sign the Poll Day Diary indicating all things had been done well, despite stating that the Presiding Officer did not follow instructions. PW2 stated that he signed the Poll Day Diary because of the pressure, intimidation and dictatorship by the Presiding Officer.
27. The Respondents called the Presiding Officer of Wanakhale Polling Station Wycliffe Ojina Odede (RW6) who denied that he was a dictator as was alleged but that he was firm when issuing instructions. RW6 stated that there was no confrontation or commotion in the polling room but admitted that he had a difference of opinion with his deputy on the way he was conducting voter assistance. RW6 stated that his deputy was of opinion that he should not have assisted the illiterate voters and that such voters should get assistance from their relatives. RW6 stated that he reported the matter to Deputy Returning Officer who resolved the issue. RW6 also testified that he did not force any agent to sign Form 35 and that they were signed only after the results were declared and entered.
28. Samuel Terah (PW3) the 1<sup>st</sup> Petitioner’s agent at Esiamarwi Polling Station also testified in respect to alleged intimidation of voters by the Presiding Officer. It was his evidence that as soon as he saw the anomaly of the 1<sup>st</sup> Petitioner’s name in the ballot papers, he reported the same to the Presiding Officer who stated that there was nothing he could do about that. PW3 testified further that he heard the Presiding Officer telling voters that “Kibira” was not on the ballot paper. PW3 also testified that the polling station was closed locking out about 9 voters who were on the queue.
29. Mary Nyangweso Tuti (RW11), the Presiding Officer of Esiamarwi Polling station, denied the allegations that she misled a voter or shut out any who was on the queue. It was her evidence that voting commenced at 6:20am and ended at 5:20pm and there were no people on the queue by the time they closed the polling. RW11 testified further that in her station, the 1<sup>st</sup> Petitioner got the most votes as that was his stronghold. RW11 confirmed that “Kibira” was not on the ballot paper but that most voters who she assisted asked to vote for “Apungu”.
30. In the final submission by the Petitioners, Muyundo for the Petitioners submitted at length on the failure to properly capture the 1<sup>st</sup> Petitioner’s sir-name on the ballot papers. It was his submission that it was highly irregular and it did affect the outcome of the election to the detriment of the 1<sup>st</sup> Petitioner. Counsel referred to the case of **Ntwiga v Musyoka & 3 Others (2008) 2 KLR 276** where the Court found that it was irregular to omit the Petitioner’s title from his name. The Court observed,

*“.....it is not farfetched in a Kenyan context that some people would come seeking to vote for a captain.*

*The party sponsoring the captain is immaterial. It is that in Kenya, certain politicians have what one would call a permanent constituency, in that voters would vote for him irrespective of what party he belongs to."*

31. Mr. Mungai, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in distinguishing the above authority referred to by the Petitioners submitted that the more relevant decision is **Election Petition no. 1 of 2013 Nyeri being Dr. Thou Mathenge Vs. Nderitu Gachagua** the petition on the Nyeri County gubernatorial elections where the learned Judge dealt at length with the issue of names and more importantly the issue of identifying candidates in an election which is the real legal issue thrown up by any wrong rendering of a name on the ballot paper.

*"...having looked at the law as regards election did the minor error on the ballot effect the outcome of the election so as to enable the court void the same" It was upon the Petitioners to prove that the non-compliance with Regulation 51 of the Election Act had effect on the election..."*

32. Mr. Mungai also referred to the case of **Kitale Election Petition No. 11 Of 2013 Charles Maywa Chedofum** supra wherein the judge had this to say at page 26

*"In any event, the mix-up would not have prevented the voters or the Petitioners exercising their constitutional rights. This was because, the name of the candidate was not the only means of identification in a ballot paper. There were other means which included the candidate's political party's name, symbol and colour.... it cannot be true that voters at certain polling station refrained from voting or voted for wrong candidate... it cannot also be true that both Petitioners did not vote for themselves due to the mix-up in their names..."*

33. It is noteworthy that all the Presiding Officers that were called to give evidence in defence to this Petition gave the same response in respect to illiterate voter assistance. They all testified that where a voter came with an assistant, they would administer an oath to the said assistant and then let him/her help the illiterate voter. Where, on the other hand, such a voter came by him/herself, then the Presiding Officer, or on delegation, the Deputy Presiding Officer, would in the presence of two or three party agents picked at random assist the voter. That is how they had been trained and that is what they all claimed to have done.

34. I have carefully considered the submissions in respect of the misspelt name of the 1<sup>st</sup> Petitioner. To begin with, it is true that the 1<sup>st</sup> Petitioner's name is "Kibira" and was misspelt to "Kibara". This was a clear material departure because, certainly, "Kibira" is not "Kibara" and it is very possible to find different people answering to those different names. The issue for this Court to determine is who is responsible for that mistake, and secondly, the effect of the mistake on the results of the said elections. When the IEBC published the names in the Kenya Gazette, its intention was to give notice to the electorate of the various candidates who were contesting for various seats. The intention was not expressly for candidates to observe and make any corrections on their names. However, it always remained the obligation of a prudent candidate to confirm that the correct name is captured in the said Kenya Gazette, and where there were misspellings or other mistakes, it is the duty of the candidate to have it corrected.

35. The 1<sup>st</sup> Petitioner testified that he did not see the Kenya Gazette and that if he had seen it, he would have corrected the misspelling. The 2<sup>nd</sup> Respondent also admitted that had the IEBC seen the mistake in time, it could have corrected the same or stopped the election all together. In my view, the 1<sup>st</sup> Respondent had the responsibility to accurately capture the names of the 1<sup>st</sup> Petitioner in the ballot paper. Also, in equal measure, the 1<sup>st</sup> Petitioner had the responsibility to

read the said Kenya Gazette, to reaffirm, recheck and correct any mistakes it may have contained. This was a general election and therefore the 1<sup>st</sup> Petitioner could not have casually perused the said Kenya Gazette, leave alone, not being aware of its publication. I find that the responsibility for the misspelling of the 1<sup>st</sup> Petitioner's name is equally shared between the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Petitioner.

36. What I need to consider now, is the effect of the misspelling on the elections. The 1<sup>st</sup> Petitioner alleges that the effect of misspelling his name was that his competitors started to spread rumors that he was arrested and therefore disqualified from the race, and also that many voters, especially illiterate voters were told that "Kibira" was not on the ballot paper. The 1<sup>st</sup> Petitioner alleges that this information was given to him by one of his agents, Jeremiah Asikoye, whom he told to visit some other polling stations. The Petitioner testified that Jeremiah Asikoye visited 12 polling stations, and confirmed to him that voters were disenfranchised by the misspelling of the 1<sup>st</sup> Petitioner's name. However, it is unfortunate that the 1<sup>st</sup> Petitioner did not call the said Jeremiah Asikoye to testify. I have noted that Jeremiah Asikoye was one of the proposed witnesses whose proposed affidavits were struck out by this Court.
37. The 1<sup>st</sup> Petitioner voted at Kima Polling Station. The Presiding Officer in this station, Lilian Ongachi Okalo (RW12) testified that the polling was peaceful at her station. She also testified that the illiterate voters who sought her assistance all voted for the 1<sup>st</sup> Petitioner whom they referred to as "Apungu". Indeed, this Polling Station was the 1<sup>st</sup> Petitioner's stronghold, where he garnered 259 votes and the 3<sup>rd</sup> Respondent had 34 votes. Obviously it is clear that in Kima Polling Station, the misspelt name of the 1<sup>st</sup> Petitioner had little or no effect. The allegations of John Akwale (PW2), that illiterate voters who wanted "Kibira" were mistreated by the Presiding Officer of Wanakhale Polling Station, and that they were advised to vote for other candidates since "Kibira" was not there, was not proved. PW2 still signed the Poll Day Diary stating that everything went on well in the Polling Station. On the contrary, I believe the testimony of Wycliffe Ojina Odede (RW6) who was the Presiding Officer at Wanakhale Polling Station. He stated that he did not force anybody to sign Forms 35. He reaffirmed that he was firm and he conducted the elections as per the relevant regulations.
38. Sameul Terah also made allegations of voter intimidation and that when he reported the same to the Presiding Officer of Esiamarwi Polling Station, Mary Nyangweso Tuti (RW11), she told him that there was nothing she could do. In addition, the witness testified that the Presiding Officer locked the Polling Station while 9 voters were on the queue. RW11 denied these allegations. She stated that voting commenced at 6:20am and ended at 6:20pm and that there were no voters on the queue when she closed the station. She testified that most of the illiterate voters she assisted asked for "Apungu" and not "Kibira". RW11 also clarified that in her station, the 1<sup>st</sup> Petitioner garnered the highest votes.
39. After careful consideration, it is clear that the majority of voters were not misled by the misspelt name. It is clear that the 1<sup>st</sup> Petitioner was identifiable with other names, being "Arthur Apungu". Other voters identified him with his photograph and a physical feature – a gap between his teeth. Indeed, the 1<sup>st</sup> Petitioner under cross-examination by Mr. Mungai, answered that he never saw a voter being turned away by a Presiding Officer. At Ebusakami Polling Station, the 1<sup>st</sup> Petitioner was present when a voter asked for a man with a gap between his teeth, that is the 1<sup>st</sup> Petitioner. The 1<sup>st</sup> Petitioner heard a voter not asking for "Kibira" but a man with the gap between his teeth. Other still used the party symbol and colour to identify him. Indeed there is not a speck of evidence before Court that the misspelling of the name "Kibira" to "Kibara" occasioned any vote loss to the 1<sup>st</sup> Respondent.



40. However, if the Court were to stretch its imagination, and look beyond the evidence, what is the chance that the misspelling of “Kibira” to “Kibara” in any way prejudiced the 1<sup>st</sup> Petitioner? To answer this question one would have to consider that a name on the ballot paper is just one of several other ways open to a voter to identify a candidate. A voter who, looking for “Kibira”, only sees “Kibara”, would have to think twice, pause and ask whether or not “Kibara” was not in fact “Kibira” given that the spelling and pronunciation are almost similar. Such a voter would also look at other names of the candidate, in this instance, “Arthur” and “Apungu”. Still, such a voter can look at the party, the party symbol and the colours to determine his preferred candidate, if there were to be such confusion. It is, however, important to note that in the Petition, no allegation has been made that literate voters were confused but that illiterate voters who asked for “Kibira” were told that there is no such candidate. This allegation, however, has been rebutted by the evidence of RW6 and RW11, Presiding Officers, who stated that almost all illiterate voters asked for “Apungu” and that in their stations, the 1<sup>st</sup> Petitioner emerged the winner.
41. The evidence of John Akhwale (PW2), is also relevant. On cross-examination by Mr. Mungai, he testified that although the Presiding Officer was tough in his duties, he did not think that the Presiding Officer was out to rig the elections in favour of any candidate or political party. On the misspelling of the 1<sup>st</sup> Petitioner’s name, he only witnessed one instance where one voter went away when she could not see “Kibira” on the ballot paper. This witness did not see any other such case.
42. Having very carefully considered this issue, I am satisfied that the misspelling of the 1<sup>st</sup> Petitioner’s name from “Kibira” to “Kibara” though regrettable, did not occasion any voter confusion, or cause the 1<sup>st</sup> Petitioner to lose any votes, and that the evidence before the Court shows that the 1<sup>st</sup> Petitioner led in vote counts in the polling stations where the 1<sup>st</sup> Petitioner chose to provide evidence from. Indeed, in his own testimony, the 1<sup>st</sup> Petitioner testified that voter turn-out in his Constituency was over 80%. From this observation, it is hardly convincing that the misspelling of his name resulted to voter apathy as is alleged or at all. I therefore dismiss the allegation that the misspelling of the 1<sup>st</sup> Petitioner’s name was ever prejudicial to him during the 4<sup>th</sup> March 2013 general elections for the seat for Member of National Assembly, Luanda Constituency.

### **Voter Bribery**

43. The Petitioners alleged in their Petition that the 3<sup>rd</sup> Respondent engaged in corrupt practices on the election date by offering monetary incentives to voters at various polling stations to induce them to vote for him. It was their averment that such incidences of bribery were witnessed in various polling stations including Esirabe, Epang’a, Wemilabi, Esinamutu, Waluka, Wanakhale, Ebusatsi, Emululu, Es’songolo, Emusenjeli, Em’aloba and Ochuore. In evidence, PW1 testified that he received a report that Emusenjeli Polling Station, that one Tom Amatala Ombima, an ODM supporter had been arrested in possession with a voters’ register with the intention of bribing voters. PW1 testified that the said Tom Amatala Ombima was arrested, and charged at Vihiga Court, convicted and sentenced to 2 years imprisonment. On cross-examination, PW1 admitted that he did not witness the 3<sup>rd</sup> Respondent or any of his agents give any bribe and therefore the allegations were based on reports that were given to him.
44. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents called the Presiding Officer of Emusenjeli Polling Station Kelly Ongaya Ombima (RW10) who testified that at about 9:00am on the day of the Poll his deputy notified him of an arrest made by the Police Officer guarding his station of one Tom Ombima who

was found in possession of a colour photocopy of a voters register. RW10 stated that he went out and confirmed the report was true. It was his evidence that both he and the officer wrote statements with the police over the incident. RW10 testified that he was alarmed when the said Tom Ombima was found with the voters' register classified as a strategic material and which nobody other than the 1<sup>st</sup> Respondent's officers were allowed to be in possession of, thus making it an offence to be found with it.

45. RW10 testified that his deputy told him that the said Tom Ombima was bribing voters, and that he recorded the incident in the Poll Day Diary. However, he stated, that when he went out to confirm his deputy's report, he found the suspect already arrested and so he did not witness him bribing voters. RW10 testified that it was not for him to explain why the police decided to charge the suspect with being in possession with the IEBC (1<sup>st</sup> Respondent's) strategic material. RW10 also clarified that despite sharing the name "Ombima" with the suspect, they were not relatives. RW10 affirmed that the suspect was a registered voter in his station but not an agent and so RW10 could not establish how he would have come into contact with the said register.
46. Wycliff Ominde (PW4) testified that he witnessed two ODM agents namely; Ernest Odongo and James Osieko Owayo offering bribes at the gate of the polling station, and that he could see this from where he was seated in the polling room. It was his evidence that the two were just moving around the gate between 10:00am – 3:00pm giving bribes. PW4 testified that noting that bribery was an election offence he reported it to the Presiding Officer. On cross-examination, PW4 was shown the ODM agent list, annexed to the 3<sup>rd</sup> Respondent's bundle of documents, and he confirmed that the two individuals were not in the said list. PW4 however maintained that he knew the two to being ODM agents. In re-examination, PW4 referred to one Shem Olemba who signed the Polling Station's Form 35 yet his name does not appear in the ODM agent list and so, according to him, a political party could have more agents than those listed as official agents.
47. Ruth Ong'ayo Onyanchi (PW6) an agent for Progressive Party of Kenya at Emukhuyu polling station testified that as she stepped out to take lunch, she witnessed Chief of Emukhuyu location, Mrs. Leonidah Okemo accompanied by Agnes Okonji and one Nditi campaigning for ODM. It was her evidence that the named persons were bribing voters with Ksh. 200/= telling them to vote "six piece". PW6 testified that the persons who were given money were Mary Ogada and Jerusa Ndeda. PW6 stated that she reported the incident to the Presiding Officer of the station.
48. The 3<sup>rd</sup> Respondent (RW18) denied the allegations that he or his agents bribed voters, either before or during the elections. It was his evidence that he voted at around 9:00am after queuing like any other voter and immediately thereafter he went home to rest. He called several witnesses to give evidence to rebut the evidence of PW6, namely: Leonida Okemo (RW14) the Chief of Emukhuyu location, Bishop Simekha (RW15), Zadock Okayo (RW16) and Agnes Okonji (RW17). Leonida Okemo (RW14) testified that she knew PW6 as they were neighbours and that they had been friends up to sometime in 2006 when a family dispute came in between them. RW14 stated that she believed that PW6 accused her of bribery on personal baseless grounds because of the differences they had. RW14 stated that as a civil servant, pursuant to the ethics and code of conduct she was supposed to refrain from openly supporting a candidate during the elections. It was her evidence that it was inconceivable how a civil servant in uniform could be dishing out bribes as alleged.
49. On cross-examination RW14 stated that she went to vote at about 6.15am and returned to her house to sleep. It was her evidence that she did not visit the polling station during the day until 6pm and later returned at 8pm during counting. RW14 stated that her house was next to the

polling station, and she could see what transpired at the station. RW14 confirmed that the District Commissioner's vehicle came to the polling station and so she went to meet the occupants of that vehicle who were the Chairman and member of the District Peace Committee. RW14 stated that their conversation was not anything to do with voter bribery but that they asked her to instruct the Administration Police Commandant to deploy more officers to the Polling Station.

50. Bishop Simekha (RW15) testified that he is the Deputy Chairman of the Peace Committee in the Vihiga County, a member and Treasurer of the Emuhaya District Peace Committee, Secretary to the clan of Elders, Emuhaya District, and Chairman of Emuhaya Poverty Eradication Committee. RW15 wore a badge of honour bestowed upon him by the Former Head of State, President E. Mwai Kibaki and he annexed a copy of the certificate of the Presidential Commendation. RW15 testified that he did not witness any person including RW14 giving bribes during the day of the poll.

51. On cross-examination RW15 stated that the District Peace Committee, though not accredited observer, went round polling stations checking on the progress of the polling exercise. RW15 stated that as the Peace Committee, they also work very closely with the Provincial Administration. It was his evidence that they visited about 21 polling stations, asking if elections were going on well, including Emukhuyu Polling Stations for 20 minutes. RW15 testified that at Emukhuyu they found that there was a long queue which was dragging and that is why they asked if elections were proceeding freely and fairly. RW15 confirmed that the Chief (RW14) met them at the polling station since they were being driven in the official vehicle of the District Commissioner.

52. Zadock Okayo (RW16), testified that he is the Chairman of the District Peace Committee of Emuhaya which has two constituencies- Emuhaya and Luanda constituencies. He stated that he was previously an assessor at the High Court in Kisumu and a Member and later a Chairman of the Board of Governors, Essongolo Secondary School. This witness corroborated the evidence of RW15 stating that the aim of checking was to see whether there were any cases of disorder affecting peace. RW16 stated that they were in Emukhuyu polling station for about 15 minutes, where he went into polling room, talked to the Presiding Officer and agents and asked if there was any problem. RW16 testified that the only issue they found in the polling stations they visited was the failure of the electronic identification device, and Emukhuyu was not any different.

53. The 3<sup>rd</sup> Respondent also called Agnes Okonji (RW17) who testified that she was the lady referred to by PW6 as one of those who was bribed by the Chief (RW14). RW17 testified that she was not bribed neither did she witness RW14 giving bribes as alleged.

54. In the final submission, Mr. Muyundo for the Petitioners submitted that there were inconsistencies in the evidence of all Respondents' witnesses and that there was no basis put forward by any of the Respondents witnesses to disbelieve the evidence of Ruth Ong'ayo Onyanchi (PW6). Counsel cited both local authorities and those of other jurisdictions in respect of bribery and also referred the Court to **Halsbury's Laws of England 4<sup>th</sup> Edition Vol.15 Pg. 534** which states:

*"As a general rule, due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the election. Court is not at liberty to weigh its importance nor can it allow any excuse, whatever the circumstances may be."*

55. The 3<sup>rd</sup> Respondent in his final submission on bribery cited the case of at **Richard Kalembe**

**Ndile & Another vs. Dr Patrick Musimba & 2 others Election Petition (Machakos) 1 of 2013.** In the case, it was observed that;

*“Bribery is a serious charge to make against someone and in this respect the petition is vague and lacks particulars as against Mr. Musimba (the elected Member of the National Assembly for Kibwezi Constituency)...Evidence of bribery needs to be reasonably precise and capable of being quantified if it is to be considered to affect the results. For instance, how many votes were procured as a result of the bribery, were they two, ten, or a whole polling station or what number” If it were to be assumed that such amorphous crowd was bribed to either vote in a particular way or abstain from voting, aside from the criminal aspect of it, what number is the court to attribute to such illegal conduct in order for it to say that such conduct affected result of the election” This is crucial because if such evidence is proved then such vote is liable to be excluded inn a scrutiny exercise by virtue of section 82(2)(b) of the Act”.*

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

*“As a general rule, due proof of a single act of bribery by or with knowledge and consent or approval of the candidate or by the candidate’s agents, however insignificant the act may be, is sufficient to invalidate the election. Court is not at liberty to weigh its importance nor can it allow any excuse, whatever the circumstance may be”.*

57. It is trite law and a clear moral obligation that bribery if proved against its beneficiary, nullifies an election, however insignificant that proven act of bribery is. So it is always the onerous duty on the party who alleges bribery to do so in clear and certain fashion, drawing clear distinction and particulars of the alleged offence. If bribery was in the form of money, the party alleging it must give the time, place, currency and denominations, the recipient and then how the money was given, the words that preceded the giving or words uttered after giving. The standard of proof for an allegation of bribery is beyond reasonable doubt, as apart from it being an election offence, it is also a criminal offence. A mere shouting of “thief” “thief” is not enough to hold a party liable for bribery.

58. The Petitioners allege that one Tom Amatala Ombima was arrested with a voters’ register at Emusenjeli Polling Station and that the suspect was using the voter register to identify and bribe voters. It id alleged that the suspect was doing this on behalf of the ODM Party and hence on behalf of the 3<sup>rd</sup> Respondent. This allegation was denied by the 3<sup>rd</sup> Respondent. He further denied that Tom Amatala Ombima was an ODM agent or that he was bribing voters on behalf of ODM or the 3<sup>rd</sup> Respondent. I have considered this allegation. It is true that the said suspect was arrested being in possession of the voter register. As stated, he was charged and convicted by a Court at Vihiga. This Court, however, notes that the suspect was not charged with the offence of bribery but was charged with being in possession of a voters’ register. This Court, without evidence, cannot speculate the reasons why the suspect had the voters’ register, and on whose behalf he had it. It could as well be he had the register so as to influence the voters. It is also possible that he was doing the same on behalf of the ODM Party or the 3<sup>rd</sup> Respondent as alleged. The truth, however, is that the Court cannot base its decision on speculation. There is no evidence before the Court that Tom Amatala Ombima was bribing voters, leave alone, doing that

one behalf of any party to these proceedings. Despite this kind of allegation arousing exciting fantasy in proceedings such as these, I find no nexus between Tom Amatala Ombima and the 3<sup>rd</sup> Respondent, and I dismiss the allegation of bribery by the said suspect.

59. In the same breath, the allegations against Ernest Odoyo and James Osieko Owayo that Wycliffe Ominde (PW4) saw them giving bribes at the polling station appear to be mere fantasy. How can an agent of a candidate witness two people giving bribes between 10:00am – 3:00pm, and do absolutely nothing about it except informing the Presiding Officer and stopping there" As an agent of the Petitioner, PW4 had greater responsibility to stop the alleged bribery even if it meant shouting about it, or reporting it to the Police during the time he stepped out for lunch. Evidence of bribery was necessary, not just mere allegations. However, the most unconvincing allegation of bribery is that which is alleged by Ruth Ongayo Onyanchi (PW6) who alleged that she witnessed the Chief of Emukhuyu Location Mrs. Leonida Okemo accompanied by Agnes Okonji and one Nditi campaigning for ODM and bribing voters with Kshs. 200/- telling them to vote 'six piece". The Chief, Leonida Okemo denied those allegations. The testimony was corroborated by the evidence of eminent members of the community who are members of the Peace Committee and whose evidence or testimony satisfied the Court. These were Bishop Simekha (RW15) and Zadock Okeyo (RW16). It is inconceivable that a Chief in uniform, in broad daylight, sitting at a gate as a watchman could, without any concern at all or care, dish out money in form of bribes for several hours. Even if that were to be conceived in some circumstances. I am nonetheless satisfied with the testimonies of the above witnesses that nothing of the sort took place.

60. However, even if such bribery allegations were to be proved, it still must be shown that it was done at the behest of the 3<sup>rd</sup> Respondent and with his command. The Petitioner in his testimony states that he had not claimed that the 3<sup>rd</sup> Respondent carried out any malpractices in the elections. He, however, testified that the bribery allegations were perpetrated by the ODM party for all the candidates in a "six piece" bribery plot.

61. In sum, the allegations of bribery in this Petition are shallow, and amount to mere allegations, which in the absence of cogent evidence, remain unproved. I hereby dismiss these allegations.

### Failure of Electronic Equipment

62. The Petitioners pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to ensure a free and fair electoral exercise by deliberately orchestrating the failure of the electronic voting, transmission and tallying system in all polling stations.

63. Mr. Mungai for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' submission in respect to the Petitioners' claim that election process was not free and fair due to the failed devices, submitted that the Petitioners had not proved that the failure of electoral devices affected the elections. In any event, he submitted, there was already a binding decision by the Supreme Court in the case of **Raila Odinga & Others v IEBC & Others Petition No. 5/2013**. Counsel quoted the following excerpts:

Par. 131

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

*voting system envisioned in Kenya appears to be manual. Regulation 82, and Section 39 of the Elections Act, which deal with electronic transmission, operate on the basis that electronically transmitted results are only provisional. Can there, therefore, be an invalidation of final results, because of the non-transmission of provisional results"*

Par. 237

*...From case law, and from Kenya's electoral history, it is apparent that electronic technology has **not** provided perfect solutions. Such technology has been inherently undependable, and its adoption and application has been only incremental, over time. It is not surprising that the applicable law has entrusted a discretion to IEBC, on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This negates the Petitioner's contention that, in the instant case, injustice, or illegality in the conduct of election would result, if IEBC did not consistently employ electronic technology. It follows that the Petitioner's case, insofar as it attributes nullity to the Presidential election on grounds of failed technological devices, is not sustainable..."*

64. I need not go any further on this issue. There is no evidence that the failure of electronic equipment in Luanda Constituency was greater or had greater negative consequences than what was experienced throughout the country.

### **Inadequate Lighting**

65. The Petitioners also pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to place measures in place to enable adequate lighting and visibility in many polling stations. It was their averment that the counting, transmission and tallying of results went on well into the night despite the poor lighting and visibility and as a result the results relayed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not easily verifiable by the Petitioners and their agents.

66. Sameul Terah (PW3) gave evidence that there was poor lighting in Esiamarwu polling station to the extent that agents used their mobile phones as a source of light to complement the lamp given by the 1<sup>st</sup> Respondent, and this significantly affected the counting process. PW3 however confirmed that there was no difference between results announced and the results recorded on Form 35.

67. The Presiding Officer Mary Nyangweso Tuti (RW11) , testified that the 1<sup>st</sup> Respondent provided gas lamps to be used in the event that the voting or counting exercise went into the night. RW11 admitted that some of the agents in her station did use their own torches to supplement the light from the gas lamp. However, she stated that the use of the torches was at their own volition because the light from the gas lamp was sufficient. RW11 attributed the use of the torches to the advanced age of the said agents, who in her view had their eyesight failing them. RW11 testified that a total of 10 agents including PW3 signed Form 35 and none of them complained that they had any problems at all.

68. In my view, there is no evidence of irregularity. All the 10 agents signed the Form 35 and none of them complained of inadequate lighting. Besides, the inadequate lighting as a problem was the problem affecting all the candidates and so the Petitioners cannot claim that it solely affected them.

### **Irregularities on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

69. Wycliff Ominde (PW4) testified that the Former Speaker of the National Assembly (Mr. Marende) visited to the tallying center at about 3:00pm on 5<sup>th</sup> March 2013, and spoke with the Returning Officer outside the tallying hall. It was his evidence that though he did not hear what they discussed, he believed that his presence influenced the announcement of the results in favour of the 3<sup>rd</sup> Respondent. PW4 stated that he believed so because the 1<sup>st</sup> Petitioner was leading with 5600 votes and the 3<sup>rd</sup> Respondent had 5450 votes but when Mr. Marende and the Returning Officer returned, the 3<sup>rd</sup> Respondent's votes suddenly shot up without any justifiable cause with 6200 votes while the 1<sup>st</sup> Petitioner remained at 5600. PW4 averred that the latter announcement was not backed by any return from any polling station.
70. I have considered this testimony and I do not see how the presence of Mr. Marende affected the vote counting, or tallying exercise. In any event, PW4 states that he did not hear what Mr. Marende discussed with the Returning Officer.
71. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents called Presiding Officers of various polling stations to give evidence in relation to how they conducted elections on the day of the Poll. Daniel Augustine Ndanyi Olasya (RW1) the Presiding Officer for Emululi Polling Station testified that voting process went on smoothly other than a voter who declined to have the indelible ink put on his finger to show that he had voted. RW1 stated that he followed the said voter and brought him back to have his finger dipped in the ink. RW1 maintained that there was no such thing as voters voting twice. It was his evidence that he is the one who made the entries in Form 35 and then filled in the same information to 4 other copies to make 5 copies. He retained a copy, 2 copies he gave to the Returning Officer while one was to be put in a temper proof envelope and locked into the ballot box and another was to be fixed outside the box. RW1 stated that the agents present after the counting and announcement of the results signed the Form 35.
72. Wisom Okata (RW2) the Presiding Officer for Ebusyubi polling station testified that the polling exercise went on as scheduled other than the failure of the electronic devices which caused them to open the polling station 30 minutes late. RW2 stated that he compensated for this time by extending the closing time by 30 minutes. RW2 stated that he prepared 3 Forms 35 a copy of which he gave to the Returning Officer, one copy he placed inside the ballot box and the last copy he gave to one of the party agents. He further stated that only one party agent out of the 8 agents signed Form 35 not because they refused to sign but they simply did not sign. RW1 maintained that the results contained in Form 35 were correct and genuine.
73. Joseph Ombima (RW3) the Presiding Officer at Kwhiliba Polling Station testified that he had a total of 10 Forms 35. One was put in the ballot box. The second one he attached to the ballot box. The third he fixed on door of the polling room. He retained the fifth copy, and the sixth, seventh and eighth were given to agents and the rest were given to the Returning Officer.
74. Jason Omfwoko (RW4) the Presiding Officer at Ekwanda Polling Station, testified that he re-wrote the number "2" on a candidate's votes – Caroline Alosa Angote to emphasize that she had 22 votes and that he did so when filling in the results the first time. RW4 stated that even if he did not countersign on the alteration, the same was insignificant and did not change the results.
75. Gloria Anindo Elizabeth (RW9), the Presiding Officer at Ebwiranyi Primary School Polling Station, testified that she had a total of 9 agents 4 of whom were present when she opened the station and signed the Polling Day Diary as being present. It was her evidence that none of the agents signed the Form 35 and the two names appearing on the agents' column must have been written by her deputy. RW9 acknowledged that this was a mistake but that the results therein were

genuine and correct. RW9 testified that she declared the results in the presence of all agents and none of them raised any issue with the results neither did she have any disputes with any agent. She stated further that all agents signed the Polling Day Diary at the end of the counting exercise.

76. The Court cross-examined Presiding Officers in respect of Forms 35 and the serial numbers appearing on them. RW2 stated that he filled 3 original Forms 35, each having a different serial number but the same content. RW2 further told the Court that the rules did not allow them to photocopy Forms 35 or destroy them. He also could not explain why he had 3 Forms 35 in different serial numbers instead of one. RW3 stated that he had a total of 10 Forms 35 with different serial numbers which were not consequential. However the serialization did not have a bearing on the contents.
77. Wycliffe Ojina Odede (RW6) testified that he filled 10 Forms 35 which had the same content and all signed by the party agents. RW6 stated that of the 10 Forms 35, he retained 1 copy, 3 copies he gave to the Returning officer, 1 copy he posted on the polling door, 3 copies he gave to the agents, 1 he affixed on the ballot box and 1 he placed inside the ballot box.
78. Jairus Ndui Khabelwa (RW7), the Presiding Officer of Mumboha Polling Station stream 1, stated that he had a total of 13 Forms 35 distributed as follows: 2 to the Returning Officer, 2 for the ballot box, 1 at the polling room door, 3 for the party agents, 3 for observers and 2 for the Presiding Officer and his deputy.
79. On the issue of the disparity on the numbers of Forms 35 given to each polling station the 2<sup>nd</sup> Respondent (RW13) testified that he could not tell the number of Forms 35 given to each polling station. It was his evidence that the materials for each polling station came bound and sealed in a plastic paper and that he had no authority to open the said package. RW13 stated that the seal was opened by the Presiding Officer of each station and it is only them who knew the number of Forms 35 packaged for their polling stations. RW13 stated that the Presiding Officers gave him different numbers of Forms 35, others 3 while others gave him 1. In any event, he stated, there was no law regulating the number of copies to be given to him. RW13 also testified that he was not even aware that the Forms 35 were serialized until they were returned to him by the Presiding Officers.

## Form 35

80. The Petitioners alleged neither themselves nor their agents were furnished with Forms 35 and that the said forms were not displayed at the door as is required by law. Additionally, the Forms 35 were not available at the Polling Stations and therefore the results purportedly announced by the Respondents lacked basis. The Petitioners alleged that upon being furnished with copies of the Forms, they noted that most of them had alterations in the entries made without endorsements and also the said forms in respect of the same polling stations had different results for the same candidates, and that the said forms contained different serial numbers with different results for the same candidate.
81. In evidence, the PW1 referred the Court to the forms 35 that the 1<sup>st</sup> Respondent provided him attached to the petition at pages 27-104 and those given to the 2<sup>nd</sup> Petitioner (PW7) at pages page 104-178 of petition. PW1 testified that there were glaring irregularities and inconsistencies in Forms 35 given to him and those given to his co-Petitioner. PW1 also testified that the Forms 35 had different serial numbers emanating from the 1<sup>st</sup> Respondent and said that this was



evidence of fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and therefore unacceptable. PW1 testified that to his knowledge there should have been only a total of 74 Forms 35 with distinct serial numbers.

82. PW1 cited Mumboha Primary School Stream 1 which has 2 different Forms 35 (annexed at Pages 27, 28 and 104 of the Petition). PW1 testified that in that station he got 73 votes, but on page 28 his votes were recorded as 24. In respect of the 2<sup>nd</sup> Petitioner he garnered 87 votes but on page 28 his votes were recorded as 36 votes. Consequently, both the Petitioners lost a total of 100 votes. PW1 further testified that in page 27 the 3<sup>rd</sup> Respondent had 88 votes but at page 28 his votes were recorded as 188 votes. PW1 stated that the only logical inference would be that their votes were given to the 3<sup>rd</sup> Respondent.
83. Also in Esibembe polling station (Forms 35 attached at Pg. 76 & 152 of the Petition). Herein, his votes on page 76 are 89 whereas at page 152 he got 95 votes. PW1 testified that the 2<sup>nd</sup> Petitioner's votes at page 152 are 97 but on page 76 it is 59 votes. The 3<sup>rd</sup> Respondent on page 76 got 97 votes while at page 152 he had 59 votes, signifying that there was an interchange of votes between the 2<sup>nd</sup> Petitioner and 3<sup>rd</sup> Respondent. The third incident was Ebusakami Primary School (Form 35 annexed at pages 86 and 162 of the Petition). In page 162 it was recorded that he garnered 3 votes, the 2<sup>nd</sup> Petitioner 7 votes and the 3<sup>rd</sup> Respondent 4 votes. However, the registered voters were 754 and the number of votes cast is 573. PW1 testified that all candidates were given votes in single digit which was an abnormality yet the form was signed by party agents. PW1 testified that this demonstrated that the party agents signed Forms 35 before the details were put in, and are typical of the entire process.
84. In response to the allegations about Mumboha Primary School Stream 1 the Respondents called the Presiding Officer of the said station Jairus Ndui Khabelwa (RW7) who testified that he filled in 4 Forms 35. It was his evidence that he prepared and signed Forms 35 at pages 28 and 104 of the Petition, and that he had no idea where the Form 35 at page 27 came from. RW7 reiterated that the said Form 35 was not his document despite it having his name, that of his deputy and the party agents of his station. The only difference in the said forms is the entries of the votes garnered by the candidates. RW7 also testified that he forgot to countersign on the alteration on the Forms 35 but that he stamped them with the 1<sup>st</sup> Respondent's official stamp to authenticate them. It was his evidence that the alterations were due to a mathematical error of the additions of votes and not on what each candidate garnered.
85. In response to the allegations about Ebusakami Polling Station Stream 2 the Respondents called the Presiding Officer of the said station John Khamala Ongoma (RW8), who owned the Form 35 on page 86 of the Petition but totally disowned the Form 35 on page 162 of the Petition, stating that he was certain that the Form 35 with single digit entries was not written by him or his deputy. RW8 testified that he announced the results using his retained copy of Form 35 with the serial No. 35 PA 21400219390, which corresponds with Form 35 at page 86 and also with Form 35 in the ballot box. It was his evidence that he filled 4 Forms 35 and his deputy filled the last one but that he counter checked before putting his signature. On cross-examination, RW8 confirmed that he had a total of 5 Forms 35 which all the 6 party agents in his station signed, and which he distributed as follows: 2 to the Returning Officer, 1 affixed on top of the ballot box, 1 inside the ballot box and the last one he retained. RW8 stated that he made copies for 2 agents who were available to get their copies, but he did not post a copy at the door of the polling room.
86. The 2<sup>nd</sup> Respondent (RW13) admitted that there were conflicting entries in some Forms 35, relating to the same polling station. He testified however that not all the Forms 35 attached to the

petition was issued by him. RW13 testified that he believed that somebody either in his office or elsewhere was tampering with Forms 35 and therefore there was need for further investigations to establish the origin of the conflicting Forms 35. RW13 categorically disowned the Forms 35 annexed at Pages 27, 123, 152 and 162 of the Petition. RW13 testified that the only way to confirm the correctness of the results that he had announced was to open up the boxes and do the re-counting or scrutiny.

87. The 2<sup>nd</sup> Petitioner (PW7) reiterated the averments made by the PW1 about the inconsistencies in the Forms 35 in respect of Mumboha, Esibembe and Ebusakami Polling Stations. PW7 testified that in Khwiliba Polling Station, he had garnered 178 votes but it was recorded as 78 whereas the 3<sup>rd</sup> Respondent's votes were inflated to 300 from 225 votes.
88. PW2 testified that in Wanakhale Polling Station, he and his fellow party agents were issued with a blank form 35 to sign at about 5:30pm. Gladys Karani (PW5) an agent of the Federal Party of Kenya in Kwiliba Polling Station testified that she and 7 other party agents were asked by the Presiding Officer to sign the Form 35 and that they signed a blank Form 35 at around 1:00pm while voting was going on.
89. In response to the allegations on Khwiliba Polling Station, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents called Joseph Ombima (RW3) who testified that he did ask all the agents to write their names in good time as they had several documents to sign, which was done between 1pm – 3pm. RW3 stated that the signing was to be done after the results were declared. In response to the allegation by the 2<sup>nd</sup> Petitioner (PW7) that his votes were reduced and those of the 3<sup>rd</sup> Respondent inflated, RW2 stated that PW7 garnered 78 votes and the 3<sup>rd</sup> Respondent got 300 votes and that he was not aware of any other results that were different from his.
90. To back the evidence of Joseph Ombima (RW3), the 2<sup>nd</sup> Respondent (RW13) testified that during the training sessions, they never instructed Presiding Officers to fill in the Form 35 before the voting exercise was over. However, he testified, they trained the Presiding Officers to build a consensus with the party agents on how to carry out their stations smoothly. Therefore, it was the Presiding Officer and agents to handle how Form 35 would be filled in, but that signing had to be done at the end of the counting exercise. RW13 stated that the law does not distinguish between capturing the details of the agents on Form 35 and signing of the same.

## **Ballot Stuffing**

91. The Petitioners alleged that the Respondents' introduced three ballot boxes, stuffed with ballot papers whose origins and results cannot be verified. In support of this allegation, the Petitioners called Wycliffe Ominde (PW4) the 1<sup>st</sup> Petitioner's agent at Mwitubwi Polling Station. It was his evidence that on 7<sup>th</sup> March 2013 he was called to Ebusiralo, the tallying center, to go to identify ballot boxes that belonged to his station. PW3 stated that he established that there were 3 additional or extra ballot boxes, stuffed with suspicious votes alleged to have been cast at Mwitubwi Nursery Polling Station. PW4 testified that he objected to those extra boxes and told the Returning Officer as much. PW4 also testified that he declined to sign Form 35 of his Polling Station because total member of votes cast were more than total number of registered voters. PW4 disowned the signature that appeared alongside his name.
92. In response to this allegation Sarah Akinyi Omolo (RW5) the Presiding Officer of Mwitubwi Polling Station testified that she did know PW4 as he was an agent at her polling station. It was her evidence that on 7<sup>th</sup> March 2013, the 1<sup>st</sup> Respondent's Logistic's Officer Mr. Matika called to inform her that she had wrongly filled in the serial numbers of ballot boxes at page 7 of Polling

Day Diary by writing in “Aperture” and not serial numbers. RW5 testified that she went to meet Mr. Matika at the tallying centre to give him the serial numbers of the ballot boxes as was required. RW5 stated that she then realized that she did not have the serial number of the Governor’s ballot box and so she started to make phone calls to the party agents who were in her polling station. RW5 testified that she was able to find PW4 who said that he had the information but that the same was at his home. RW5 stated that she requested PW4 to go to his home and then she would call him so that he could read out the numbers, which he did. RW5 reiterated that PW4 read out the serial numbers to her on the phone and that he did not come to the center as he alleged.

93. On the allegation that the votes cast were more than the registered voters, RW5 testified that she mistakenly recorded the number of registered voters of Mwitubwi Polling Station as 358 instead of 458 which therefore seemed as if the votes cast were more than the registered voters but that it was not the case.
94. The 2<sup>nd</sup> Respondent (RW13) on the allegation that he was with PW4 at the tallying centre on 7<sup>th</sup> March 2013, testified that he was not in Luanda on that day. RW13 testified that he was at National Tallying centre at Bomas as he together with other Returning Officers had been summoned by the Chairman of the 1<sup>st</sup> Respondent to deliver the Presidential results in person. RW13 testified he was not aware of any additional ballot boxes for Luanda Constituency and that he only had 74 ballot boxes which he delivered to the court.

### **Tallying issues and Scrutiny exercise**

95. The Petitioners alleged that the 2<sup>nd</sup> Respondent during the counting and tallying of votes, inflated the 3<sup>rd</sup> Respondents’ figures, the effect of which accorded him undue advantage over them.
96. The 2<sup>nd</sup> Respondent (RW13) admitted that there were some errors which he came to learn of after he had already announced the results. He stated that he re-tallied the results and figures changed albeit marginally. The stations where he found errors were as follows:
1. Essongolo Primary School, where he received 3 Forms 35 one had 89 votes and another 69 votes for Omulele.
  2. Mulwanda Primary Schools. – Votes cast were indicated as 580 while it is 490. There was no error on votes.
  3. Mundabale Nursery school station No.35 where Apungu had two (2) votes while in essence he had zero (0) votes
  4. Esitsimi Nursery school where he had indicated number of votes cast as 368 while the number was 366. There was no error attributed to any candidate.
  5. Hobunakha Primary School where he had indicated a score for Tom Oscar Alwaka as 431 while in essence he had 341.
  6. Wanakhale Primary school where he had indicated a tally of 62 for Aggrey Tiema while the actual score was actually 2.
  7. The tallies for Ebbiba (13) Primary school were never reflected in the results which therefore affected everybody.
97. RW13 testified further that the errors that he made in Form 36 did not affect the outcome of the results because even after adjustment of the results the 3<sup>rd</sup> Respondent still won the elections.
98. Prayers 1, 2, 3, 4, 5, and 6 of the Petition were subject of an application for scrutiny filed by the

Petitioners on 23<sup>rd</sup> July 2013. The Petitioners cited over 40 polling stations in the said application and classified them according to the different issues arising, such as alterations without endorsements, and conflicting results. The Court analyzed in detail all the issues raised in respect of all the polling stations that were cited by the Petitioners in its ruling dated 8<sup>th</sup> August 2013. To restate the issues raised and analysis made by the Court in this judgment will be repetitive and a waste of precious judicial time. The Court still holds the finding in its ruling of 8<sup>th</sup> August 2013. The outcome of the said ruling was that the Court did allow, in part, the Petitioners' application for scrutiny.

99. The Petitioners' pleaded, and the Respondents conceded, that a scrutiny and re-count process be conducted in Mumboha Stream 1, Esibembe Stream 2 and Ebusakami Stream 2 Polling Stations to establish the credibility of the results and put to rest any doubts that exists thereto, as these were the stations that contain Forms 35 that have different results. Upon analyzing the evidence by the Petitioner and the responses by the Respondents, the Court ordered a full scrutiny in Ebusiralo Polling Station as there was an allegation that there was a problem of a mix-up of the lids of the ballot box resulting to a high number of spoilt votes and a partial scrutiny limited to a re-count to ascertain what each candidate garnered in the following polling stations: Ebusatsi, Wanakhale Stream 1 and 2, Essongolo, Mundabala Nursery School, Mulwanda Primary School, Hobunaka Primary School, and Esitsimi Primary School. The Court further ordered that the tallies of Ebbiba Polling Station be added to the final tally.

100. Below is the summary of the Scrutiny Report as conducted by the Deputy Registrar, pursuant to the Court Order dated 8<sup>th</sup> August 2013:

#### **Mumboha Polling Station Stream 1**

The problem here was that a Form 35 annexed at page 27 of the Petition had a questionable origin and so the results were questionable. The scrutiny exercise established that the votes as recorded in the Form 35 found inside the box was the same as recorded in Form 35 used to tally the results. The scrutiny exercise erased any doubts.

#### **Esibembe Polling Station Stream 2**

The issue here was that the origin of Form 35 annexed at page 151 of the Petition was unknown and its results conflicted with those recorded in the Forms 35 in the possession of the Petitioners. The scrutiny exercise confirmed that indeed the 3<sup>rd</sup> Respondent had 97 votes while the 2<sup>nd</sup> Petitioner had 59 votes thereby allaying the fear that votes for the two parties had been inter-changed.

#### **Ebusakami Polling Station Stream 2**

The issue here was that a Form 35 had single digit entries on the section of the votes garnered by each candidate. The Presiding Officer disowned this form. The scrutiny exercise established that the Form 35 issued to the Returning Officer and used during the tallying of the results had the same entries as that found in the ballot box and thereby erasing any doubt.

#### **Ebusiralo Polling Station**

Here there was a problem of a mix-up of lids of two ballot boxes. The other issue was a high number of spoilt votes at 31. The scrutiny exercise established that the 31 votes were stamped as rejected votes yet they were valid. The exercise also showed that the problem affected all the candidates in equal

measure.

### **Ebusatsi Polling Station**

Here the 1<sup>st</sup> Petitioner had alleged that his votes were deducted and added to the 3<sup>rd</sup> Respondent. Votes on physical count during the scrutiny exercise confirmed the figures recorded on the Form 35

### **Wanakhale Polling Station Stream 1**

Votes on physical count confirmed the entries record on the Form 35

### **Wanakhale Polling Station Stream 2**

The partial scrutiny exercise confirmed the entries recorded on Form 35

### **Essongolo Polling Station**

The partial scrutiny exercise confirmed that the 3<sup>rd</sup> Respondent had 69 votes. The 1<sup>st</sup> Petitioner votes after the re-count increased from 249 to 251 meaning that the re-count added the 1<sup>st</sup> Petitioner 2 votes.

### **Mundabala Polling Station**

The partial scrutiny exercise confirmed the entries recorded on Form 35 as being correct for all the parties.

### **Mulwanda Nursery School Polling Station**

Here the re-count established that the 2<sup>nd</sup> Petitioner had his votes increase from 362 to 366. For the other candidates, the entries recorded on the Form 35 were confirmed.

### **Hobunaka Polling Station**

Here the re-count revealed that there was 1 additional vote to the 1<sup>st</sup> Petitioner where he moved from 62 to 63 votes. This additional vote was found inside the packet of votes for the candidate known as Alwaka. For the other candidates, the entries recorded on the Form 35 were confirmed.

### **Esitsimi Polling Station**

Here the re-count exercise reduced the 3<sup>rd</sup> Respondent's votes from 195 to 194. At the same time, there was an increase of the 2<sup>nd</sup> Petitioner's votes by 1 from 73 to 74 votes.

101. It must be noted that the scrutiny exercise confirmed that all the ballot boxes were found in good order with their seals intact. After the exercise, they were resealed accordingly. The exercise was attended by the respective agents appointed by each party to the proceedings and they all endorsed the report dated and filed in Court on 23<sup>rd</sup> August 2013, and signed by the Deputy Registrar.

### **Submissions on Scrutiny**

102. Mr. Muyundo, Counsel for the Petitioner submitted that the scrutiny exercise was a sham

because the most important exercises were not carried out. Counsel submitted that it was not possible to a) confirm the ballot boxes that were delivered by the 1<sup>st</sup> Respondent and b) Identify the ballot boxes for scrutiny and recount. This, Counsel submitted, was because the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had failed to provide the Polling Day Diaries. Counsel contended that this was a deliberate policy of the 2<sup>nd</sup> Respondent to frustrate the scrutiny exercise.

103. Notably the Petitioners' filed an application dated 20<sup>th</sup> August 2013, seeking orders that the Polling Day Diaries be availed because, in their view, ballot boxes had been tampered with and that allegation could only be verified if the Polling Day Diary was availed to determine the serial numbers. The Court granted the application and observed that Polling Day Diary is part of written statements envisaged under Rule 33 (4) (a). The Court however noted that scrutiny exercise was over and the report had already been filed in Court.
104. I have considered all the evidence about the alleged irregularities by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents especially in filling Forms 35, having them signed by agents, and transferring the contents thereof to Form 36. All the irregularities were admitted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The bulk of them are very minor and that is why I have decided to enumerate each of them in the foregoing paragraphs. The irregularities range from re-writing figure (2) to contesting entries in Forms 35. All these allegations were responded to by the witnesses of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to the satisfaction of the Court. More importantly, however, all these allegations of irregularities on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were the subject of scrutiny and partial scrutiny limited to recount processes, which were ordered by the Court. The scrutiny exercise was meant to clarify any conflicts on the entries in Forms 35; explain the situations like in Mumboha Polling Station Stream 1 which had two different Forms 35; explain the allegation of the additional of 3 extra ballot boxes at Mwitubwi Polling Station and other irregularities. In the foregoing paragraphs, I have already stated the results of the scrutiny exercise.
105. Mr. Muyundo for the Petitioners has discredited the scrutiny exercise on several technical grounds that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not avail the original copies of Poll Day Diaries during the scrutiny exercise. He has also made allegations that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents tampered with the ballot boxes and that they engaged in ballot stuffing. This Court noted the above complaints and directed that copies of the Poll Day Diaries be availed to the Petitioners to enable their counsel submit on the same. However, the Court, in allowing scrutiny and partial scrutiny to be conducted, had an aim and objective to establish. The scrutiny exercise is not meant to open up jurisprudence and legal theory on scrutiny, it is an opportunity which allows the Court to peep through, and see, for a fleeting second, what may have transpired during the counting, tallying, sealing of the ballot boxes, signing Forms 35, transferring data to Form 36 and any other related exercise, for purpose of establishing the regularity or otherwise of the exercise. In most cases, scrutiny is meant to confirm or disprove the evidence that is already before the Court.
106. The issues before the Court which were the subject of scrutiny were well laid out in the Court's ruling dated 8<sup>th</sup> August 2013 which allowed the exercise. The aim of the exercise was to confirm or disprove certain allegations, for example, the 3 extra ballot boxes, the number of votes cast exceeding the number of registered voters, the authenticity of Forms 35, the reconciliation of certain entries and so on. For this Court, the finding of scrutiny exercise as far as the same answers the above issues, is what is relevant. It must be had in mind that scrutiny is just a part of the exercise and its results explains or clarifies the issues that may not be clear. It is not the duty of this Court at this time to delve into the law and jurisprudence of a scrutiny exercise.
107. Mr. Muyundo has submitted that the exercise was a sham. I disagree. As I have already stated,

the aim of the scrutiny exercise was already achieved. It clarified all the lingering doubts on the tallying exercise, the alleged extra ballot boxes, misplaced or exaggerated counts or entries in Forms 35. Ultimately, the purpose of the scrutiny is to validate or invalidate the results before the Court. The scrutiny exercise either confirms the results at hand or identifies irregularities which cast serious doubt on the results. The scrutiny exercise may also confirm certain irregularities which are correctable and may not lead to the nullification of the results. This appears to have been the case in this matter. The scrutiny exercise confirmed irregularities most of which relate to tallying and which irregularities had already been admitted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and were rectified and reconciled.

108. It is also noteworthy that the scrutiny exercise dismissed the allegations of the 3 extra ballot boxes at Mwitubwi Polling Station. It is also instructive that the 1<sup>st</sup> Petitioner himself carried out a tallying exercise which he believed was correct. In his finding, the 1<sup>st</sup> Petitioner still found that the final results (for the major candidates) were as follows:

Arthur Apungu Kibira – 6,368

Abraham Sikalo Ochiel – 4,181

Christopher Omulele – 8,419

Even in his own reconciliation, the 1<sup>st</sup> Petitioner agreed that the 3<sup>rd</sup> Respondent won the elections with over 2,000 votes. It was on this basis that those reconciliations that the 1<sup>st</sup> Petitioner asked for the scrutiny exercise for all the Polling Stations to establish if there were further irregularities.

109. It must, however, still be noted that even after the IEBC rectified the results after the said errors, the 3<sup>rd</sup> Respondent still leads with 9,762 votes ahead of his closest challenger, the 1<sup>st</sup> Petitioner with 6,588 votes. The margin of 3,174 votes is too wide for an error allowing nullification of elections.

110. I am satisfied that there were minor errors which affected the counting and tallying exercise and the subsequent declaration of results for Member of National Assembly for Luanda Constituency. I am also satisfied that the irregularities as concerns the tallying exercise were reconciled and corrected by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as proved by the scrutiny exercise which the Court ordered for particular polling stations. Other irregularities which may not have been corrected were too minor to be the basis of upsetting the results of an otherwise peaceful, lawful and credible election.

111. In the upshot, I make the following orders:

- a. This Court returns with the verdict that the 3<sup>rd</sup> Respondent, Hon. Christopher Omulele was validly elected and declared Member of the National Assembly for the Luanda Constituency during the elections held on 4<sup>th</sup> March 2013. These elections were conducted in a free, fair and credible manner and in compliance with the provisions of the Constitution, Elections Act, the Rules and Regulations thereunder and all other provisions of the law.
- b. This Petition is dismissed with costs to the Respondents.
- c. The costs of the Petition shall not exceed Kshs. 2 Million out of which the 3<sup>rd</sup> Respondent's costs shall not exceed Kshs. 1 Million and those of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall not exceed Kshs. 1 Million.
- d. It is hereby directed that a certificate of determination be issued to the Independent Electoral and

Boundaries Commission and the Speaker of the National Assembly as provided under Sections 86(1) of the Elections Act.

112. I take this opportunity to thank all the counsel for the rigorous legal and intellectual work, their excellent conduct during the Petition, the excellent submissions and authorities. Even though I cited a few of the authorities referred to me in this Judgment, I have perused all of them, and I am grateful to the counsel for taking the trouble to avail them to the Court.

113. That is the Judgment of the Court.

Dated, Signed and Delivered at **Kakamega** this **7<sup>th</sup>** day of **October** 2013

**E.K.O. OGOLA**

**JUDGE**

In the Presence of:-

VADANGA ADV H/B FOR MUYONDO ADV..... - For the Petitioner

ESTHER OMULELE ADV H/B FOR MUNGAI ADV..... - For the 1st and 2nd Respondents

TOLLO ADV..... For the 3rd Respondent

Paul - Court Clerk



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