REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CIVIL APPEAL NO. 38 OF 2013

BETWEEN

IN THE MATTER OF AN APPLICATION BY MEMBER OF NATIONAL ASSEMBLY FOR BUTULA CONSTITUENCY

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE PROVISIONS OF THE ELECTION ACT NO. 24 OF 2011

BETWEEN

PHILIP OSORE OGUTU...APPELLANT

VERSUS

MICHAEL ONYURA ARINGO …...1st RESPONDENT

INDIPENDENT ELECTORAL & BOUNDERIES

COMMISSION (I.E.B.C.)..2nd RESPONDENT

RETURNING OFFICER …..3rd RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Busia (F. Tuiyot, J) dated 9th September, 2013

in

BUSIA PETITION No. 1 OF 2013

****

JUDGEMENT OF THE COURT

This is an appeal against the judgment of the Election Court (**Tuiyot, J**.) delivered on 9th September, 2013 dismissing, with costs, the election petition lodged by **Philip Osore Ogutu** (hereafter "the appellant") seeking to nullify the election of **Michael Onyura Aringo** (hereafter "the 1st respondent") as the Member of National Assembly for **Butula Constituency.** The election was conducted by the Independent Electoral and Boundaries Commission (hereinafter "I.E.B.C.") which appointed a Returning Officer (hereinafter "the Returning Officer") to conduct and manage the election of 4th March, 2013 for Butula Constituency (hereinafter "The Constituency").

The 1st respondent was declared the winner of the National Assembly election for the said Constituency after garnering 12,325 votes and was gazetted as the winner. There were seven candidates in all. The respective votes obtained by each of the candidates is tabulated below:-

"1.Michael Aringo Onyura - 12,325

2. Joseph Maero Oyula - 10,936

3. Alfred Bwire Odhiambo - 8,881

4. George Wesonga Ojwang - 2,429

5. Ignatius Pancrass Oyula Agola - 1,238

6. George Peter Bwire Ogengo - 107

7. Eric Ambutsi Mudimba - 97"

The appellant was a registered voter in the said constituency and was aggrieved by the declaration of the 1st respondent as the winner. He therefore filed a petition in the Election Court at Busia alleging, against the 1st respondent that he had, by himself and through known persons, engaged in acts that contravened the provisions of the law such as meting violence against supporters of his rivals; engaging in bribery and treating of voters ; engaging in campaigns after the official campaign period; employing services of known public servants in his campaigns and dissuading voters inclined to vote for his rivals not to vote.

The appellant alleged, as against I.E.B.C., that it failed to adhere to basic standards and procedures allowed by law and allowed the Returning Officer to act illegally by allowing unauthorized persons and non – employees of I. E. B. C. to collect ballot papers from one polling station to another and without the consent and authority of approved party agents of various candidates; failing to secure and or properly secure ballot boxes at the close of polling and while transporting ballot boxes to the tallying centre; allowing unmarked ballot papers to be cast in favour of the 1st respondent; counting and or allowing counting of spoilt ballot papers in favour of the 1st respondent; allowing, permitting and or conniving with the 1st respondent to continue with election campaigns at known polling stations on election day; declaring results of candidates before the requisite forms were signed by all party agents and stuffing and or allowing invalid ballot papers to be staffed in ballot boxes in favour of the 1st respondent.

In the premises, the petitioner contended that he had been denied the right to have a credible, free and fair election as envisaged by the Elections Act No. 24 of 2011 (hereinafter "the Act") and as guaranteed by the Constitution of Kenya 2010 (hereinafter "the Constitution "). He also contended that I.E.B.C.'s and the Returning Officer's failure to conduct a free, fair and credible election for the member of the National Assembly for the said Constituency was an affront to National Values and Principles on

governance as set forth in the Constitution and in the Act and denied the petitioner and the people of the said Constituency choice of a leader for the position of membership of the National Assembly as envisaged by the Law.

The reliefs sought in the petition included a declaration that the petitioner's right to a free and fair election for membership of National Assembly for the said Constituency was infringed; a recount and scrutiny of votes cast for candidates for membership of National Assembly for the said Constituency and a declaration that the 1st respondent was not duly elected.

At the preliminary stage of the petition, a pretrial conference was held and following the same a scrutiny of voters in one polling station called Bujumba Primary School (hereinafter "Bujumba polling station") was ordered and the issue of service was dealt with. The following issues for determination were also framed:

"(a) Whether there should be scrutiny and recount of votes in specified polling stations

(b) Whether there should be a declaration that the 1st respondent was not validly declared as elected Member of the National Assembly for Butula Constituency

(c) Who should pay for costs."

The Deputy Registrar of the High Court was commissioned to undertake the said recount and scrutiny for Bujumba polling station and a retallying of all the votes cast after the exercise. The same was done in the presence of the representatives of all the parties. After the completion of the exercise, the 1st respondent still emerged the winner with the same margin.

The election court ultimately rejected all the allegations of electoral malpractices made against the 1st respondent. It also found that although the Returning Officer was guilty of some non-compliance with the principles laid down in the Constitution and the Act, the same was insignificant and did not affect the result of the election. In the end the court concluded that the result returned by the Returning Officer and declared by I.E.B.C. reflected the will of the people of Butula Constituency. The petition was therefore dismissed with costs.

That decision triggered this appeal which is premised upon some 23 grounds. The principal ones being that the learned Judge of the election court erred in law and in fact in not finding that there had been ballot stuffing after polling; in not finding that results were announced before statutory forms 35 and 36 were signed by the candidates or their agents; in disregarding the findings of the Document Examiner; in not finding that forms 35 had alterations, erasures, cancellations to the disadvantage of the petitioner's preferred candidate, **Joseph Maero Oyula,** in not finding that the appellant's averments were supported; in not finding that the Returning Officer was not candid; in ignoring the testimonies of the agents of the petitioner's preferred candidate; in relying on a tallying sheet which was not produced; in failing to find that violence, voter bribery and treating, use of public officers were proved; in not finding that the 1st respondent was guilty of unlawful campaigns; in ignoring that the Returning Officer allowed the 1st respondent to use unauthorized persons to take part as agents; in not appreciating the results of the scrutiny and in not ordering the respondents to pay the appellant's costs. The appellant was represented by Learned counsel **Mr. Kasamani,** the 1st respondent by learned counsel **Mr. K'opot** and the 2nd and 3rd respondents by learned counsel **Mr. Anyul** holding brief for learned counsel **Mr. Akide**.

It was common ground that the law which regulates the elections of President, Member of National

Assembly, Member of Senate, Member of County Assembly women representatives is the Constitution, the Elections Act, and the Regulations made thereunder. The Learned Judge, in our view clearly appreciated the law applicable. He acknowledged the requirement for free and fair elections as envisaged in **Article 81 (e)** of the Constitution which reads as follows:-

"The electoral system shall comply with the following principles-

(e) free and fair elections, which are

i. **by secret ballot;**
ii. **free from violence, intimidation, improper influence or corruption;**
iii. **conducted by an independent body;**
iv. **transparent and**
v. **administered in an impartial neutral, efficient, accurate and accountable manner."**

With regard to the timely determination of electoral disputes **Article 87 (l)** states:-

"87 (l) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes."

Pursuant to Article 87 (l) Parliament enacted the Elections Acts No. 24 of 2011 which, among other things, sets out the mechanisms for the timely settlement of election disputes and which settlement must be in accordance with the principles laid down in the Constitution. Section 83 saves those principles when it says:-

"83. 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."

To ensure compliance with the law, the Act makes provision for the making of regulations to give effect to the principles of the Constitution and the Act. The Regulations which were made provide an exhaustive procedure for the efficient management of elections including registration of voters, nomination of candidates, voting and declaration of results. **Regulations 79 (1) (b), (2) (b) (c), (3), (4) and (5)** reads:-

" 79 (1), the presiding officer, the candidates or agents shall sign the declaration in respect of the elections.

For purposes of sub-regulation (1), the declaration for

(a) ….......

(b) National Assembly, County Women Representatives, Senator, County governor and County Assembly elections shall be in form 35 set out in the schedule.

2. **The presiding officer shall-**

(a)

(b) request each of the candidate or agents then present to append his or her signature

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

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

Regulations **83, 84, 85** and **86** make similar provisions with regard to the tallying and announcement of results. By those regulations, the Returning Officer is required to, among other things, tally the results, examine ballot papers which are rejected, objected to or disputed and confirm or vary the decisions of Presiding Officers; publicly announce the results, publicly announce the total number of votes cast; publicly declare the candidate who has won and finally complete form 36 with respect to election to the National Assembly.

So, was the election for the Member of the National Assembly for Butula Constituency conducted in accordance with the principles set out above or was it conducted so badly that it was not substantially in accordance with the law as to elections"" Or can we say that even though it was conducted substantially in accordance with the law as to elections, nevertheless there was a breach or breaches of the rules or mistake or mistakes at the election and the same did affect the result" See **James Omingo Magara v Manson O. Nyamweya & 2 others [2010] eKLR** in which **Morgan v Simpson [1975] IQB 151** was cited with approval.

Starting with the appellant's complaints regarding Forms 35 and 36,the appellant contended in his petition at paragraph 14 (f) as follows:

" (f) Declaring results of candidates before the requisite forms were signed by all party agents as procedure demanded and the Petitioner pleads complicity on the part of the 2nd and 3rd Respondents in returning the election of 1st Respondent as Member of National Assembly for Butula Constituency despite the glaring flaws in the process adopted during and after elections of 4.3.2013."

It is plain beyond peradventure that the appellant's complaint in his petition with regard to the said forms was that they were not signed by all party agents by the time the results of the candidates were declared. **Mr. Kasamani**, learned counsel for the appellant in his oral address in court referred us to a copy of a tally sheet which he said was not signed by the three leading candidates or their agents and that those who signed did not indicate for whom they signed.

The learned Judge of the High Court after considering the appellant's complaints regarding forms 35 concluded as follows:-

"At any rate the word "shall not by itself invalidate the results announced" appearing in sub-regulations 6 and 7 are not idle. For results in the form 35 to be invalidate(d) it would have to be shown that they do not reflect a true and accurate account of the ballots. It was therefore not enough for the Petitioner to begrudge the non-signing of the forms. It was incumbent upon him to prove to this Court that the forms were untruthful and/or inaccurate. Having failed to do so, this court is unwilling to oblige to his gesture that the results in the Forms 35 which are not signed by all the agents be invalidated."

We cannot fault the learned Judge in his appreciation of the regulations governing the conduct of elections and his application of the same to the facts proved before him. It is not the law, as the appellant seemed to suggest in his pleadings and contention before us, that declaration of results of candidates cannot be made before all party agents or the candidates have signed forms 35 and or 36 as the case may be.

The appellant has also complained, in this appeal, about forms 35 having had alterations, erasures and cancellations to the disadvantage of his preferred candidate, Joseph Maero Oyula. We have set out above the petitioner's complaints in his petition regarding forms 35 and 36. It is plain that the complaints did not relate to alterations, erasures and /or cancellations in those forms. The Learned Judge acknowledged the omission or failure to plead those complaints. Nevertheless he still considered them and concluded that no proof had been given by the petitioner that the defects in the forms were deliberate and that they indicated incorrect results. If he had arrived at a different result on the basis of those defects, a complaint that he determined the petition on the basis of unpleaded issues would, in our view, be legitimate. Like the Learned Judge, we must reject the complaint that there was an error in not finding that forms 35 had alterations, cancellations and erasures which violated provisions of the Law.

Related to this issue is the complaint that the evidence of the Document Examiner was wrongly disregarded by the learned Judge. The Document Examiner is said to have analyzed 25 forms 35 out of 88 provided which analysis showed that the appellant's preferred candidate won the election. On the basis of this report, the learned Judge indeed accepted that there were some alterations, erasures and cancellations on some forms 35. That finding did not help the appellant for two reasons. First the issue of alterations, cancellations and erasures, was not pleaded and could not therefore, according to the Judge, form the basis of his decision. Second, that even if account was to be taken of the erasures, cancellations and alterations, the results in the affected forms 35 would not be rendered invalid as, in any event, the petitioner had not adduced evidence that the erasures, cancellations and alterations had affected the results of the election or that they were in substantial non-compliance with the law. The learned Judge further held that the statistical analysis of the Document Examiner's report made by the appellant were not of any evidential value as it was not tendered in evidence to be tested by cross examination.

We have perused the same Document Examiner's report and indeed observed that the maker did not express an opinion on its impact on the results of the election. The interpretation given the report by the appellant was not evidence as the appellant seems to suggest. In any event the evidence could only have been led if there was foundation for it in the pleadings. We reject the appellant's complaint with respect to the failure of the learned Judge to base his decision on the Document Examiner's report.

The appellant also complained that the learned Judge failed to consider the testimonies of the agents of

his preferred candidate, Joseph H. M. Oyula.The appellant was specifically concerned that the Learned Judge only considered the evidence of **Mary O. Makokha** the 1st respondent's witness, yet he offered two agents at the trial as witnesses. Our perusal of the proceedings shows that **Stephen Maero Nyamuringa** (PW4) stated in his evidence that he was an ODM agent. He did not specifically state that he was the agent of the appellant's preferred candidate and when he gave evidence in chief he acknowledged that his names were not captured as one of the agents. The substance of his testimony was however considered by the Learned Judge when resolving the issue of a ballot book carrying 50 ballot papers which were released from **Burinda Primary School Polling Station** to **Bujumba Primary School Polling Station**. Although the appellant made heavy weather of that ballot book, it turned out that the same was never utilized. There is also the evidence of **Joseph Juma Okello (PW6)**. The record shows that he said he was one of the agents of the appellant's preferred candidate and was duly appointed by the ODM Party. In cross examination, he acknowledged that his name was not also captured as one of the agents. His evidence was nonetheless taken into account by the learned Judge whilst considering other aspect of the petition.

Given the above facts, we think the appellant's complaint that the evidence of the agents of his preferred candidate was not considered by the learned Judge, lacks substance and we reject it.

Lastly, on the challenge made against the quality of the evidence relied upon by the learned Judge, the appellant raised the issue of a tallying sheet which was purportedly accepted even though the same was not produced in evidence. That tallying sheet is now of little significance because in the course of the hearing of the petition the learned Judge ordered a retallying of final results which order was carried out by the Deputy Registrar of the High Court. On the retallying, the learned Judge stated:-

"127) For the retally, some mistakes were also noted. In respect to the total registered votes, the original form 36 tally were 40,803 but upon retally, they were found to be 40,811. Another discrepancy was in the total votes cast. In the original form 36 they were 36,332, but upon retally they reduced by 2 to 36,330. Rejected votes were after retallying found to be 288 and not 387 entered in the original form 36. For the candidates George Wesonga Ojwang, the tally shows that he garnered 2, 449 instead of 2,429 reflected in Form 36. As for Ignatius Oyula votes in his favour were 1,228 on retallying and NOT 1,2238 captured by I.E.B.C. Upon examination of the final retally the 1st Respondent still emerges victor with unchanged margin of 1,387 over his runners up. And the other discrepancies did not affect the result."

The appellant did not complain that the comparison made by the two tallies by the learned Judge was inaccurate or that the form 36 he used reflected fake results. In our view, the learned Judge diligently considered the evidence of the tallying and retallying quite admirably and he cannot be faulted. We also find that the appellant suffered no prejudice in the exercise.

This leads us to consideration of the evidence on recount which exercise was again carried out by the Deputy Registrar who produced his report at the hearing of the petition. The appellant complains that the report on the recount and scrutiny was not appreciated by the learned Judge. Only seven (7) polling stations were involved in the exercise. We have ourselves perused the report on the scrutiny and recount and agree with the learned Judge that the two errors disclosed were insignificant and could not invalidate the results. With regard to alleged tampering with ballot boxes while in the court custody; alleged broken seals on ballot boxes from three polling stations; alleged counting of spoilt votes and alleged failure to sign forms 35 in one polling station, we think the appellant was hanging on straws and was inviting us to decide his petition on unpleaded issues. It should be noted that the order for recount was made on the basis of specific reasons and was not designed to expand the appellant's petition. In any event the complaints are post-election anomalies which did not affect the vote.

Related to the above complaint is the charge that there was ballot stuffing after polling. We understood the appellant to mean that ballot papers which were not utilized during the poll were introduced into the ballot boxes. He pleaded as follows in paragraph 14 (g) of his petition:-

"14, The Petitioner further states that the 2nd Respondent aggravated the flawed process in election of the 1st respondent as member of National Assembly for Butula constituency by failing to adhere to basic standards and procedures allowed by the law in allowing the 3rd respondent do the following illegal acts which rendered the said election of 1st Respondent null and void;

………………………….

(g) Stuffing and or allowing it to be stuffed into ballot boxes invalid ballot papers in favour of the 1st Respondent."

The appellant did not identify any direct incidents of ballot stuffing in the entire material placed before the Learned Judge. He however, made assumptions of the same because of the erasures, alterations and cancellations found in some forms 35. The learned Judge did not agree with the petitioner. He concluded that suspicion perse was not good enough. The learned Judge considered the anomalies in the forms 35 which were impunged and ultimately, as already observed, determined that they had no impact in the overall result of the elections. In our view, the learned Judge had the proper standard of proof in mind and who had that burden. He had indeed found guidance in the Supreme Court decision in **Petition No. 5 of 2013 Raila Odinga v The Independent Electoral and Boundaries Commission and 3 others.** In that petition 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 the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse actar-all acts are presumed to have been 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."

We have on our own independently considered the material which was placed before the High Court on the appellant's complaint regarding ballot stuffing after the poll and have come to the conclusion that the learned Judge was right on that aspect of the appellant's complaint and we cannot interfere.

The appellant also complained that the learned Judge should have found that the Returning Officer committed perjury. The complaint was made because he had initially denied certain anomalies on election materials only to admit the same when he testified before the Learned Judge. The learned Judge considered the testimony of the Returning Officer and invalidated results of one polling station- Buluma Township because, in his view, there was breach of Regulation 79 (1) of the Election Regulations. The invalidation did not improve the results of the petitioner's preferred candidate as the margin between the 1st respondent and the runner-up widened.

Nothing in our view should turn on the manner in which the learned Judge treated the testimony of the Returning Officer. The learned Judge did not find deliberate desire to mismanage the election on the part of the Returning Officer and in our view there was no warrant for censure. The appellant's complaint in that regard is therefore without merit and is rejected.

We shall briefly discuss the complaint that the Returning Officer allowed the 1st Respondent to use unauthorized persons to take part as agents which fact was purportedly ignored by the Learned Judge. We have noted that this complaint did not also have its root in the appellant's petition. The Memorandum of Appeal, however, raised the issue in ground 15. The appellant contended that Mary C. Makokkha (RW4) was allowed to participate in the election as the 1st Respondent's agent yet she was appointed on the election day in contravention of the Election Regulations. In his submission before us, learned counsel for the appellant did not urge this ground. In our view the learned Judge was entitled to ignore the complaint. Even if it had been urged, we doubt whether it would have affected the ultimate decision the learned Judge reached. We say so, because there was no allegation of the participation of Mary C. Makokha as was such that it would have offended the principles as to elections cited above. We shall, at a later stage consider Mary's evidence with respect to other complaints made by the appellant.

Related to the above complaint was the issue of alleged collusion between the 1st respondent and the 2nd and 3rd respondents during the election. The appellant alleged in his petition that the 2nd respondent allowed the 3rd respondent to use unauthorized persons and non-employees of the two respondents to collect ballot papers from one polling station to another without the consent and authority of approved party agents of various candidates. It is plain that there was no mention of collusion between the respondents in the complaint. Collusion between the 2nd and 3rd respondents and any participating candidate is a serious offence and should have been specifically pleaded. In his Memorandum of Appeal, the appellant alleged that RW4 stayed with the Returning Officer on election day for over 2 hours and further collected appointment letters from the same officer which events, in his view, amounted to collusion. Another event which, according to the petitioner, established collusion was the evidence that RW3 was paid his allowance from I.E.B.C. Office.

The learned Judge did not find proof of the allegation that there was use of unauthorized persons and non-employees of I.E.B.C. in the transportation of ballot boxes and election materials. In our view, use of non-employees by I.E.B.C. with its authority would not amount to a matter of law but fact and would be outside the purview of section 85A of the Act. The appellant's related complaint that RW4 was with the Returning Officer for 2 hours on election day even if proved would also be a complaint about fact not law which cannot be entertained at this stage.

We now turn to the appellant's complaints of electoral malpractices allegedly committed by the 1st respondent. It was contended in the petition that by himself and through known persons under his instructions or directions, the 1st respondent meted violence against supporters of his known rivals; engaged in open bribery; engaged in campaigns after the official campaign period was over; employed services of known public civil servants in his campaigns and dissuaded voters inclined to vote for his rivals not to vote.

The appellant's allegations of electoral malpractices made against the 1st respondent were rejected by the election court. In his memorandum of appeal, the appellant contended that the learned Judge erred in law by requiring corroboration of the allegations of violence. It is significant that the appellant did not furnish particulars of the allegations of violence in his petition. At the hearing however, the petitioner testified that **Okello** (PW6) told him of the violence. Okello testified that he was assaulted by four people who included one **Denis Oduori** who reacted violently when the former challenged him regarding bribing voters. **Joseph Wandeyi Malal** (PW7) testified that he saw some people, among them, Oduor slap Okello. That was the only recorded incident of violence. It was however not linked to the 1st respondent and it was not contended that the act of violence was intended to induce or compel Okello to support the 1st respondent or as a punishment for him having supported the 1st respondent's rivals nor did the appellant allege that the violence was intended to restrain him from supporting the 1st

Respondent's rivals. Indeed the alleged act of violence did not qualify as an election offence in terms of section 65 of the Elections Act which reads:-

"65. A person who, directly or indirectly in person or by any other person on his behalf inflicts or threatens to inflict injury, damage, harm or loss on or against a person -

(a) so as to induce or compel that person to support a particular candidate or political party;

(b) on account of such person having voted or refrained from voting; or

(c) in order to induce or compel that person to vote in a particular way or refrain from voting; commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding five years or both."

Given the above provisions of the law, we cannot fault the decision of the learned Judge. In our view the learned Judge properly appreciated the evidence on the alleged electoral violence and correctly rejected the allegation. We too find that the appellant fell short of proving the electoral offence of violence against the 1st Respondent.

It was also contended that the 1st respondent was guilty of voter bribery and treating. In his petition, the appellant pleaded that the 1st respondent engaged in open bribery in providing gifts and cash to known voters within Butula Constituency. He did not particularize the complaint. The appellant sought to prove the complaint through **John Wycliffe Wanga** (PW1) **Esther Engefu Musundi** (PW2), **Andrew Juma Okello** (PW3). **Allan Barasa Otenda** (PW5) and **Joseph Juma Okello** (PW6). PW1 testified that he was given a lesso by one Allan Barasa who had been given the same as a gift on a date he did not know. In cross examination he expressly stated that he did not witness anyone being bribed. PW2 testified, inter alia, that he was given a lesso and Kshs. 100/=by people who claimed to be the "1st respondent's people". In cross – examination he stated that he could not tell with certainty that the people who gave him the gifts were supporters or agents of the 1st respondent. On his part, PW3 testified, inter alia that on 3rd March, 2013 he saw lessos being given to women by people who alleged they had been sent by the 1st respondent. In cross examination he admitted that he never saw the 1st respondent. PW5 testified that on 3rd March, 2013 he was given 2 lessos and 400/= by people who alleged they were campaigners of the 1st respondent. He opened the lessos the next day and saw that they had the 1st respondent's picture. PW6 testified that on 4th March 2013 he saw people who were giving out 200/= and when he demanded an explanation he was assaulted. The appellant himself, on the issue of voter bribery and treating, testified that the same was only reported to him.

On the evidence of bribery and treating of voters, the learned Judge found that the same had not been proved and had no nexus with the 1st respondent. In **Raila A. Odinga & 5 others =vs= IEBC and 3 others [2013]e KLR**, the Supreme Court of Kenya held as follows with regard to the standard of proof in election disputes:-

" The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt save that this would not affect the normal standards where criminal charges linked to an election, are in question."

So, the appellant in this case had to prove the allegations of voter bribery and treating, which are of a criminal nature, beyond reasonable doubt. In our view the evidence which the appellant adduced before the High Court fell far short of even the balance of probabilities, test, let alone above the balance

of probability test which is the standard for all allegations in election matters save those alleging criminal violations. There is good reason for the requirement that allegations of commission of election offences be proved beyond reasonable doubt. They are criminal offences. In our criminal justice system for any one to be held criminally liable, Article 50 (2) (a) of the Constitution requires that the case against such person should be proved beyond reasonable doubt. In election petitions, the law requires the election court to report such person to the I.E.B.C., which may bar such person from contesting in that or future elections. That is of course besides the sentence which may be meted out to such person if criminal charges are brought against him. Those consequences inform the requirement for proof of election offences beyond reasonable doubt. It is with the penal consequences in mind that we have said the appellant failed to show even on a balance of probability that any election offence was committed by the 1st respondent. We cannot therefore interfere with the learned Judges' findings on alleged voter bribery and treating.

The third complaint against the 1st respondent was use of public servants in his campaign. The appellant sought to demonstrate the same through his testimony and that of PW3. The appellant testified, amongst other things, that civil servants whose name he did not know assisted the 1st respondent in his campaign. PW3 who was the source of that information, never mentioned the words civil or public servant throughout his testimony. As the learned Judge, in our view, rightly found, the appellant did not demonstrate that any public servant campaigned for the 1st respondent or that the 1st respondent employed any public officer in his campaigns. The appellant's complaint in that regard lacks merit and is rejected.

The fourth complaint against the 1st respondent was that he campaigned after the official campaign period. The appellant offered the testimony of John Wycliffe Wanga (PW1) to demonstrate the same. He testified, inter alia, that he was informed of unlawful campaigns by **Ososo Onyango** who captured the same on vedeo tape. PW1 himself stated that he saw the 1st respondent campaign on 3rd March 2013 by which time campaigns had been stopped. He further stated that he was given a lesso on 4th March, 2013 by one Allan Barasa who had also received the same from other people. On his part the appellant testified that he witnessed a road show on 2nd March, 2013. In cross -examination he made an about turn and admitted that his evidence on late campaigns was given to him by others who also did not inform him that they had personally seen the 1st respondent commit the malpractice. The allegations were denied by the 1st respondent in his testimony and that of his witnesses. The learned Judge, in great detail, considered what the appellant offered in evidence on late campaigns and the response of the 1st respondent and his witnesses and concluded that the same did not prove the allegation.

We have considered the same evidence and our view is that the learned Judge fully appreciated the gravity of the allegation and came to the correct conclusion that the same had not been proved as required in law.

The last compliant against the 1st respondent in the petition was that he himself and through known persons under his instruction or directions dissuaded voters inclined to vote for his rivals not to vote. The petition again carried no particulars of those acts and no evidence was adduced to demonstrate the same. The learned Judge again thoroughly considered the complaint and in our view properly rejected it. We agree, and are not surprised that the appellant did not specifically challenge the learned Judge's finding on that aspect of his complaints in his Memorandum of Appeal.

We have decided against the appellant on all the Principal complaints and in the end agree with the learned Judge that the election of the 1st respondent as Member of National Assembly for Butula Constituency was conducted, managed and supervised substantially in compliance with the principles enshrined in the Constitution, in the Act and the Regulations made thereunder and that the anomalies

found were not so pervasive or so serious as to affect the election. We dismiss the appeal and confirm the decision of the learned Judge of the High Court.

As to costs it was contended for the appellant that he should not have been condemned to pay the same because he was a mere voter and was not found guilty of any election malpractice. Costs under the Civil Procedure Code (Section 27) are normally at the discretion of the court and may only be interfered with if the discretion was not properly exercised. Under section 84 of the Elections Act however an election court must award costs of and incidental to a petition and such costs follow the cause. The appellant lost the petition. There was therefore no basis for not ordering costs against him. Indeed, in our view, the learned Judge had no discretion in the matter.

We have anxiously considered the appellant's plea not to be condemned in costs of this appeal. The appeal has been dismissed. Is there any basis for acceding to the appellant's plea. In our view, the status of the appellant perse is not sufficient to depart from the normal rule on costs. We therefore order that the appellant pays costs of this appeal to the respondents.

Judgment accordingly.

Dated and Delivered at Kisumu this 21st day of February, 2014.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

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