IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, J. MOHAMMED, & OTIENO - ODEK, JJ.A.)

CIVIL APPEAL NO. 38 of 2013

BETWEEN

DICKSON MWENDA GITHINJI …….. APPELLANT

VERSUS

GATIRAU PETER MUNYA …….. 1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION …….. 2ND RESPONDENT

FREDRICK NJERU KAMUNDI

COUNTY RETURNING OFFICER MERU COUNTY ..... 3RD RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Meru (Makau, J.) delivered on 23rd September 2013

in

Election Petition No. 1 of 2013)

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JUDGMENT OF THE COURT

BACKGROUND

1. The margin between the winner and runner up in the Meru gubernatorial elections conducted on 4th March 2013 is 3,436 votes. This translates to 0.819 per cent of the total votes cast of 423,247 as per Form 36. The trial Judge described this margin as wide and one of the issues in this appeal is whether a margin of 0.819 per cent which is less than one per cent can be said to be wide both in terms of numerical value and as a percentage of the total votes cast. The crux of this appeal is whether the errors and irregularities disclosed by the evidence on record materially affected the quantitative margin and the qualitative aspects of the Meru gubernatorial election.

The other central issue in the appeal is whether the trial judge was right in ordering scrutiny and recount in only 7 polling stations. Central to the appeal is the question whether the trial judge independently evaluated the evidence on record and if he considered and evaluated the testimony of DW10 **Kennedy Onditi.**

2. The results of the elections as declared by the 2nd and 3rd respondents were as follows:

Name of Candidate	**Political Party**	**Number of Votes**
Hezekiah Gichunge	Kenya National Congress (KNC)	34,340
Jasto Mati Maore	Orange Democratic Party (ODM)	9,500
Kilemi Mwiria	The National Alliance (TNA)	180,837
Peter Gatirau Munya	The Alliance Party of Kenya (APK)	184,273
Reuben Mbaine Marambii	United Democratic Front (UDF)	12,134
	Total Votes Cast	428,273
	Total Valid Votes	423,247

3. Dissatisfied with the declaration of election results, the appellant lodged a Petition before the High Court in Meru. In the Petition dated 20th March 2013, the appellant challenged the declaration of the 1st respondent as the duly elected Governor for Meru County. The Petition is founded on the grounds that:

a. ***The 1st respondent and his supporters committed multiple election offences and malpractices which deprived the election of the fundamental constitutional and statutory requirements of freeness and fairness.***

b. ***That the 2nd and 3rd respondents conducted the election in a manner substantially inconsistent with the provisions of the Constitution and the written laws relating thereto particularly the provisions of Articles 1, 3, 38, 81 and 86 of the Constitution.***

c. ***That the electoral malpractices, offences, irregularities and breaches of electoral laws and principles vitiated the validity, integrity, credibility and result of the election.***

4. The Appellant in his Petition cited the alleged particulars of the electoral offences, irregularities and malpractices and stated *to wit*:

i. ***That the 1st respondent and his supporters engaged in widespread buying of voters cards, bribery and unduly influenced voters and election officials. Further, that the 1st respondent and his supporters engaged in widespread violence, intimidation and harassment of voters and election officials.***

ii. ***That the 2nd and 3rd respondents denied agents the right to participate in the election contrary to the statutory requirements of freeness, fairness, transparency and accountability.***

iii. ***That the 2nd and 3rd respondents presented fraudulent tally/returns for Kiremu, Rumanthi, Kisima Polling Center and Yururu Primary School Polling Center where the total votes cast purportedly exceeded the number of registered voters. That fraudulent tally/return for Forest Camp, Gachige Coffee Factory, Thuura Primary School, Rurine Primary School and Ciothirai Market were made, where also the total votes cast exceeded the number of registered voters.***

iv. ***That the 2nd and 3rd respondents presented Forms 36 in which the votes garnered by candidates differed materially with those recorded in Forms 35 at Nkubu Primary School and Mugure Tea Factory polling stations.***

v. ***That the 2nd and 3rd respondents presented, wrong and misleading figures for the total valid votes cast in Meru for the Governor position where the total votes of each candidate did not add up giving rise to an unexplained difference of 2,163 votes.***

vi. ***That the 2nd and 3rd respondents manipulated the outcome of the election by altering figures entered into Forms 35 &36 without countersigning and duplicating election results for Kathera Tea Buying Centre, Igandene Primary School and Nkubu Primary School polling stations.***

vii. ***That the 2nd and 3rd respondents unlawfully omitted, refused and/or otherwise failed to tally the results for Mwichune Polling Station.***

viii. ***That the 2nd and 3rd respondents were complicit in harassment of TNA agents by officers of the provincial administration and conducted the elections in a partisan and biased manner by misleading illiterate and incapacitated voters in favour of APK candidate.***

5. The Appellant itemized and cited alleged electoral malpractices by the 2nd and 3rd respondent in Tigania East Constituency, North Imenti Constituency, Imenti South Constituency and Central Imenti Constituency. The trial court identified three issues for determination in the Petition namely:

a. ***Did the 1st respondent commit electoral offences and malpractices during the March 4th 2013 gubernatorial elections"***

b. ***Did the 2nd and 3rd respondents conduct the March 4th 2013 gubernatorial elections in contravention of the Constitution and electoral laws"***

c. ***If the said elections were not carried out in accordance with the principles of the Constitution and written law, whether the said non-compliance materially affected the outcome of the results.***

6. In the judgment, the trial Judge (Makau J.) correctly stated that the burden of proof was on the appellant as the petitioner. The trial Judge appropriately cited the Supreme Court decision in ***Raila Odinga & Others – v- Independent Electoral and Boundaries Commission & Others, Petition No. 5 of 2013*** and observed:

"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."

7. In relation to the standard of proof, the trial Judge was correctly guided by the decision in ***John Kiarie Waweru – v- Beth Wambui Mugo & 2 Others (2008) eKLR 4*** wherein it was stated:

"As regards the standard of proof which ought to be discharged by the Petitioner in establishing allegations of electoral malpractices, there is consensus by electoral courts that generally, the standard of proof in electoral petition cases is higher than that applicable in ordinary civil cases…. The standard is higher than proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt…. Allegations of electoral malpractices like for instance bribery require higher proof."

8. Taking into account the incidence of the burden and standard of proof, the learned Judge dismissed the Petition and confirmed the 1st respondent as the duly elected Governor for Meru County pursuant to the General Elections conducted on 4th March, 2013.
9. Aggrieved by dismissal of the Petition, the appellant lodged this appeal citing a plethora of thirty six (36) grounds. For brevity, the grounds can be summarized as follows:

i. ***The High Court denied the appellant a fair trial/hearing by denying him the right and opportunity to cross-examine the 2nd and 3rd respondents on the contents of irregular and/or defective Forms 35 and 36 and to challenge the respondent's evidence.***

ii. ***The trial court erred in not taking into account that a significant number of Forms 35 were not filled in accordance with the law. The court further erred in holding that the multiple errors in Forms 35 and 36 were as a result of honest human error and the said errors were not material.***

iii. ***The court erred in relying on Form 35 as a basis for rejecting the appellant's allegation on intimidation of agents.***

iv. ***The court erred in holding that the appellant had not challenged Form 35s in the election petition or the supporting affidavit.***

v. ***The trial Judge erred in law in holding that the appellant's witnesses PW3, Esther Kabebi Aritho, PW4, Steven Mugambi, PW5, John Kamenchu Málaile, and PW6, Chirstine Kananu George, were not duly authorized electoral agents and this affected the trial court's approach to the issues raised in the Petition.***

vi. ***The court erred in holding that PW 3, PW 4 and PW 6 were not credible witnesses.***

vii. ***The trial court further erred in dismissing the appellant's agent's complaints merely because the same had not been lodged with the police.***

viii. ***The trial Judge misdirected himself on the law on validity and nullification of elections in Kenya and also misdirected himself on the incidence and shifting of the legal and evidential burden of proof.***

ix. ***The trial court erred in law by limiting scrutiny and recount to seven (7) polling stations and erred in holding that the appellant had alleged irregularity in only the seven (7) polling stations.***

x. ***The trial court erred in law by rejecting the findings of its own scrutiny and recount on the issue of votes that purportedly exceeded the number of registered voters.***

xi. ***The trial court erred in not taking into account the damning testimony of DW 10.***

xii. ***The trial court erred in law in ordering the arrest and prosecution of the appellant's witnesses PW 4 and PW 6.***

xiii. ***The trial court erred in holding that the affidavit of PW 3 was not properly commissioned and requiring corroboration of the appellant's evidence. To this extent, the trial court was biased, discriminatory and or partial in requiring corroboration of the appellant's witnesses.***

xiv. ***The trial court erred in law in making adverse findings against the appellant for failing to call witnesses from each of all the polling stations in which the results were disputed.***

xv. ***The trial court erred in law by relying on the Biometric Register and the Green Book which was not produced in Court and are unknown to the Constitution and applicable electoral law.***

xvi. ***The trial court erred in failing to find that the evidential burden on the existence and contents of the Biometric Register, the Green Book and votes that purportedly exceeded the number of registered voters lay on the 2nd and 3rd respondents.***

xvii. ***The High Court erred in awarding the respondents costs of Ksh. 5,000,000/=.***

10. In this appeal, the appellant is seeking the following orders and reliefs:

a. ***Setting aside of the judgment, decree, decision and orders made by the High Court on 23rd September, 2013.***

b. ***A declaration that the 1st respondent was not validly elected as the Governor of Meru County during the gubernatorial elections held on 4th March, 2013.***

c. ***A Certificate as by law to issue to the relevant speaker.***

d. ***Costs of the Petition filed in the High Court and costs of this appeal be awarded to the appellant.***

e. ***Such other, further, incidental, alternative or consequential orders and reliefs as this Court may deem just and expedient.***

11. During the hearing of this appeal, the appellant was represented by learned

counsel **Pheroze Nowrojee** and **Muthomi Thiankolu**. The 1st respondent was represented by **Senior Counsel, Okongo Omogeni** while the 2nd and 3rd respondents were represented by learned counsel **Nyaburi O.H.**

APPELLANT'S SUBMISSIONS

12. Learned counsel, **Pheroze Nowrojee,** elaborated on the grounds of appeal and urged this Court to set aside the judgment and decree of the High Court dated 23rd September 2013. He adopted all the submissions made by the appellant before the trial Judge and the written submissions filed in this appeal. Counsel emphasized that the learned Judge made a serious flaw in his application of the test for determining whether an election should be voided. Counsel stated that the learned Judge misapplied the principle in the case of ***Morgan – v – Simpson (1975) Q.B. 151 at 164***. In particular, it was submitted that the learned Judge erred in drawing the issue to be considered in the following manner:

" (a)……..

(b) ……..

(c) If the said elections were not carried out in accordance

to(sic) the principles of the constitution and written law, whether the said non-compliance materially affected the outcome of the result."

13. Counsel submitted that by drawing the issue for consideration as stated above, the learned Judge misdirected himself and made an error of law that permeated the entire judgment. Counsel submitted that from the above quote, the learned Judge was saying that even if there were irregularities and the elections were not conducted in accordance with the ***Constitution***, the court could still find that the irregularities were excusable if they did not materially affect the outcome of the elections. Counsel submitted that this was a misdirection and misstatement of the principle in ***Morgan – v- Simpson*** (***supra)***. It was submitted that the correct position in law is that if constitutional principles have not been complied with, the court is under a duty to void the elections whether the results are affected or not. Counsel emphasized that if the elections are not conducted in accordance with the ***Constitution***, the court has no discretion to look into whether the results were affected. Counsel stated that ***Section 83*** of the ***Elections Act*** codifies the principle in ***Morgan – v- Simpson (supra)***; and it is mandatory that the elections be conducted in accordance with the principles enshrined in the ***Constitution***. That the learned Judge misdirected himself as he did not take into account the provisions of ***Section 83*** of the ***Elections Act*** as required. Counsel submitted that the constitutional principles to be observed are specific and are found in ***Articles 81 (e) & 86*** of the ***Constitution***; and if these principles are not complied with, the election is vitiated.
14. Counsel for the appellant submitted that the constitutional principles emphasize efficient, accurate and accountable elections. He submitted that the Meru gubernatorial elections were neither efficient, accurate nor accountable. Counsel submitted that nowhere in the judgment did the trial Judge weigh and consider the principles of ***Article 81 (e)& 86*** of the ***Constitution***. That failure to weigh and consider ***Articles 81 (e) & 86*** of the ***Constitution*** is manifested in the manifold errors in the findings and conclusions made by the trial Judge. That having started on a misapprehension of the principle in ***Morgan – v – Simpson (supra)***, the trial Judge embarked on

a judgment on critical issues by basing himself on a wrong statement of law. That in the exercise of his discretion, the Judge took into account what he ought not to have taken into account and he tested the Petition on wrong principles of law and he inevitably arrived at a wrong decision.

15. Adopting the submissions made before the trial court, Counsel for the appellant, observed that the present appeal is premised on the errors of law made by the trial court. That the trial court erred by failing to find that it was irregular and unlawful for the 2nd and 3rd respondents to exclude the agents of the runner up to fully participate in the electoral process. That there was fraudulent or inaccurate vote counting, tallying and falsified returns. There was duplication, refusal, and omission and or failure to count and tally results from all polling stations. That there was irregularity through alteration, cancellation and manipulation of election results through inflation or deflation of some candidates votes.
16. **Mr. Norowjee** for the appellant submitted that the trial court erred in rejecting the findings of scrutiny and recount conducted by the court. The scrutiny and recount report is at page 639A of the record of appeal. It was submitted that the scrutiny report pointed out various errors and irregularities all of which were ignored by the trial court. It was submitted that the scrutiny and recount report returned a 100% confirmation that indeed there were errors and irregularities in all the 7 polling stations where scrutiny and recount was done. On the results of the scrutiny and recount report, the appellant's submission was as hereunder:

"The Scrutiny Report showed that the 1st respondent was added 156 votes in the 7 polling stations. This is an average of 22 irregularly added votes per polling station. If one were to take the 7 polling stations as a representative sample, and spread the average across the 953 polling stations in Meru County, the total would come to at least 21,000 irregularly-added votes, about seven times the margin by which the 1st respondent purportedly beat his closest competitor. If one were to spread the average to the 141 polling stations in Imenti South alone, the total would come to 3,142 irregularly-added votes. This is very close to the margin by which the 1st respondent purportedly beat his closest competitor. The appellant further submitted that Mr. Kilemi Mwiria, the runner up, was wrongfully deducted 155 valid votes in 7 polling stations, translating to an average of 22 irregularly-deducted votes per polling station and if one were to spread the average across the 953 polling stations in Meru County, this translates to 21,000 irregularly reduced votes and if this were to be spread to 141 polling stations, it would mean that Kilemi Mwiria was wrongfully denied 3,122 votes in Imenti South alone. The errors and irregularities in the 7 polling stations was a cumulative sum of 711 votes and there was a consistent trend in which the 1st respondent's votes were increased while those of Kilemi Mwiria was reduced almost by the same number. The appellant submitted that electoral results showed that the 1st respondent was awarded all the votes that were deducted from Mr. Kilemi Mwiria in 12 out of the 14 streams that were recounted and scrutinized. That when you increase the votes of one candidate by a certain number and decrease the votes of another by the same number, the adversely affected candidate suffers a double tragedy namely unfair reduction of his votes and the unfair increase or decrease in the gap between him and the favoured candidate."

17. Counsel for the appellant referred this Court to the testimony of **DW 10 (Kennedy Onditi)** who was the 2nd and 3rd respondents' main witness. It was emphasized that DWO 10 was not the County Returning Officer but a returning officer for Imenti South Constituency. This Court was urged to note that the County Returning Officer though a respondent in the Petition, did not testify. Based on the testimony of DW 10, the appellant submitted that the said Returning Officer was extremely careless, irresponsible, nonchalant and indifferent to the irregularities committed during the gubernatorial elections. That DW 10 testimony is important as it shows how the learned Judge treated his evidence which revealed extensive non-compliance with the principles laid out in the ***Constitution***. The appellant submitted that the indifferent and nonchalant attitude

demonstrated by DW 10 was proof that the gubernatorial elections for Meru County was a travesty and was not free, fair, transparent, accurate and accountable. Counsel for the appellant quoted verbatim the relevant testimony of DW 10 on the irregularities. In his testimony, DW10 stated:

"I won't be concerned if I receive Form 35 which is not signed by any single agent. I won't be concerned if I received a Form signed by a few agents. The returning officer is not allowed to increase or decrease candidates votes. If he increases or decreases candidates votes that would be an irregularity. I do not know whether that (i.e. increasing or decreasing candidate's votes) would put IEBC into questionable integrity. I would not be concerned. I cannot tell whether candidates would be concerned with altered votes. I do not know whether voters would be concerned. I would not be worried by failure to have any single agent signing the Form inspite of the alterations. That would not impact on the integrity of the electoral process."

18. Counsel for the appellant submitted that from the testimony of DW 10, the learned Judge should have considered the evidence as an admission by the 2nd respondent that constitutional principles were not followed and the 2nd respondent did not bother with the accuracy and accountability of the elections. That the 2nd respondent did not ensure that the voting method was accurate and accountable. That the learned Judge erred in not giving weight to DW10's testimony and further erred in finding that the irregularities were human error. That the conclusions of the trial court are not drawn from the evidence on record and was unreasonable in light of DW 10's own admissions.
19. In the written submissions both before the trial court and this Court, counsel for the appellant, submitted that the scrutiny and recount report by the Deputy Registrar of the High Court revealed irregularities in all the seven (7) polling stations. It was submitted that the testimony of the appellant and his witnesses revealed malpractices and irregularities. Counsel submitted that the learned Judge erred in rejecting the scrutiny and recount report by the Deputy Registrar. In the written submissions adopted from the High Court, **Mr Nowrojee** urged this Court to apply two tests to determine whether the Meru gubernatorial elections should be nullified. These are:

    a. ***Whether the illegalities, irregularities or malpractices proved by the petitioner are of such a nature or extent to vitiate the integrity or credibility of the electoral process (qualitative or substantial compliance test) or***

    b. ***Whether the illegalities, irregularities or malpractices proved by the petitioner, trivial or fundamental as they might be, affected the result of the election (result test).***

20. The appellant submitted that applying the foregoing tests, the Meru gubernatorial elections should be nullified because:

    a. ***the findings of the scrutiny and recount exercise revealed a consistent trend that the 1st respondent's votes were deliberately increased while those of Mr. Kilemi Mwiria were deliberately reduced.***

    b. ***the findings of the scrutiny and recount exercise reveal that there were errors and irregularities in all the 7 polling stations translating to an average irregularity of 101 votes per polling station.***

    c. ***taking into account allegations of similar errors and irregularities in the multiple polling stations not covered by the scrutiny and recount, the 2nd and 3rd respondents cannot***

claim that the Meru gubernatorial results were complete and accurate.

d. ***there are errors and irregularities which are manifest in Forms 35 and 36 for those polling stations not covered by the scrutiny and recount.***

e. ***the presiding officer did not state the reasons why a candidate or his agent failed or refused to sign Form 35.***

21. Counsel for the appellant cited the persuasive case of **William *Kabogo Gitau - v- George Thuo & 2 others*, *{2010} eKLR***, where Kimaru, J. stated that failure by a presiding officer to state reasons why a candidate or his agents failed or refused to sign Form 16 A (now Form 35), or failure to record the absence of such candidate or agent, renders the results contained in the said Form 16 A invalid. It was submitted that in the instant case, the presiding officer did not record the reasons why candidates or agents did not sign Forms 35 in 48 polling stations involving more than 20,000 votes. The appellant submitted that there were Forms 35 which had cancellations and alterations that were not countersigned and such Form 35s cannot be said to contain valid results of the polling stations in question.
22. For the appellant it was submitted that over 48 polling stations had Forms 35s with alterations and cancellations **without signatures of even a single candidate or agent**. It was submitted that the defence of human error is not available for such multiple irregularities. Counsel cited that case of ***Manson Oyongo Nyamweya – v- James Omingo Magara & 2 others***, Kisii Election Petition No. 3 of 2008, where the issue of failure to sign Form 16A by the presiding officer and/or agents was considered. In the said case the trial court expressed itself as follows:

"The refusal or failure of a candidate or agent to sign Form 16A or to record the reasons for not doing so as required cannot by itself invalidate the results as announced by a presiding officer. Failure by a presiding officer to comply is a serious breach which requires appropriate explanation by the officer concerned. It is an election offence for a presiding officer, without a reasonable cause, to fail and/or refuse to sign the form…and state the reasons for refusal and/or failure of a candidate and/or his agent to sign the form and any necessary statutory comments. Where a presiding officer presents to a returning officer a Form 16A which is neither signed by that presiding officer and/or any of the candidates, that declaration is of no value and cannot be used or authenticate any declared results." (Emphasis ours)

In ***William Odhiambo Oduol –v – IEBC & Others, Election Petition 2 of 2013*** Justice Muchelule in relation to alterations, errors and mistakes opined:

"Each petition has to be decided on its own merits. It would depend for instance, on the number of the Forms in question in relation to the total Forms in the petition. It would also depend on the explanations given by the electoral officials, whether or not the agents signed the Forms or what questions they (the agents) raised about them. But the correct thing should always be that every alterations and/or cancellations be countersigned and stamped by the maker.

23. A further ground of appeal is that the learned Judge erred in failing to find that the Returning Officer by delegating the duty to fill Form 36s to data entry clerks committed an irregularity which rendered the tallied and declared results unlawful. Counsel submitted that in ***James Omingo Magara – v- Manson Oyongo Nyamweya* {2010} eKLR,** it was stated that a free and fair electoral process involves the presiding officer himself signing the form and then inviting the candidates or their agents to sign.
24. In the instant case, the appellant contend that Mr. Onditi (DW10) and Mr. Abdi (DW9) admitted

that they had delegated the responsibility of verifying the information on Forms 35 and filling Forms 36 to data entry clerks. The appellant contends that this delegation was not only negligent but invalid and it affected the integrity of the election process. In support of this submission, the appellant in *extenso* quoted from the judgment of Kimaru J. in **William *Kabogo Gitau - v- George Thuo & 2 others*, {2010} eKLR** as follows:

"In regard to failure to include the results of the seven polling stations in the Form 17A, the 3rd respondent attributed it to human error. The 3rd respondent was further mandatorily required to make entries in respect of all the polling stations in Juja constituency as contained in the Form 16As. He cannot purport to abdicate from his statutory responsibility by casually pleading to be excused on the ground that the non-inclusion of Form 16A in respect of seven polling stations was understandable because it was occasioned by human error. In the present petition, it was apparent that the 3rd respondent failed to verify or confirm that the results filled in the Form 17A were the true and accurate results of all the 231 polling stations in Juja Constituency. It was evident that the 3rd respondent, if at all, filled the Form 17A in the absence of the candidates. That was the reason why the candidates, including the 1st respondent, failed to append their signatures on the said Form 17A. The said form 17A cannot therefore be said to be a valid legal instrument or statutory form containing the declared results of Juja constituency… The cancellations and alterations in the Form 16As produced in this court raised questions regarding the veracity and authenticity of the said results. The said Form 16As cannot in the circumstances be said to contain the valid results of the polling stations in question. The fact that the 1st respondent won the elections by more than 19,000 votes cannot be reason why the irregularities and malpractices should be condoned." (Emphasis ours).

25. The appellant also cited the Ugandan case of ***Musinguzi Garuga James – v- Amama Mbabazi & The Electoral Commission Election Petition No. HCT-05-CV-EPA-003 of 2001***. In that case, the first respondent was declared the winner with 25,433 votes while the petitioner garnered 12,977 votes. After considering various issues of non-compliance, the court applied the qualitative test and was satisfied that the non-compliance affected the final results notwithstanding the huge margin of votes between the petitioner and the 1st respondent. The appellant submitted that the above dicta has been followed in numerous persuasive authorities such as in ***Manson Onyango Nyamweya – v- James Omingo Magara & 2 Others {2009} eKLR; Simon Nyaundi Ogari & another – v- Joel Omagwa Onyancha & 2 others {2008} eKLR; James Omingo Magara – v- Manson Oyongo Nyamweya & 2 Others {2010} eKLR*** and ***Thomas Malinda Musau & 2 others – v- IEBC {2013} eKLR .***
26. In view of the authorities cited, the appellant submitted that the failure of the Returning Officer to record the fact of failure or refusal of a candidate or agent to sign Form 35s and 36s was a serious breach of law that should invalidate the Meru gubernatorial elections. It was also submitted that the numerous irregularities cited and non-compliance with mandatory and important provisions of law means that the Meru gubernatorial elections cannot be said to have been transparent, free and fair.
27. The appellant submitted that the results of scrutiny and recount revealed that in some polling stations, the votes cast exceeded the number of registered voters. The appellant urged this court to follow the persuasive decision in ***Manson Oyongo Nyamweya – v- James Omingo Magara & 2 others***, ***Kisii Election Petition No. 3 of 2008,*** where the court considered the issue of acceptance of results from polling stations in which the votes cast exceeded the number of registered voters. In that case it was held that it was evident that the results posted in Form 17A in respect of the five polling stations had been inflated from the actual ones as recorded in Form 16A. Although the arithmetic difference between the figures was not very significant, it showed that there was no due diligence on the part of the 2nd respondent and/or officials subordinate to

him.

28. We have examined the scrutiny and recount report. We note that in the seven (7) polling stations subjected to scrutiny and recount, there is no mention that the ballot paper counterfoils were analyzed and compared with the total number of votes cast and the voters register. Ballot paper counterfoils are vital documents and must be in the ballot box together with the cast ballots. The counterfoils are aimed at giving credence to the integrity of the election. As was stated in ***Manson Oyongo Nyamweya – v- James Omingo Magara & 2 others***, Kisii Election PetitionNo. 3 of 2008,

"Without the ballot paper counterfoil, the ballots in a box are unverifiable. If scrutiny showed that the documents in the ballot boxes were substantially non-compliant or that certain statutory documents were not contained therein, a recount of the ballots per se cannot cure the inherent defect. The presence of a ballot paper in a ballot box is validated by the counterfoil thereof and the marked voter's register. Without the two, there is no telling how it found its way into the ballot box. This means that the principle of transparent, free and fair election was compromised."

29. In our re-evaluation of the appellant's submission, we note that the common malpractice and irregularity in contention are as follows:

a. ***the declaration of a final tally by the 2nd and 3rd respondents which do not correspond with the results in Form 35;***

b. ***accepting results from polling stations in which the number of votes cast exceed the number of registered voters;***

c. ***accepting and including in the final tally/count ballots and ballot boxes of questionable origin;***

d. ***using Form 35s and 36s that were not signed by agents in the declaration of results for the gubernatorial elections.***

e. ***in Central Imenti Constituency, the 2nd and 3rd respondents irregularly required candidates/agents to sign blank forms ahead of the vote counting and tallying and forcing agents to take long breaks while the returning officer and presiding officers were left in the Tallying Centre contrary to Regulation 75 (4) of the Electoral Regulations, 2012.***

f. ***it is contended that the 2nd and 3rd respondents denied agents the opportunity to participate in vote counting and tallying and submitted results in Forms 35 that were not signed by all the candidate's agents contrary to Election Regulations 79 and 85.***

g. ***that the 2nd and 3rd respondents refused to project the results entered into the computer thereby denying agents the opportunity to verify the accuracy of the result.***

h. ***that the trial Judge erred in interpreting the constitutional principle for vitiating an election and erred in the burden of proof in respect to the total number of registered voters.***

1ST RESPONDENT'S SUBMISSIONS

30. **Senior Counsel, Okongo Omogeni**, made submissions on behalf of the 1st respondent. He adopted the written submissions filed in the appeal. The gist of the response is that the Meru

gubernatorial elections conducted on 4th March, 2013 were free, fair and transparent and in accordance with ***Article 81*** of the ***Constitution*** and the 2011 ***Elections Act*** as well as in compliance with the 2012 ***Election Regulations***. He submitted that the elections were a genuine expression of the free will of the voters and was free from violence, intimidation, undue influence or corruption; that the elections were conducted in an impartial, neutral, efficient, accurate and accountable manner; that the learned Judge did not misdirect himself in framing and drawing the issues to be considered and the applicable law; that the trial Judge properly evaluated the evidence on record and based his decision on the evidence.

31. Adopting the submissions made before the trial court, the 1st respondent denied committing multiple election offences and malpractices either in isolation or in combination with others. Counsel submitted that the petitioner in his own evidence testified that the allegations contained in the petition were not true. That the petitioner admitted in evidence that there were mistakes in his affidavit and he did not tell the trial court the truth; that he relied on a document prepared by a one Kevin Koome which was not true. The 1st respondent denied that the total votes cast in any polling station exceeded the number of registered voters; he denied there having been any fraudulent tallying or return in the polling stations as cited by the appellant. The 1st respondent deposed that he did not have control of the entries made in Forms 35s and 36s at any polling station and the entries therein were factual and if any error existed therein, it was inadvertent typographical human error which did not materially affect the outcome of the election. The 1st respondent stated that there was no wrong or misleading entry of votes cast in Meru for the position of Governor and it was not true that the votes for each candidate did not add up. The 1st respondent deposed that from the information received from the Alliance Party of Kenya, there were no incidents of violence, voter bribery, intimidation or fraudulent tallying and return of votes; and the votes cast did not exceed the registered voters.
32. Counsel for the 1st respondent, submitted that on the record, there is no scintilla of evidence that the elections were conducted contrary to ***Article 81*** of the ***Constitution***. That there is no evidence to show that the elections were not transparent, not conducted by secret ballot, not conducted by an independent body, or the results were not accurate. It was submitted that no single affidavit was sworn by any agent or witness to show that the elections were neither accurate nor accountable. Counsel submitted that the learned Judge properly summarized the law on the materiality principle which was applied by the Supreme Court in the case of ***Raila Odinga & Others – v- IEBC & others (supra).***
33. Counsel for the 1st respondent submitted that ***Rule 62(3)*** of the ***Election Regulations*** provides for instances where agents or candidates refuse to sign Forms 35s and 36s and this does not vitiate the results of the elections. That a remedy is provided in ***Regulation 79 (7)*** for Forms that have not been signed; the remedy is that the results are not invalidated. He submitted that to the best of the 1st respondent's knowledge, no votes cast in favour of Mr. Kilemi Mwiria were destroyed.
34. Learned counsel in adopting the submissions before the High Court, submitted that no evidence was tabled to demonstrate that the 1st respondent either used or threatened to use force or violence to compel anyone to vote or not to vote for a particular individual or political party. That the appellant's witnesses who swore affidavits on bribery were never called to testify and the names of women allegedly bribed were not supplied or produced before the trail court. It was submitted that no evidence was tabled to support the allegation of widespread violence, intimidation and harassment. Counsel refuted the submission that the presence of the District Commissioner and a Senatorial Candidate at the South Imenti tallying Centre amounted to intimidation and undue influence. Citing the case of ***Benard Shinali Masaka – v- Boni Khalwale & 2 others {2011} eKLR*** in support of his submissions, counsel stated that there was nothing in law which bars a District Commissioner or a Senatorial candidate from being in a tallying centre and there is nothing patently illegal with their presence in the tallying centre.

35. Counsel submitted that all the appellant's witnesses admitted that none of them made any attempt in reporting the alleged irregularities and electoral offences to the police or to the electoral officials and urged this Court not to rely on their testimonies. Citing the case of ***Thomas Malinda Musau & 2 others – v- IEBC {2013} eKLR***, where it was stated at paras. 89-90 that,

"It is also important to note that he did not report the matter to IEBC as required by the second schedule provision 6 (h) of the Elections Act which specifically provides that, any misconduct can and should be reported by any person to the Electoral Code of Conduct Enforcement Committee; which Committee will liaise with the government security agencies in the constituency and report suspected election malpractices."

It was submitted that failure to report the alleged bribery, intimidation and violence of voters/agents could not be remedied by this Court.

36. On the submission that party agents were refused the right to participate in the electoral process, the 1st respondent cited ***Regulation 62 (3)*** which stipulates that the absence of agents shall not invalidate the proceedings at a polling station. It was further submitted that the appellant's witnesses Esther Kabebi (PW3), John Kamenchu (PW5) and Christine Kananu George (PW6)) did not provide any evidence to prove that they were the duly authorized agents to be at any polling station and that they were locked out unlawfully, if at all. Counsel submitted that since these witnesses did not prove they were agents, the Presiding Officer was within his power to lock and prevent unauthorized persons from accessing the polling and tallying centre.
37. On the failure by agents to sign Forms 35s at the polling stations, the 1st respondent submitted that since it was not proved that PW3, PW4, PW5 and PW6 were authorized agents, they had no capacity to sign Forms 35s and in any event, ***Regulation 79 (6)*** provides that the refusal or failure of a candidate or agent to sign a declaration form does not by itself invalidate the results as announced. Further, that ***Regulation 79 (7)*** stipulates that the absence of a candidate or an agent at the signing of a declaration Form or announcement of results shall not by itself invalidate the results announced. Counsel submitted that the appellant did not prove that failure of some agents to sign Form 35s materially affected the results of the election. Counsel cited the dicta in ***Thomas Malinda Musau & 2 others – v- IEBC {2013} eKLR*** where it was stated that,

"though it was crucial for the agents or candidates to sign the Form 35, failure to do so does not necessarily nullify the elections."

38. The 1st respondent in his submissions challenged the integrity of the appellant alleging that he is of lacklustre, questionable character, unreliable and is being financed by Mr. Kilemi Mwiria. It was submitted that the appellant confirmed in cross-examination that he knew nothing about the allegations set forth in the Petition and he had no knowledge of what was happening at the tallying centres and he had no names of the alleged unauthorized agents.
39. Regarding the errors revealed after scrutiny and recount as ordered by the trial court, the 1st respondent submitted that only 358 votes were found to be in contention despite the 1st respondent having won by a margin of 3,436 votes. That the appellant has chosen to point out random human errors without showing how they affected the will of the voters in Meru. In relation to the trial court striking out the appellant's annextures DMK2, DMK3 and DMK4, the appellant citing the case of ***Phillip Osore Ogutu – v- Michael Onyura Aringo & 2 others (2013) eKLR***, submitted that there can be no quarrel with the principle that any evidence that goes beyond the pleadings must either be rejected outright or be disregarded. Counsel further cited the case of ***Wavinya Ndeti – v- IEBC & 4 others (2013) eKLR*** where it was stated that the court ought to guard against a party's attempt to sneak in fresh evidence in the guise of additional evidence or

further evidence where the effect is to amend pleadings and set the cause of action on an entirely different path.

40. The 1st respondent submitted that out of 953 polling stations in Meru Country, the appellant could only cite credible irregularities in seven (7) polling stations where scrutiny and recount was conducted. Counsel submitted that the seven (7) polling stations cannot be used in any scientific or analytical way as representative sample of the rest of the polling stations in the larger Meru County where no irregularities were identified. It was submitted that the irregularities identified in the 7 polling stations were minor errors which were not for the benefit of any single candidate and the errors discovered did not materially affect and alter the results of the elections. The 1st respondent cited the case of ***Raila Odinga & Others - v – IEBC (supra)*** where the Supreme Court held that despite irregularities and discrepancies revealed through tallying, the evidence does not disclose any profound irregularity in the management of the electoral process, nor does it gravely impeach the mode of participation in the electoral process by any candidate.
41. In the instant appeal, Counsel for the 1st respondent submitted that the minor errors and discrepancy of 358 votes did not disclose profound irregularity in the Meru gubernatorial elections. The 1st respondent submitted that the margin between the winner and runner up was 3,436 votes. That the votes that were noted to affect this margin after scrutiny were 358 votes and this number does not affect the results as announced. The 1st respondent cited the case of ***Rishad Hamid Ahmed Amana & 2 Others, Malindi Election Petition No. 6 of 2013*** where it was stated,

"what is not in doubt is that even if the figure of 600 votes was added to the then total votes of 10,639 that the Petitioner is said to have obtained, that would add up to 11,239 which will still be less than 11,560 votes that the 3rd respondent obtained."

42. The 1st respondent referred this Court to statutory and judicial decisions on materiality of irregularities in elections. Counsel cited ***Section 83*** of the ***Elections Act*** which provides that no election shall be declared void by reason of non-compliance with any written law, if it appears that the election was conducted substantially in accordance with the principles laid down in the ***Constitution*** and in written law and if the non-compliance did not affect the result of the election. Counsel relied on the case of ***Islington west Division Case, Medhurst – v- Lough and Gasquet*** (1***01) 5 O'M & H 120, 17 TLR 210, 230*** where the court held that,

"an election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the elections where the court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election was not and could not have been affected by those transgressions."

43. Counsel for the 1st respondent urged this Court to note the persuasive decision in the case of ***Joho – v- Nyange (2008) 3 KLR (EP),*** Maraga J. (*as he then was*) stated:

*"**There were two kinds of election errors namely deliberate and innocent, even though negligent. Error is to human. Some errors in an election like this conducted under a frenetic schedule are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental, they should be excused and ignored. It is not every non-compliance or every act or omission in breach of the electoral regulations or procedure that invalidates an election for being non-compliant with the law."***

44. Counsel for the 1st respondent distinguished the judicial authorities cited by the appellant

particularly the case of ***William Kabogo Gitau – v- George Thuo & Others (supra)***. It was submitted that the irregularities in that case were major and not minor arithmetical errors as is in the instant case which cannot alter the true wishes of the Meru County voters. Counsel submitted that in all the cases cited by the appellant, the discrepancies and errors were not minor and affected the outcome and result of the elections. Counsel pointed out that in ***Thomas Malinda Musau & 2 others v IEBC & 2 others (2013) eKLR***, the ballot papers which were not validated by counterfoils were 2680 which could have altered the results. The 1st respondent in distinguishing the case of ***Manson Oyongo Nyamweya – v- James Omingo Magagra & another, Petition No. 3 of 2008***, submitted that the errors were multiple for example 3 ballot boxes were missing, four ballot boxes were empty, 31 ballot boxes had no Form 16A; and in 40 polling stations the presiding officers did not sign Form 16A.

45. The 1st respondent also distinguished the case of ***Simon Nyaundi Ogari & another – v- Joel Onyancha & another,*** in which scrutiny revealed massive anomalies for instance, out of the 151 ballot boxes delivered to the court, 8 were empty; 42 ballot boxes were open, 22 ballot boxes had no seals and very many boxes had seals which had been tampered with; out of the 151 ballot boxes, only 39 were in good order. Counsel for the 1st respondent submitted that in the instant case, the Deputy Registrar having conducted scrutiny and recount confirmed that the ballot boxes were intact and had not been tampered with. He urged this Court to note the dicta in the case of ***William Kabogo Gitau – v- George Thuo & two others (supra)*** where the issue of integrity of the ballot boxes was considered after 66 of the ballot boxes were found to have been tampered with and the court held that whenever ballot boxes have been tampered with, the integrity of the said ballot boxes is put in question. It was submitted that in the present case, since the ballot boxes were not tampered with, the integrity of the ballot boxes remain unscathed.
46. Counsel cited the case of ***Steven Kariuki – v- George Mike Wanjohi & others Nairobi EP No. 2 of 2013***, where Kimondo, J. correctly stated that ***Section 83*** of the ***Elections Act*** is coached in negative language and there is a rebuttable presumption in favour of the respondents that the election was conducted properly and in accordance with the law. (See also ***Mohammed Ali Mursal – v- Saadia Mohammed & 2 others (2013) eKLR***).
47. In the instant appeal, we pose the question as posited by the Supreme Court in ***Raila Odinga & Others - v – IEBC (supra)*** and ask: did the appellant/petitioner clearly and decisively show that the conduct of the election was so devoid of merits and so distorted as not to reflect the expression of the people's electoral intent" In the case of ***Morgan – v – Simpson (1975) QB 15, (1974) 3 All ER 722***, Lord Denning stated:

    a. ***If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.***

    b. ***If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. (See also Wabuge – v- Limo & another (2008) 1 KLR (EP) 417; see also Magara – v- Nyamweya (2010) 4 KLR (EP).***

    c. ***But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated.***

48. Counsel for the 1st respondent observed that the appellant's complaints raise issues of irregularities, election offences such as bribery, intimidation, tallying errors and other data specific allegations. These issues have different standards of proof. In ***Shri Kirpal Singh – v-***

Shri V.V. Giri (1970) INSC 191, the Supreme Court of India stated that there can be no doubt that a charge of undue influence is in the nature of a criminal charge and must be proved by cogent and reliable evidence, not on the mere ground of balance of probability, but on reasonable certainty that the persons charged therewith have committed the offence, on the strength of evidence which leaves no scope for doubt as to whether they have done so. The Kenya Supreme Court in ***Raila Odinga & Others - v – IEBC (supra)*** stated that in the case of data specific electoral requirements, the party bearing the legal burden of proof must discharge it beyond reasonable doubt. The Supreme Court further held that the legal burden of showing that the voter's register as compiled and used, was in any way in breach of the law or compromised the voter's electoral rights, is on the petitioner.

49. Regarding the use of electronic register and failure to electronically display the results, counsel for the 1st respondent cited the Supreme Court decision in ***Raila Odinga & Others - v – IEBC (supra)*** where the Court held that the contention that the elections could only have been based on the Biometric Voter Register (BVR) element of the principal register is not tenable nor was it tenable to contend that the BVR register all by itself was the Principal Register of Voters. On data irregularity, the Supreme Court stated that no credible evidence had been adduced to show that such irregularities were premeditated and introduced by the respondent for purpose of causing prejudice to any particular candidate.

2nd and 3rd RESPONDENTS' SUBMISSIONS

50. Learned counsel, **Nyaburi O. H.,** made submissions for the 2nd and 3rd respondents. He adopted the written submissions filed in the appeal as well as the submissions filed before the trial court. Counsel associated himself with the submissions made by Senior Counsel for the 1st Respondent. In opposing the appeal, **Mr. Nyaburi** stated that it is not in doubt that any electoral process should comply with ***Articles 81 & 86*** of the ***Constitution***. It was submitted that the IEBC in promulgation of the ***Election Rules*** captured the principles of ***Articles 81& 86*** of the ***Constitution***. Counsel submitted that the learned Judge correctly crystallized the issues for consideration in the Petition. That a plain and ordinary meaning of ***Section 83*** of the ***Elections Act*** shows that the learned Judge was right in asking himself whether the election was done in accordance with the principles laid down in the ***Constitution***. It was submitted that non-compliance in the said section refers to non-compliance with both the ***Constitution*** and written law. Counsel posited the question, if there are inaccuracies in transferring figures from Forms 35 to 36, does this vitiate the elections" It was submitted that in answering the question, the issue to determine is the effect of the errors on the outcome of the elections.
51. Learned Counsel observed that the appellant alleged that DW10 had made certain concessions and admissions. He urged this Court to look at the entire evidence of DW10 as whole and not isolated items of evidence. It was submitted that it was not in dispute that no agent was called to testify that the votes entered in Forms 35 were not correct; no candidate or agent complained that the results as announced were not accurate or that agents were denied access to the tallying centre. Counsel submitted that on scrutiny and recount, the learned Judge correctly interpreted and applied ***Regulation 33 (4)*** that limit scrutiny to polling stations that are contested and listed in the Petition. It was submitted that the appellant had misrepresented to this Court that the learned Judge rejected the scrutiny report by the Deputy Registrar. Counsel submitted that the correct position is that the learned Judge faulted the Deputy Registrar for making findings and conclusions on facts which exceeded his mandate as set out in the order for scrutiny and recount. That it was not the province of the Deputy Registrar to arrive at a finding that the votes cast exceeded registered voters when the Deputy Registrar had not seen the Green Book or the Special Register.
52. Counsel for the 2nd and 3rd respondents submitted that the learned Judge went through each and

every allegation in the Petition and properly evaluated the evidence, saw the demeanor of witnesses and gave a reasoned and considered judgment. Counsel urged this Court to find that there was substantial compliance with the constitutional electoral principles and the written electoral laws. He submitted that the allegations of bribery, intimidation and undue influence were never proved.

53. In adopting the submissions before the trial court, the 2nd and 3rd respondents submitted that if at all there was any non-compliance with electoral laws, the same was insignificant and in respect of isolated incidents which did not materially affect the outcome of the elections. The respondents urged this Court to apply the test of public interest, proportionality and harm test that militate against nullification of the election results for the position of Governor for Meru County.
54. In the submissions before the trial court, the 2nd and 3rd respondents stated that the appellants complaints could be categorized into two namely, election offences and breach of electoral regulations. As regards election offences, it was submitted that the contention by the appellant is to the effect that there was bribery and undue influence, buying of voter's cards, violence and intimidation and harassment of voters. In respect to breach of electoral regulations, the respondents identified 23 alleged instances of breach *to wit:*

a. ***Denial of agents the right to participate in the elections***

b. ***Presenting fraudulent tally/returns where votes cast allegedly exceeded registered voters.***

c. ***Votes garnered by candidates in Form 35s materially differed from Form 36.***

d. ***Manipulation of results by altering figures in Forms 35 and 36 without countersigning and duplication of results.***

e. ***Complicity in harassment of TNA agents by officers of the provincial administration.***

f. ***Failing to tally votes for Mwichume Polling Station (083) in Imenti South Polling Station.***

g. ***Conducting the election in a partisan and biased manner by misleading illiterate and incapacitated voters to vote in favour of the 1st respondent.***

h. ***Denying voters the right to vote at Limoro and Antuanuu polling stations.***

i. ***Accepting Form 35s and 36s not signed by agents in declaring results.***

j. ***Failing to project results and transmit results electronically to the tallying centres.***

k. ***Failing to safeguard the safety of the ballot boxes.***

- ***Transporting ballot boxes in the absence of agents.***

m. ***Destroying valid votes in favour of Kilemi Mwriria at Mikinduri area.***

- ***Irregularly requiring agents to sign blank Forms 35s and 36s.***

- ***Failing to address agents concerns and objections.***

p. ***Allowing unauthorized persons to impersonate genuine agents and sign Forms 34s and***

36 at Muthara Youth Polytechnic.

q. ***Refusal to display results on the doors of the polling stations.***

r. ***Forcing agents to take long breaks.***

s. ***Refusing to count and tally valid votes at Gambela, Mukuani and Kirimanchuma polling stations.***

t. ***Succumbing to pressure and undue influence from the 1st respondent and Alliance Party Senatorial candidate.***

u. ***Refusing to conduct vote counting at Mituguu primary school.***

v. ***Instigating arrest, harassment and threatening of an agent at Kaguru Tallying Centre.***

w. ***Accepting and including in the final tally ballots and ballot boxes of questionable origin brought to Kaguru Tallying Centre.***

55. Counsel submitted that the respondents were not aware of any incidents of harassment, intimidation, bribery and violence as alleged by the appellant/petitioner and no report or complaint was made by the appellant/petitioner or his agents. The 2nd and 3rd respondents denied the allegations of partisanship, bias and undue influence as alleged by the appellant. It was submitted that the electronic voter identification system was to provide safeguard to promote the integrity of the electoral process by enhancing transparency but was never meant to substitute the manual voting procedure provided for in ***Regulation 69*** of the 2012 ***Election Regulations.*** Counsel submitted that the appellant failed to adduce any cogent and independent evidence to back the allegations of bribery and the same was not proved to the required standard or at all.
56. On the issue of buying voters cards, the 2nd and 3rd respondent submitted that the only document required to facilitate voting was a National Identity Card or Passport. That voter's card were inapplicable in the elections held on 4th March, 2013 and thus the allegation of buying voters cards held no water and should be dismissed in entirety. As relates to violence, intimidation and harassment of voters, the 2nd and 3rd respondents submitted that there were no reported incidents of widespread violence and none was disclosed by the appellant's witnesses during their oral testimony before the trial court. Whatever the witnesses deposed to in their affidavits were neither re-stated nor proved during their oral testimony. Counsel submitted that no report of voter harassment was made to the Returning Officer and perusal of Forms 35s does not show any comments on intimidation and harassment reported by any agent. It was submitted that no affidavit was filed by any voter confirming or alleging that he/she was intimidated or harassed. On that basis, learned counsel submitted that the appellant did not prove beyond reasonable doubt the offences alleged.
57. The 2nd and 3rd respondent's submitted that no single agent was called to testify that he/she was denied the right to participate in the tallying process and no witness affidavit to this fact was filed. It was submitted that under ***Regulation 62 (1)*** of the ***Election Regulations 2012***, only authorized agents were to be allowed at the polling stations and by ***Regulation 62 (4),*** the authorized agents were required and expected to display their official badges. It was submitted that it was not proved that Christine, Stephen Mugambi , John Kamenchu or Esther Kabebi who were allegedly denied access were duly authorized agents to be at the tallying centre. It was submitted that the Returning Officer, Abdi Sheikh Mohammed, never received any report

regarding any incident of an agent being denied access to the tallying centres. The respondents submitted that the allegation of denial of the right to be present and participate at the tallying centre was not proved.

58. The 2nd and 3rd respondents denied the allegation that fraudulent tally/returns were made and that the votes cast exceeded the registered voters. It was submitted that for the Court to be satisfied that votes cast exceeded registered voters, the appellant was required to confirm the number of registered voters as is in the Biometrics Register, the Register of People without Biometrics and the Green Books that were used during the March 4th elections.
59. The 2nd and 3rd respondent fault the Report on Scrutiny and Recount and the findings by the Deputy Registrar in relation to the votes cast at Yururu Polling Station Stream 2. The respondents submitted that in Yaruru Polling Station Stream 2, the votes cast were 502 and the registered voters were 493. The respondents fault the Deputy Registrar for using the manual biometric register and not the green book in concluding that votes cast exceeded registered voters. Counsel submitted that the Deputy Registrar exceeded his mandate by drawing conclusions of law which is the preserve of the electoral court. The respondents submitted that the allegation of votes cast exceeding registered voters is not backed by any independent and cogent evidence. It was submitted that the trial Judge did not reject the results of scrutiny and recount but properly stated that the Deputy Registrar exceeded his mandate in making conclusions.
60. The 2nd and 3rd respondents addressed the allegations that the votes entered in Forms 35s were materially different from the results entered in Form 36s. The 2nd and 3rd respondents admitted that there were differences in Forms 35s and 36s in Nkubu Stream 1, Kathera Stream 2, Bubui Primary and Kaubau Primary. The respondents argued that even if the correct differences in votes were added to the various candidates, the 1st respondent would still have won.
61. It is our considered view that the 2nd and 3rd respondents' perspective of addition of votes is not correct for the simple reason that firstly, the votes sought to be added had already been counted and we do not know who got the benefit of these votes when they were erroneously counted. Secondly, a double counting would arise as these votes would be counted twice over, first, during the initial count and second, when they are being added. Thirdly, the effect of adding those votes would increase the total tally of the votes cast.
62. The 2nd and 3rd respondents denied manipulating or altering the figures in Forms 35 and 36 without countersignature. It is the respondents contention that pursuant to ***Article 86 (c)*** of the ***Constitution***, the 3rd respondent ensured that any alterations or corrections made at Nkubu Stream 1 polling station were made before the five (5) agents who signed the Form and no alterations were made after the agents signed the Form 35. The respondents admitted that duplication of results occurred at Kathera Stream 2 and Nkubu Stream 1 and these were honest transcription errors where figures from Kathera Stream 1 were erroneously transferred to both Stream 1 and 2 in Form 36 and results for Stream 1 were honestly and erroneously transferred and reflected in Form 36 as belonging to Stream 1 and 3. The respondents submitted that if any alterations were made, it involved correcting arithmetic errors and this was not prejudicial to any candidate and any error of transcription affected all the candidates across the board and no unique disadvantage was occasioned to any candidate.
63. On the allegations that the respondents accepted Forms 35 which were not signed by agents, the 2nd and 3rd respondents submitted that only Form 35 from Murembu Primary School was not signed by any agent. In addition, it was submitted that the results reflected on Forms 35s were not challenged at the polling station or the tallying centre. That since no recount was sought in any of the polling stations; the results reflected in Form 35 are a correct representation of the counting process across the county. The 2nd and 3rd respondents cited ***Regulation 79 (6)*** which stipulates that refusal or failure of a candidate or agent to sign a declaration Form or failure to record the reasons for their refusal to sign by a candidate or agent by itself shall not invalidate

the result. It was submitted that the 2nd and 3rd respondents were obligated to accept the Form 35s and declare the results inspite of lack of signatures from agents and therefore acted in compliance with the law in accepting such Forms.

64. The 2nd and 3rd respondents submitted that no harassment or intimidation of voters took place and the elections were not conducted in a partisan or biased manner with a view to misleading illiterate and incapacitated voters in favour of the 1st respondent. That all the appellant's witnesses gave vague and general statements in their affidavits to the effect that they believed that election officials deployed to their constituencies conducted the election in a partisan and biased manner. Counsel for the 2nd and 3rd respondents submitted that these statements were sweeping and vague and no basis upon which the witnesses held such beliefs was given. The respondents cited a Botswana High Court decision in ***Mokwaledi Bagwasi – v- Seabe Morueng & another Misc. App. F 228 of 2004*** where it was held that,

"where a petitioner asserts that an election official was biased against him, he should adduce evidence to show the manner in which the election official was biased."

It was submitted that in the instant case, the appellant/petitioner made bare allegations and did not adduce any evidence to prove those allegations.

65. The 2nd and 3rd respondents contested the allegation that voters at Limoro and Antuanuu were denied the right to vote. It was submitted that no affidavit was filed and no witness was called to testify that he/she was denied the right to vote and consequently this ground of appeal was not proved.
66. The respondents submitted that no evidence was adduced by the appellant to support the allegation that ballot boxes were received without seals. The respondents submitted that ***Regulation 82*** of the ***Elections Regulations 2012*** does not make provision for transportation and delivery of ballot boxes in the presence of agents. The Returning Officer, Messrs Kennedy Onditi (DW10) testified that ballot boxes were ferried by motor vehicle KAB 029T from Murembu Polling Station which vehicle he had officially hired for lawful work and as such, no ballot papers or ballot boxes were of questionable origin.
67. On the averment that valid votes belonging to Kilemi Mwiria were destroyed, it was submitted that no witness was called to testify or verify this allegation and neither the appellant nor any of his witnesses testified seeing ballot papers being destroyed or thrown away.
68. On the appellant's allegation that the 2nd and 3rd respondents failed to project results and to transmit the same electronically, the respondents cited the Supreme Court decision in ***Raila Odinga & Others - v – IEBC (supra)*** where the Supreme Court stated:

"But as regards to the integrity of the election itself, what lawful course could IEBC have taken after the transmission technology failed. There was no option in our opinion but to revert to the manual electoral system, as was done … since such technology has not achieved a high level of reliability, it cannot as yet be considered a permanent or irreversible foundation of the conduct of the electoral process. It follows that the Petitioner's case in so far as it attributes nullity to the presidential election on the grounds of failed technological devises, is not sustainable".

69. The 2nd and 3rd respondents submitted that no complaint, objection or concern was raised by any agent or candidate and thus the respondents did not commit an electoral malpractice of failing to address agents concerns and objections. Further, the appellant did not tender in court a list of authorized agents who are alleged to have been impersonated. No evidence was tendered to demonstrate that the Returning Officer procured strangers to sign Forms 35 and 36 at Muthara Polytechnic. Relating to the complaint that no results were displayed on the doors of the polling

stations, the respondents submitted that the appellant did not specify where this anomaly allegedly happened and thus there was no proof of the allegation. On the allegation that the 2nd and 3rd respondents forced agents to take long breaks at Muthara Youth Polytechnic, the respondent's submitted that no evidence was tendered to prove the allegation. It was submitted that the Returning Officer at the tallying centre permitted a health break of one hour and no one left the tallying centre and the polling station was not closed. Counsel urged this Court to follow the persuasive decision by Emukule, J. in ***Harun Meitamei Lempaka – v- Lemanken Aramat-EP No. 2 of 2013*** at Nakuru where it was stated:

"It was the applicant's counsel case for a recount that there was a long break in the counting of votes, thus giving room for manipulation of the votes. I find no evidence to support that the break was for the purpose of manipulating any votes or the tallying forms."

70. One of the issues raised in the appeal is that valid votes at Gambela, Mukuani, Kirimanchuma and Mitunguu primary polling stations were not counted. The 2nd and 3rd respondents submitted that the Returning Officer DW10, Mr. Onditi, in his affidavit deposed that the results were announced at the polling stations and he received Form 35s from Mitunguu primary school and no agent or candidate complained to him that no counting had taken place at the polling station. He testified that Form 35 from Mitunguu Primary School was signed by agents and none was called to testify. The 2nd and 3rd respondents summarized their submissions by stating that the appellant had failed to prove all the electoral offences and electoral irregularities alleged and urged this Court to find that the appellant did not discharge the burden of proof and the appeal should be dismissed.
71. The 2nd and 3rd respondents reiterated that the burden of proof lies with the appellant. See Nigerian case of ***Abubakar – v- Yar'Adua (2009) All FWLR (Pt.457)*** 1 ***S.C;*** see also ***Col. D. Kizza Besigye – v- Musevein Yoweri Kaguta &Electoral Commission, Election Petition No. 1 of 2001*** where a majority of the Uganda Supreme Court Bench held that

"***The burden of proof in election petitions as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the Court."***

As regards the standard of proof, counsel cited the Supreme Court in the case of ***Raila Odinga & Others - v – IEBC*** as follows:

"The Petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt – save that this would not affect the normal standards where criminal charges are linked to an election, are in question. In the case of data-specific electoral requirements, the part bearing the legal burden of proof must discharge it beyond any reasonable doubt."

72. The 2nd and 3rd respondents also cited the case of ***John Kiarie Waweru – v- Beth Wambui Mugo & 2 others (2008) eKLR*** where it was stated:

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

higher proof."

73. The 2nd and 3rd respondents addressed this Court on points of law relating to compliance or non-compliance with Constitutional principles and electoral law regulations. It was conceded that some irregularities and mal-practices occurred during the Meru gubernatorial elections. However, the respondents submitted that the non-compliance with the Constitutional principles or written law was not material, widespread or significant as to affect the outcome of the elections. Counsel submitted that any errors made were honest, unintended and innocent. The respondents urged this Court to adopt the Nigeria persuasive case of ***Olusola Adeyeye – v- Simeon Oduoye (2010) LPELR-CA-1/EPT/NA/67/08*** where the court stated:

"It is not enough to merely catalogue instances of malpractices and breaches of the Electoral Act without adding up or tallying the number of votes involved or affected and their impact on the overall result of the election… The reason for tying such malpractices to votes affected thereby is because irregularities affecting minority votes would not upset the election of a candidate with majority of lawful votes. An election cannot be cancelled on the mere speculation of the probable effect of uncertain or unlawful votes procured through alleged malpractices."

74. The respondents submitted that there was no evidence in support of the allegations of violence, intimidation and harassment of voters. There was no proof that agents were denied the right to participate in the electoral process; no proof of fraudulent tally and returns or that casts votes exceeded registered voters. In the case of Yururu Primary School Stream I where votes cast exceeded registered voters, it was submitted that even if the excess votes were deducted, the overall outcome and winner shall not be affected. Likewise where there was material difference and discrepancies in Forms 35 and 36, it is the respondents' case that correction of these errors does not materially affect the outcome of the elections. The respondents urged this Court to find that the results declared by the 2nd respondent were authentic, reliable, true and accurate and the appellant had failed to establish his case to the required standard.

APPELLANT'S REPLYING SUBMISSIONS

75. Learned counsel, **Muthomi Thiankolu,** made the appellant's reply to the respondents' submissions. He submitted that the evidence on record revealed systematic addition of votes to the benefit of the returned candidate and the same number of votes deducted from the runner up. That it was the duty of the learned Judge to follow and evaluate the evidence on record as attached to the affidavit of DW 10. It was submitted that the testimony of DW10 should have been considered as an admission and that had the honourable Judge properly considered this evidence he would have arrived at a different conclusion. Relating to the 7 polling stations where scrutiny and recount was done, it was submitted that there was not a single polling station in which the scrutiny report agreed with Form 35 as filled. That the affidavit in support of the Petition listed each and every polling station that was in contention and the trial Judge erred in not ordering scrutiny and recount in all polling stations. On the issue of materiality, counsel submitted that the trial court treated materiality as an issue of simple arithmetic and figures and thus the learned Judge erred on this aspect. On ***Regulations 79(6) and (7)*****,** counsel submitted that the real issue is accuracy and verifiability of the election results as well as the transparency thereof. It was submitted that the evidence of DW10 clearly showed that errors were manifest and manifold on Forms 35. Relating to the order for arrest of PW4 and PW6, counsel submitted that the procedure in ***Section 87 (2)*** of the ***Elections Act*** was not followed. Counsel reiterated that the trial Judge erred in applying in a conjunctive manner the test in ***Morgan – v – Simpson****;* that the test as stipulated in the **Morgan case** should be applied in a disjunctive manner.

TRIAL JUDGE'S FINDINGS ON FACTS AND APPLICABLE LAW

76. The trial Judge having listened to all the witnesses and submissions by counsel made findings and conclusions on various issues as hereunder:-
77. On the issue whether the 1st respondent committed electoral offences and malpractices in the March 4th , 2013 gubernatorial elections, the trial Judge having examined the definitions of undue influence and bribery in ***Sections 63 & 64*** of the ***Elections Act*** expressed himself thus:

"The petitioner alleges in his petition that there was widespread bribery at Pig and Whistle Hotel and Nguthiru Primary School polling stations. The evidence on record is clear that the petitioner was not present at both venues and no single witness was called to confirm the petitioner's allegations. Further, no evidence was ever tabled to demonstrate that the 1st respondent either used or threatened to use force or violence (including sexual violence), directly or indirectly whether in person or through another person to compel anyone to vote or not to vote for him or another particular candidate or political party so as to make him culpable of the offence of undue influence. Neither was evidence tabled to show that he directly or indirectly in person or by any other person on his behalf gave, lent or offered… or endeavoured to procure any money or valuable consideration to or for any voter….in order to induce any voter to vote for him or to refrain from voting for any particular candidate so as to make him culpable of the offence of bribery. The Petitioner and his witnesses have failed to adduce any cogent and independent evidence to back their allegations. The same has not been proved to the requisite standards. There was no complaint registered with IEBC officials nor written complaint was made nor was there report made with the police. …Mere allegation without proof to the required standard remains mere speculation which the court cannot accept as truthful."

78. On the issue that agents were not allowed at the tallying centre, the Honourable Judge noted that PW 3, Esther Kabebi Aritho admitted that though her affidavit was allegedly commissioned by Mr. Nyenyire, she did not appear before him but before Mr. Kariuki. The trial Judge held that the affidavit of PW 3 was in contravention of ***Section 4 & 5*** of the ***Oaths and Statutory Declaration Act (Cap 15)*** and accordingly struck it out. Further, the trial Judge found that PW 3 had not annexed a letter of appointment as an agent to her affidavit and she could not be heard to say she was a duly authorized agent who was ejected from a polling station and yet fail to show that she was indeed a duly appointed agent of TNA. The Honourable Judge found that the duly appointed agent for TNA at that Nchuui Polling station was one Mriti who signed Form 35. The trial court found that PW 3 did not complain or report any irregularity to the police officers. The trial Judge found that PW 3 was not an honest and credible witness. On the signing of Forms 35s at the polling stations, the court found that the witnesses who alleged that they were agents did not prove to the required standards that they had been duly appointed as agents let alone being denied to sign Forms 35s.
79. The trial court found PW3, PW4, PW 5 and PW6 were not credible and honest witnesses. PW 6 was held to have admitted that she relied on rumours. PW5's , John Kamenchu Málaile, testimony was found to be far-fetched and he was found to be testifying as a matter of sour grapes aimed at settling old scores with DW6, Cyprian Kailikia. PW 4, Stephen Mugambi, was a civil servant in the employment of the Teachers Service Commission. The court found that the honesty of PW4 and his ability to discern what he alleges happened on the material date of election was questionable. The trial Judge observed that PW4 in his affidavit attached a letter of appointment showing he was a polling agent of GNU but did not annex any document showing he was a tallying agent for any candidate or party and therefore entitled to be at Muthara Tallying Centre. The trial judge held that PW4 made wild allegations about irregularities in his diary and alleged an unofficial document written in the Returning Officer's handwriting which according to

him showed inconsistencies with Form 36. The trial court noted that PW4 did not see it prudent to produce the alleged diary before the court nor did he attach the alleged document in the said officer's handwriting. The court found PW4 to be incredibly unreliable and ordered for his immediate arrest as being a public servant on the basis that he was identified with one political party in a partisan manner.

80. In relation to the allegation that the 1st respondent was buying voters cards, the trial court found that there were no voters card in use during the March 4th , 2013 gubernatorial elections and the allegation was founded on shaky and unsubstantiated grounds. The trial Judge held that nothing in ***Regulation 85 (1) (b)*** of the ***Election Regulations*** barred the District Commissioner or the Senatorial candidate from being at the tallying centre and no evidence was on record to prove that by their presence, they engaged in impropriety or electoral malpractice in support of the 1st respondent.
81. Pertaining to the multiple irregularities in the conduct of the elections, the trial court upon evaluation of the evidence on record made various findings as follows:

a. ***Taking into account the polling stations complained of in North and South Imenti, analysis reveals that the petitioner had not proved to the required standard that the votes garnered by the candidates in Forms 35s were materially different from that in Form 36s.***

b. ***The court notes that the allegations that the alterations were in bad faith, tailored to manipulate the results in favour of the 1st respondent was not proved to the required standard as no evidence was tendered to that effect before the court. If anything, the alterations were clearly made so that the 2nd respondent adheres to the constitutional mandate of collating results accurately as required by Article 86 (c) of the Constitution. The court found that appellant/petitioner had failed to prove to the required standard the allegations of manipulation of results by altering figures in Forms 35 and 36 without countersigning and duplication of results. The trial court found that Form 35s were altered or amended where a mistake in arithmetic was disclosed during the filling of the forms and such alterations were done in good faith and in accordance with the respondent's constitutional mandate. That it was incumbent upon the appellant/petitioner to prove that the alterations were unlawful and for an illegal motive and did not adhere to the constitutional mandate of the respondents. The appellant failed to prove this.***

c. ***On the allegations that the elections were conducted in a partisan manner, the court found that the appellant's witnesses made vague and general statements that they believed that the election officials were partisan and biased. The court found that no specific instances of bias were demonstrated and no particulars of any bias were given. Evidence must be produced to support allegations of bias or partisanship and none was forthcoming.***

d. ***On the issue of failure of technology and to transmit the results electronically, the trial court relied on the Supreme Court decision in Raila Odinga & Others – v- Independent Electoral and Boundaries Commission & Others, Petition No. 5 of 2013 and held that the appellant's submission on this point was unsustainable.***

e. ***The trial court held that no evidence was adduced by the appellant to support the allegation that ballot boxes were received without seals. The appellant did not specify the name of the polling stations whose boxes were affected or the elective seat whose boxes were broken.***

f. ***On the allegation that valid votes in favour of Kilemi Mwiria at Mikunduri area were***

destroyed, the trial court observed that the appellant himself testified that he got the information from a TNA agent he could not remember and he himself neither saw the destroyed or thrown away votes. This allegation was found to have no basis and with no proof.

g. ***On the allegation that agents were required to sign blank Form 35s, the trial court held that no authorized agent was called who testified that they were required to sign blank Form 35s or 36s. The court held this allegation was not proved. Likewise the court found that the allegation that the respondents failed to address agents concerns and objections were not proven. No witnesses testified in this regard and no report or complaint was made to the 2nd and 3rd respondents.***

h. ***On the assertion that strangers signed Forms 34s and 36s, the court held that Form 34s related to presidential elections and had no relevance to the gubernatorial elections. In relation to Form 36s, the court found that PW 2 (David Kamenchu) was an unreliable witness as he did not have a list of the genuine agents for the parties and he had no evidence that the Returning Officer procured strangers to sign Form 36s.***

i. ***On refusal to display results on the doors of polling stations, the honourable judge held that the appellant did not specify where this anomaly happened and in which stations; and as such, the allegation was not proved.***

j. ***Pertaining to the allegedly long health breaks, the trial judge observed that Abdi Sheikh Mohammed (DW9), the Returning Officer stated that the health break was taken at the tallying centre for one hour and no one left the tallying centre and the polling station was not closed; that the break was necessary to allow Muslims to pray and people to eat and stretch.***

82. The trial court cited and adopted the decision in ***Harun Meitamei Lempaka – v- Lemanken Aramat EP. No. 2 of 2013 (eKLR 2013)*** Emukule, J. in considering breaks during the counting process and stated:

"It was the applicant's counsel case for a recount that there was a long break in the counting of votes, thus giving room for manipulation of the votes. I find no evidence to support that the break was for purposes of manipulating any votes or the tallying forms. It is a fact behoving the courts to take judicial notice, that in a constituency bereft of infrastructure, social amenities and other facilities, without mentioning lack of adequate or any feeding at all and where ballot papers and boxes are delivered on the eve of elections, the officers concerned including agents get extremely fatigued and must I think get opportunity to stretch from doing the long hours of counting votes. It is bad faith to impute improper motives for such breaks to mean manipulation of votes."

83. The Honourable Judge held that the allegation of refusal to count and tally votes at Gambela, Mukuani and Kirimachuma polling stations were not proved. The trial court found that examination of Forms 35s from Tigania East in the annexture to the affidavit of Mr. Onditi, the Returning Officer, indicated that the results from those stations were announced at the polling stations and no evidence to the contrary was adduced. As regards refusing to conduct vote counting at Mitunguu primary school, the court held that the appellant did not call any witness to confirm the said allegations; and perusal of Forms 35s from the three streams at the school revealed that the said Forms were signed by agents and no complaint was received by the

Returning Officer.

84. One of the grounds of appeal is that the trial Judge erred in rejecting and failing to properly evaluate and consider the findings and determinations in relation to scrutiny and recount of votes as contained in the Report of the Deputy Registrar. The Deputy Registrar's observation was that the ballot boxes for the affected polling stations were intact and had not been tampered with. The trial Judge held that from the results of the scrutiny and recount, there were no massive material discrepancies between the results declared by the 2nd and 3rd respondents in the respective Form 35s of the polling stations and Form 36 of the tallying stations that were under scrutiny. The trial Judge rejected the appellant's contention that the seven polling stations scrutinized should be used in an analytical way as representative sample for the rest of the polling stations in Meru County where no irregularities were noted. The trial court stated that adopting such representative sample was inappropriate as it was speculative and not scientific or analytical and a trial court should only rely on evidence and not speculation. The trial Judge opined that the scrutiny and recount revealed minor errors which were not meant for the benefit of one person as alleged by the appellant; that it would be wrong and illogical to say that any candidate systematically and deliberately manipulated results in those seven polling stations. The errors revealed could be attributed to normal human errors which cannot vitiate the overall gubernatorial election results.
85. The trial court considered the evidence to determine the critical question whether the irregularities exposed during the scrutiny and recount materially affect the results. The trial Judge considered ***Section 83*** of the ***Elections Act*** wherein it is provided that:

"No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written law or that the non-compliance did not affect the result of the election."

The trial Judge noted that it was incumbent upon the appellant as the petitioner to tie up the alleged malpractices to the votes affected and the impact on the overall results. The court held that in the instant Petition, the irregularities that the appellant was able to establish were not material as to affect the outcome of the results. In the learned Judge's considered view, the results of the scrutiny and recount did not support the appellant's assertion of massive irregularities that could lead the court to nullify the electoral results.

ANALYSIS OF THE GROUNDS OF APPEAL AND POINTS OF LAW

86. We have considered the grounds of appeal as raised in the memorandum of appeal and submissions by counsel in support and opposition to the appeal. The electoral law stipulates that appeals to the Court of Appeal shall lie on matters of law. We now turn to consider whether the trial Judge erred in law in evaluation of the evidence on record and application of the relevant Constitutional principles and electoral laws. The memorandum of appeal lodged in this case is premised on the following points of law:

- ***did the learned Judge err in interpreting the principles in Articles 81 (e) and 86 of the Constitution while drawing the issues for determination"***
- ***was the appellant denied a right of hearing and fair trial"***
- ***did the trial Judge properly exercise his discretion in ordering scrutiny and recount of votes in 7 polling stations rather than in all polling stations within 4 constituencies as***

stated by the appellant in the petition"

- ***what is the interpretation of the phrase "irregularities materially affecting the result of the election"***
- ***what is the effect of post-declaration irregularities or illegalities.***
- ***did the appellant prove to the required standard that there were electoral malpractices and irregularities in the Meru gubernatorial elections"***
- ***did the irregularities identified and proved in the Meru gubernatorial elections held on 4th March, 2013 materially affect the result of the election"***
- ***did the trial court err in evaluating the credibility of the appellant's witnesses"***
- ***what is the legal consequence of errors identified in Forms 35s and 36s"***
- ***what is the legal consequence of the tallying errors identified in the scrutiny and recount report"***
- ***did the trial court properly evaluate and consider the evidence of DW10, Kennedy Onditi"***
- ***Is human error a permissible excuse, explanation or defence to electoral irregularities"***
- ***what is the legal consequence of the cumulative errors and irregularities identified"***

87. We are cognizant of the jurisdictional limits of this Court in relation to election petitions. The jurisdiction of this Court flows from ***Article 164 (3)*** of the ***Constitution*** and ***Section 85 A*** of the ***Elections Act***. ***Section 85A*** stipulates:

"85A. An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only…"

Rule 35 of ***Election Petition Rules*** stipulates that:

"An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules."

88. ***Article 81 (e)*** of the ***Constitution*** lays down the electoral principles that must be observed in the conduct of elections. Elections shall be free from violence, intimidation, improper influence or corruption and the electoral process shall be transparent and administered in an impartial, neutral, efficient, accurate and accountable manner. Ensuing from the provisions of ***Article 81(e)*** the following constitutional issues arise for our consideration and determination in this appeal:

(a) Did the trial Judge err in law in finding that the gubernatorial elections for Meru County was free from violence, intimidation, improper influence or corruption"

(b) Did the appellant as petitioner prove that there was violence, intimidation, improper influence or corruption in the Meru gubernatorial elections"

c. ***Did the trial Judge err finding that the Meru gubernatorial elections were conducted in an impartial, neutral, efficient, accurate and accountable manner"***

d. ***Did the appellant as petitioner prove that the Meru gubernatorial elections were not conducted in an impartial, neutral, efficient, accurate and accountable manner"***

89. Pursuant to ***Regulation 62, 74& 85*** of the ***Elections Regulations*** the following issues arise for determination in this appeal.

a. ***Did the Returning Officer exclude authorized agents from the polling stations"***

b. ***Did the appellant as petitioner prove that authorized agents were excluded from the polling stations"***

c. ***Was an electoral irregularity committed when the presiding officer allowed a break in the counting of votes"***

d. ***Did strangers sign Form 35s in the Meru gubernatorial elections"***

e. ***Is there proof that votes casts in some polling stations exceeded the number of registered voters in any polling station and what is the legal effect thereof"***

f. ***Did the trial Judge err in interpreting and applying the observations made after scrutiny and recount"***

PRINCIPLES GOVERNING "IRREGULARITY IN ELECTIONS" AND "AFFECTING THE RESULTS" OF ELECTION:

90. The central theme in this appeal is whether the irregularities and malpractices identified materially affected the results of the election. This requires us to consider and determine the qualitative and quantitative aspects of the elections. We take this opportunity to lay out the relevant principles on irregularities that materially affect the results of elections. These principles will enable us to determine if the appellant was able to prove that the irregularities identified materially affected the results of the elections.
91. Irregularities in elections refers to mistakes and serious administrative errors in the conduct of elections. In determining whether irregularity affects the result of an election, one has to look at the number by which irregular votes exceed the plurality of the winning candidate. The margin between the winning and losing candidate is a factor in determining whether the irregularity affected the results of the election. In deciding whether to annul an election, an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election or whether the irregularities are such as to call into question the integrity of the electoral process. If a court is satisfied that, because of irregularities, the winner is in doubt, it would be unreasonable for the court not to annul the election. Before annulling an election based on irregularity, the magic number test has to be considered. This means that the contested or irregular votes casts when set aside must exceed the margin between the winner and the runner up.
92. "Materially affecting the result of election" is interpreted to mean that the final aggregate figure arising from the tallying process will be affected arithmetically to the extent that the margin

between the returned candidate and the runner up is not only narrowed but significantly eliminated to the point that a reasonable doubt is raised as to whether the returned candidate garnered votes that exceed the runner up. If after an arithmetical calculation has been made and the returned candidate still maintains a lead over his nearest rival, the results of the election has not been materially affected. The purpose of the arithmetical calculation is to remove any possibility that any difference in votes between the returned candidate and the nearest rival could be wiped out and the result of the election being materially affected.

93. In the case of ***Mbowe – v- Eliufoo (1967) EA 240,*** the Election Court in Tanzania while interpreting the meaning of "affected the result" stated:

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

94. In determining the issue whether non-compliance affected the results of an election in a substantial manner, both a quantitative and qualitative test are applicable. This quantitative and qualitative test is the nomenclature used by Muskoe J. in ***Winnie Babihuga – v- Masiko Winnie Komuhangi & Others HCT-00-CV-EP.0004-2001***. It was stated that the quantitative test is the most relevant where the numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire election process is questioned and the court has to determine whether or not the election was free and fair. It was stated:

"to determine whether the results as declared in an election ought to be disturbed, the court is not dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. It a democratic election, the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official."

(see also ***Manson Oyongo Nyamweya – v- James Omingo Magara & 2 others, Kisii Election Petition No. 3 of 2008).***

95. In the case of ***Ali Hassan Joho & another – v- Suleiman Said Shahbal & 2 Others, Supreme Court Petition No. 10 of 2013***, the Kenya Supreme Court in endorsing the quantitative test stated:

"Bearing in mind the nature of election petitions, the declared election results, enumerated in the Forms provided, are quantitative, and involve a numerical composition. It would be safe to assume, therefore, that where a candidate was challenging the declared results of an election, a quantitative breakdown would be a key component in the cause. It must also be ascertainable who the winner, and the loser (s) in an election, are."

CAN INTERLOCUTORY ISSUES BE HEARD AND DETERMINED IN THE MAIN APPEAL"

96. The appellant filed a Notice of Appeal dated 7th August, 2013 against an interlocutory Ruling by the trial court dated 2nd August, 2013 ordering scrutiny and recount in only seven (7) polling stations. The particular ruling is the subject of this appeal and it raises a jurisdictional issue. The fundamental question is whether this Court has jurisdiction to hear an appeal arising from an interlocutory ruling by the Election Court. (***See Nyangau - v- Nyakwara (1986) KLR 712). Section 80 (3)*** of the ***Elections Act*** stipulates that

"***Interlocutory matters in connection with a Petition challenging results of presidential, parliamentary or county elections shall be heard and determined by the election court".***

Section 2 of the ***Elections Act*** defines an election court to be the High Court in the exercise of the jurisdiction conferred upon it by ***Article 165(3) (a)*** of the ***Constitution***. ***Article 165(3) (a)*** stipulates that the High Court shall have unlimited original jurisdiction in criminal and civil matters. In ***Bhagat Singh –v – Ramanlal P. Chauhan & 2 others (1956) 23 EACA 178, 188*** it was stated that where the High Court makes an order in original jurisdiction, that order is always appealable as of right.

97. ***Article 164 (3)*** of the ***Constitution*** vests the Court of Appeal with jurisdiction to hear appeals from the High Court. ***Article 164 (3)*** does not limit the jurisdiction of the Court of Appeal to exclude appeals from interlocutory orders of the High Court. It is our considered view that the appellate jurisdiction of this Court to hear appeals from interlocutory orders is not ousted either by ***Article 164(3)*** of the ***Constitution*** or ***Section 80(3)*** of the ***Elections Act***. ***Section 80 (3)*** of the ***Elections Act*** is not an ouster clause that ousts the jurisdiction of the Court of Appeal in relation to interlocutory orders of the High Court made in an election Petition.

98. In the case of ***Karanja - v- Kabugi (1981) KLR 270***, it was held that the Court of Appeal had jurisdiction to hear appeals from an interlocutory order of the High Court sitting as an election court. This position was followed in ***Mudavadi - v- Kibisu & another (1970) EA 585*** wherein it was held that the Court of Appeal had jurisdiction to entertain an appeal from an interlocutory order of the High Court, sitting as an election court, which did not determine the validity of the election. We concur with the view expressed by Law JA. in ***Karanja - v- Kabugi (supra)*** wherein he opined that:

"it is not beyond the bounds of possibility that Parliament, in order to obviate unnecessary delay in deciding the validity of an election, left that decision entirely to the High Court, but intended that the Court of Appeal should exercise a supervisory appellate control over interlocutory proceedings, so as to ensure that when the Petition itself came up for hearing it was in proper form."

In ***Matiba - v- Moi (2008) KLR 525***, this Court differently constituted held that generally, under the ***Constitution, Section 3*** of the ***Appellate Jurisdiction Act*** and the ***Civil Procedure Act***, an appeal lies from every decision of the High Court to the Court of Appeal, unless otherwise expressly provided by the ***Civil Procedure Act***. This Court further held that the High Court, as an election court merely exercises ***additional jurisdiction conferred upon it by the*** Constitution and when called upon to function as an election court, the High Court is not thereby deprived of nor does it forsake the unlimited original jurisdiction and when faced with an issue outside the ambit of electoral law, the High Court will shed the role of an Election Court and assume the normal role and jurisdiction of the High Court. The decisions of the Election Court on any question which it may be called upon to adjudicate but which does not in any way affect the validity of the election are appealable.

99. In the case of ***Hassan Ali Joho & another – v- Suleiman Said Shahbal and 2 others (supra)*** the Supreme Court while considering whether it had jurisdiction to hear an appeal arising

from an interlocutory ruling in election Petitions expressed itself as follows:

"While the principle of timely disposal of election Petitions affirmed by the Court of Appeal, (in Benjamin Ogunyo Andama vs. Benjamin Andola Andali & 2 Others, Civil Application No. 24 of 2013 (UR 11/13) must be steadfastly protected by any Court hearing election disputes, or applications arising from those disputes, the interests of justice and rule of law must be constantly held paramount. …. In the present case, the issues arising out of the interlocutory application determined by the High Court, the Court of Appeal and now before this Court are issues of law that touch directly on the interpretation of the Constitution and the statute governing the electoral process. As the apex Court, we must always be ready to settle legal uncertainties whenever they are presented before us. But in so doing, we must protect the Constitution as a whole. Election Courts and the Court of Appeal, have discretion in ascertaining the justice of each case to balance justice, but that discretion must be concretised in enforcing the Constitution. (Emphasis ours)"

100. The Supreme Court in the above cited case stated that the issues arising out of the interlocutory application determined by the High Court are issues of law. Guided by this dictum, we are inclined to follow the same and find that this Court has jurisdiction to consider the appeal lodged by the appellant in relation to the interlocutory ruling delivered by the trial judge on 2nd August, 2013 pertaining to the orders of scrutiny and recount. The Notice of Appeal having been lodged and filed on 7th August, 2013 is valid before this Court and we have jurisdiction to consider and determine issues raised therein

BURDEN OF PROOF ON THE TOTAL NUMBER OF REGISTERED VOTERS

101. The appellant contends that the trial Judge erred in placing the burden of proof on the appellant to prove the total number of registered voters in the polling stations where it was alleged that the total number of votes cast exceeded the number of registered voters. The 2nd and 3rd respondents in their submission before this Court, argued that it was the legal obligation of the appellant to establish the number of registered voters and then the number of actual votes cast. The respondents submitted that the appellant had a right and adequate opportunity to request for all the registers used during the election and the right to move the court under ***Rules 17 (1) (d), (g) and (j) of the Elections (Parliamentary and County Elections) Rules 2013 and Article 35 of the Constitution*** in order to compel the 2nd and 3rd respondents to furnish the appellant with all components of the register used.
102. In the case of ***Kakuta Hamisi –v- Peris Tobiko & Others Nairobi EP No. 5 of 2013 (2013) eKLR,*** the Honourable Kimondo, J. correctly stated that:

"It should be recalled that the number of registered voters is already fixed at the close of the registration process and therefore an error in the number is not fatal ... as this number can readily be ascertained by reference to the voter register"

Section 112 of the ***Evidence Act*** provides as follows:

"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him"

103. Guided by the provisions of ***Section 112 of the Evidence Act***, it is our considered opinion that failure by the 2nd and 3rd respondents to produce a certified and confirmed figure as to the total number of registered voters at Yururu Primary Polling Station Streams 1 and 2 means that they

did not discharged the evidential burden of proof cast upon them. The total number of registered voters is a fact and matter that was well within the personal knowledge of the 2nd and 3rd respondents. The 2nd and 3rd respondents cannot hide behind the concept of legal burden of proof and fail in its duty to provide a statutory figure that is well within its knowledge and custody. It is not sufficient to state that the origin and authenticity of the figure given by the appellant has not been established. Whereas we agree with the trial Judge's finding that the number given by the appellant as representing the total registered voters cannot and could not be used, this is because the appellant is not the custodian of the register of voters and the appellant by any stretch of imagination cannot authoritatively provide the total number of registered voters.

104. We find that the evidential burden to prove the total number of registered voters is on the IEBC and not on the petitioner. The Constitutional and statutory duty to register voters and prepare the voters register is on the IEBC and this duty entails generating the total number of registered voters in the country in general and in each polling station in particular. This duty should not be confused with the legal burden to prove the allegations raised in the Petition. The legal burden to prove allegations in an election Petition rests with the petitioner but the evidential burden to provide the total number of registered voters is a Constitutional and statutory obligation on the IEBC. This Constitutional and statutory duty is constant and cannot shift. The 2nd respondent is the statutory custodian of the voter's register and it cannot be gainsaid that the evidential burden to prove the total number of registered voters can never shift to the appellant. We find that the learned Judge erred in placing the burden to prove the total number of registered voters on the appellant/petitioner. The 2nd and 3rd respondents are the official statutory custodians of the figure representing the total number of registered voters and they should have produced the same to counter the allegations by the appellant.

DID THE TRIAL JUDGE ERR IN FINDING THAT THE RETURNING OFFICER DID NOT COMMIT AN IRREGULARITY IN EXCLUDING AGENTS FROM THE TALLYING CENTRES

105. The appellant contend that the trial Judge erred in not finding that the Returning Officer committed an irregularity in excluding agents from the tallying centre. We hasten to add that the issues of irregularity and malpractices cited by the appellant are issues of fact. However, if the trial Judge erred in the interpretation of the facts as tendered in evidence, this becomes a point of law. On the factual aspects, we remind ourselves the dicta in ***Mwangi - v- Wambugu (1984) KLR 453***, where it is stated that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding.
106. The power of the Returning Officer to admit persons to the polling station is provided for by ***Regulations 62, 74 & 85 (1) (e)*** of the ***Elections (General) Regulations, 2012*****.** Of significance is ***Regulations 62 (1), (2), (3) & (4)***. It is stipulated in ***Regulation 62 (1)*** that the presiding officer may exclude all other persons from a polling station except a candidate, authorized agents etc. ***Regulation 62 (3)*** provides that the absence of agents shall not invalidate the proceedings at a polling station. In ***Regulation 62 (4)***, it is stipulated that every agent appointed shall at all times display the official badge supplied by the IEBC. ***Regulation 85 (1) (e)*** provides for persons who shall be allowed into tallying centres, such persons include authorized agents.
107. We have examined and re-evaluated the evidence on record to ascertain if any error of law and non-judicious exercise of discretion by the Returning Officer is revealed. The first and most important criteria for admission to the polling station other than being a voter is the requirement under ***Regulation 62 (1) (c)*** that the individual/person shall be an authorized agent. The

appellant was not a candidate in the gubernatorial elections held on 4th March, 2013. Consequently, for the appellant or any other person to be lawfully present at any polling station or tallying centre, it must be demonstrated that the appellant was an authorized agent of a political party and also that the appellant had an official badge provided by the IEBC. The evidence on record shows that neither the appellant nor his witness (PW3, PW 4, PW 5 or PW 6) were able to furnish any document demonstrating that they were agents authorised to be present at any polling station or tallying centre. Neither the appellant nor any of his witnesses proved that they had badges issued by the IEBC to signify that they were entitled to be at the polling station or tallying centre. None of these witnesses testified that they were unlawfully excluded from the polling or tallying centre. ***Regulation 74 (1)*** stipulates that no agent shall be deemed to be an agent for purposes of counting unless the candidate or political party has submitted the name and address of the agent and a letter of appointment of the agent.

108. It is our considered view that if one is not entitled to be at a polling station or tallying centre, then one cannot claim to have been unlawfully excluded thereat. The failure of the appellant and his witnesses to prove that they were authorized agents of any political party and failure to tender evidence that they had badges issued by the IEBC is fatal to the allegation that authorized agents were excluded from the polling station and tallying centre. For such an allegation to succeed, it must be proved that the person allegedly excluded was an authorized agent - this is the *sine qua non* for the allegation to have a legal foothold. Upon proof that the person was an authorized agent, then proof of exclusion is to follow. From the evidence on record, we pose the question who was excluded" The appellant as petitioner did not testify that he was excluded from any polling station or tallying centre. Did any of the appellant's witnesses testify that they were excluded from the polling or tallying centres" We have examined the record. Neither did PW 3, PW 4, PW 5 or PW 6 testify that they were excluded.
109. In ***Simon Nyaundi Ogari & another – v- Joel Omagwa Onyancha & 2 others (2008) eKLR,*** it was held that in evaluating the allegation of being excluded from the tallying centre, the important thing to consider is whether the acts complained of affected or may have affected the final outcome. In the instant case, we find that there is no evidence on record of any authorized agent being excluded and we further find that even if it were true, the appellant did not lead evidence to show how such exclusion materially affected the result of the Meru gubernatorial election.

CREDIBILITY OF APPELLANT'S WITNESSES AND ORDER OF ARREST OF PW 4 AND PW 6

110. It is the appellant's contention that the trial Judge erred in law in finding that the petitioner's witnesses were not credible and more particularly the trial Judge erred in ordering the arrest and prosecution of PW 4 and PW 6.
111. The key witnesses for the appellant were PW3, PW4, PW5 and PW6. A common observation and finding made by the trial court is that all these witnesses were not credible and worthy of belief. An order to arrest PW 4 and PW 6 was made by the trial court. The finding that the appellant's witnesses were not credible goes to the weight of their evidence. The 2nd and 3rd respondents in their submissions before this Court stated that for each of these witnesses, the trial Judge gave cogent reasons why they were not credible. For instance, it was submitted that PW1 on his own admission stated that most of the allegations in his affidavits were not true. That both PW5 and PW6 alleged that they were authorized agents but did not offer proof that they were duly authorized agents. That PW 6 allegedly witnessed bribery and ballot stuffing but never reported to any police station or to the 2nd respondent's officials. The 2nd and 3rd respondents submitted that in a nutshell, the trial court found that the testimony of all these witnesses carried very little weight if any.
112. Time and again, this Court has stated it will not interfere with the decisions of a trial Judge who had the benefit of hearing and seeing the witnesses. Lord Jenkins in ***Akerlin and another – v- R***

De mare and others (1959) EACA 476,497 opined that to interfere, the appellate court must be satisfied that the appeal before it is one of those exceptional cases in which an appellate court is justified in reversing the decision of Judge at first instance when the decision is founded upon the Judge's opinion of the credibility of witnesses formed after seeing and hearing the witness evidence. Credibility of a witnesses is gauged through cross-examination and the observations made by the trial court on the demeanour of the witnesses. Is it an error of law for a trial court to make findings on the credibility of witnesses" It is the duty of the appellant to demonstrate to this Court that the findings by the trial court on the demeanour and credibility of the witnesses had no basis in law.

113. In the case of ***Ogol - v- Muriithi (1985) KLR 359***, this Court emphasized that the Court of Appeal in considering evidence should be mindful of the advantage enjoyed by the trial court who saw and heard the witnesses and that the Judge was in a better position to assess the significance of what was said, how it was said and equally important what was not said. In ***Hahn - v- Singh (1985) KLR 716***, it was held that before the appellate court can come to a different conclusion from that reached by the High Court Judge, it had to be satisfied that the advantage enjoyed by the judge of seeing and hearing the witnesses was not sufficient to explain or justify his conclusion. It was further held that where there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial, the appellate court will hardly interfere with a conclusion made by the trial judge after weighing the credibility of witnesses. (See Lord Thankerton ***in Watt or Thomas - v- Thomas {194} AC 484 and Lord Bridge in Whitehouse - v- Jordan (1981) 1 WLR 246,269).*** The court must be satisfied as to what are the facts or circumstances that led to unreliability of the witness ***(*** See ***Ilanga - v- Manyoka, 1961 EA 705). In Tayab - v - Kinanu (1983) KLR 114,*** this Court stated that an appellate court will not interfere with a Judge's finding of fact based on his assessment of the credibility and demeanour of witnesses who gave evidence before him, unless it was wrong in principle.
114. Was an error of law committed by the trial judge in relation to the findings made on credibility of the appellant's witnesses" Having considered the evidence on record and submissions by counsel, we are of the considered view that the appellant has not demonstrated to this Court that there was no legal basis for the trial Judge to arrive at the credibility findings that he made. On our part, we have evaluated the evidence on record and we find that the witnesses in question either relied on hearsay or rumours and there was no direct testimony that they witnessed anything that they purported to state as facts. In addition, no independent corroborative evidence was tendered to lend credence to the testimony of these witnesses particularly relating to allegations of bribery, undue influence, intimidation, harassment and destruction of votes cast for Kilemi Mwiria.
115. As regards the order that PW4 and PW 6 should be arrested, we find that the trial Judge erred in law in making such orders as the court did not comply with the provisions of ***Sections 87 (1) & (2)*** of the ***Elections Act***. ***Section 87 (1)*** of the ***Elections Act*** provides:

"An election court shall, at the conclusion of the hearing of a petition, in addition to any other orders, send to the Director of Public Prosecutions, the Commission and the relevant Speaker a report in writing indicating whether an election offence has been committed by any person in connection with the election and the names and descriptions of the persons, if any, who have been proved at the hearing to have been guilty of an election offence."

Section 87 (2) of the ***Elections Act*** provides as follows:

"Before a person, not being a party to an election petition or a candidate on whose behalf the seat is claimed by an election petition, is reported to an election court, the elections court shall give that person an opportunity to be heard and to give and call evidence to show why he should

not be reported."

116. In the instant case, the issues before the court related to allegation of electoral irregularities and malpractices in the conduct of the 4th March, 2013 elections. PW 4 and PW 6 were not on trial and if the trial Judge was satisfied that some electoral irregularity or an electoral offence had been committed, the recourse available is to recommend to the Director of Public Prosecution to investigate the matter and comply with ***Section 87*** of the ***Elections Act***. We hereby set aside the order directing the arrest and prosecution of PW 4 and PW 6 and substitute the same with a recommendation to the Director of Public Prosecution to further investigate the matter.

LONG LUNCH BREAK IN COUNTING OF VOTES

117. It is the appellant's contention that an irregularity in electoral law was committed when the presiding officer allowed a break in the counting of votes. The trial court held that there was no electoral irregularity occasioned by the lunch break. The appellant contends that an irregularity was committed as the break was too long to allow for manipulation of votes. What evidence is on record to support the notion of manipulation of votes during the break" ***Regulation75 (3)*** stipulates that the presiding officer shall, so far as practicable, proceed continuously with the counting of votes. ***Regulation 75 (4)*** states that the presiding officer shall not commence the counting or recount of votes unless the presiding officer is of the opinion that the count or recount, as the case may be, can conveniently be completed without a break.
118. We have considered the submission by the appellant and respondent on this matter and the evidence on record. We are satisfied that the appellant did not tender any evidence that manipulation of votes occurred during the break. The significant point of law is what effect the break had on the outcome of the elections. Whatever the length of the break, did the break materially affect the results of the elections" It is our considered view that the appellant did not demonstrate that the break had an impact on the outcome of the elections and particularly on the votes announced for each candidate. We are cognizant of the discretion vested upon the presiding officer in ***Regulation 75 (3) & (4)*** and no evidence is on record to show that the discretion not to continuously count the votes was exercised in an unlawful manner or for ulterior motive and purpose.

ABSENCE OF SIGNATURE ON FORM 35s AND 36s

119. A critical issue for consideration in this appeal is the alleged absence of signature by agents on Form 35s and 36s. At first instance, it might be argued that the signing of Form 35 is a question of fact and this Court is enjoined to deal with matters of law. It is our considered opinion that it is a question of law as to who is legally empowered and entitled to sign Form 35 or 36s. It is also a question of law as to what is the consequence of failure to have a signature on Form 35 or 36. If an unauthorized person appends his/her signature to either Form 35s or 36s, this is an irregularity of law and a point of law that can be canvassed before this Court. ***Regulation 79*** requires the presiding officer, the candidates or agents to sign Form 35 in respect of the gubernatorial elections. The presiding officer shall provide each political party, candidate or their agent with a copy of the declaration of the results and affix a copy of the results to the entrance of the polling station or at any other place convenient and accessible to the public. **Regulation 5 (4)** provides that a deputy presiding officer may perform any act, including asking of any question, which a presiding officer is required or authorized to perform by the regulations. Under ***Regulation 79 (3)***, where a candidate refuses or fails to sign the Form, the candidate or agent shall be required to state the reasons for the refusal to sign or failure to sign. ***Regulation 79 (7)*** stipulates that the absence of a candidate or an agent to sign a declaration form or to record the

reasons for their refusal shall not be itself invalidate the results announced.

120. Our understanding of the appellant's case is that Form 35 was not signed by the authorized agents or persons. In the instant appeal, what is the evidence relating to the absence of signature on Forms 35s. The appellant contends that Forms 35s were either not signed or signed by persons who were not the authorized agents of the political party or candidates. The 2nd and 3rd respondents tendered evidence through the Returning Officer (DW 10 Kennedy Onditi) to the effect that all Forms 35s had signatures and were signed by duly authorized agents. It was submitted that the results of all polling stations were neither questioned by any candidate or agent at the polling station nor were complaints raised at the tallying centre regarding the accuracy of the results read out from Form 35 or denial of the agent's right to sign the Form 35s. The 2nd and 3rd respondents further submitted that none of the candidates or agents requested for a recount under ***Regulation 80*** of the ***Elections Regulations***, if at all there was any doubt as to the accuracy of the results.
121. The trial court found that in the polling stations where the appellant alleged that Form 35s were not signed, the said Forms were actually signed. Subject to the testimony of DW 10, we are of the considered opinion that the petitioner did not lead evidence to prove that Form 35s were not signed by either the presiding officer or the Returning Officer or that strangers did in fact sign the Forms. It was the duty of the appellant to prove the allegation that Forms 35s were not signed by the duly authorised person. Under ***Regulation 79 (2) (c)***, the presiding officer is under duty to provide the candidate or agents with a copy of the results as declared.
122. The 2nd and 3rd respondents submitted that Form 35s were signed by duly authorized agents and the burden was on the appellant to prove that the persons who signed Form 35s were not the duly authorized agents. The appellant has not countered this by tendering evidence to prove that there were different persons who were the duly authorized agents who were supposed to sign the Form 35s. The appellant has failed to discharge the burden of proof to illustrate that the persons who signed the Form 35s were not authorized agents or the presiding or returning officer as appropriate.
123. In the case of ***William Kabogo Gitau - v- George Thuo & 2 others, {2010} eKLR***, one of the issues was that the petitioner had listed thirty seven (37) polling stations where the presiding officers did not provide statutory comments as required by the law and further failed to allow the agents of the candidates to authenticate the results by signing on the Form 16As. In all these polling stations, the presiding officers did not give statutory comments in the Form 16As. Neither did they give reasons for the failure or refusal by the candidates or their agents to sign Form 16As. The trial court expressed itself as follows in the judgment:

"Regulation 35A (7) requires the presiding officer to record the reasons for such failure or refusal by a candidate or his agent to sign the Form. The regulation with a view to promoting transparency and accountability in the electoral process requires candidates or their agents to participate in the counting of ballots and thereafter the tallying of the results. The participation of the candidates or their agents is not incidental or cosmetic to the process but is an important component of the electoral process. The presiding officer is required to ensure that at each of the stage of electoral process, the candidates and their agents participate and in the event that a candidate or his agent refuses or declines to participate in the electoral process, a mechanism has been put in place for the presiding officer to give reasons for such failure or refusal by a candidate to participate. This court is of the view that failure by the presiding officer to state reasons why a candidate or his agent failed or refused to sign Form 16A or failure to record the absence of such candidate renders the results contained in the said Form 16As invalid. Regulation 35A (7) is couched in mandatory terms requiring that the presiding officer shall…. A presiding officer has no discretion in the matter."

124. In the instant case, we note that the accuracy of the declared results have not been challenged in relation to those polling stations where the appellant contends that Form 35s were signed by strangers. In the case of ***William Maina Kamanda , Election Petition No. 5 of 2008,*** signatures in Form 16As were found to be missing but the results in all the forms whether signed or unsigned were taken into account. In the instant case, the net effect is that the appellant has not shown that the total number of vote's casts for each candidate was materially affected by the presence or absence of agents signatures on Form 35s. Subject to the testimony of DW 10, we find that the appellant has failed to point out and prove that an irregularity of law occurred as to the signatures appended on Forms 35s and 36s and that this irregularity materially affected the result.

ALTERATIONS IN FORM 35s and 36s and COMPARISON BETWEEN FORM 34 and 36

125. The appellant submitted that the trial Judge erred in failing to find that Form 35s that had alterations were invalid and such Forms and the votes entered thereon should have been declared invalid. The cancellations and alterations in statutory electoral Forms beg the issue of veracity and authenticity of the said results. Unless the cancellations and alterations are countersigned, the cancelled and altered forms cannot be said to contain valid results of the polling stations in question. (See ***William Kabogo Gitau - v- George Thuo & 2 others, {2010} eKLR)***. In the instant case, we have perused the record and the testimony of DW 10, reveals that there are some Form 35s with alterations which were not countersigned. Guided by the dicta in the ***William Kabogo case supra***, we find that Form 35s with alterations that were not countersigned do not contain valid results of the polling stations involved.
126. The appellant contended that the material differences in the total of votes casts entered in Forms 34 and Form 36 were brought to the attention of the trial Judge. The trial Judge expressed that the court could not compare Form 34 which relates to presidential elections with Form 36 which relates to gubernatorial elections. We pose the question: did the trial Judge err in holding that Forms 34 and 36 could not be compared as Form 34 related to the presidential elections and had no relevance to the gubernatorial elections" In ***Manson Oyongo Nyamweya – v- James Omingo Magara & 2 others, Kisii Election PetitionNo. 3 of 2008***, the Petitioner compared several forms 16As in respect of presidential returns and form 16As in respect of parliamentary returns and realized that there were several stations that had no returns in respect of the parliamentary election but there were returns for presidential elections. There were also few polling centres where the presiding officers who signed Form 16A in respect of parliamentary election were different from those who signed Form 16A for presidential elections. In ***William Kabogo Gitau - v- George Thuo & 2 others (supra)*** an issue raised in the Petition was that there was discrepancy between the results contained in the presidential and civic vote as contrasted with the results of the parliamentary vote. In that case, whereas the total number of votes cast in the parliamentary vote as contained in the results published by ECK was 114,808, the total number of votes cast in the presidential election was stated to be 119,050 while the total number of votes cast in the civic election was said to be 119,110. The trial court stated that:

"The discrepancies between the presidential and civic elections on one hand and that of the parliamentary election on the other is such that it raises eyebrows. The said elections were conducted from one voters roll. The results of the election are contained in the statutory forms i.e Forms 16A and 17A. The 3rd respondent cannot simply explain away the discrepancies in the voter turnout between the elections that were held on the same day and in the same polling station by stating that the discrepancies could be as a result of his failure to include certain results in the finally tally as contained in Form 17A. This court takes judicial notice of the fact that in normal circumstances, the tally of the total number of votes cast in the presidential,

parliamentary and civic elections is expected to be more or less the same. The difference of over 5,000 votes between the parliamentary vote on one hand and the presidential and civic vote on the other hand in the circumstances of this petition is evidence of serious electoral malpractice that was apparent during the conduct of the elections."

127. Persuaded by the judicial approach in comparing the Forms used in presidential elections vis-à-vis parliamentary elections in the case of ***Manson Oyongo Nyamweya – v- James Omingo Magara & 2 others (supra)*** and in ***William Kabogo Gitau - v- George Thuo & 2 others (supra)***, we find that in the instant case, the trial Judge erred in declining to examine and compare Forms 34 and 36. We hasten to add that it is not mandatory to compare the two Forms but once a discrepancy between the two has been brought to the trial court's attention, it was incumbent for the court to consider the issue.

MATERIAL DIFFERENCES IN FORMS 35s AND 36s

128. We now consider the allegations that there were material differences in the figures/entries in Forms 35s and 36s. In the case of ***Kakuta Hamisi –v- Peris Tobiko & Others Nairobi EP No. 5 of 2013 (2013) eKLR,*** Kimondo, J. properly analyzed the place of Forms 35 and 36 within the electoral process; he stated as follows:

"Form 35 is a snapshot of the votes cast. Its contents are then transposed into Form 36 that captures the constituency total tallies for all the candidates. Form 35 contains three distinct parts. The first part requires the presiding officer to insert the following details; total number of registered voters for the polling station, number of spoilt ballot papers; total number of votes cast, number of rejected votes, number of disputed votes and total number of valid votes cast. The second part captures the actual vote tally. The part contains the name of the candidate and against it a space to fill in the number of valid votes cast in favour of each candidate. The last part is where the presiding officer is required to sign and date the Form and declare that they were present when the results were announced. There is also a space for the candidate or his agent. Then there is space for the presiding officer to record any comments pertinent to the counting of votes. Mistakes may be made in the first part as the presiding officer may insert the wrong number of registered voters. It should be recalled that the number of registered voters is already fixed at the close of the registration process and therefore an error in the number is not fatal to Form 35 as this number can readily be ascertained by reference to the voter register. The other figures in Form 35 require reconciliation of the votes cast vis a vis the other numbers. This is a mathematical exercise. However, where errors are evident in the votes cast for each candidate and that number exceeds the registered voters, then the courts sense of scrutiny is heightened. The errors may be self evident or may be corroborated by a party or candidates agent tallies and the court in appropriate circumstances may decide to order a recount if it is satisfied that a basis has been laid or it is in the interest of justice to do so." (Emphasis ours).

129. The entries in Form 35s are required to be transposed and tallied into Form 36s which contains the aggregate number of votes cast in the respective electoral area and the votes cast for each candidate, the total number of registered voters and the name of the respective electoral area. In the instant case, there are two critical issues for determination. First, has it been established that there were differences in Forms 35s and 36s" and second, are the differences material" There are two sources of evidence relating to differences in Forms 35s and 36s. One is evidence emanating from the Report of the Deputy Registrar as a result of the scrutiny and recount ordered by the trial Judge. The other is evidence from the annextures attached to the affidavit of DW 10, Mr. Kennedy Onditi. The evidence shows that there were 953 polling stations in the Meru

gubernatorial elections. Out of the 953 polling stations, the trial court ordered scrutiny in 7 polling stations and these revealed differences in the figures entered in Forms 35s and 36s. The attachments in the affidavit of DW10 also reveal that there are errors and discrepancies in entries in Forms 35 and 36. We shall revert to the legal consequences of the discrepancies and errors identified later in this judgment.

130. Having observed that there were discrepancies in the tallying, transposition and entry of figures in Forms 35s and 36s, the next issue for us to consider is whether it is the legal duty of the High Court or this Court to engage in mathematical or arithmetic calculations and to undertaken a reconciliation exercise to correct any errors" What is the legal consequence of these differences and what inferences in law can and should be drawn" We shall say more on this later.
131. In the instant case, the trial Judge held that the discrepancies affected all candidates and there was no pattern to systematically benefit one candidate to the detriment of others. In ***William Maina Kamanda case***, it was stated that the Returning Officer cannot depart from the figures captured in Form 16A (now Form 35) that were submitted to him from each of the polling stations. He has no escape clause to avoid performance of his statutory duty to take into consideration the results from all the polling stations. The role of the returning officer is to primarily tally the results from the polling stations as captured and indicated in Form 35 and announce the winner of the election. The Uganda Supreme Court in the case of ***Joy Kabatsi Kafura – v- Anifa Kawooya & Another (Election Petition No. 25 of 2005)*** stated:

"An election is a process encompassing several activities from nomination of candidates through to the final declaration of the duly elected candidate. If any one of the activities is flawed through failure to comply with the applicable law, it affects the quality of the electoral process and subject to the gravity of the flaw; it is bound to affect the election results. One such activity is the declaration of the results at every polling station. If any declaration is invalid by reason of non-compliance with the applicable law, it affects the quality and the result of the electoral process."

132. Relating to the differences in Forms 35 and 36, we concur with what Kimondo, J. stated in ***Kakuta Hamisi –v- Peris Tobiko & Others Nairobi EP No. 5 of 2013 (2013)eKLR*** that, what is material is whether the final Form 36 corresponds in all particulars with entries in Part B of all the Forms 35. Differences in Forms 35 and 36 affect the verifiability and credibility of the election results. Whenever there is a difference between Forms 35 and 36, the entries in Form 36 are not verifiable and yet it is the entries in Forms 36 that are used to declare the winner. In this case, we note that the discrepancies identified in the scrutiny and recount report are from seven (7) out of 953 polling stations and this Court cannot be blind to the plausible fact that if all the 953 polling stations were scrutinized, additional discrepancies may or may not have been detected. Noting that the margin between the returned candidate and the runner up in the instant case is less than one per cent, the discrepancies disclosed between entries in Forms 35 and 36 begs the question whether one can confidently state that the candidate returned and declared to be the winner was indeed the actual winner"
133. The appellant's submission is that the errors discovered in the seven polling stations should be used as an analytical representative sample for the rest of the polling stations in Meru County where no scrutiny and recount was conducted. The trial court in rejecting this submission stated that the sample could not be used in any scientific or analytical way as a representative sample. The trial Judge observed that the minor errors discovered were not just meant for the benefit of one person as alleged by the appellant; that there was no proof of a systematic and deliberate manipulation of the results in the seven polling stations and the said errors could be attributed to normal human error. The trial court found that only a total of 360 votes were irregularly counted in the seven polling stations and this would not significantly reduce the margin between winner and

the runner up to alter the results of the elections. In this case, we observed that the margin between the winner and runner up was 3436 votes. If seven (7) polling stations reduced the margin by 360 votes, what would have been the scenario if all the 953 polling stations were scrutinized"

134. In the case of ***Hari Vishnu Kamath vs Syed Ahemd Ishaque (1995) 1 SCR 1104: AIR 1955***, the Supreme Court of India held that the results of the returned candidate was materially affected when the Returning Officer accepted 301 votes which should have been rejected and the difference between the returned candidate and the defeated candidate was only 174 votes. The Court held that the election of the returned candidate was voided by the improper reception of 301 votes which had materially affected the result of the election.
135. The critical issue for this Court to consider is whether from the seven (7) polling stations scrutinized, first it can conclude that the returned results had integrity, second, if the results as entered in Form 35 were accurate; and third, if any singular candidate was consistently and systematically being positively affected or negatively affected" Who is persistently gaining from the errors" Arising from the scrutiny and recount report of the Deputy Registrar, we pose the question asked in ***Wabuge – v- Limo & another (2008) 1 KLR (EP) 417)*** whether there was a serious and grave state of affairs arising from the scrutiny. In the ***Wabuge case (supra)***, the court found that a total of 660 ballot papers were rejected and upon scrutiny this number increased to 1832; out of this 1035 had previously been counted for the 2nd respondent who was declared the winner; upon scrutiny, there was a decrease in the 2nd respondent's votes by 1,118 votes. The court annulled the election stating that this was a serious and grave state of affairs. In the ***Wabuge case (supra)*** the trial court found a number of glaring anomalies and inconsistencies at the time of scrutiny and recount and to this, the trial court declined to shut its eyes.
136. In the instant case, it is instructive to note that the trial court's judgment at pages 988 to 991 of the record has unusual similarity with paragraphs 62 to 65 of the written submissions by the 1st respondent (See pages 730 to 731 of the record). It is our considered opinion that on this critical issue, it was the duty of the trial Judge to analyze and evaluate the evidence on record and come up with his own independent conclusions. There is no evidence of critical analysis having been made by the trial court on this fundamental issue. We shall consider this matter later in this judgment.

HUMAN ERROR AS AN EXCUSE FOR TALLYING ERRORS, MISTAKES AND IRREGULARITIES

137. The appellant submitted that the trial Judge erred in concluding that the irregularities in Forms 35 and 36 were due to human error. The adage goes that to err is to human as humans' are fallible. Humans are generally not good at repetitive tasks such as counting. In the instant case, the 1st, 2nd and 3rd respondents explained the differences in Forms 35 and 36 as due to human error. Is human error an absolute excuse and justification for any tallying mistakes or errors in collating and tallying the results of elections" What is human error" Human error can simply be described as an error made by a human. However, people make mistakes, but why they make mistakes is important. In considering whether human error is an excuse for mistakes or error in electoral tallying, the basic premise is to determine whether the errors or mistakes are random, persistent, multiple or systemic. If the mistakes are premeditated and persistent, multiple and systemic, substantial and reveal a pattern or cause prejudice to any particular candidate, or affect the will of the people; then the integrity and credibility of the declared results comes into question.
138. What is the jurisprudence of Kenya's electoral law on human error" In the case of ***Joho v. Nyange*** it was stated as follows:

"Some errors in an election are nothing more than what is always likely in the conduct of human

activity. If the errors are not fundamental, they should be excused or ignored."

In ***Raila Odinga vs I.E.B.C and 2 others*** the Supreme court in dismissing the petitioner's case stated:

"…..although there were many irregularities in the data and information captured during the registration process they were not so substantial as to affect the credibility of the electoral process and besides, no credible evidence had been adduced to show that such irregularities were premeditated and introduced by the 1st respondent for the purpose of causing prejudice to any particular candidate"

In the case of ***Wavinya Ndeti vs Alfred Nganga Mutua,*** Majanja, J. observed:

"That perfection is an aspiration but the election process is a human endeavour carried out in the background and therefore errors are bound to occur but the question is did the errors affect the will of the people""

139. The jurisprudence on human error in Kenya's electoral law leans in favour of a general principle that human error is an excuse for collating and tallying errors/mistakes in the conduct of elections. However, such a general principle is not absolute. Should the existence of human error be proved or is it sufficient to make a mere statement and allegation that the errors were human" It is our considered view that the fact that it is human beings who do the tallying does not mean that constitutional principles governing elections should be ignored. ***Article 81*** of the ***Constitution*** dictates that the electoral system should be *inter alia* administered in an …. efficient and accountable manner. The 2nd respondent having the legal mandate to conduct elections is required under ***Article 86*** of the ***Constitution*** to ensure that the electoral system is accurate, verifiable, secure, accountable and transparent and that the results from the polling stations are openly and accurately collated and appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safe keeping of election material.
140. The 2nd and 3rd respondents submitted that the errors identified were made in good faith due to fatigue, pressure of work and extremely exhausting circumstances. Human error is excusable, but in the instant case, taking the example of Mwichune primary school polling station, were the election officials and the Returning Officer so tired and fatigued not to include the results of this polling station in the final tally" Further, the 2nd and 3rd respondents submitted that only Form 35 from Murembu Primary School was not signed by any agent. Was this due to human error" What about the errors and mistakes identified by DW 10. Can all these be attributed to human error"
141. It is our considered view that whereas human error may be an excuse for tallying mistakes, a party that raises this excuse must prove the existence of human error. Human error is not a blanket excuse that justifies and excuses any arithmetic, collating or tallying mistakes. Human error is neither an excuse for all errors or mistakes in transposition nor is it an excuse for failure to have the statutory forms duly signed by authorized persons. Simply stating that human error is responsible for the mistakes is not proof of existence of the error. The burden to prove the existence of human error rests on he who asserts. Human error must be proved. Human error is excusable if it is a single, isolated and random occurrence. When the mistakes or errors are multiple and persistent such mistakes cease to be human errors and point towards an inefficient, negligent, careless or even deliberate occurrence of the errors and this affects the credibility of the declared results. In the instant case, the mistakes on record do not reveal a pattern in favour of any one candidate but shows that there were multiple errors and mistake that go towards the overall integrity and credibility of the figures entered for each candidate. It is our considered view that due to the multiplicity of the mistakes, there are indications that human error is not a plausible explanation for all the irregularities identified. We cannot say that human error was the

cause of the mistakes with certainty because there is no evidence. We find that the 2nd and 3rd respondents raised human error as an excuse but failed to discharge the burden to prove its existence.

IS SCRUTINY CONFINED TO POLLING STATIONS AND NOT CONSTITUENCIES

142. An issue raised in this appeal is whether the trial Judge erred in ordering scrutiny and recount in 7 polling stations and not in the 4 constituencies as cited in the Petition. The trial court stated that scrutiny and recount is restricted to polling stations and not constituencies. The legal foundation for electoral scrutiny is ***Section 82*** of the ***Elections Act*** and ***Rule 33 (4)*** of the ***Election (Parliamentary and County) Petition Rules 2013. Section 82 (1)*** of the ***Elections Act*** stipulates that:-

"An election court may, on its own motion or application by any party to the petition, during the hearing of an election petition, order for scrutiny of votes to be carried out in such manner as the election court may determine."

Rule 33 (4) of the ***Election (Parliamentary and County) Petition Rules 2013***

provides that-

"***Scrutiny shall be confined to the polling stations whose results are disputed and shall be limited to the examination of the documents and materials in (a) to (f) of the rule."***

143. In ***Joho - v- Nyange & another (2008) 3 KLR 15,*** Ojwang, J. (as he then was) stated that it is the primary business of the court to entertain grievances and to resolve them, in such a manner as dispenses justice to the parties. Technical issues must not be allowed to defeat the broad goal of justice as between litigants. Warsame, J. (as he then was) in ***Dickson Daniel Karaba – v- Hon. John Ngata Kaiuki & 2 Others***, ***Election Petition No. 1 of 2008,*** observed that it is only after scrutiny that the court can form an opinion whether the results contained in Form 35 are correct.

144. Our examination of the jurisprudence developed by election courts in Kenya show that courts have time and again made orders for scrutiny and recount when the applications refer and point to constituencies and not necessarily polling stations. In ***Ayub Juma Mwakesi –v- Chirau Ali Mwakwere & 2 others, Mombasa Election Petition No. 1 of 2008***, the applicant sought scrutiny and recount in the following terminology:

"Recount, scrutiny and reconciliation of all ballot papers, counterfoils and register of all votes cast in the election in Matuga Constituency".

The trial court accepted and ordered scrutiny and recount despite the presence of the word constituency in the Petition.

145. In ***Richard Kalembe Ndile – v- Dr. Musimba Mweu & Others, Machakos Election Petiotion Nos. 1 & 7 of 2013***, the learned Judge allowed full scrutiny in all the 164 polling stations of Kibwezi West constituency.

"The applicant sought orders "to recount the votes and examination of the tallies in the election for the Member of National Assembly of Kibwezi West Constituency held on 4th March, 2013. That there be a recount, re-tally and scrutiny of votes cast in Kibwezi West Constituency."

146. In the case of ***Joash Wamangoli - v- IEBC & Others, Bungoma HC Election Petition No. 6 of 2013,*** scrutiny and recount in a constituency was ordered. The Petitioner in that case sought an order for scrutiny in respect of the parliamentary elections of Webuye West Constituency. The election court did not decline to grant an order for scrutiny simply because the petitioner sought scrutiny in Webuye West Constituency. The learned judge expressed himself:

"This court has a duty to ensure that if there is evidence of irregularities, these should be exposed to the view of the general public, so as to encourage transparency and credibility in the electoral process. Citing the case of Justus Mungumbu Omit - v- Walter Enock Nyambati (EP No. 1 of 2008 Kisii), the trial judge observed that "all issues raised in the petition and those which crop up during the hearing, whether pleaded or not and which had the potential to affect adversely the final result, and the will of the voters in a constituency, must come under spotlight, scrutiny and interrogation."

147. In the case of ***William Odhiambo Oduol - v- Cornell Rasanga Amoth & Others Kisumu High Court Election Petition No. 2 of 2013,*** the petitioner made an application for scrutiny and recount of all the votes cast in the gubernatorial election of Siaya County conducted on 4th March, 2013 and scrutiny and examination of the election materials used in all the polling stations in the gubernatorial elections. The trial court while granting partial scrutiny limited it *inter alia* to the Constituencies of Bondo, Gem and Rarieda. The court also examined the provisions of ***Section 82 (1)*** of the ***Elections Act*** relating to scrutiny of votes and ***Rule 33 (4)*** of the ***Elections (Parliamentary and County) Petition Rules.***

148. ***Article 159*** of the ***Constitution*** enjoins courts to dispense justice without undue regard to technicalities. The ***Constitution*** should also be interpreted in a purposive manner. Taking note of ***Article 159*** and the jurisprudence developed by election courts in Kenya and a purposive approach to interpretation of ***Rule 33 (4),*** we are of the considered view that in the instant case, the trial Judge erred in law in placing a restrictive and technical interpretation to ***Rule 33 (4)*** of the ***Election Petition Rules*** in stating the scrutiny and recount cannot be done in constituencies. Polling stations are found in constituencies and whenever one refers to scrutiny, it means scrutiny in a polling station and for electoral purposes; a constituency is made up of various polling stations. It is our considered view that scrutiny and recount in a constituency means scrutiny and recount in all polling stations within the constituency. If the trial court had adopted a purposive interpretation of ***Rule 33 (4),*** it would be apparent that if a petitioner seeks scrutiny and recount of votes in a constituency, the purposive approach is that he is seeking scrutiny and recount of votes in all the polling stations in the constituency. Further, it is our considered view that Section 82 of the Elections Act is the legal foundation for scrutiny. In this section, the mandate of the court is to order scrutiny of votes and not scrutiny of polling stations. Rule 33 (4) must be interpreted so as not to negate and violate the import of Section 82 that provide for scrutiny of votes without imposing a restriction that scrutiny is confined to polling stations. It is our view that a regulation cannot add a limitation to a statutory provision when no such limitation exists in the enabling statute.

DISPUTED POLLING STATIONS

149. A fundamental issue in this appeal is to identify which are the polling stations whose results are disputed" The answer must be found in the Petition itself. As was stated in ***William Odhiambo Oduol - v- Cornell Rasanga Amoth & Others Kisumu High Court Election Petition No. 2 of 2013***, the petitioner under ***Rule 33 (4)*** should specify the polling stations in respect of which he seeks scrutiny and the materials and documents that he wishes the court to scrutinize. In the instant Petition filed by the appellant, at paragraphs 7, 8, 9 and 10, the following 36 polling

stations are expressly identified and mentioned as disputed.

1. Kiremu
2. Rumanthi
3. Kisima polling centre
4. Yururu Primary School
5. Forest Camp
6. Gachiege Coffee Factory
7. Thuura Primary School
8. Rurine Primary School
9. Ciothirai Market
10. Nkubu Primary School
11. Mugure Tea Factory
12. Kathera Tea Buying Centre
13. Igandene Primary School
14. Nkubu Primary School
15. Mwichune Polling Station
16. Muthara Youth Polytechnic Tallying Centre
17. Limoro Polling station
18. Antwamuu polling station
19. Mitunguu polling centre
20. Luuma primary
21. Muthara Youth Polytechnic Tallying Centre
22. Gambela polling centre
23. Mukuani polling centre
24. Kirimanchuma polling centre
25. Kinangaru polling station
26. Kaaga Tallying Centre
27. Ithitwe primary school
28. Bubui primary school,
29. Rurama primary School
30. Kabau Primary School polling station
31. Kithimu primary school polling station
32. Mutembu Primary School
33. Mitunguu Primary School polling station
34. St Allysius primary school
35. Maguru Polliny stations
36. Kaguru Tallying centre

150. Our reading and analysis of the judgment of the trial court reveals that the Honourable Judge considered each of the polling stations identified in the Petition to determine if a basis had been laid for scrutiny and recount. We shall revert to this aspect in considering whether the trial Judge properly applied the law in restricting scrutiny to only 7 polling stations.

EXPUNGMENT OF ANNEXTURES TO PETITIONER'S AFFIDAVIT IN SUPPORT OF THE PETITION

151. The appellant submitted that the trial Judge erred in expunging the annextures in support of the Petition on the ground that they introduced new issues in the Petition. The Petition at paragraph 7(e) alleges that wrong and misleading figures for the total valid votes cast in Meru for the Governor position was made and the particulars are as contained in Exhibit DKM 2, DKM 3 and

DMK 4 and giving rise to a difference of 2,163 votes.

152. The fundamental issue in this appeal is that these exhibits are attached to the affidavit in support of the Petition itself and the trial Judge struck them out. In striking out the exhibit DKM2. DKM3 and DMK4, the trial Judge expressed himself as follows:

"The Petitioner's attempt to rely on annexture DMK2, DMK3 and DMK4 as part of the pleadings cannot be acceptable as the annextures to any affidavit cannot be said to be part of the pleadings. In addition, the annextures are of all polling stations in the 9 constituencies and this is contrary to Rule 33 (4) of the Petition Rules 2013 which confines scrutiny to polling stations and not constituencies and in respect of which polling stations results are disputed. The polling stations in 4 constituencies are too many to consider and the area too wide. The Petitioner is using scrutiny and recount to fish for fresh evidence from the ballot boxes and the court cannot agree to consider any polling station outside the pleadings. The Petitioner can only ask for scrutiny and recount in stations which he has specifically pleaded in the Petition."

The trial Judge in the instant case continued and opined that:

"In any election petition, the main pleas are the Petition and the Responses. The witness statements and the affidavit are just the evidence upon which the Petition and Responses are premised. My finding is that although the Petitioner did not specifically plead all the stations he now points to in this application; the issue was implicitly canvassed at the hearing of the Petition."

153. In ***Justus Mungumbu Omiti - v- Walter Enock Nyambati (EP No. 1 of 2008 Kisii);*** the trial Judge observed that:

"All issues raised in the petition and those which crop up during the hearing, whether pleaded or not and which had the potential to affect adversely the final result, and the will of the voters in a constituency, must come under spotlight, scrutiny and interrogation. They have to be interrogated and determination made thereon. In this case, all illegalities and irregularities which impugn on the credibility of the outcome of the elections have to be considered. It will be a sad day indeed if such evidence which comes through the petitioner, his witnesses, the respondents and their witnesses as well, are to be discarded and rendered irrelevant or inadmissible merely on the grounds that the same was not the subject of any pleading. At the end of the day, what is of prime concern to this court, is whether the elections were conducted in a fair, free and transparent manner…Such a determination cannot be made, if relevant evidence is locked out on technical grounds that the issues addressed by such evidence were not pleaded."

154. The 2nd and 3rd respondents in their submissions before this Court supported the trial Judge's decision to strike out the annextures. It was submitted that the annextures DMK2, DMK3 and DMK4 were prepared by a third party, Kevin Koome, who did not swear a witness affidavit and was not called to testify. That the annextures could not be relied upon in accordance with the provisions of ***Rules 10 and 12 (4)*** of the ***Elections (Parliamentary and County Elections) Petition Rules 2013***. That the said annextures were admittedly incorrect and could not form a sufficient basis for an order for scrutiny.

155. We have considered the submission by the 2nd and 3rd respondent and state that a distinction should be drawn between admissibility of the exhibits DMK2, DMK3 and DMK4 and the issue of weight to be attached to them. If the annextures are incorrect in relation to the facts deposed therein, this goes to the weight and not admissibility. Subject to the hearsay rules and exceptions thereto, if the person who prepared the annextures is not called to testify, this goes to the weight

to be given to the annextures. We hasten to add that the issue of hearsay was neither raised nor canvassed in this Petition in relation to the expunged annextures

156. In the case of ***Phillip Mukwe Wasike – v - James Lusweti & 2 others***, ***High Court Bungoma Election Petition No. 6 of 2013***, one of the issues for determination was whether the application for scrutiny introduced issues or evidence not contained in the Petition and if so, whether the court should nevertheless consider the new issues and evidence and make a determination thereon. The trial Judge expressed himself as follows:

"The alleged new issues or evidence is contained in paragraph 6 and 7 of the petitioner/applicants supporting affidavit. In these paragraphs, the petitioner has enumerated the various incidences of breaches of law, irregularities, malpractices and omissions complained of and particulars thereof. The bone of contention is that whereas the petition had specified only about 5 polling stations where the alleged breaches of law, irregularities, malpractices and omissions were committed, he has listed more polling stations in which he alleges the malpractices and irregularities were committed. It is also alleged that the petitioner has introduced issues not contained in the affidavit and sought to support the issues on evidence not given on oath and which the respondents never got an opportunity to respond. Generally, parties must confine their arguments to the issues raised in their pleadings and that issues not pleaded cannot be introduced by way of evidence or submissions (See Nganga & another –v- Owiti & another (2008) 1 KLR (EP) 749."

157. In the case of ***Mohamud Muhamed Sirat – v- Ali Hassan Abdirahman & 2 Others, Nairobi EP No. 15 of 2008 (2010)eKLR***, Kimaru, J. observed:

"From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required it to make decisions in respect of matters that were not specifically pleaded."

158. In ***Plotti – v- The Acasia Company Ltd (1959) EA 248*** and in ***Esso Petroleum Company – v- Southport Corporation (1956 All ER 864,*** it was observed that the function of pleadings is to give a fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. In ***Day – v- William Hill (1949) 1 All ER 219***, it was stated that if documents are referred to in the pleadings, they become part of the pleading. In the case of ***Castelino - v- Rodriques (1972) EA 233***, it was stated that a reference in a document incorporates the contents of the annexture in the document (See also ***Kabwimukya - v- John Kasiga (1978) HCB 251.)***

159. In the instant case, the appellant at paragraph 7 of the Petition referred to Exhibits DMK2, DMK3 and DKM4 as containing the evidence relevant to support the allegations made in the Petition. ***Rule 9 (3) (b)*** of the ***Election Petition Rules*** provides that an election Petition shall be supported by an affidavit of the petitioner containing the grounds on which relief is sought. The plain reading of this rule is that an affidavit in support of the petition is a mandatory requirement. This means that by virtue of the express provision of the rule, such an affidavit is admissible. It is worth noting that admissibility is a question of law and in this case, ***Rule 9 (3) (b)*** of the ***Election Petition Rules*** makes the affidavit in support of a Petition to be admissible. It is our considered view that the learned Judge erred and misapprehended the admissibility as stipulated in ***Rule 9 (3) (b).*** Any mistakes of fact or otherwise that may be in exhibits DMK2, DMK3 and DMK4 go towards the weight to be given to the exhibits. The trial Judge could not properly make a

determination on the weight to be given to exhibits DMK2, DMK3 and DMK4 in relation to the alleged irregularities and malpractices after striking these exhibits from the record and denying himself the opportunity to test in judicial proceedings the veracity of the allegations made. The allegations were substantial enough that the truth thereof could not rationally be established without proper inquiry to resolve the issue one way or the other. The appellant's evidence whatever their weight was contained in the Exhibits attached in DMK2, DMK 3 and DMK 4. In striking out these exhibits the trial Judge breached the rules of natural justice and fair hearing in that no person should be condemned unheard. The failure to exercise the duty to judiciously and diligently inquire into the allegations raised in exhibits made the trial Judge err as he excluded items of evidence that would enable him to judiciously arrive at a decision after giving all parties an opportunity to tender any evidence that they wished.

160. Taking into account the explicit provisions of ***Rule 9 (3) (b)*** of the ***Election Petition Rules*** and noting that annextures DMK2, DMK3 and DMK4 are expressly referred to in the body of the Petition lodged by the appellant and guided by the judicial decisions cited, we find that these annextures were part of the Petition and the learned Judge erred in finding that they were not part of the pleadings in the Petition. We find that the trial Judge's decision was made *per incuriam.*

161. Our finding that the learned Judge erred in striking out the annextures to the appellant's affidavit in support of the Petition is fortified by our consideration of the Supreme Court's decision in the Matter of Application by Mr. R.A. Odinga to file a Further Affidavit in ***Odinga & 5 others -v- Independent Electoral and Boundaries Commission & 3 others (2013) KLR-SCK***. The Supreme Court stated that the principle of substantial justice rather than technicalities particularly in a Petition was a matter of great public interest. That the basic tenet in admitting an affidavit is for the other party to be able to respond. In the instant case, it is our finding that the affidavit in support of the Petition which contained annextures DMK2, DMK3 and DMK4 were filed with the Petition and the respondents had an adequate opportunity to respond to the issues raised therein. We find that these annextures having been part of the Petition did not introduce any new evidence that was not in the original Petition. The annextures never changed the nature and character of the Petition and did not give rise to new facts and allegations. They were not a serious departure from the Petition as they were an integral part of the Petition as filed.

ORDERING SCRUTINY IN ONLY SEVEN (7) POLLING STATIONS

162. The appellant contend that the trial Judge erred in ordering scrutiny and recount in only seven (7) polling stations. It is the appellant's case that he had requested for scrutiny and recount of votes in four constituencies in Meru County: i.e Imenti South, Tigania East, Igembe South and Buuri constituencies; yet the trial judge ordered scrutiny and recount only in seven (7) polling stations.
163. In the case of ***William Maina Kamanda – v- Margaret Wanjiru Kariuki & 2 others (2008) eKLR,*** it was observed that scrutiny is necessary in order to-

a. ***Investigate the truthfulness or otherwise of the allegations made;***
b. ***assist the court to investigate if the allegations of the irregularities and breaches of law complained of are valid and***
c. ***to assist the court to determine the valid votes cast in favour of each candidate.***

164. The appellant's pleading for scrutiny and recount as expressed in the Petition is for immediate scrutiny and recount of the votes in Imenti South, Tigania East, Igembe South and Buuri constituencies. Despite this, the recount and scrutiny was done in seven polling stations. What was the rationale for this" The answer is to be found in the ruling delivered pursuant to the appellant's Notice of Motion dated 4th June 2013.

165. In the Notice of Motion application, appellant had sought scrutiny and recount of the votes cast in Imenti South, Tigania East, Igembe South and Buuri Constituencies. The grounds upon which the appellant sought recount is that the total valid votes cast in each of the identified nine (9) polling stations exceeded the total number of the registered voters for each of the respective polling stations; that the votes affected by the irregularity were 5,339 which exceeded the margin by which the 1st respondent allegedly defeated the runner up. That the results of 48 polling stations in the four constituencies were not signed or authenticated by any candidate or agent; that the returning officer had not written the reasons for the agent's or candidates failure to sign or authenticate the results; that the votes affected by the irregularity and failure to sign were 20,108.
166. Ground 6 in support of the Notice of Motion is critical to this appeal. In this ground, it is stated that the Returning officers duplicated and/or omitted results for seven (7) polling stations in the final tally. The appellant/petitioner submitted that the result of the election had been materially affected by the improper rejection of valid votes in the polling stations where results were omitted. The results were also affected by improper reception of invalid votes where the candidates or their agents did not sign Forms 35 and where the votes cast exceeded the registered voters. That these irregularities were not confined to the seven (7) polling stations where scrutiny and recount was ordered and the trial Judge erred in failing to appreciate that a legal basis had been laid for scrutiny and recount in all the polling stations in the four constituencies and not only in seven polling stations.
167. By a ruling dated 2nd August, 2013, the trial court in making a decision on the application for scrutiny and recount stated that the appellant was trying to introduce new evidence by introducing polling stations outside the four pleaded constituencies that is Imenti South, Tigania East, Igembe South and Buuri constituencies. The court declined to order scrutiny and recount in polling stations outside these four constituencies. The court also declined to order scrutiny and recount in the polling stations within the four constituencies which were mentioned in the Notice of Motion but were not in contention in the Petition. On this, the trial Judge stated as follows:

"In the testimony of the Petitioner and his witnesses, no evidence was adduced on the further polling stations which are not mentioned in the Petition nor any cross-examination done on polling stations outside the ones mentioned in the Petition. I find that the said polling stations should be disregarded. In addition to the above, no basis is laid in respect of polling stations outside the four constituencies or the polling stations which were not mentioned in the petition. The petitioners attempt to rely on annextures DMK2, DMK3 and DMK 4 as part of the pleadings cannot be acceptable to court as the annextures to any affidavit cannot be said to be pleading. In addition to that the annextures are of all polling stations in the 9 constituencies and I find this to be contrary to Rule 33 (4) of the Petition Rules which confines scrutiny to polling stations and not constituencies and in respect of which polling stations results are disputed. The polling stations in 4 constituencies are too many to consider and the area too wide. The Petitioner has not laid basis nor disclosed any evidence to warrant scrutiny and recount in the said constituencies... The Petitioner can only ask for scrutiny and recount in stations which he has specifically pleaded in the Petition. He cannot be allowed to go beyond his pleadings nor can court look beyond his pleading. The polling stations which are not mentioned in the petition nor any cross-examination done on polling stations outside the ones mentioned in the petition should be disregarded as a party is bound by his pleadings...This Court cannot grant the Petitioner's request to scrutinize and recount results from polling stations that he did not specifically pleaded in his petition. The stations objected to by the Respondents numbering 62 are disregarded."

168. From the polling stations mentioned in the appellant's Notice of Motion for scrutiny and recount,

the trial Judge held that the appellant had laid out a legal basis for scrutiny and recount in only seven (7) polling stations which were within the four constituencies mentioned in the petition. In relation to the seven polling stations where scrutiny and recount was ordered, the trial court stated as follows:

" The Respondents objected to an order of scrutiny and recount being issued to the remaining 7 polling stations being:

(i) Yururu polling station (070) Imenti South

(ii) Mwichune Primary School (083) Imenti South

(iii) Igandene Primary School (086) Imenti South

(iv) Kathera Primary School (123) Imenti South

(v) Nkubu Primary School (138) Imenti South

(vi) Murembu Primary School (055) Imenti South

(vii) St. Aloysious Primary School (062) Imenti South

The respondents conceded that the results of two polling stations that is Nkubu Primary and Kathera Primary School were not tallied in Form 36. These allegations are clearly spelt out in the Petition and the supporting affidavit of the Petitioner. Having carefully considered the evidence and perused Form 36, it is clear to this court that while explanation given by the 2nd and 3rd respondents may be reasonable, and may be possible, this court, though in agreement with the respondents that the margin of 3,336 votes is too wide, it is convinced that the Petitioner has laid sufficient basis for the need of the court to investigate the truthfulness or otherwise of the allegations made by the Petitioner."

169. Based on the above quoted reasoning, the trial Judge allowed scrutiny and recount in the seven polling stations. It was ordered that the scrutiny and recount in the seven polling stations shall be restricted to the ascertainment of votes that each candidate obtained as compared with the results that were announced in Forms 35 that were later collated in Form 36 by the 3rd respondent; the exercise would enable the court to ascertain the integrity of the results which were announced by the 3rd respondent. Dissatisfied with the trial Judge's Ruling on Scrutiny and Recount, the appellant filed a Notice of Appeal dated 7th August, 2013.
170. The critical questions for our consideration are as follows: did the trial judge err in excluding other polling stations from scrutiny and recount"; did the trial court err in excluding annexures to the affidavit as not part of the pleadings"; did the trial court err in stating that cross-examination did not reveal need to scrutinize and recount other polling stations"; did the trial court err in stating that there was no need for recount and scrutiny as the area was large and wide and polling stations too many"; did the trial court err in failing to order scrutiny and recount in all polling stations in the 4 constituencies"; did the trial court err in finding that scrutiny and recount is limited by law to polling stations and not constituencies" Some of these questions have been addressed in this judgment hereabove.
171. An order for scrutiny and recount is an exercise of discretion by the trial court. In ***Wabuge – v- Limo & another (2008) 1 KLR (EP) 417),*** it was stated that one of the reasons for granting scrutiny is the desire of the court to provide the petitioner with a full opportunity for the prayers

made in the interest of justice and to test the bona fides of the election exercise. Was interest of justice served in this case by ordering scrutiny in seven polling stations despite the appellant/petitioner seeking scrutiny and recount in all polling stations in four constituencies" In ***Edward Sargent – v- Chhotabhai Jhaverbhat Patel (1949) 16 EACA 63***, it was held that an appeal does lie to an appellate court against an order made in the exercise of judicial discretion, but the appeal court will interfere only if it be shown that the discretion has not been exercised judicially. (See also Spry VP in ***Haman Singh & Others –v – Mistri (1971) EA 122, 125)***. The circumstances in which appellate courts can interfere with discretionary orders is well settled in the case of ***Mbogo & another – v- Shah (1968) EA 93,*** where it was held ***at 96*** that,

"An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."

172. In an election Petition for relief of scrutiny and recount, it is not the requirement of law that in respect of each ballot paper contested, a specific averment must be so made as to identify the ballot paper and only those that can be correlated to the allegations in the Petition specifically and not generally shall be recounted. When a Petition is for relief of scrutiny and recount on the allegation of miscount, all that the petitioner has to offer is *prima facie* proof of errors in counting and if errors in counting are *prima facie* established a recount can be ordered. If proof is furnished of some errors in respect of some ballot papers, scrutiny and recount cannot be limited to those ballot papers only. We have examined and evaluated the legal reasoning of the trial court in arriving at the decision to order scrutiny and recount in only seven (7) polling stations. We are satisfied that the trial Judge properly interpreted the law relating to scrutiny and recount but he erred in the application of the law to the facts before him. In the body of the Petition, the appellant had expressly referred to annextures DMK2, DMK3 and DMK4 as containing the details of polling stations where miscount and errors were to be found. In these annextures, polling stations not only in four but nine constituencies had been identified. We have stated that the honourable judge erred in excluding these annextures and made a further error in finding that new and additional evidence was being introduced in the Petition. We find that the trial judge erred in not ordering scrutiny and recount in all the polling stations in the four identified constituencies.

WERE THERE VOTES CAST IN EXCESS OF THE TOTAL NUMBER OF REGISTERED VOTERS"

173. The appellant contends that the trial Judge erred in failing to find that a basis had been laid to order scrutiny and recount in polling stations where the total number of votes cast exceeded the number of registered voters. At this stage, we pose the question; did the number of vote's casts exceed registered voters in any polling station"
174. The scrutiny and recount report of the Deputy Registrar sheds light on this issue. In the report, it is observed as follows:

(i) Yururu Primary School (070) Stream 1 - Form 35 there were 499 votes cast. The number of registered voters is 493.

(ii) Yururu Primary School (070) Stream 2 - Form 35 total registered voters 493, votes cast 502.

175. In relation to the report by the Deputy Registrar, the 2nd and 3rd respondents denied that the number of votes cast exceeded the number of registered voters and stated that the Deputy Registrar ignored the Green Book and the Special Register during the scrutiny exercise. The respondent further submitted that the Deputy Registrar exceeded his mandate in drawing a conclusion and making a finding that the number of votes cast at Yururu Primary School both streams 1 and 2 exceeded the number of registered voters. The trial Judge agreed with the submission that the Deputy Registrar had exceeded his mandate in drawing conclusions. We agree with the trial Judge that it is the duty of the trial court to draw inferences and make conclusions on the facts disclosed by the evidence on record. We find that the trial Judge did not err in stating that the Deputy Registrar exceeded his mandate.
176. In the present appeal, the evidence on record does not reveal the total number of registered voters at Yururu Primary School both in Streams 1 and 2. For this polling station, the entries in Form 35 attached to the affidavit of DW 10 are different from the entries in Form 35 used for purposes of scrutiny and recount by the Deputy Registrar. In the absence of the authentic and verifiable total number of registered voters in these two polling stations, it is our considered view that it was not established that the total votes cast exceeded the number of registered voters. Taking into account that the evidential burden to prove the total number of registered voters was on the 2nd and 3rd respondent, we are reluctant to draw an inference or conclusion that there is credence to the allegation that there was irregularity in the conduct of the election itself at Yururu Polling Station.

POST-ELECTION IRREGULARITIES

177. One of the grounds in the Petition was to the effect that the 2nd and 3rd respondents did not take proper care and custody of the ballot boxes whose seals were broken. This allegation raises a post-declaration irregularity. The evidence on record shows that upon scrutiny and recount of the votes in the ballot boxes of 7 polling stations, the Deputy Registrar observed that the ballot boxes were intact. It is our considered view that post-declaration non-compliance with the Electoral rules for the proper custody of the election material by the election staff is not *per se* one of the grounds for setting aside the election of a returned candidate. However, non-compliance with the electoral rules as to the proper custody of electoral material may be evidence that a pre-declaration irregularity did in fact take place. When the ballot boxes and their seals have been tampered with or there are fewer votes in the ballot boxes, this may be evidence of a pre-declaration irregularity.
178. The trial Judge made a finding that there was no proof that ballot boxes had been tampered with. The basis of this finding is that the Deputy Registrar observed that the ballot boxes from the 7 polling stations that were scrutinized were intact. The 2nd and 3rd respondents urged this Court to find that there was no proof of tampering with the ballot boxes as observed by the Deputy Registrar. In the Petition document, the allegation is that broken locks and seals were found in Tigania East Constituency. The issue for our consideration is whether there was factual and evidential basis for trial Judge to arrive at the conclusion that there was no tampering with the ballot boxes. The report of the Deputy Registrar related to 7 polling stations. Can the finding and observations made in 7 polling stations be used to make a determinative conclusion in relation to 953 polling stations spread within the Meru County" The learned Judge correctly observed that one cannot extrapolate the findings of 7 polling stations and use the same as a sample to determine what happened in all the 953 polling stations. We concur with the reasoning of the trial Judge on this issue. In the instant case, there is no evidence on record that electoral seals were recovered anywhere. We are satisfied that the trial Judge did not err in law in finding that there was no proof of the alleged irregularity of failing to take proper care and custody of the ballot boxes.

SUBMITTING THE RESULTS ELECTRONICALY

179. One of the grounds of appeal is that the trial Judge erred in not finding that the 2nd and 3rd respondents committed an election irregularity in not transmitting the results electronically and not posting the results on the door of the polling station. In the case of ***Hassan Ali Joho & another – v- Suleiman Said Shahbal and 2 others***, Supreme Court Petition No. 10 of 2013, the Supreme Court expounded on the provisions of ***Regulation 87*** which provides:

> ***(1) …….***
>
> ***(2) The returning officer shall after tallying of votes at the constituency level—***
>
> ***(a)***
>
> ***(b)***
>
> ***(c) Electronically transmit the provisional results to the Commission.***

180. The Supreme Court in that case emphasized that once Form 35 has been duly completed and signed; the presiding officer is required to submit the election results electronically to the returning officer. According to Regulation 82, electronically-transmitted results are provisional.
181. The legal consequence of failure to transmit the results electronically was considered by the Supreme Court in the case of ***Raila Odinga & 5 others – v- Independent Electoral and Boundaries Commission & Others (supra).*** The Supreme Court stated that the electoral laws had specifically given the 3rd respondent the discretion to either work with a full electronic system or a manual system. The Court opined that since technology had 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.
182. Guided by the dictum as expressed by the Supreme Court as cited above, it is our considered view that failure by the 2nd and 3rd respondents to transmit the results of the Meru gubernatorial elections electronically was not fatal and did not affect the outcome of the election results. As regards failure to display the results on the door of polling stations, we agree with the learned Judge that the appellant did not lead evidence to show in which polling stations there was failure to display the results.

CRUX OF THE PETITION APPEAL

183. ***Regulations 14 & 15*** of the ***Election Petition Rules 2013*** oblige the respondents to file answers to the Petition and witness statements. In the instant appeal, the results of the scrutiny and recount report as well as the testimony of DW10, Kennedy Onditi, shed light on how tallying of votes for Meru gubernatorial elections was conducted. DW 10 was a witness called by the IEBC, the 2nd respondent herein.
184. The IEBC is established as an independent body that is neutral and impartial. Under ***Section 25 (e)*** of the ***IEBC Act***, the Electoral Commission in fulfilling its mandate is expressly enjoined to observe the principles of transparent, efficient, accurate and accountable elections and to observe fairness. As custodian of the electoral process, IEBC is not expected to take sides but to assist the Court to understand how the election was conducted. IEBC is the custodian of the register of voters and keeper of the tallied results and the custodian of the paper trail that verifies the declared results. The evidence given by IEBC is not expected to favour one party, its evidence is neutral. IEBC's oral or documentary evidence is meant to explain to the Court the

conduct of elections and the tallying of votes in the Meru gubernatorial elections in light of the issues raised in the petition. A court of law is required to consider and evaluate all the evidence that is on record.

185. In **PIL Kenya Ltd. – v- Oppong** (2009) KLR 442 at 446, it was stated that "where a court has decided to set out evidence of the parties to a suit, even if only briefly, it should for purposes of apparent impartiality, set out the conflicting evidence of both parties before analyzing and evaluating the same." It is a misdirection and an error of law for a court to fail to analyse and evaluate the evidence adduced on behalf of a party and cite and rely only on the evidence of one party. An election court cannot rely on the evidence tendered by the petitioner and his witnesses alone in arriving at the determination of the issues raised in the Petition; the court must also consider and evaluate the respondent's evidence that is on record. In ***Justus Mungumbu Omiti - v- Walter Enock Nyambati (EP No. 1 of 2008 Kisii);*** the trial Judge observed that:

...It will be a sad day indeed if ... evidence which comes through the petitioner, his witnesses, the respondents and their witnesses as well, are to be discarded and rendered irrelevant or inadmissible merely on the grounds that the same was not the subject of any pleading. At the end of the day, what is of prime concern to this court, is whether the elections were conducted in a fair, free and transparent manner…Such a determination cannot be made, if relevant evidence is locked out on technical grounds that the issues addressed by such evidence were not pleaded."

186. A court of law is enjoined to look at the entire evidence on record. In the present case, of relevance is the report on scrutiny and recount as well as the testimony of DW10. This Court is enjoined to deal with points of law only. We cannot interfere with the findings of the trial judge unless we are satisfied and convinced that the trial judge either misdirected himself on a point of law or erred in law in considering a matter which he ought not to have considered or he erred in law by failing to take into account a matter which he ought to have considered.

187. The final outcome of this appeal is dependent on determination of five critical issues:

a. ***What errors and irregularities were disclosed by the scrutiny and recount report of the Deputy Registrar"***

b. ***What errors and irregularities have been disclosed by the attachments to the affidavit of DW 10 Kennedy Onditi"***

c. ***Did the trial judge misdirect himself or err in law in evaluating and drawing inferences from the errors and irregularities identified"***

d. ***What inferences and conclusions on points of law should be drawn from the errors identified and disclosed" Should this Court shut its eyes to the errors and irregularities disclosed"***

e. ***Did the errors and irregularities disclosed materially affect the outcome of the elections"***

188. The following discrepancies and errors were revealed by the Deputy Registrar upon scrutiny and recount in seven (7) polling stations. See page 639A of the record.

1. ***Yururu Primary School (070) Stream 1: in Form 35, there were 499 votes cast; and the number of registered voters as per Form 35 is 493.***
2. ***Yururu Primary School (070) Stream 2: total registered voters as per Form 35 is 493, votes***

cast 502.

3. ***Mwichune Primary School (083) Stream 1: total registered voters 446, votes cast 401.***
4. ***Mwichune Primary School (083) Stream 2: total registered voters 447, total votes cast 410. Results not tallied and no entry in Form 36 for all candidates. Runner up lost one vote after recount.***
5. ***Igandene Primary School (086) Stream 1: total registered voters 494, total votes cast 448, and winning candidate lost 2 votes upon recount and runner up gained 2 votes upon recount.***
6. ***Igandene Primary School (086) Stream 2: total registered voters 494, votes cast 448. Entry in Form 35 is same as Form 36 but candidates gained and lost votes after recount. The winning candidate lost 3 votes after recount which three votes were gained by other candidates.***
7. ***Kathera Tea Buying Centre (123) Stream 1: total registered voters 407, votes cast 383. Two votes not accounted for which is the difference between the valid votes and cast votes. The winning candidate lost 2 votes after recount.***
8. ***Kathera Tea Buying Centre (123) Stream 2: total registered voters 407, votes cast 347. There was duplication of Stream 1 results for all candidates. The correct results in Stream 2 for all candidates were not entered in Form 36.***
9. ***Nkubu Primary School (138) Stream 1: total registered voters 688, votes cast 637. The results entered in Form 36 are not correct.***
10. ***Nkubu Primary School (138) Stream 2: total registered voters 685, votes cast 514. Winning candidate lost one vote, runner up gained one vote.***
11. ***Nkubu Primary School (Stream 3): total registered voters 688, votes cast 611. Entry in Forms 35 and 36 are different for winning candidate and runner up.***
12. ***Murembu Primary School (055): registered voters 764, votes cast 678. Winning candidate lost 2 votes upon recount, runner up gained 2 votes upon recount. Form 35 not signed by candidates or their agents.***
13. ***St. Alloysius Primary School (062) Stream 1: registered voters 560, votes cast 493; winning candidate gained one vote upon recount, runner up lost one vote upon recount.***
14. ***St. Alloysius Primary School (062) Stream 2: Registered voters 562, votes cast 493, runner up lost one vote upon recount and the rejected votes tally increased by one.***

189. We now turn to consider the testimony of **DW 10, Kennedy Onditi**, to identify the errors and irregularities disclosed. The cross-examination of DW10 and the relevant proceedings are found in pages 854 to 863 of the record. The following errors and irregularities are disclosed:-

1. *At page 857, DW 10 states as follows: "I see Form 35 for Forest Camp (001) Vol. 111 page 849. I confirm it has corrections which are not countersigned."*
2. *At page 857, DW 10 states as follows: "I see Form 35 for Nkubu Primary School (138) Vol. 1 page 172 and Form 36 for Imenti South. Candidates did not get identical votes. There is an error in Form 36 in entry of stream 1 twice and omitting stream 3."*
3. *At page 858, DW 10 states as follows: "I see Form 35 for Kathera (C123) Vol. 1 page 151. The candidates did not get identical votes in both streams. In Form 36 there was an error in duplicating stream 1."*
4. *At page 858, DW 10 states as follows: "The Form for Nkubu has alterations on Vol. 1 page 171. There is no countersigning."*
5. *At page 858, DW 10 states, "I see Vol.1 page 70 Murembu Primary School (055), I can confirm that Form 35 is not signed by a single agent. See also at page 861, DW 10 states as follows: "I received Form 35 from Murembu Primary School. I made entry to Form 36. Form 35 was not signed."*

6. *At page 858, DW 10 states as follows: "I see vol. 1 page 78 and 79 (Code No. 062 St. Alloysius Primary School Stream 1). Stream has alteration but it is not signed by single agent. Stream 1 is signed."*
7. *At page 859, DW 10 states as follows: "I see Form 35 for Nkubu Primary School Vo. 1 page 171 (138). No complaint has been made on entries in Form 35. On Form 36, the error is in stream 1. Kilemi Mwiria lost 78 votes, Peter Munya added 66 votes."*
8. *At page 859, DW 10 states as follows: "On Kathera Vol. 1 page 151 (123) Kathera Tea Buying Centre, the complaint is on duplication of the results. On Form 36, the error is on stream two due to duplication. Kilemi Mwiria got additional 24 votes and Peter Munya 10 votes."*
9. *At page 859, DW 10 states as follows: "In North Imenti, I can't know how many polling stations there were. I had an error of two polling stations on failure to transfer the results to Form 36."*
10. *At page 863, DW 10 states as follows: "There were cases in which candidates votes increased or reduced. I recall being shown Nkubu Polling Station and Kathera polling. I did notice the errors at the tallying centre. I discovered the error when I was going through this petition. The error affected all the 5 candidates. There was deduction of 54 votes for Dr. Kilemi Mwiria and an increase in 56 votes for Hon. Munya in respect of both stations."*
11. *At page 632 of the record, the trial court finds that the respondents conceded that the results of Nkubu Primary School and Kathera Primary School were not tallied in Form 36.*
12. *In Form 35 Muguru Coffee Factory (001) there is alteration in votes garnered by the 1st respondent which is not countersigned by any agent and no reasons for failure to sign by the agents have been given (See page 227 of the record).*
13. *In Form 35 of Kirimancuma Primary School (055) there is alteration in votes garnered by the runner up which is not countersigned by any of the agents and no reasons for failure to sign by the agents has been given (See page 333 of the record).*
14. *In Form 35 Kiremu Primary School (063) there is alteration in votes garnered by the 1st respondent which is not countersigned by any agent and no reasons for failure to sign by the agents have been given (See page 283 of the record).*
15. *In Form 35 Mitunguu Primary School (008) there is alteration in votes garnered by Hezekiach Gichunge which is not countersigned by any agent and no reasons for failure to sign have been given (See page 211 of the record).*
16. *In Form 35 printed as Antuanuu Primary School (079) there is cancellation of the name Antuanuu Primary School to read Mikinduri Primary School (027) (See page 417 of the record). The cancellation is not countersigned and the returning officer DW9 Mr. Abdi Sheikh Mohamed in his testimony stated that he had no explanation for the cancellation of the Form 35 for Antuanuu Primary School (see page 851-852 of the record).*
17. *At page 847 of the record, DW 8 Habiba Godana Hilama testified that "not all Form 35s were signed. In some instances, some reasons were given and others not." The appellant sought to cross-examine this witness on Forms 35 and 36 and the trial judge declined the application to cross-examine the witness (See page 848 of the record).*
18. *The 2nd and 3rd respondents admitted that there were differences in Forms 35s and 36s in Nkubu Stream 1, Kathera Stream 2, Bubui Primary and Kaubau Primary.*

QUANTITATIVE ERRORS DISCLOSED BY THE AFFIDAVIT OF DW 10, KENNEDY ONDITI

190. Having identified the errors and irregularities disclosed through the scrutiny and recount report as well as through the attachments to the affidavit of DW10, the next issue is to ascertain the quantity of votes that are the subject of the errors and irregularities disclosed" This is to evaluate if the quantity of votes involved substantially affect the margin between the winner and runner up and thereby materially affect the result of the election. In the case of ***Ali Hassan Joho & another – v- Suleiman Said Shahbal & 2 Others (supra)*** the Kenya Supreme Court endorsing the

quantitative test stated:

"Bearing in mind the nature of election petitions, the declared election results, enumerated in the Forms provided, are quantitative, and involve a numerical composition. It would be safe to assume, therefore, that where a candidate was challenging the declared results of an election, a quantitative breakdown would be a key component in the cause."

191. ***Section 80 (1) (d)*** of the ***Elections Act*** enjoins the election court to decide matters that come before it without undue regard to technicalities. In the Petition, the appellant prayed for relief of scrutiny and recount in Imenti South, Tigania East, Igembe South and Buuri constituencies. In the body of the Petition, the appellant contested and alleged irregularities in the results from Tigania East, North Imenti; Imenti South and Central Imenti constituencies. The appellant in his written submissions filed in this Court stated that incontrovertible errors and irregularities had become manifest on the Forms 35 and 36 filed by the 2nd and 3rd respondents and attached to the affidavit of DW10 Kennedy Onditi. The appellant quantitatively summarized the errors and irregularities as follows:

1. *9 polling stations, representing 5,339 votes in which the votes cast purportedly exceed the number of registered voters (See p. 566N of the record of appeal). The polling stations are from Imenti South, Imenti North, Buuri, Igembe South and Igembe Central constituencies.*
2. *6 polling stations, representing 6,187 votes, in which the results were either not tallied at all or duplicated in Form 36 (See p. 566N of the record of appeal). The polling stations are from Imenti South, Imenti North and Imenti Central.*
3. *21 polling stations, representing 8,882 votes in which the results had not been signed either by the presiding officer or the deputy presiding officer (See pp. 566, 0-566 P of the record of appeal). The polling stations are from Buuri, South Imenti, North Imenti, Tigania East and Central Imenti constituencies.*
4. *48 polling stations, representing 20,885 votes in which the election results had not been authenticated by any candidate or agent. That Forms 35 for each of the 48 polling stations did not have mandatory statutory comments as to why the results had not been authenticated by candidates (See pp 566P-566R of the record of appeal). The polling stations involved are from Imenti North, Buuri, Imenti Central, Imenti South, Igembe Central, Igembe North, Igembe South and Tigania East.*
5. *Missing results of polling stations with more than one voting stream. The polling stations identified are Mwichiune Primary School (083) in South Imenti constituency; Kaluli Primary School (007) in Tigania East constituency; Karumaru Primary School (081) in Igembe South constituency and Nkuene (032) in Central Imenti constituency.*
6. *In the following polling centres, the appellant alleged that Form 35 as attached to the affidavit of DW 10 indicates that votes for the runner up were reduced in the tallying process: Kianjuri Famers (047) in Imenti North Constituency votes of runner up reduced by 118 votes; Kiria Primary School (042) in Imenti Central reduced by 100 votes; in Luuma Primay School (066) in Tigania East Constituency reduced by 128 votes.*

192. The 2nd and 3rd respondents at paragraph 20 (h) of their written submissions filed in this appeal responded to the errors and irregularities pointed out in Forms 35 as follows:

"The appellant cannot state that he was not aware of the results of the elections and that new errors came into light because the appellant already had all the results in his possession to have attempted an analysis of the results of the entire county. Further, the appellant never requested for any documents from the 2nd and 3rd respondent at any given time nor did he move the court to

amend the Petition as is provided in Section 75 of the Elections Act, 2011 to include any new areas of dispute or an interlocutory application for production of any results or documents they so wished. Even though the results for the entire county had been presented by way of Forms 35s and 36s by DW10, only polling stations in respect of which the results were disputed in the petition would be subject to an order for scrutiny."

193. The 1st respondent in his written and oral submissions before this Court did not directly address the quantitative aspects of the irregularities in Forms 35 and 36 as attached to the affidavit of DW10, Kennedy Onditi, and as pointed out by the appellant. Submissions were made in regard to scrutiny and recount where the 1st respondent stated as follows at paragraph 21 of the filed written submissions:

"The appellant on several occasions invented different ways of introducing new evidence from polling stations not pleaded in the petition in an apparent lack of decorum including; during the scrutiny and recount exercise where the appellant introduced sixty two (62) new polling stations from eight (8) constituencies in his application for scrutiny and recount and during cross-examination of DW10 where the appellant without making a formal application tried to force the court's hand to be allowed to cross-examine the witness on all the Forms 35s from the larger Meru county."

194. It is our finding that the quantitative errors disclosed in Forms35 and 36 as attached to the affidavit of DW10 were neither explained nor denied. The key response to the errors by the 1st, 2nd and 3rd respondents is that the polling stations where errors and irregularities were disclosed in DW10's affidavit were not identified as contested or disputed polling stations in the Petition. Another common explanation for the errors and irregularities is that no candidate or agent questioned the results at the polling stations; no candidate or agent requested for recounting of the ballots at the polling stations; and that the errors were excusable as human error. The respondents submitted that the trial Judge correctly ignored the irregularities and errors identified. This Court was urged to similarly ignore the irregularities and errors identified.
195. On our part, we have considered the submissions made by the respondents in explanation of the errors and irregularities. We take cognizance of the provisions of ***Section 80 (1)(d)*** of the ***Elections Act*** which enjoins an election court to decide matters that come before it without undue regard to technicalities. The respondents submitted that no candidate or agent lodged a complaint at the polling stations in relation to the declared results. The submission by the respondents is to the effect that because no complaint was lodged at the polling stations, the appellant is estopped from questioning the validity of the declared results. It is our considered view that ***Rule 80*** of ***the Election General Regulations Rules*** does not establish a principle that bars any person from questioning the declared results. If this were so, there would be no need for ***Section 82*** of the ***Elections Act*** that makes provision for scrutiny of ballots. **Rule 80 of the Election General Regulations** does not establish a principle that if no complaint is made at a polling station, then a candidate or any other person must be deemed to have waived the right to scrutiny and recount or the right to challenge the electoral results. It is our considered opinion that in the conduct of elections, there is no rule of law that if the announced results are not questioned at the polling station, then the declared results are final and conclusive for all intents and purposes. The doctrine of estoppel or waiver is inapplicable in electoral law. The Constitutional and statutory obligation on the IEBC to conduct a free, fair, transparent, accountable and verifiable elections cannot be deemed to be waived simply because no complaint is lodged at the polling stations. It is a misdirection in law to hold that if no recount is requested at a polling station and no complaint is lodged, then declared result is deemed accurate and valid.

196. The next issue for our consideration is whether the trial judge erred in consideration and evaluation of the evidence on record. We pose the question whether the trial Judge independently appraised and evaluated the evidence on record in relation to the inferences to be drawn from the errors and irregularities identified. To appreciate how the trial Judge evaluated the evidence, we reproduce the submissions made by the 1st respondent on the matter and compare and contrast with the relevant portions of the trial court's judgment.
197. The relevant submission by the 1st respondent is at pages 730 to 731 of the record, more particularly paragraphs 62 to 65 thereof. This is what the 1st respondent submitted:-

Para. 62. It should be noted that the seven (7) polling stations where scrutiny and recount were conducted are the ONLY polling stations where the petitioner could make reference to any form of irregularity and/or omission, out of a total of Nine Hundred and Fifty Three (953) polling stations in Meru County. Further, all the seven polling stations where scrutiny and recount was conducted were from Imenti South Constituency which constituency had a total of One hundred and Forty One (141) polling stations. The seven (7) polling stations cannot therefore be used in any scientific or analytical way as representative sample of the rest of the polling stations in the larger Meru County where no irregularities whatsoever were noted. ...

Para. 63. It is also glaringly obvious from the recount that the minor errors discovered were not just for the benefit of one person as alleged, as one, Kilemi Mwiria had also erroneously gained 24 votes at Kathera Tea Buying Centre, one vote in stream 1 of St. Alloysius Primary School, one vote in stream 2 of St. Alloysius primary School and one vote in Mwichune Primary School.

Para. 64.... The errors noted were normal human errors which cannot vitiate the overall gubernatorial election results. Several candidates gained from the minor errors just as much as several candidates were prejudiced by the errors.

Para 65. All in all, the margin between the winner and the loser in the Meru gubernatorial elections was Three Thousand Four Hundred and Thirty Six (3,436). The votes that were noted to affect this margin in the scrutiny ad recount report are 358 votes. It is glaringly clear that the 1st respondent remains the winner of the elections with over Three Thousand Votes, still a clear reflection of the will of the voters of Meru. The minor errors and irregularities noted did not affect the overall results of the election in any way and as such, in the absence of any evidence to the contrary, the 1st respondent is still democratically elected Governor of Meru County."

198. We now reproduce how the trial Judge expressed himself in the judgment and the relevant parts are pages 989 to 991 of the record. The following paragraphs in the judgment are relevant:- At page 989 of the record, the trial Judge writes:

"The seven (7) polling stations where scrutiny and recount was conducted were the only stations where the petitioner could make reference to any form of irregularity and/or omissions out of a total of 953 polling stations in Meru County. All seven (7) polling stations were from South Imenti Constituency which had 141 polling stations. The petitioner's contention that the seven (7) polling stations be used in an analytical way as representative sample of the rest of the polling stations in Meru County where no irregularities were noted cannot be acceptable in this petition and the same cannot be used in any scientific or analytical way as a representative sample."

At page 989-990 , the trial Judge writes:

"The scrutiny and recount further revealed that the minor errors discovered were not just meant

for the benefit of one person as alleged by the petitioner, as it is evident that one Dr. Kilemi Mwiria had also erroneously gained 24 votes at Kathera Tea Buying Centre, 2 votes at St. Allyosious Primary School and one in Mwichune Primary School."

At page 900, it is written in the judgment:

"The errors noted in the said polling stations are improbable that they were manipulated in favour of any particular candidate as alleged by the petitioner but can be attributed to normal human error which cannot vitiate the overall gubernatorial election results, as several candidates gained from the minor errors just as much as several candidates were prejudiced.

At page 990, it is written in the judgment:

"It should be noted following the scrutiny and recount the margin between the winner and runners up of 3,436 votes could only be reduced by (350 + 10), 360 votes."

199. In our mind, what is disturbing is the figure of 3,436 votes as the margin. This figure is first introduced in the 1st respondent's written submissions and then picked up in the final judgment of the trial court at page 990 of the record. A look at the ruling dated 2nd August, 2013 (page 583 of record) where scrutiny and recount in seven (7) polling stations was ordered sheds light on the source of the information on the figure stipulating the margin between the winner and runner up. At page 632 of the record, the following statement appears in the Ruling dated 2nd August 2013:

"This Court, though in agreement with the respondents that the margin of 3,336 votes is too wide....."

At page 580 of the record at paragraph 36 of the 2nd and 3rd respondents' written submissions, the following sentence is made:

"...as regards the margin of votes between the 1st respondent and the runner up, the difference is 3,336 votes."

200. At page 578 of the record, the same figure of **3,336** appears in the 1st respondent's submission. We now pose the question, is it a coincidence that when the respondents cite an erroneous figure as the margin between the winner and runner up the trial Judge does the same" Can an inference be drawn that the trial Judge failed in his duty to independently evaluate the evidence on record and arrive at his own independent conclusions" Did the trial Judge independently calculate the difference and margin of votes between the winner and runner up" Did he do the simple arithmetic"
201. It is the cardinal duty of any trial court to independently evaluate the evidence on record and arrive at its own conclusions. In this computer technology era, cut and paste of submissions is not the modus of evaluating the evidence on record. Even if the trial court agrees with submissions made by any party, it is too much of a coincidence for the phraseology and wordings of the written submissions by a party to be similar if not identical to the written judgment. The record does not show that the trial Judge was quoting from the written submissions of the parties. At page 988 of the record, the impression created is that the trial Judge is conducting his own evaluation of the evidence. We have agonized over the similarities in phraseology between the written submissions of the 1st respondent and the written judgment of the trial court in relation to the critical issue of inference to be drawn in relation to the disclosed errors and irregularities. Doubt is cast in our minds whether the trial Judge independently evaluated the evidence on

record. This doubt was increased when the margin between the winner and runner up shifts from **3,336** to **3,346** depending on the written submissions by the respondents. At first instance, one would think that this is a typographical error but the coincidences are too many for this to be typographical.

202. We are convinced and we find and hold that the trial Judge erred and failed to discharge his legal duty to independently evaluate the evidence on record. We have failed to detect independent analysis and reasoning by the trial Judge on the critical issues which form the crux of this appeal. In addition, we have analyzed the judgment and note that the trial judge erred in not considering and drawing inferences and conclusions on the tallying irregularities and errors disclosed in the testimony of DW 10. The weight accorded to the testimony of DW10 is not evident on the record. There is no evaluation of the testimony of DW 10 and its impact on the constitutional principles in **Articles 81 and 86 of the Constitution** and the relevant electoral laws. We find that the trial Judge erred in arriving at general conclusions which are not supported by the specific testimony of DW10 and the errors disclosed by the scrutiny and recount report.

INFERENCE TO BE DRAWN FROM ERRORS DISCLOSED IN THE SCRUTINY AND RECOUNT REPORT BY DEPUTY REGISTRAR AND ERRORS IDENTIFIED BY DW 10, KENNEDY ONDITI

203. The issue for this Court to determine is what conclusions of law and inferences should be drawn from the identified errors of transposition of figures from Forms 35 to 36s; what inferences should be drawn from the irregularities in which some Forms 35 do not have signatures; irregularities in alterations on Form 35s without counter-signatures and the admission of errors by DW 10. Our perusal of the record shows that with regards to Yururu Primary school polling station, entries in Form 35 used in the scrutiny report do not agree with the entries for the same polling station in Form 35 attached to the affidavit of DW10 (see pages 1176 & 1178 of the record). Should this Court shut its eyes to the identified errors and irregularities"
204. DW 10, Kennedy Onditi, in his testimony explained the discrepancies between Forms 35 and 36 by stating that he did not fill Form 36s by himself but it was done by clerks. The election court in **William *Kabogo Gitau - v- George Thuo & 2 others*, {2010} eKLR**, examined the provisions of law as to the completion of Form 17A which is equivalent to Form 36. The trial Judge in that case stated that immediately after the results for all polling stations in a constituency have been received, the returning officer should complete Form 17A. It is the duty of the returning officer to personally complete Form 17A. The then ***Regulation 40(1)*** set out in mandatory terms that the Returning Officer ***shall*** perform the task of filling the Form and this task cannot be delegated to anyone else. In ***Manson Oyongo Nyamweya – v- James Omingo Magara & 2 others, Kisii HC Election Petition No. 3 of 2008***, Musinga. J, *(as he then was)* stated:

"The returning officer is mandatorily required to make entries in respect of all the polling stations. He cannot abdicate this statutory responsibility and casually state that it was human error. In the event that the returning officer chooses to delegate that responsibility to anyone else (which seems to be against the law), the returning officer has to ensure that the Form is filled correctly and in accordance with the declared results as they appear in Form 16A. In the event of any mistake, he cannot shift the blame to anyone else."

205. From the scrutiny and recount report of the Deputy Registrar, the election results of Mwichune Primary School Stream 1 were not included in the final tally of the declared results. ***Regulation 83 (1) (a)*** provides as follows:

"(1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or

agents and observers, if present-

a. ***Tally the results from the polling station in respect of each candidate without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a polling station exceeds the number of registered voters in that polling station, the returning officer shall disregard the results of the count of that polling station in the announcement of the election results and make a statement to that effect..”***

206. ***Regulation 83 (1) (a)*** requires that before declaring the results, the returning officer must take into account the results of all polling stations. This did not happen in respect of Mwichune Primary School Stream 1.
207. In ***Dickson Daniel Karaba – v- John Ngata Kariuki & 2 others***, ***Election Petition No. 2 of 2009***, it was stated that an election becomes a flawed process when a matter which ought to be taken into consideration is not taken into consideration. It was mandatory for the returning officer to take into consideration the results from all polling stations as captured in Form 35 before he announced the final results to the candidates. This was the legitimate expectation of the electorate and all candidates who participated in the elections. The results declared by the returning officer did not take into account the results from Mwichune Primary polling station and the results as declared was inaccurate. It is not the duty of this Court collate and tally the results from the various polling stations and determine what would have been the correct figures to be entered in Forms 35 or 36.
208. The Supreme Court in the case of ***Hassan Ali Joho & another – v- Suleiman Said Shahbal and 2 others***, stated that once the returning officer receives a declaration of the Governors’ results in Form 35 from the presiding officer, he or she then proceeds to tally the results from the different polling stations in respect of each candidate. The Supreme Court reiterated the provisions of the Election Regulations, in particular, ***Regulation 87(3)*** which provides:

“The county returning officer shall upon receipt of the results from the returning officers as contemplated under regulation (1) - *(a)Tally and announce the results* for the elections for the county governor, senator, and county woman representative to the National assembly.”

209. From the above dicta, we concur that the responsibility to tally the results for the Meru gubernatorial elections lay with the County Returning Officer and the errors identified in the scrutiny and recount report as well as the errors disclosed in the testimony of DW 10 squarely lie on the shoulders of the County Returning Officer, the 3rd respondent in this Petition. We find that the trial judge erred in law in not considering the legal effect of the identified errors on the tallying process. The errors identified lead us to conclude that in law, the tallying process was not accurate, efficient and verifiable.

QUALITATIVE AND QUANTITATIVE TEST ON THE RESULTS DECLARED

210. Having identified errors and irregularities as per the scrutiny report and from the testimony of DW 10, we now weigh these errors and irregularities against the principles governing the conduct of elections as provided in ***Articles 81 (e) and 86*** of the ***Constitution***. The constitutional principles provide the qualitative test in determining the impact of the irregularities on the conduct of elections. The principles embody the requirement of efficient, accurate, transparent, accountable and verifiable results. Do the disclosed errors and irregularities affect the credibility and integrity of the results that were declared" Are the errors and irregularities of such a nature or magnitude as to qualitatively and quantitatively affect the outcome of the results of the Meru gubernatorial elections" Cumulatively, do the errors and irregularities affect the quantitative margin between the

winner and runner up"

211. In ascertaining the qualitative aspects of the Meru gubernatorial elections, this Court is not dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. The Court has to consider whether the errors and irregularities identified sufficiently challenge the entire tallying process and lead to a legal conclusion that the tallying was not transparent, free and fair. It is not just a question of who got more votes than the other. The votes must be verifiable by the paper trail left behind. *(See* ***Manson Oyongo Nyamweya – v- James Omingo Magara & 2 others***, ***Kisii Election Petition No. 3 of 2008)***. In the instant case, we pose the question: are the election results that were tallied and declared verifiable through the paper trail left behind" We concur with the dictum in ***William Kabogo Gitau - v- George Thuo & 2 others, {2010} eKLR****,* where it was stated:

"The fact that the said results reflect that the 1st respondent had won by more than 19000 votes is no reason why the irregularities and malpractices should be condoned. If that were the case, then we would not have problem with the election results declared in respect of leaders of totalitarian regimes who are said to have won elections by a margin of 99.9 %."

212. The validity of elections is not dependent on the results alone but is a factor of the entire tallying process. In the present case, it is evident that in some polling stations, the 3rd respondent accepted and tallied results which did not conform to the law. Some Form 36s which the 3rd respondent relied on to declare the results are riddled with irregularities and the same cannot be said to constitute statutory Forms which stands up to legal scrutiny. As per the 1st respondent, the total of the valid votes cast is 421,084 and not what is posted as in Form 36 as 423,247. (See Para 47 (a) at page 164 of the record and page 186 of the record). From the 1st respondent's perspective, the number of total votes casts does not agree with what the 2nd and 3rd respondent stated. This means the total votes cast are not verifiable from the evidence on record. Applying the quantitative test as required by law and as explained in ***Winnie Babihuga – v- Masiko Winnie Komuhangi & Others HCT-00-CV-EP.0004-2001***, the election results of Meru gubernatorial elections are not verifiable by the paper trail left behind. From the recount and scrutiny conducted, the number of votes found in the ballot boxes as garnered by each of the candidates did not agree with the results in Forms 35. There were instances where the votes that were recorded in Form 36 were not the correct votes as reflected in Form 35. There is evidence that results of some polling stations were not included in the tally. There is prima facie evidence on record that in some polling stations, the votes cast exceeded the number of registered voters. The report on scrutiny and recount disclosed errors of transposition in seven (7) polling stations. There is no conclusive evidence on record that enabled the trial court to conclude and find that in law, apart from the seven (7) polling stations subjected to scrutiny and recount, there were no more errors or irregularities in the polling stations that were not subjected to scrutiny and recount. We are convinced that the trial judge misdirected himself and erred in law in not considering the totality of the evidence on record and evaluating the legal effect of the errors and irregularities disclosed in arriving at his decision.
213. In the case of **Mbowe – v- Eliufoo** (***1967) EA 240***, it was stated that election result may be said to be affected if, after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. In the instant case, the margin between the returned candidate and runner up is 3,436 votes and we pose the question whether the errors and irregularities identified affected the results.
214. The Supreme Court in ***Ali Hassan Joho & another – v- Suleiman Said Shahbal & 2 others,*** stated that a quantitative breakdown is a key component when the issue involves numerical composition. In the instant case, the total votes cast as per Form 36 is 423,247. The margin between the returned candidate and the runner up is 3,436. In terms of percentage, the margin is

0.819 per cent which is less that one percent. A fatal aspect from the analysis of Forms 35 and 36 attached to DW 10's testimony is that in six (6) polling stations, representing 6,187 votes the results were either not tallied at all or duplicated in Form 36. Also fatal is the fact that in twenty-one (21) polling stations, representing 8,882 votes, the results had not been signed either by the presiding officer or the deputy presiding officer. In addition, there were missing results of polling stations with more than one voting stream such as Mwichiune Primary School (083) in South Imenti constituency; Kaluli Primary School (007) in Tigania East constituency; Karumaru Primary School (081) in Igembe South constituency and Nkuene (032) in Central Imenti constituency. In some polling stations, Forms 35 and 36 tendered in evidence do not give an accurate quantitative breakdown of the votes for each candidate. For example, the alterations on Form 35 at Forest Camp polling station (001) were not countersigned; alterations in Form 35 for polling station Code 062 have no signature; Form 35 from Murembu Primary School polling station was not signed; results from Kathera polling stations were not included in the final tally; results from Nkubu Primary was not included in the final tally; and results from Mwichune polling station was not included in the final tally. The trial Judge erred in his observation that from the scrutiny report ONLY 360 votes were not properly tallied. This was misdirection because the sum of 360 votes did not take into account the quantitative errors and irregularities disclosed in the affidavit of DW10. It was also misdirection because the trial judge did not ascertain and verify what were the total votes cast in the Meru gubernatorial elections. The 1st respondent and the 2nd and 3rd respondents gave different figures of 421,084 and 423,247 respectively. It was incumbent upon the trial court to determine the correct figure.

215. Given the 0.819 per cent margin made up of 3,436 votes between the winner and the runner up, we are convinced that had the trial judge not erred in failing to consider the legal effect of the errors and irregularities disclosed in the attachments to the affidavit of DW10, he would have found with certainty that an accurate tallying of votes from the polling stations would significantly reduce or wipe out the margin. This Court is neither a tallying centre nor is it mandated to conduct scrutiny and recount of votes. This Court cannot reconcile and re-tabulate the votes garnered by each candidate as this would amount to delving into factual issues. Considering that scrutiny and recount was only done in seven (7) out of 953 polling stations, and taking into account the errors disclosed by DW 10, we are convinced that the trial judge misdirected himself and erred in finding that the returned candidate garnered a majority of votes cast during the elections. We are convinced that the trial Judge erred in law in declining to permit the appellant to cross-examine *DW 8,* Habiba Godana Hilama, in relation to Forms 35 and 36. By refusing cross-examination of the witness on these Forms, the trial Judge erred in invoking procedural technicalities rather than substantive justice. The right to challenge any evidence adduced against a party is an essential component of the right to a fair hearing. The right to cross-examine a witness is provided for in ***Section 80 (1) (c)*** of the ***Elections Act***. In ***Kibaki – v- Moi 2 KLR 301***, it was stated that a deponent of an affidavit may be cross-examined on the contents of the affidavit. If the facts of the deponent are not disputed, cross-examination will not be allowed. In the present case, DW8 and DW10 were to be cross-examined on Forms 35 and 36 which were tendered in evidence by the 2nd and 3rd respondents. It is our considered view that the learned Judge erred in declining cross-examination and misdirected himself and failed to properly interpret and take into account the provisions of Section ***80 (1)(c)*** and Section ***80 (1)(d)*** of the ***Elections Act***. An opportunity to explain the errors and discrepancies identified was lost and there was no evidential basis for the trial judge to arrive at the conclusions he made in the face of the disclosed errors and irregularities.

216. We find that errors in wrongful tallying of results in some polling stations were proved through the testimony of DW 10, DW 9 and DW8. The multiple errors identified by DW 10 and errors pointed out in the scrutiny and recount report go to the credibility and integrity of the declared results. The identified irregularities lead us to quantitatively conclude that the candidate returned and declared

as the winner did not garner a majority of the votes cast. We are not convinced that the trial Judge conducted an independent appraisal, consideration and evaluation of the evidence on record. Applying the quantitative and qualitative tests, we find that the results of the Meru gubernatorial elections as declared did not conform to the principles in ***Articles 81 (e) (iv) & (v) and Article 86*** of the ***Constitution***. The declared results did not conform to ***Section 25 (e) of the IEBC Act.*** Whereas the election itself was conducted substantially in accordance with the Constitutional requirements, errors and irregularities became manifest at the tallying and declaration of results. We find that the declared results are not accurate, verifiable and accountable. We find that the tallying process was not efficient and accurate.

217. It is our considered view that the trial Judge erred and misdirected himself in finding that a margin of 0.819 per cent which is less than one per cent could be described as wide. We find and hold that quantitatively, the errors and irregularities disclosed materially affected the results of the elections when one considers that the margin between the winner and runner-up is 3,436 votes. This margin is statistically small and we are convinced that had the trial judge made adjustments due to the proved errors and irregularities as disclosed in the evidence of DW 10, the margin between the returned candidate and the runner up would be significantly impacted and the election result materially affected.
218. The appellant also raised the issue of the right to a fair trial/hearing. The contention is that the trial Judge erred in striking out the affidavit of PW3, Esther Kabebi Aritho, which the court held not to have been properly commissioned. In relation to the commissioning of PW3's affidavit, we have perused the record and PW 3 testified as follows:

"This is my affidavit….I signed before Kelvin Nyenyire Advocate opposite Kensilver Booking Office. I signed at Mithega & Kariuki Advocate. I signed before Kariuki. I did not meet Mr. Nyenyire Advocate. ..I am surprised that M/s Kelvin Nyenyire stated that I appeared before him and signed the affidavit before him. The signature is mine."

219. We have considered the testimony by PW3 which is an admission that the advocate named as having commissioned the affidavit did not do so. We find that the trial Judge did not err in striking out PW3's affidavit. On the issue of a right to fair hearing and denial of a right to cross-examine DW8, ***Section 80 (1) (c)*** of the ***Elections Act*** gives a right to all parties to cross-examine witnesses. The trial Judge erred in refusing the appellant to cross-examine DW8 in relation to Forms 35 and 36 that had been placed on record by the 2nd and 3rd respondents.
220. Based on the findings and reasoning stated above, we hereby set aside the judgment of the High Court dated 23rd September 2013 and set aside all consequential orders and decree made pursuant thereto. We declare that the Meru gubernatorial elections conducted on 4th March, 2013 did not meet the Constitutional threshold in ***Article 81 (e) (iv) & (v) and Article 86*** of the Constitution by not being administered in an efficient, accurate and accountable manner. Results from some polling stations were not included in the final tally of the declared results. In some polling stations, the votes garnered by the candidates were not accurately reflected in Form 36s. In other polling stations, alterations on Forms 35 were not countersigned. We find that the declared results were not accurate and the tallying process was not efficient and transparent.
221. This appeal has merit and is hereby allowed with the result that the election of the 1nd respondent as the Governor for Meru County is hereby determined and declared to be null and void. We hereby make a determination that the 1st respondent, Gatirau Peter Munya, was not validly elected, announced and declared as the winner of the Meru gubernatorial elections. We hereby order that a certificate issue to IEBC, 2nd respondent, under ***Section 86 (1) of the Elections Act*** certifying the determination of this Court that the declaration of the 1st Respondent as the Governor for Meru pursuant to the 4th March, 2013 gubernatorial elections is null and void. The 2nd respondent to notify the relevant Speaker to issue notifications as necessary.

222. On the issue of costs, we order that the 2nd respondent shall bear the costs of the petitioner at the High Court and the costs of the appellant before this Court. The 2nd respondent shall also bear the costs of the 1st respondent before the High Court. The 1st respondent shall bear his own costs in this appeal. All costs to be verified and taxed by the Deputy Registrar. Costs in the High Court shall not exceed Kshs. 2.5 million while costs in appeal shall not exceed Kshs. 1.5 million. Finally, we hereby set aside the order directing the arrest and prosecution of PW4, Steven Mugambi, and PW 6 Christine Kananu George and substitute the same with a recommendation to the Director of Public Prosecution to investigate whether an election offence was committed by the said PW4, Stephen Mugambi and PW 6 Christine Kananu George.

Dated and delivered at Nyeri this 12th day of March, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR