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Court:	High Court at Garissa
Case Action:	Judgment
Judge:	Stella Ngali Mutuku
Citation:	Mohamed Ali Mursal v Saadia Mohamed & 2 Others [2013] eKLR
Advocates:	Thiga for the Petitioner Oriaro for the 1st and 2nd Respondents Issa for the 3rd Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Garissa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition Dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**IN THE MATTER OF THE ELECTIONS ACT, 2011**

**ELECTION PETITION NO 1 OF 2013**

MOHAMED ALI MURSAL.....PETITIONER

VERSUS

SAADIA MOHAMED.....1<sup>ST</sup> RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT

AHMED ABDULLAHI MOHAMAD.....3<sup>RD</sup> RESPONDENT

**JUDGEMENT**

**Introduction**

On 4<sup>th</sup> March 2013, the residents of Wajir County went to the polls to elect their Governor. The position of Governor is one of the new positions created by the Constitution of Kenya 2010 in the new structure of the devolved government. Wajir County is divided into six electoral constituencies, namely; Eldas, Tarbaj, Wajir North, Wajir South, Wajir East and Wajir West. Four candidates; Mohamed Abdi Mahamud, Ahmed Abdullahi Mohamad, Mohamed Ali Mursal and Maalim Mohamed Omar competed for that position. Wajir County has a total of 118,375 registered voters shared as follows: Eldas Constituency 13,119 registered voters; Tarbaj Constituency 16,422 registered voters; Wajir North Constituency 15,912 registered voters; Wajir South Constituency 30,343 registered voters; Wajir East Constituency 19,484 registered voters and Wajir West Constituency 23,095 registered voters. The voter turnout is given as between 82.10% and 90.06%. Wajir South Constituency has the lowest and Wajir North Constituency the highest. These statistics are found in the Constituency Forms 36 produced in court.

The elections came to pass and the votes were counted and tallied with the following scores:

- i. Mohamed Abdi Mahamud - 35,269 votes
- ii. Ahmed Abdullahi Mohamad – 40,622 votes
- iii. Mohamed Ali Mursal – 22,919 votes
- iv. Maalim Mohamed Omar – 589 votes

Ahmed Abdullahi Mohamud was declared the winner and the results gazetted on 13<sup>th</sup> March 2013. Mohamed Ali Mursal, who ranked number three with 22,919 votes, contested the results and filed this Petition. He cited Ms Saadia Mohamed; the Independent Electoral and Boundaries Commission (IEBC) and Mr. Ahmed Abdullahi Mohamud as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively. Ms Saadia was appointed by the IEBC as the County Returning Officer for Wajir County in line with Regulation 4 (1) of the Elections (General) Regulations, 2012. Her responsibility included tallying results from the constituencies for purposes of elections of county Governor among other specified positions, declaring and announcing the tallied results. The IEBC is a Commission created by Article 88 of the Constitution and mandated to conduct and supervise elections. Its operations are governed by the IEBC Act. Mr. Ahmed Abdullahi was one of the candidates for the 4<sup>th</sup> March 2013 County elections and was declared the winner for the gubernatorial seat.

### **The Petition**

For ease of reference, in this Judgement, the Constitution of Kenya 2010 will be referred to as the Constitution; the Elections Act 2011 as the Act; the Elections (General) Regulations 2012 as the Regulations and the Elections (Parliamentary and County Elections) Petition Rules 2013 as the Rules. Reference and arrangement of witnesses is sequential in the order in which they testified, that is, PW1 to PW12 for the Petitioner respectively and RW1 to RW8 for all the Respondents respectively without differentiating for 1<sup>st</sup> and 2<sup>nd</sup> Respondents or for 3<sup>rd</sup> Respondents.

The Petition is dated 23<sup>rd</sup> March 2013 and was filed on 25<sup>th</sup> March 2013. The Petitioner claims that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, by their acts and/or omissions, deprived him of his legitimate expectation to win the elections. He has listed 8 grounds as follows:

- a. Arbitrary transfer of Polling Stations.
- b. Locking out Petitioner's Agents.
- c. Undue and improper influence.
- d. Manipulation of Voter Register.
- e. Voter bribery.
- f. Mishandling of the Election.
- g. Inaccurate and Inconsistent Counting and Tallying.
- h. Integrity of the Ballot Boxes.

The Petitioner is asking this court to grant the following prayers:

- a. A declaration that the 3<sup>rd</sup> Respondent, Ahmed Abdullahi Mohamad, was not validly elected Governor Wajir County and that the election was void.
- b. An order that fresh election for Governor Wajir County be held.

c. Costs of the Petition.

### **Petitioner's Evidence**

The Petitioner called fifteen witnesses in support of his case. Three of the witnesses whose affidavits are attached to the Petition did not testify. On 20<sup>th</sup> June 2013 the last day for the hearing of the Petitioner's case counsel for the Petitioner informed the court that the three witnesses were not available in court. He closed his case at that stage and did not seek additional time to call the three witnesses.

Ibrahim Mohamud Abdirahman (PW1) filed an affidavit dated 10<sup>th</sup> May 2013 on 22<sup>nd</sup> May 2013. He vied for the member of National Assembly in Wajir West Constituency on The National Alliance Party (TNA) ticket. On the morning of 4<sup>th</sup> March 2013 he voted at Kalkacha Polling Station (Code No. 46) in Wajir West Constituency after which he decided to visit other polling stations to see how voting was going on. One of the polling stations he visited is Forest Polling Station (Code No. 10) situated at Griftu Centre. While there he saw a man he named as Hassan Noor Abdille with a size A4 envelope full of money in 500 notes. The man was giving money to voters on the queue telling them to vote for Orange Democratic Movement (ODM). He said he was denied entry into the polling station by security and did not report the matter to the Presiding Officer. He stated that he went to report to the Constituency Returning Officer Mr. Ngeera (RW2) who told him to report to the police or to go to court. He states that he went to Griftu Police Station where he reported the matter and the same was entered in the Occurrence Book as case No. 5 of 4<sup>th</sup> March 2013.

Dr. Mohamed Yussuf Elmi (PW2) testified as second witness. His evidence, contained in his affidavit dated 10<sup>th</sup> May 2013, is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to supply him with a list of Presiding Officers and Deputy Presiding Officers in Wajir West Constituency. He told the court that he was a candidate for member of National Assembly on a Kenya National Congress Party (KNC) ticket. According to him the Respondents breached the law in failing to supply the list fourteen days prior to the Election Day. He told the court that he complained to Mr. Ngeera (RW2) the Returning Officer for Wajir West and that the list was posted at the 2<sup>nd</sup> Respondent's Constituency Notice Board. He exhibited letters dated 26<sup>th</sup> February 2013 and 28<sup>th</sup> February 2013 addressed to the above mentioned Returning Officer on the issue. He told the court that the letters were not responded to. He told the court that he was apprehensive that the 2<sup>nd</sup> Respondent's Officials may have been biased towards some candidates and he wanted to see the list before the election date to confirm who had been appointed. He told the court on cross examination that he did not object to the list as exhibited on the notice board because it was too late.

Adan Abdi Hassan (PW3) testified he was a candidate in the 4<sup>th</sup> March 2013 General Elections and he was vying on a United Republican Party (URP) for Member of National Assembly for Eldas Constituency. His affidavit is dated 26<sup>th</sup> March 2013. He alleges that a number of polling stations in Eldas Constituency were unilaterally and without notice transferred in contravention of the law. His evidence is that:

- i. Eldas Polytechnic Polling Station (Code No. 007) was transferred to Eldas Secondary School Polling Station (Code No. 005).
- ii. Haragaal West Dam Polling Station (Code No. 018) and Delayere Polling Station (Code No. 016) were transferred to Dela Town and that actual voting for Delayere Polling Station took place in the residence of Chief Salat of Dela Location.

- iii. Tula Tula Dam Polling Station (Code No. 035) was transferred to Tula Tula Primary School (Code No.033).
- iv. Jua Kali Polling Station (Code No. 006) was transferred to the residence of one Mr. Ibrahim an ODM supporter.
- v. Voting in Bulla Shair Polling Station (Code No. 008) was being conducted in one Farah Haji Abdi's residence.
- vi. Tula Tula Dispensary Polling Station (Code No.036) was transferred to Madrassa instead of the gazetted Dispensary.

According to this witness the transfer of the polling stations affected voting because "it is possible that voters did not find the polling stations." He also admitted on cross examination that "it could be possible that the voters did not turn up."

Further to this evidence, this witness testified that he visited Masalale Mobile Polling Station (Code No. 011) at 7.30pm and found it dark and crowded and that the polling clerks were using light from the mobile phones to mark ballot papers. He said that he vehemently protested leading to physical confrontation. He reported the matter to the Returning Officer who sent security personnel to the place to calm the tension.

He testified that at Anole Primary School Polling Station (Code No. 019) he found the Chief and his Assistant in full uniform at the polling station canvassing for votes for a preferred candidate. He feared that their presence was intimidating to voters because they supply relief food to residents. His further evidence is that at ICF Primary Polling Station electronic voter identification kit was not working and voters were not being verified nor was there stamping of ballot papers or marking of voters fingers with indelible ink.

The same witness testified that on 5<sup>th</sup> March 2013 while travelling to Wajir town before reaching Della he found ballot boxes on the road around 10.30am without security. He stopped to find out what the matter was and he was informed that the vehicle used to ferry the boxes had broken down. He photographed the boxes. The photo is attached to Petitioner's documents.

Hassan Mohamed Hassan (PW4), testified that he was an agent for TNA candidate for Member of National Assembly. He testified to witnessing electoral malpractices at Athibohole Primary School Polling Station (Code No. 015) in Wajir West Constituency. His affidavit is dated 10<sup>th</sup> May 2013. His evidence is that the Presiding Officer at Athibohole Primary School Polling Station, one Abdirashid Adan, was wearing an ODM T-shirt while presiding over the polls; that the said Officer was also the Headmaster of Athibohole Primary School and he was marking ballot papers for voters saying that they were voting for ODM; that voters identities were not verified before voting and that even though voters stopped coming to the station at 4.00pm the station remained open until 7.30pm because the Presiding Officer was waiting for 17 voters who came to vote at 7.30pm. He told the court that although he complained, he was ejected from the polling station. He also testified to voter bribery.

Ahmed Abdullahi Osman (PW5) testified about Kutulo Primary School Polling Station (Code No. 034) in Tarbaj Constituency where he said he was an agent for URP. His affidavit is dated 22<sup>nd</sup> March 2013. He

stated that he witnessed double voting by a woman named Sutha Abdille. He further testified that a Presiding Officer from Leheley Polling Station came to vote at Kutulo in Motor Vehicle number KAX 500X used by one Abdullahi Ali an aspirant for Wargadud County Assembly Ward.

Ibrahim Kalmoi Mohamed (PW6) testified that there was double voting at Kajaja II Polling Station (Code No.040) in Tarbaj Constituency, where he was an agent for URP. His affidavit is dated 22<sup>nd</sup> March 2013. His evidence is that a clerk named Mohamed Sahal who had been trained as Clerk Number one (1) to handle the voters register was moved to position four (4) and replaced with one Shukri Salah Abdi who has been Clerk Number three (3) not trained to handle the register. He testified that because of that change two women, Mumina Ahmed Osman who was registered as a voter at Wajir East and Shalley Musa Dugow, attempted to vote twice at Kajaja II. The two women were not arrested despite complaints.

Mohamed Ali Sheikh (PW7) was an agent for Safina Party at Wagberi Primary School Polling Station (Code No. 001) in Wajir East Constituency. His affidavit is dated 20<sup>th</sup> March 2013. His testimony is that the Presiding Officer at that polling station called voters randomly to cast their votes and at the voting booths the voters were forced to mark or to cast their votes for an ODM candidate. He further testified that he witnessed a number of voters being issued with eight (8) ballot papers and that at around 12.00 noon Stream two (2) ran out of ballot papers; that the Presiding Officer borrowed papers from Stream one (1); that at about 4.30pm the polling station was pelted with stones causing voters to scamper for safety. He stated that although he complained about the irregularities, he was thrown out of the station.

Ahmed Adan Hefow (PW8) testified that he was an agent for TNA Party at Gersoqoftu Primary School Polling Station (Code No. 003) in Wajir West Constituency. He swore an affidavit on 22<sup>nd</sup> March 2013 and his testimony is that at Garseqoftu Primary School the area Chief and his assistant were present in full uniform trying to convince voters to vote for ODM candidates. They were also assisting the illiterate voters. He testified that a former councilor, a poll clerk, a deputy presiding officer and an assistant chief were all working collectively in marking and stuffing ballot papers with intention of favouring ODM candidates. He stated that although he protested he was assaulted by opposing agents and polling clerks. He reported the matter at Griftu Police Station in Occurrence Book (OB) Number 08/5/3/2013.

Issack Hassan (PW9) is a registered voter at Jogbaru Polling Station (Code No. 025) in Wajir East Constituency. His affidavit in respect of this Petition is dated 22<sup>nd</sup> March 2013. He went to the station to vote and witnessed one Abdillahi Issack Ibrahim alias Abdillahi Gabow, a campaigner for the 3<sup>rd</sup> Respondent, bribing voters on the queue. He stated that he complained to the security personnel leading to the arrest of Abdillahi.

Mr. Antipas Nyanjwa (PW10) is an expert witness called by the Petitioner. He is a document examiner. His affidavit is dated 13<sup>th</sup> June 2013. He was requested by the Petitioner to examine documents in respect of this Petition which he did and filed a report marked "A". Several paragraphs in that report were expunged by the Court. His evidence was confined to the documents in respect of the declaration of elections results for the Governor, Wajir County.

He examined and compared Forms 35 in bundle of documents marked "SMA1" to "SMA6" to confirm whether there was any forensic evidence on alteration, manipulation or otherwise on the signatures and handwritten entries of candidates or their agents in those documents. After that exercise his opinion was that the handwritten entries and signatures of agents on declaration of Governor Results Form 35 for Jagahir Dam Polling Stations (Code No. 011) in Wajir West Constituency found on page 255 of the exhibit marked "SMA-4" were made by the same hand; that the handwritten entries and signatures of one Ali Ahmed, Fesail Aden and Noor Ahmed on the declaration of Governor election results at Elkali Mobile Polling Station (Code No. 026) in Wajir West Constituency in the bundle marked "SMA-4" were

made by the same hand; that the handwritten entries and signatures for candidates or agents for Anole Primary School Polling Station (Code No. 019) in Eldas Constituency were made by the same hand; that the handwritten entries and signatures of candidates or agents at Burder Polling Station (Code No. 025) in Wajir South Constituency were made by the same hand. The same case with handwritten entries and signatures in Dabley Centre Polling Station (Code No. 022) in Wajir South Constituency; Ogorji Primary School Polling Station (Code No. 016) in Wajir North Constituency and Danaba Primary Polling Station (Code No. 050) in Wajir North Constituency.

Jamali Dawid (PW11) testified that he was denied entry into Wajir Girls' Secondary School Polling Station (Code No. 060) in Wajir West Constituency even after identifying himself to the Presiding Officer. His affidavit is dated 22<sup>nd</sup> March 2013. He was agent for the Petitioner. He remained outside the Polling Station until the Petitioner went to intervene.

Mohamed Ali Mursal (PW12) the Petitioner, testified last. His evidence is contained in two affidavits. The first affidavit in support of the Petition was sworn on 23<sup>rd</sup> March 2013 and filed on 25<sup>th</sup> March 2013. The supplementary affidavit was sworn on 21<sup>st</sup> May 2013 and filed on 22<sup>nd</sup> May 2013. This court expunged from the supplementary affidavit paragraphs 5, 6, 7 and 8 for introducing material that go outside the jurisdiction of this court. The Petitioner alleges numerous malpractices and discrepancies including that he was denied information regarding the names of the Presiding Officers, their deputies and polling clerks which information was required under the law to be availed to him fourteen (14) days prior to the Election Day; that the gazetted polling stations were transferred arbitrarily and without notice; that his agent was locked out of Wajir Girls' Secondary School polling centre; that voters were bribed to influence their voting; that there was undue influence in some polling stations; that there were multiple electoral malpractices including violence, intimidation, lack of ballot papers, lack adequate lighting, changing of polling clerks, double voting, failure by Presiding Officers and Returning Officers to supply him with elections results immediately, failure to supply him with Forms 35 and 36, duplication of results in some polling stations and inconsistencies in votes cast between candidates; that there were discrepancies in numbers in Forms 35 and 36 regarding registered voters, total votes cast, rejected votes, valid votes and the distribution of valid votes to the four candidates for gubernatorial position; that there are Forms 35 that have not been signed by Presiding Officer or his deputy; that there were alterations in the Forms 35 without countersignatures and Forms 35 that do not bear the official IEBC Stamp; that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to correctly count, tally and verify votes cast in Wajir County.

The Petitioner testified that in his opinion he believes that the elections for Governor Wajir County were not free and fair due to the anomalies and discrepancies noted and he does not believe the results prepared by the 2<sup>nd</sup> Respondent were authentic and therefore the irregularities and malpractices vitiated the election of the 3<sup>rd</sup> Respondent. The Petitioner holds the view that the 2<sup>nd</sup> Respondent unconstitutionally declared the 3<sup>rd</sup> Respondent as the winner of the gubernatorial seat.

### **The Response by 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

1<sup>st</sup> and 2<sup>nd</sup> Respondents have generally denied the allegations by the Petitioner and content that the election for Governor Wajir County was free and fair; that it was conducted by secret ballot; that it was free from violence, intimidation, improper influence or corruption; that it was transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

1<sup>st</sup> and 2<sup>nd</sup> Respondents have further denied that the election was manipulated, or that there was cheating; that there was transfer of polling stations; that the Petitioner's agents were locked out of the polling stations; that Provincial Administration was allowed to influence voters; that they allowed conduct

amounting to undue influence through intimidation and lack of order at the polling stations; that the voter register was manipulated to encourage double voting; that there was voter bribery; that they mishandled the election in any way and denied failing to provide Forms 36 at the polling stations or denying the Petitioner official results; that there was incorrect and inaccurate counting and tallying of results and that the integrity of the ballot boxes was compromised.

They aver that the regulations allow them to transfer polling stations if circumstances so warrant and that there were no serious irregularities in the number of votes cast in some of polling stations.

1<sup>st</sup> and 2<sup>nd</sup> Respondents have asked this Court to determine that Ahmed Abdullahi Mohamad was duly elected as County Governor for Wajir County and that the Petition be dismissed with costs.

### **1<sup>st</sup> & 2<sup>nd</sup> Respondent's Evidence**

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents called four witnesses in support of their case. These are Dickson Simiyu Kwanusu, Festus Mari Ngeera, Andrew Maina Njoroge and Saadia Mohamed Adan.

Dickson Simiyu Kwanusu (RW1) swore an affidavit on 15<sup>th</sup> May 2013. He was the Returning Officer for Eldas Constituency (Code No. 037) in Wajir County. He avers that he performed his duties well, without fear or intimidation and exercised due diligence; that he observed all the electoral rules and regulations; that he did not observe any irregularities and that there were no complaints made directly to him or to any other IEBC Official.

In response to the allegations that a number of polling centres were transferred without notice, he testified that Haragal Dam West and Delayere polling centres were placed at the Dela Trading Centre during registration of voters after consultations with the community. He stated that registration took place in the two centres and they became polling centres. There was no physical movement of the two centres. For Eldas Polytechnic, he testified that the Polytechnic does not exist but a Youth Centre which is managed by Ministry of Youth and houses the Ministry of Agriculture Offices; that on 4<sup>th</sup> March 2013, the facility was not available due to the fact the District Youth Officer who had the key could not be traced and it was decided to conduct the polling at Eldas Secondary School which is separated from the Youth Centre by a road.

In respect of Abaqmathobe, registration had been conducted at the Chief's Camp outside the Chief's Offices and that during voting the offices could not accommodate the voters. It was decided to hold the elections at the Madrassa near the Chief's Offices. He testified that for Tula Tula Health Centre, the Health Centre was being used for health facilities and stores and therefore it was unavailable. It was decided to use the Madrassa across the road. He stated that in Bulla Shair, Jua Kali and Dela Yare polling was conducted in Commercial buildings and not private residential premises as alleged; that these commercial buildings were free of charge and were donated to IEBC by well wishers; that in Dela Yare voting was done at the commercial building of Chief Salat at the town centre and the building had no doors or windows, no gate or fence and is surrounded by other shops; that it was the same with Bulla Shair but he did not know the owner of that building which is located at the town centre surrounded by other shops.

He testified that at Eldas Jua Kali, registration had been done at Kenya Power & Lighting Company rented premises. When this room became unavailable it was decided to use a commercial premises rented to Provincial Administration for storage of relief food which was next and this is where registration had taken place.



In respect to Tula Tula Dam, the witness testified that there was no physical dam but the name still exists; that during registration, local elders and other stakeholders agreed to have the centre placed at Tula Tula Primary School where registration had taken place. The witness further testified that in all these centres there were big banners with IEBC logos directing voters to the polling centres and that these had been erected with clear directions to the polling centres. On the issue of the ballot boxes found on the road to Dela, he testified that the vehicle carrying the ballot boxes to the constituency tallying centre had broken down and he had sent a rescue vehicle; that all the ballot boxes were on the road and there was security.

Festus Mari Ngeerah (RW2) was the Returning Officer for Wajir West Constituency. His affidavit was sworn on 4<sup>th</sup> May 2013. He too avers to having performed his duties according to electoral rules and regulations and announced the winner in accordance with the results filed with him from the polling centres. He testified that he did not play the role of a presiding officer in any polling centre. He testified that he did not receive any complaints from any candidate, or agent and no presiding officers in all the centres brought any complaint to his attention; that although he had met Dr. Elmi (PW2) he (Dr. Elmi) did not ask for a list of presiding officers or their deputies and that he did not receive any letters from PW2 requesting for the said list. He testified that he did not observe any irregularities and that according to him the elections for Wajir West Constituency were free and fair. He testified that he had received information from the presiding officer at the Wajir Girls Secondary School polling centre that (PW11), Petitioner's agent at that centre, was removed from the centre as a result of misbehavior but he was later reinstated after the Petitioner intervened.

Andrew Maina Njoroge (RW3) was the Returning Officer for Wajir East Constituency. His affidavit was sworn on 4<sup>th</sup> May 2013. His evidence revolves around an explosion that occurred at Wajir County Council Hall. This was the tallying centre venue for this constituency. His testimony is that on 5<sup>th</sup> March 2013 at around 6.45pm an explosion occurred outside the Tallying Centre. At the time, he had finished tallying the results for the Wajir East Constituency and had given a certificate to the winner of the Member for National Assembly and was preparing to give certificates to County Assembly Representatives. He testified that after the explosion all IEBC officials, candidates, agents, OCPD and other security personnel from NSIS and members of public present ran out of the Hall and sat outside until after ten minutes when they went back after confirmation that all was well. He denied that there was an increase of votes for some candidates after the explosion and stated that the explosion had occurred a day after the voting had concluded and all Forms 35 remitted to him and that he had made announcements on the Governor results. He said that no complaint was raised to him after the explosion. He also testified that he did not receive any report from presiding officers that ballot papers had run out and even if this were the case, the presiding officer could get extra ballot papers from other streams.

Saadia Mohamed Adan (RW4) the 1<sup>st</sup> Respondent, testified as the last witness for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case. Her evidence is contained in the replying affidavit sworn on 24<sup>th</sup> April 2013. She was the Wajir County Returning Officer in the March 4<sup>th</sup> 2013 General Elections. She testified that after receiving all the Forms 36 from all the Constituencies she consolidated the results and declared the 3<sup>rd</sup> Respondent as duly elected Governor for Wajir County with 40,622 votes.

She testified that as a County Returning Officer she was dealing with Forms 36 from the Constituencies and had no contact with Forms 35; that prior to declaring the winner she did not receive any complaint in any form from anyone; that she availed provisional results; that she did not get a request to make available official results; that sometimes in April 2013 while in her house in Nairobi she received a call from one Abduraham Abass the Petitioner's running mate asking her for the results; that since she did not have the results she asked the Constituency Returning Officers to send her the results and they sent

her the results used during tallying because the official results were with the IEBC. The rest of her evidence as contained in the affidavit relate to general denial of the allegations by the Petitioner and his witnesses. She did not have first-hand knowledge on the facts since she did not visit any polling centre as she admitted in court.

### **The Response by 3<sup>rd</sup> Respondent**

On his part, the 3<sup>rd</sup> Respondent has denied the allegations contained in the Petition. He states that the allegations that the polling stations were unilaterally moved to areas that were inaccessible are false. He states that the polling stations were moved for ease of access by voters and that all prospective voters were informed and directed.

The 3<sup>rd</sup> Respondents has termed as false allegations that the Petitioner's agents were locked out; that there was undue and improper influence by Provincial Administration or intimidation of voters on account of violence; that there was manipulation of the voter register; that there was voter bribery; that there was mishandling of elections; that the counting and tallying of the votes was inaccurate and inconsistent and that there was lack of integrity of ballot boxes. The 3<sup>rd</sup> Respondent is asking this Court to find that the Petition lacks merit and that the elections were valid and that the 3<sup>rd</sup> Respondent was duly elected; that the Petition be dismissed and that costs be awarded to the 3<sup>rd</sup> Respondent.

### **3<sup>rd</sup> Respondent's Evidence**

Ahmed Abdullahi Mohamed (RW5), the 3<sup>rd</sup> Respondent called four witnesses including himself, Yussuf Mohamud Farah, Osman Idris Mohamed and Hussein Abdinasir Mohamed. He testified as the first witness for the 3<sup>rd</sup> Respondent's case. His affidavit was sworn on 10<sup>th</sup> May 2013. His evidence is that prior to the nominations of candidates to electoral positions by the IEBC, Wajir County held a forum attended by key stakeholders including the then area Member of Parliament, political leaders, elders and religious leaders; that all the clans in Wajir, namely, Degodia, Ogaden and Ajuran, were represented and the objective was to conduct clan nomination for prospective candidates for all elective posts to curb animosity and rivalry during elections; that both he and the Petitioner belong to the Degodia clan which has the majority members in the County; that a council of elders comprising two elders from each sub-clan was constituted to oversee the nomination process; that the nomination process required the prospective candidates to submit an application with a vision statement and a contribution of Kshs 250,000; that both he and the Petitioner presented their applications and contributed the required amount and that he was nominated and endorsed by community elders to vie for the Governor for Wajir on an ODM Party ticket.

Further evidence by the 3<sup>rd</sup> Respondent is that neither he nor his agents bribed voters and that Provincial Administration did not intimidate voters to vote for ODM candidates. He told the court that he was validly elected as the Governor of Wajir County in a credible, transparent, free and fair election.

Yussuf Mohamud Farah (RW6) testified second in support of 3<sup>rd</sup> Respondent's case. His affidavit is dated 10<sup>th</sup> May 2013. He was the chief agent for ODM and a registered voter at Makaror Secondary School polling centre (Code No. 061) in Wajir West Constituency. He stated that he was not accredited to any polling centre but was in charge of all polling centres within Wajir West Constituency. He testified that he visited some of the polling centres but not all of them. He refuted allegations that the Chief of the area and his assistant were present at the polling centre persuading voters to vote for ODM candidates and that the agents for other parties were locked out of the polling centre. He stated that the elections in Wajir West Constituency were credible, transparent, free, fair and peaceful and the 3<sup>rd</sup> Respondent was duly elected as the Governor.

Osman Idris Mohamed (RW7) was witness three in support of the 3<sup>rd</sup> Respondent's case. His affidavit is dated 13<sup>th</sup> May 2013. His evidence is that he was the chief agent for ODM Party in charge of Tarbaj Constituency and also an agent for Kajaja II polling centre where he said he spent most of the time on 4<sup>th</sup> March 2013. He stated that he visited other various polling centres. He refuted allegations that the polling clerks were interchanged to afford undue advantage to the 3<sup>rd</sup> Respondent. He testified that Kajaja II polling centre and Wajir East polling centre were very close to each other and that he was not aware of any interchanging of clerks between the stations. He testified that one voter, a woman, attempted to vote twice using an identity card of another woman but she was sent away by the 2<sup>nd</sup> Respondent's officials. He stated that the elections in Tarbaj Constituency were free, fair and peaceful.

Hussein Abdinasir Mohamed (RW8) testified last. His affidavit is dated 10<sup>th</sup> May 2013. He testified that he is a registered voter at Wajir Girls Secondary School in Wajir East Constituency; that he was the chief agent for ODM at that constituency and refuted claims that ODM agents bribed and misled illiterate voters to vote for ODM candidate. He testified that he continued visiting polling centres after the voting closed and found the centres had adequate lighting.

He further testified that on 5<sup>th</sup> March 2013 while at the Wajir East Tallying Centre at the Wajir County Council Hall an explosion occurred on the road next to the County headquarters; that the tallying exercise had been completed and results announced; that security officers condoned off the area and the ballot papers and all records were secured; that there was no interference of any kind in the electoral process. His evidence is that the elections in Wajir East Constituency were credible, transparent, free, fair and peaceful and that the 3<sup>rd</sup> Respondent was duly elected as the Governor, Wajir County.

### **Agreed Issues**

During the Pre-Trial Conference held on 3<sup>rd</sup> June 2013, the parties to this Petition agreed on the following issues:

- i. Was the manner in which the election for Wajir County Governor carried out in breach of the Constitution of Kenya, Elections Act and Regulations there-under as claimed by the Petitioner"
- ii. Do the irregularities complained of by the Petitioner seriously affect the results of the Gubernatorial Elections for Wajir County as to render the elections invalid"
- iii. Was the 3<sup>rd</sup> Respondent validly elected as Governor Wajir County"
- iv. What orders as to costs"

### **Petitioner's Submissions**

Counsel for the Petitioner, Mr. Thiga, submitted that the Petitioner has proved his case by establishing breaches of the law by the 2<sup>nd</sup> Respondent; that **Regulation 7** of the Regulations was breached by purporting to ascribe other numbers for the polling stations in Wajir North Constituency on Form 36 than those designated in Gazette Notice No. 16727 of 16<sup>th</sup> November 2012; that by arbitrarily transferring the 8 polling stations in Eldas Constituency on the morning of the Election Day, the 2<sup>nd</sup> Respondent and its officials breached **Regulations 7** and also denied voters a chance to exercise their rights to vote. Counsel cited the case of **Mahamud Muhumed Sirat vs Ali Hassan Abdirahman & Others Nairobi**

**EP No. 15 of 2008, (2010) eKLR** where the court held that the transfer of one polling station in Wajir South Constituency “significantly affected the outcome of the elections in that centre”. He also cited **Ole Tipis vs Ole Ntimama & Anor, (2008) 1 KLR (EP) 385**, where a bench of three Judges acknowledged there was breach of the (National Assembly and Presidential Elections) Act in the conduct of an election at an un gazetted centre but declined to nullify the election on the basis that the Petitioner had not pleaded that a number of electors were prevented from voting and that the breach did not affect the result of the election. Counsel submitted that in the instant Petition, the Petitioner clearly and specifically pleaded the same at paragraph 3.2 of the Petition. He submitted that the evidence of PW3 and PW12 on the issue of arbitrary transfer of polling stations was based on what they saw on the ground on 4<sup>th</sup> March 2013 and this evidence was unchallenged; that the 3<sup>rd</sup> Respondent in his Response to the Petition and in his evidence in chief, as well that of RW4’s evidence in chief confirms that the named polling stations were transferred; that RW1 the Returning Officer for Eldas Constituency did not visit any polling station and the presiding officers who would have rebutted this evidence were not called to testify; that the 8 polling stations affected by the transfer recorded low voter turnout compared to the un affected stations that recorded 100% turnout.

It was submitted that the evidence of PW11 and PW12 agree on the issue that the Petitioner’s agent was locked out of Wajir Girls’ Secondary School polling station without basis and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not call evidence in rebuttal.

On voter bribery it was submitted that there was voter bribery at Forest Polling Station at Griftu Centre Wajir West Constituency and the matter reported at the Griftu Police Station and at Jogbaru Wajir East Constituency; that the evidence of PW1 and PW9 on this issue remains unchallenged.

It was submitted that voters were influenced; that Chiefs and Assistant Chiefs were allowed at polling stations in full uniform in breach of **Regulation 62**; that the Presiding Officer at Athibohole polling station was present at the polling station he was presiding over dressed in an ODM T-shirt in contravention of **Section 59 (1) (j) (k), (l), and (m) of the Act** which gave undue advantage to that political party; that the 3<sup>rd</sup> Respondent immensely benefited from the undue influence of the Degodia Council of Elders contrary to **Section 63 (1) (c) and (3) (b) of the Act**; that in **Mbondi v Galgalo & another (2008) 1 KLR (EP)** the court allowed a petition on account of undue influence targeting the nomination of the Petitioner and that the evidence of PW3 and PW8 that they saw Chiefs and Assistant Chiefs present at the Eldas Secondary School and Anole Primary school polling stations as well as Garsekhoftu Primary polling station was not challenged.

It was submitted that IEBC officials allowed two women to pick ballot papers in an attempt to vote twice at Kajaja II polling station; that the Presiding Officers at Wajir Girls Secondary School polling station and Kutulo Primary polling station allowed double voting in breach of **Section 59 (1) (j) of the Act and Regulation 79**; that majority of Forms 35 as well as Form 36 for Wajir West Constituency did not comply with **Regulations 79 and 83** respectively; that such breach of the law caused nullification of the election in **Manson Oyongo Nyamweya v. Hames Omingo Magara & 2 others (2009) eKLR** and **William Kabogo Gitau v. George Thuo & 2 others (2010) eKLR**; that failure to sign, stamp, make statutory comments, countersign alterations on Forms 35 or ensure integrity of the ballot boxes contravened the provisions of **Section 59 (1) (j) of the Act and Regulation 79**.

Further on the issue of mishandling the elections, it was submitted that there was forgery in Forms 35 in at least 7 polling stations as testified by PW10 the document examiner; that all these forms were signed by one person purporting that it was signed by different agents; that this evidence calls into question the integrity of the results in those polling stations; that Form 36 for Wajir North Constituency is illegal because it does not have a column for registered voters and that the polling stations numbers (codes) on

it differ with those in the respective Forms 35 for that Constituency;

It was submitted that the 2<sup>nd</sup> Respondent failed to ensure the integrity of the ballot boxes found on the road in Eldas Constituency; that there is no logical explanation why the vehicle carrying ballot papers had detoured from the main road into the bush

On the second issue it was submitted that due to rampant breaches of the law, the irregularities affected the results of elections for Governor Wajir County; that failure to stamp ballot papers was held by the Court of Appeal to have affected the results of the election in **Morgan & Others v. Simpson & Another (1974) 3 All ER** Counsel further submitted that non compliance with mandatory provisions and principles of law by IEBC officials affected the elections results and that any reliance the Respondents may place on **Section 83 of the Act** is overruled by the authority in **Simon Nyaundi Ogari v. Joel Omwaga Onyantha & 2 others (2008) eKLR** and therefore this issue must be answered in the affirmative.

As regards the third issue it was submitted that this must be answered in the negative that the 3<sup>rd</sup> Respondent was not validly elected as Governor Wajir County and following on this issue, costs must follow the event and in this Petition costs must be awarded to the Petitioner.

### **1<sup>st</sup> & 2<sup>nd</sup> Respondent's Submissions**

Mr. Oriaro submitted on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent that **Regulation 7 (3)** was not breached. Eldas Constituency is new and the polling took place at the registration centres. For Tula Tula Health Centre and Abaqmathobe polling stations there were sufficient reasons for use of the Madrassa and lack of gazette notice did not substantially affect the voter turnout which stood at 82.6%; that **Regulation 62** was not breached; that only one agent testified to this (PW11) and contrary to his evidence he was not denied entry as alleged but was thrown out for unbecoming behavior and was later reinstated; that **Regulation 63** was not breached; that there is no evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in a premeditated manner allowed the deployment of violence, intimidations and lack of order; that **Article 38** of the Constitution and **Section 3** of the Act were not violated because there is no evidence that any voter was prevented from voting or that the voter register had been manipulated to prevent any voter from voting; that the Petitioner's witnesses did not inspect the register to verify manipulation and there was no application for scrutiny to test the veracity of these allegations; that there was no proof of bribery.

It was submitted that the Petitioner's case focused on auditing the implementation of **Regulation 79**; that only one agent testified on this issue (PW11) and he confirmed he had no issues with the results for Wajir Girls Secondary School polling centre in Wajir West Constituency; that neither this witness or any other stated that they were denied Forms 35; that all Forms 35 were signed either by the Presiding Officer of his/her deputy; that although it is a requirement under **Regulations 6** and **7** that all presiding officers and/or their deputies must sign the forms and that it is desirable that candidates or their agents must sign, failure to sign does not by itself invalidate the results nor does the absence of a candidate or his/her agent at the signing of these forms; that the Petitioner did not provide in his evidence in chief any reasons for invalidating the results and that the Petitioner did not dispute the results as captured apart from duplication of results captured in Form 36 for Gurar Old Primary School (001) and Gurar Primary School (003) in Wajir North which is immaterial to affect the results.

It was submitted that although it is desirable that alterations be countersigned for transparency and accountability, there is no strict rule of law to this effect and what is important is whether the alterations are made with the effect of changing the results of the candidates; that the alterations were made to correct mathematical errors and there is no evidence that any alteration was made with the intention of

conferring any advantage over a candidate.

It was submitted that neither the Petitioner nor his agents were at the tallying centre to receive results and therefore the 2<sup>nd</sup> Respondent cannot be faulted for failing to provide aggregate results in Form 36; that **Regulation 87 (3)** does not obligate the county returning officer to provide form 36 to the candidates; that what is required is for the winning candidate to be issued with form 38 and all candidates are entitled to forms 35 at the tallying centres; that the Petitioner did not discharge the burden of proof that he was or his agents were present at the tallying centres to receive the results and once they are submitted to the 2<sup>nd</sup> Respondent they can only be requested in writing.

It was submitted that the Petitioner did not prove that the integrity of the ballot boxes found on the road from Dela Yare was compromised; that the only witness who testified on this issue (PW3) admitted that the seals on the boxes were intact and that the results captured at Dela Yare polling centre were accurate.

Finally on this issue, it was submitted that the election process substantially complied with the law and the test of whether the election is substantially in compliance with the election law was set out in **Joho v Nyange & Another (2008) 3 KLR (EP)** and therefore the first issue for determination must be answered in the negative.

In respect to the second issue, it was submitted that the discrepancies pointed out by the Petitioner are not material as to alter the results; that there was no polling centre where the number of voters exceeded the registered voters; that the distribution of voters to all the candidates almost tallied and that the existing errors after comparing forms 35 and 36 are not material; that the exercise the Petitioner took the court through was not useful to him because he failed to establish how these anomalies affected the results or deprived him a win. It was submitted that under **Section 83** of the Election Act non compliance with any written law does not render an election void if it appears that the election was conducted in accordance with the law or that non-compliance did not affect the results of the elections; that the burden of proof lies with the petitioner in an election petition and the standard of proof is that above a balance of probability though not above proof beyond reasonable doubt; that the test is whether the will of the people (electorate) has been impaired by the outcome of the petition.

On issue 3 and 4 it was submitted that having failed to establish grounds for invalidating the election of the 3<sup>rd</sup> Respondent as the Governor of Wajir County issue 3 has been answered in the affirmative and therefore the Petition dated 23<sup>rd</sup> March 2013 lacks merit and should be dismissed and that costs must follow the cause.

### **3<sup>rd</sup> Respondent's Submissions**

It was submitted by Mr. Issa on behalf of the 3<sup>rd</sup> Respondent that the Petitioner did not lead evidence to proof that he was denied the legitimate expectation to win the elections for Governor Wajir County through manipulation of the register or cheating by the 1<sup>st</sup> or 2<sup>nd</sup> Respondent; that the 3<sup>rd</sup> Respondent testified, and it was admitted by the Petitioner, that the Petitioner had lost in the voluntary community nomination process conducted by the Council of elders and therefore he could not validly have entertained any legitimate expectation of winning the election for Governor Wajir County.

On the issue of transfer of polling stations it was submitted that only one witness (PW3) testified on this ground. He admitted on cross examination that he had no evidence or proof that any voter could not vote as a result of relocation of the polling stations; that he confirmed that all his agents traced the relocated stations and that the turn out in the relocated polling stations was higher than in some stations not

moved; that RW1 confirmed that Haragal Dam West and Delayere polling stations in Eldas were not moved as alleged because voting took place at the same venue used for registration of voters; that Eldas Polytechnic had no physical structure by that name but a Youth Centre; that the returning officer has confirmed that the relocation resulted from consultations and agreement with stakeholders; that for all the polling stations were relocated within the same gazetted electoral area on justifiable grounds; that the turnout as confirmed by the returning officer was high and was not affected. It is submitted that the allegations that polling stations were relocated illegally are without basis and that **Regulation 7 (i) (c) (i)** confirms that registration centres maybe the same as polling stations. Further that **Regulation 64** permits presiding officers in consultation with returning officer to relocate and transfer voting from one polling station to another in the same electoral area or to a public facility.

On locking out of Petitioner's agents it was submitted that PW11's evidence lacks credibility; that the witness could not remember where he took oath as an agent or before whom the oath was taken or for which stream he was an agent; that the presiding officer who is alleged to have refused him entry was not in the stream the witness claims to have been stationed; that he did not sign Form 35 at Wajir Girls Secondary School Polling Station and that he confirmed that the results at Wajir Girls were in order and he had no complaint

On the allegation that Chiefs were allowed at Garsekhoftu Primary School polling station in Wajir West Constituency, it was submitted that PW8 who claimed to have been the only one to complain about this and was assaulted for it admitted that no one was charged as a result of his report to the police; that he did not explain how he could tell one was a Chief and the other an Assistant and yet he did not know their names; that the allegations that all agents were thrown out at 11.30am until voting ended and that he was forced to sign Form 35 are outrageous and untruths under oath and should be disregarded; that evidence by PW3 that he saw a Chief and an Assistant Chief dressed in home clothes at the Anole Primary School polling station and that they were intimidating voters as they are ordinarily in charge of distributing relief food has no basis.

It was submitted that there is no credible evidence that the 2<sup>nd</sup> Respondent allowed deployment of violence, intimidation and lack of order at several polling stations. It was submitted that it is incredible that PW7 testified that between 1000 to 2000 voters did not vote after the polling station at the Wagberi polling station was pelted with stones at 4.30pm; that on cross examination he admitted that the throwing of stones lasted for 10 minutes only; that three streams at this polling station have a total of 1759 registered voters out of which 1330 voted as confirmed by the Forms 35 produced by the 2<sup>nd</sup> Respondent; that no evidence was adduced to show that any of the voters at the Polling Station were denied the opportunity to vote; that voter turnout stood at 75.6%; that the Petitioner did not adduce any evidence of violence, intimidation or lack of order at any polling station that affected the voting process and that the allegation of violence has not been proved and should be rejected.

It was submitted that no voter was denied the right to vote; that there is no evidence has been adduced by any registered voter in Wajir County that he/she was not allowed to vote as a result of manipulation of the Voter Register; that PW4 was dishonest in stating that there was double voting at Athibohole Primary School polling station; that he admitted he could not tell the number of people who voted twice; that the results of Kajaja II polling station were in order according to PW6 who testified that the voters who attempted to vote twice were detected and ejected by IEBC officials; that PW5 who claims one voter namely Sutha Abdille voted twice admitted that he never looked at the voter register and did not report this offence. It is submitted that allegations of manipulation of Voter Register can only be established where more voters cast their votes than the registered voters and that the fact that no complaint was made to the Returning Officer or nearest Police Station confirms that the complaint is without any merit.

On voter bribery it was submitted that although PW1 testified that he saw one Hassan Noor Abdille bribing voters on the queue at Forest Polling Station to influence them to vote for ODM he did not report to the security officer who said to be 8 metres from where the witness was standing; that the Petitioner garnered 95 votes in that polling station against the 3<sup>rd</sup> Respondent's 26 votes; that the witness did not produce the letter he claimed to have written to IEBC and he did not record a statement on those allegations; that PW4 could not name the person who was allegedly bribing voters although he claimed to have witnessed bribing going on and that PW9 was lying in court by stating that he caused the arrest of one Abdillahi Issack for bribing voters but failed to record a statement with the police; that he admitted that the persons allegedly being bribed were not on the voters queue and was not sure whether they voted or not.

On the issue of the Petitioner being denied Forms 35, it was submitted that had this been the case the Petitioner would have written a complaint to the IEBC; that the Petitioner did not call witnesses especially his agents to support the allegation that they were denied Forms 35; and the only agent who testified on this issue, PW11, said he did not understand what Form 35 was; that PW11 decided without reason not to sign the Form but had no issues with the results; that the Petitioner never requested for official results at the tallying centre or thereafter as was confirmed by RW4 and that it is on record that either the presiding officers or their deputies signed Forms 35.

On the claim that the Petitioner was never issued with Form 36 for signing at the County Tallying Centre it was submitted that under **Regulation 83 (i) (d)** it is only the Returning Officer who is required to sign this form; that the Petitioner was entitled to receive the County form 36 and Constituency form 36 at the County Tallying Centre if he or any of his agent were present and this case he was not; that he admitted on cross examination that he never requested for either form.

On inaccurate and inconsistent counting and tallying it was submitted that the 3<sup>rd</sup> Respondent admits that there were minor discrepancies in transmission of the results from Forms 35 to Constituency Forms 36 but these errors were only in respect of the number of registered voters, votes cast and rejected votes; that the Petitioner admitted that there was no error on the tabulation of the results garnered by each candidate except for Gurar Primary School, Andaraka Primary School, Waititi B Stream 1 all in Wajir North and Athibohole Primary in Wajir West where all the candidates were affected but this did not in any way affect the final outcome of the results.

On the integrity of ballot boxes it was submitted that there was no witnesses to prove that the ballot boxes were not secured; that it was confirmed by the Returning Officer of that Constituency that the ballot boxes found on the roadside on the road from Eldas were sealed and guarded by security officers and IEBC officials and that the complaint that ballot boxes were unsecured is unwarranted and should be dismissed.

On allegations of forgery it was submitted that the alleged forgery was not pleaded in the Petition and no allegations were made by the Petitioner or his witnesses that their signatures were forged; that the PW10 admitted that he did not have any sample signatures to rule out the Petitioner or his agents as the persons who signed the forms; that he could not state who had signed the forms and therefore his evidence was of little probative value and his report should be disregarded. The 3<sup>rd</sup> Respondent relied on the case of ***Dhalay Vs Republic [1995-1998] 1 EA 29.***

With regard to the issues in respect of this Petition, it was submitted that the election process for Governor Wajir was secure, accountable and transparent; that the votes cast were counted, tabulated, openly and accurately collated and the results announced promptly by the Presiding Officers at each Polling Station; that **Section 83 of the Act** provides for the test to be applied in evaluating the conduct of



an election by the IEBC, that the errors in the collating of results in Forms 35 and Form 36 did not affect the result of the election.

With regard to the 1<sup>st</sup> issue in respect of this Petition, it was submitted that the election process for Governor Wajir were conducted in accordance with **Article 86** and the electoral process was secure, accountable and transparent; that the votes cast were counted, tabulated, openly and accurately collated and the results announced promptly by the Presiding Officers at each Polling Station.

On the second issue, it was submitted that **Section 83 of the Act** provides for the test to be applied in evaluating the conduct of an election by the IEBC and that the errors in the collating of results in Forms 35 and Form 36 did not affect the result of the election. Counsel relied on **Mbowe v. Eliufoo [1967] EA** and Supreme Court **Petition No. 5 of 2013 Raila Odinga v. IEBC & 3 Others** to support the point that the results of the elections were not affected by the non-compliance of the law.

On the third issue, it was submitted that the 3<sup>rd</sup> Respondent was validly elected as the first Governor for Wajir County having garnered **40, 622** votes against the Petitioner's **22, 919** votes. The Petitioner having admitted that the results as declared at all 400 polling stations were correct, the answer to the third issue can only be in the affirmative.

On the issue of costs, **Section 84** of the Act, provides that an election court shall award the costs of and incidental to a petition and such costs shall follow the cause. The 3<sup>rd</sup> Respondent submits that he should be awarded the costs of the Petition to be assessed and taxed by the Deputy Registrar of this Court.

### **Determination of the Issues**

The applicable law in Kenya in respect to election disputes is the Constitution of Kenya 2010, the Elections Act 2011 (the Act), the Elections (General) Regulations 2012 (the Regulations) made under Section 109 of the Elections Act and the Election (Parliamentary and County Elections) Petition Rules 2013 (the Rules) made under Section 96 of the Elections Act. Elections disputes are *sui generis* in nature. Courts have, hitherto, recognized this uniqueness of electoral disputes as shown in **Joho v. Nyange & another (2008) 3 KLR (EP)** where Justice Maraga, as he then was, had this to say:

***“Election Petitions are no ordinary suits. Though they are disputes in rem fought between certain parties, election petitions are nonetheless disputes of great public importance – Kibaki Vs Moi, Civil Appeal No. 172 of 1999. This is because when elections are successfully challenged by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents’ social and economic activities. It is for these reasons that I concur with the election court’s decision in Wanguhu Ng’ang’a & Another Vs George Owiti & Another, Election Petition No. 41 of 1993 that election petitions should not be taken lightly”.***

The reasons for this are made clear when one looks at the wider picture. Election disputes involve not only the parties contesting but also the electorate. They touch on the political rights of the citizens. In the petition before me, this court is being asked to resolve an election dispute between the Petitioner and the Respondents. The decision of this court will not only impact on the two disputing parties but also on the voters of Wajir County. **Article 38 of the Constitution** has assured them that their right to free, fair and regular elections based on universal suffrage and free expression of their will and the right to vote by secret ballot for a candidate of their choice are guaranteed. In resolving this dispute, I will hold this constitutional guarantee at the back of my mind.

### **Burden and Standard of Proof**

The law in respect of the burden and standard of proof in this country in respect to electoral disputes is now settled. Our own Supreme Court has addressed itself on this issue in Raila Odinga case above when it stated:

***“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been con-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. All acts are presumed to be done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departure from the prescriptions of the law.”***

In the Joho case above, the court held that:

***“.....Election petitions should be proved by cogent, credible and consistent evidence. For instance where allegations of bribery are made, instances of the bribery should be given. The burden of proof in election petitions lies with the petitioner as he is the person who seeks to nullify an election. While the proof has to be done to the satisfaction of the court, it cannot be said that the standard of proof required in election petitions is proof beyond reasonable doubt. Like in fraud cases, the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences a very high degree of proof is required.”***

In Bernard Shinali Masaka v. Bonny Khalwale & 2 others (2011) eKLR, it was held that:

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

The Petitioner bears the burden of proving all the allegations he has made and in determining the issues raised, this court will apply the standard of proof that is higher than proof on a balance of probabilities and lower than proof beyond reasonable doubt. However, where the allegations are in respect of election offences, the standard of proof required is higher. For instance, offences like bribery, forgery and undue influence in my view would attract a higher standard of proof than the one prescribed for electoral disputes. They are offences in the ordinary sense of that word. Forgery or bribery by any other name remains just that and there can be no difference between such an offence in an election petition and in a criminal case.

### **Arbitrary transfer of polling stations**

The Petitioner alleges that Haragal West Dam polling station was transferred to Dela Town, Tula Tula Dam polling station to Tula Tula Primary School, Eldas Polytechnic polling station to Eldas Secondary School, Dela Yere polling station to Dela Centre, Abaqmathobe polling station to Tula Tula Madrassa, Tula Tula Dispensary polling station to Madrassa, Jua Kali polling station to a private residential home and Bulla Shair polling station to a private residential home all in Eldas Constituency. It was alleged that this action denied voters a chance to vote. The evidence in support of this is by PW3. Although the PW12 (Petitioner) in his evidence in court testified that he witnesses the transferred polling stations, this information is not contained in his affidavit. His affidavit in support of the Petition in paragraph 6 (b)

states that “**I am informed by Adan Abdi Hassan, information I verily believe to be true that a number of gazetted polling stations were changed or transferred without prior notification, some on the morning of the Election Day.**” He however testified in Court that he witnessed firsthand the transferred polling stations. This court is not sure which is the correct version, whether he was informed or whether he witnessed the transferred polling stations.

This allegation of transfer of polling stations is not denied by the Respondents. RW1, the Returning Officer for Eldas Constituency where the polling stations are situated justified that these were not transfers but administrative changes meant to accommodate the voters; that the changes had been agreed with the stakeholders before the election date; that at Haragal West Dam and Delayere voting took place at the registration centres and there was no physical movement of the two stations; that it was decided to conduct elections at Eldas Secondary School, which was across the road, after failing to access the Youth Centre; that at Abaqmathobe polling took place outside the Chiefs Camp at the Madrassa because the Chief’s Office that had been used as a registration centre could not accommodate voters; that Tula Tula Health Centre was being used for health services and storage and therefore unavailable; that the decision was made to move voting to the nearest Madrassa which was across the road; that in Bulla Shair, Jua Kali and Delayere voting was conducted at commercial premises provided free of charge.

PW3 admitted on cross examination that Eldas Polytechnic was 200 metres from Eldas Secondary; that Jua Kali was 500 metres from Ibrahims plot where voting is said to have taken place; Tula Tula Dam to Tula Tula Primary School is about 1 km away; that Tula Tula Health Centre to Madrassa was a distance of about 300 metres. PW3 admitted too that no voter complained that they could not vote due to the changes.

I have confirmed that all the 8 polling stations alleged to have been transferred exist and are gazetted polling stations in Eldas Constituency of Wajir County. Comparisons of registered and valid votes show the following picture:

Code	Name	Registered voters	Votes cast	Variance	%
005	Eldas Secondary	103	80	23	77.66
006	Eldas Jua Kali	201	168	33	83.58
007	Eldas Polytechnic	261	204	57	78.16
008	Bulla Shair	316	262	54	82.91
016	Dela Yarey	261	210	51	80.45
018	Haragal Dam West	49	38	11	77.55
033	Tula Tula Primary	372	328	44	88.17
034	Abaqmathobe	296	243	53	82.09
035	Tula Tula Dam	226	175	51	77.43

I find no evidence in PW3’s affidavit or testimony in court that Abaqmathobe polling stations (034) is one of the stations changed but even if it was, it shows that 296 voters were registered and 243 voters turned up to vote. The distribution of votes in all these stations has no problems other than at Tula Tula Primary where 328 was changed to 329 as votes cast without countersigning but the distribution adds up to 328. In Abaqmathobe, PW12 leads with 175 votes. In my view the turnout was impressive by any standards.

**Regulation 7 (1)** requires the 2<sup>nd</sup> Respondent to assign each electoral area a distinguishing number or

letter or a combination of both; appoint or designate a place, vehicle or vessel as a polling station, gazette and publicize the same through electronic and print media of national circulation. The 2<sup>nd</sup> Respondent may alter under **Regulation 7 (3)** any polling station and gazette the alteration at least three months before election date. **Regulation 64** gives presiding officer discretion, after consultation with the returning officer, to transfer voting to another station or public facility in the same constituency and advertise that fact in such a manner as is sufficient to bring it to the notice of the voters. When this is done, the electoral area from which the proceedings are transferred shall be deemed to be part of the electoral area of the polling stations to which the proceedings are transferred.

The evidence before this court is that the areas where the proceedings were transferred to were short distances from the gazetted areas; that there were banners giving directions to voters to the new areas; that no voter failed to trace the new areas, or at least no one testified to have lost their way to the voting or to having failed to vote because they could not trace the new areas. In his own words, PW3 told the court on cross examination **“I found no one at the Polytechnic stranded”** and **“I do not know the number of voters who could not trace the moved polling stations. Tula Tula Dam had no structures. Tula Tula Primary School had structures. My agents traced the polling stations. None of my agents got lost.”**

I have also considered that the allegations that the voting was done in residential houses and I find this not the case. The evidence of RW1 is that voting was transferred to commercial buildings and not private residential houses. He explained to the court how the buildings looked like and the challenges facing the 2<sup>nd</sup> Respondent’s officials to necessitate the changes. I have no reason to doubt that evidence in view of the fact that no credible evidence was given in rebuttal. However, **Regulation 64** requires changes to public buildings and where private buildings are used, **Regulation 8** require the law (Public Procurement and Disposal Act) to be followed. This court was told that the premises were given free of charge and therefore there was no need to follow public procurement procedures. With this evidence and while the court finds that the acquisition of the private facilities, though commercial buildings, may not have been done properly, it is my view that this did not affect the outcome of the elections given that there is no evidence to that effect.

To lay this issue to rest, I have considered the case of **Mahamud Muhumed Sirat** above. I wish to distinguish this case with the case before me in that in that case the court found that the transfer of the polling station affected the outcome of the elections. In this case, I have no evidence that this was the case. I am satisfied that the officials of the 2<sup>nd</sup> Respondent took necessary measures to direct voters to the changed polling stations and these stations were in the same electoral areas as the original gazetted areas. I am also satisfied that no voter failed to vote because they did not locate the new polling stations and that the new stations were not far from the original gazetted ones. Also see **Bura v Sarwatt [1967] EA** where it was held that the transfer of voters and their admission to vote at polling stations other than those allocated to them constituted non-compliance with the Act (National Assembly (Elections) Act 1964, Tanzania) but such non-compliance did not affect the result of the elections.

### **Locking out Petitioner’s agents**

It has been alleged that the Petitioner’s agents were locked out the polling stations in contravention of **Regulation 62**. The Petition avers that his agents were locked out of the polling stations during voting process by the 2<sup>nd</sup> Respondents’ presiding officers. The testimony of the Petitioner in respect of this allegations contained in his affidavit is **“I am informed by Jamali Dawid, information I very believe to be true that some of my agents were locked out from a number of polling stations including but not limited to Wajir Girls Secondary School in Wajir West Constituency.”**

The Petitioner called 12 witnesses including himself. Among the 12, three were unsuccessful candidates for Member of National Assembly for TNA Party (PW1), KNC Party (PW2) and URP Party (PW3); six agents for URP Party (PW5 and 6), TNA Party (PW4 and 8), Safina Party (PW7) and KNC (PW11). The latter was the Petitioner's agent at Wajir Girls Secondary School. He told the court that he presented his credentials to the presiding officer at Wajir Girls Secondary School polling stations (Code 060) but the presiding officer pushed him outside. He was later allowed in after the Petitioner went to the polling station and intervened. On cross examination PW11 said he did not sign Form 35 and did not know what that form was. He said he was in charge of Stream 2 and named the Presiding Officer of that stream as Mohamed Bishar and deputy as Raha. After he was shown Form 35 for this station's both streams he changed his evidence to say that he could not remember the Stream he was in and that the Presiding Officer is Mohamed Hassan Maalim and deputy is Raha was in Stream 1. He also admitted to signing Form 35. His signature appears on Form 35 for Stream 1. He told the court that he did not have any problems with the counting and tallying of votes in this station and he did not complain to the presiding officer. The Petitioner on his part testified that he had agents in all the polling stations in Wajir County. RW2 told the court that PW11 was removed from the station after he misbehaved but was reinstated after PW12 intervened.

I have considered this ground and the evidence is support. I find the witness unreliable and inconsistent. He contradicted himself, did not know what Form 35 was and could not remember where he took the oath or before whom. I also find no evidence to show any other agent was locked out. Other than PW11 no other agent for PW12 testified on this issue. It is my view that the other agents who testified for the Petitioner did not represent his interests. They were concerned about the welfare and interests of the Parties they represented. It is my finding that their evidence did not establish that the Petitioner was denied votes due to breaches of the law or irregularities. I find that this ground has not been proved, has no merit and Regulations 62 was not breached.

### Voter bribery

Bribery is an electoral offence. It is also a criminal offence in ordinary life. Being such, proof of the same must be by credible evidence and in my view, nothing short of proving this offence beyond reasonable doubt will suffice. There is no distinction as far as I am concerned, and rightly so, between bribery in a criminal case and one in an election petition. Bribery involves offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of the person receiving. Under the Act, bribery is an election offence under **Section 64** and both the giver and the taker of a bribe in order to influencing voting are guilty of this offence upon proof. The penalty found under Part VIII – General Provisions of the Act, specifically **Section 106 (1) of the Act** is a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.

Bribery has been alleged in Forest Primary School Polling Station (Code 010) and Athibohole Primary School Polling Station (Code 015) both Wajir West Constituency and Jogbaru Polling Station (Code 025) Wajir East Constituency. PW1, a candidate for Member of National Assembly on TNA ticket, testified that he saw a man he named as Hassan Noor Abdille with a size A4 envelope full of 500 Kenya shilling notes bribing voters on the queue and telling them to vote for 'six' oranges (ODM) in Somali language at Forest Primary School polling station; that the queue had 30 voters and two people were given 500 note each; that the person was two metres from him which he changed on cross examination to say it was eight metres from him; that the person walked away on seeing PW1; that he was denied entry to report to the presiding officer by security officer at the entrance; that he did not arrest the person; that he reported to RW2 who told him to go to police or to court; that he reported the matter to the police at Griftu Police Station in OB No. 5/4/3/2013; and that he did not go back to check on the progress of that report. On cross examination he admitted that TNA candidate beat ODM one with 100 notes.

PW4 told the court that there was voter bribery at Athibohole Primary School polling station. He said he could not name the person bribing but he could see the person 'dishing out money'. At the time, he said he was seated inside the polling centre and the bribery was outside. He said he reported to deputy presiding officer but not to the police. PW9 said he found a man he named as Abdillahi Issack who was 3<sup>rd</sup> Respondent's campaigner 'dishing out money' and telling voters to vote for Ahmed Abdillahi; that he was behind the man; he alerted police and the man was arrested. On cross examination he said he was not called to record a statement and that he saw one voter who was not on the queue receive the money but he left on seeing him (the witness). This witness contradicted himself. At one moment he mentioned one voter as having been bribed, then he changed to mention three voters and further on cross examination he said there were two voters who showed the briber their voters' cards and he did not see them on the voting queue or voting. He also said he did not know the police officer he reported to and that the following day he saw the arrested man in the streets. He said he did not see anyone being bribed on the queue. I have scrutinized Forms 35 in those polling stations and I find that the distribution of valid votes to all the candidates has no issues and that other numerical entries are in order save for alterations in Form 35 for Athibohole in respect of registered voters from 313 to 373 without countersignature. In Forest Primary and Jogbaru, PW12 leads in votes.

Bribery has not been proved to the required standard or at all. It beats logic that serious allegations can be taken so casually. It was expected that OB references in respect of the reports made to the police be tabled before the court and even the testimony of the police officers who arrested the culprits or recorded statements. The reportees are also expected to have followed up the matter especially where police laxity to take action existed. There is no evidence that as a result of the alleged bribery, the elections results for gubernatorial position in Wajir County were affected.

On the other alleged breaches of the law, malpractices and other irregularities, I wish to determine all the issues raised under the main umbrella of **Mishandling of the elections** in the following paragraphs.

### **Undue and improper influence**

It is alleged that PW3 found Chiefs and Assistant Chiefs in full uniform inside Anole Primary School polling station (Code 019) Eldas Constituency and later inside the tallying centre where counting of the votes was going on. According to him their presence was intimidating to voters because they are in charge of and supply relief food to residents; that he concluded that the Chiefs must have been canvassing for votes because they were not supposed to be inside. PW8 testified that at Garsekhoftu Primary School polling station (Code 003) in Wajir West the Chief and Assistant Chief were physically present telling voters to vote for ODM candidates and marking ballot papers for voters without asking whom they wanted to vote for; that he raised issue with presiding officer but no action was taken; that he took a video of what was happening using his mobile phone but he was assaulted by a councilor who was brother to the presiding officer; that he got injuries on his face and was thrown out of the station; that he reported the matter to police vide OB No. 08/05/5/2013. On cross examination he admitted he never recorded a statement; that he did not know the name of the Chief or the Assistant; that although there was a police post nearby he did not report that day but the following day at Griftu Police Station. It is further alleged that the Council of elders influenced voters by supporting the 3<sup>rd</sup> Respondent as the candidate for Governor.

**Regulation 62 (1)** provides in mandatory terms that the presiding officers shall regulate the number of voters to be admitted to the polling station at the same time. The same Regulation gives them discretion to exclude all other persons except those specified in that Regulation.

I have carefully considered this evidence and submissions on the same and I have this to say: that

undue influence is an electoral offence under **Section 63 of the Act** and just like the offence of bribery above there must be credible evidence in support. Both offences attract the same penalty under **Section 106 of the Act**. It is not enough in my view to state that one concluded that the Chiefs were canvassing for votes or that their very presence intimidated or influenced voters because they supply relief food. This court wanted to see evidence showing voters were intimidated or influenced not to vote. Again in respect of any report made to the police required production of OB reference and also evidence of the officer who received the report and acted on it if at all and especially where someone claims to have been assaulted, adding another criminal offence on top of the electoral one. Incidentally PW8 did not see the urgency in reporting the assault until the following day on 5<sup>th</sup> March 2013 and did not follow up with recording a statement. A casual look at Forms 35 for Anole Primary and Garsekhoftu Primary show that the Petitioner garnered 77 votes at Anole and was leading with 278 votes at Garsekhoftu. If there was undue influence it is expected that the Petitioner would have lost in both polling centres. I find no merit in this allegation and I find no proof of the same.

One more thing before I stop on this issue. This court takes judicial notice of clan dynamics in this part of this Republic. Whether for Governor or any other elective position, the voting patterns are dictated by clan dynamics. It is almost certain that any candidate with the backing of the majority clan wins. One may say this is not good for democracy but then one should not lose sight of the fact that it may take this country quite some time before the monsters of tribalism and clanism are eliminated. The Petitioner and the 3<sup>rd</sup> Respondent both come from the larger Degodia clan. It has not been denied that the Council of elders supervised nominations that ran parallel to those of IEBC and charged interested candidates Kshs 250,000 while IEBC charged Kshs 50,000 for nomination. But then both gentlemen paid so the Petitioner was not locked out by these stringent measures. It seems that the Petitioner did not buy the idea that he should give up on his ambitions to become Governor for Wajir and this is good for democracy. He offered himself to the electorate. After this I think it was left to the electorate to make their decision. In my view it is rather late in the day to bring up nomination issues at this stage. This is an issue that ought to have been presented before a different organ, the IEBC, for resolution. It was not and in my view the voters of Wajir County exercised their right to vote and being secret ballot elections, they were free to pick their choice.

### **Forgery**

Forgery is not pleaded in the Petition. Evidence of forgery was adduced by PW10 a document expert. His evidence is that he compared the handwritten entries and signatures of candidates or agents on Form 35 in respect of Jagahir Dam polling station (Code 011) Wajir West Constituency; the handwritten entries and signatures of one Ali Ahmed, Fesail Aden, Noor Ahmed on Form 35 in respect of Elkali mobile polling Station (Code 026) Wajir West Constituency; signatures on Forms 35 in respect of Anole Primary School polling station (Code 019) in Eldas Constituency; signatures on Form 35 in respect of Burder Primary School polling station (Code 025) Wajir South; signatures on Form 35 in respect of Dabley Centre polling stations (Code 022) Wajir South Constituency; signatures on Form 35 in respect of Ogorji Primary School polling station (Code 016) in Wajir North Constituency and signatures on Form 35 in respect of Danaba Primary School polling station (Code 050) in Wajir North Constituency. In his opinion all these bear a common formation, characters, pen speed and pen pressure which can only be achieved in common authorship. He concluded that they were all made by the same hand. I have stated that this ground was not included in the Petition but in the spirit of substantive justice and after this court allowed the Petitioner to file further witness affidavit and call the document examiner, this court nonetheless considered this evidence. In so considering I am guided by the Court of Appeal decision in the **Dhalay case** above where the Court held that:

***“While the courts were obliged to give proper respect to the opinions of experts, such opinions***

***were not binding on the courts. Expert evidence had to be considered along with all other available evidence and, where there was a proper and cogent basis for rejecting an expert opinion, a court was perfectly entitled to do so. A trial court had the duty of deciding whether or not it believed the expert and of giving reasons for its decision.***

Forgery is an electoral offence. Although the forgery specified under **Section 58 of the Act** is in respect of ballot papers forgery is a felony under our criminal law. Evidence in proof of the same must be credible and to the required standard. PW10 did not have samples from sources and he could therefore not say who had made those entries or signatures. The conclusion is that the Forms 35 in the specified polling stations above were forged by the same person, but who was this person" This court does not have an answer. Failure to take samples of the suspected persons has weakened the Petitioners case and this court is not able to make a finding as to who did it. There is therefore no evidence that the alleged forgery was done by the 2<sup>nd</sup> or 3<sup>rd</sup> Respondent or the agents of 2<sup>nd</sup> Respondent. Most importantly there is no evidence to show that the alleged forgery affected the election results. My scrutiny of Forms 35 in respect of the polling stations in issue shows that the distribution of votes is captured well, the mathematics add up, forms are signed by presiding officers and deputies, forms are stamped and that the Petitioner leads in Dabley; Mohamed Abdi Mahamud leads in Ogorji and the 3<sup>rd</sup> Respondents leads in the rest. If there was forgery, which has not been proved, then it is not clear in whose favour it was done.

#### **Failure to ensure integrity of ballot boxes**

PW3 testified to finding ballots boxes on the road to Della at 10.30am on 5/3/2013; that there was no security and on asking he was told that the boxes were from Dela Yarey and that the vehicle ferrying them had broken down in the bush and the boxes had been brought to the road. RW1 told the court that he received information from the Presiding Officer of Della Yarey that the vehicle had broken down in the bushes; that the vehicle was using a short cut in the bushes when it broke down and RW1 told the Presiding Office to move the boxes to the main road where they can be rescued from. From the evidence of PW3 the ballot boxes were on the main road. He said he did not see security but he admitted that there were people although he did not ask them to identify themselves. The photos he took and which form part of the Petitioner's documents did not meet the requirements of Section 78 of the Evidence Act.

It has been submitted that there was no logical explanation why the vehicle had detoured from the main road. RW1 explained that the officer who reported to him that the vehicle had broken down had used a deviation through the bushes. PW3 admitted that he did not complain to the Returning Officer at Eldas and most importantly that he did not notice any discrepancy between the votes cast and valid votes at Eldas Constituency. There is no evidence to show that the seals on the boxes were tampered with or that the 2<sup>nd</sup> Respondent allowed opportunities for rigging the elections. If there was 'bush tallying' as submitted, this has not been proved to the standard of proof required and remains mere allegations. In my considered view there is no evidence to prove that there was rigging or that the elections results were affected. In my view this allegation is not proved.

#### **Manipulation of voter register**

The manipulation of the voter register complained of in the Petition is to do with double voting. It is alleged that the 2<sup>nd</sup> Respondent allowed double voting in contravention of **Article 138 of the Constitution** and **Section 3 of the Act**. However in the Petitioner's submissions the alleged manipulation is about discrepancies in the registered voters in Forms 35, Constituency Form 36 and County Form 36. Be that as it may, this court has painstakingly looked at all the Forms 35 and 36 both at



Constituency and County level. I have found that the registered voters are captured as follows:

Constituency	Registered			Variance	Remarks
	Forms 35 (Totals)	Constituency Form 36	County Form 36		
Eldas	13,119	13,119	13,119	None	All agree
Tarbaj	16,422	16,422	16,422	None	All agree
Wajir North	15,891	Does not have column for registered voters	15,912	21	Do not agree
Wajir South	30,262	30,343	30,343	81	Do not agree
Wajir East	19,514	19,484	19,484	30	Do not agree
Wajir West	23,104	23,095	23,095	9	Do not agree

When I take into account the sequence of capturing electoral numerical data it is my belief, in the absence of evidence to the contrary, that the Presiding Officers had an official source document from where they got data in order to enter it in Forms 35 at each polling station. The Constituency Returning Officers are required by law to get data from Forms 35 and transmit it to Forms 36 and likewise, the County Returning Officer is required to get information from Constituency Forms 36 and transmit it to County Form 36. For this reason, I have no reason to doubt the information contained in Forms 35 in regard to the registered voters. I will comment more on these figures in the course of this judgement when dealing with the issue of inaccurate and inconsistent counting and tallying.

### **Double voting**

Evidence on double voting was adduced by PW5 an agent for URP Party. He stated that he saw one Sutha Abdille who was known to him and who was a cook at Kutulo Primary School voting twice. Kutulo Primary School was a polling station (034) Tarbaj Constituency. He stated that Sutha had voted at 10.00am and came again at 2.00pm; that PW5 drew the attention of the Presiding Officer who overruled him despite protestations by other voters and allowed her to vote. On cross examination he stated that he did not see Sutha's finger being marked with indelible ink after she voted in the morning but confirmed that his finger was marked after he voted; that he did not report to the Returning Officer or to the police; that he did not know who Sutha voted for. The witness admitted that the candidate for URP Mohamed Abdi Mahamud garnered more votes (423) in this polling station. Another incident of alleged double voting was by PW6 who named one Shalley Musa and Mumina Ahmed Osman as having voted twice at Kajaja II polling station (Code 040) Tarbaj Constituency. However this witness contradicted himself by stating that the two women did not succeed to vote the second time as IEBC's officials intervened and took the ballot papers from them and ejected them from the polling station. A casual look at Form 35 for Kajaja II shows that the leading candidate is Mohamed Abdi Mahamud with 232 votes.

Double voting is an offence under Section 58(m) of the Act and the penalty is a fine of one million Kenya shillings or imprisonment for six months or to both. I have set out the standard of proof required and in my view this threshold has not been met in this allegation. The evidence does not prove that double voting by Sutha took place and even if I were wrong on this matter, I find no evidence that the elections results were affected and that the double voting if any was in favour of the 3<sup>rd</sup> Respondent.

**Failure to provide official results, list of presiding officers.**

The Petitioner alleges failure by the 2<sup>nd</sup> Respondent to supply him and/or his agents with a list of presiding officers; official results and Forms 35 and 36. In respect to the list of presiding officers or other IEBC officials, the law is clear that the list is given the Political Parties or Independent Candidates (see **Regulations 4 and 5**). The 2<sup>nd</sup> Respondent cannot be faulted for not giving a candidate the list when there is legal no requirement to do so and this fact was appreciated by PW2 after these regulations were shown to him.

The Petitioner alleged that he was denied election results and the only Form 35 he had was from Jogbaru polling station where he voted. He admitted on cross examination that at the polling station level he did not have complaints with the results and he is only challenging the results because the forms were not signed; that he did not have the letter asking the IEBC for results nor did he indicate this in his affidavit; that he did not have any evidence that any of his agents asked for and were denied Forms 35. The Petitioner also admitted that among the e-mails sent requesting for Forms 36 none were from him.

RW4 testified that she was not asked for official results until in April when one Abdurahman Abass, the Petitioner's running mate called her to ask for the official results but by this time she has handed them to IEBC. She said that she got the results from Returning Officers and sent them by e-mail. It has also been testified that the Petitioner and his agents were not at the County Tallying Centre. I find no proof that the Petitioner asked for and was denied the results of the election. Failure to get results in my view can be attributed to absence of the Petitioner or any of his agents at the tallying centres and more importantly, this court finds that there is no evidence that such failure to provide him with results affected election results.

**Partisan presiding officer.**

The Petitioner alleges that the Presiding Officer at Athibohole Primary School polling station (Code 015) in Wajir West Constituency was partisan. PW4 an agent for TNA Party testified that the presiding officer was wearing an ODM T-shirt at the polling station he was presiding over and after he objected he was ejected from the station but he later he forced his way back to the polling room. He changed this on cross examination to say that he did not force his way back but sneaked back into the polling station. This witness further alluded to importation of voters when he testified that even though voting stopped around 4.30pm the station was not closed until 7.30pm; that at 7.30pm 17 voters came to the station and voted. What I find incredible is that no evidence that any report was made to the security personnel or to the police. This court doubts that a presiding officer can blatantly wear a T-shirt with one Party colours at a polling station he was in charge of and get away with it. This witness did not testify as to when the polling station opened to make this court find that it was illegal for the station to have remained open at 7.30pm. He could not say who the 17 voters voted for.

**Use of violence and intimidation**

It was alleged by the Petitioner that the Respondents allowed use of violence and intimidation of voters. PW7 testified that voting at Wagberi Primary School polling Station Stream 2 in Wajir East Constituency was pelted with stones at 2.00pm and this lasted for 10 minutes causing voters to scatter away. On cross examination this witness said that stones were thrown on the roof of the polling station stalling voting; that between 1000 and 2000 voters did not vote because of this. When this witness was shown Forms 35 for Wagberi Primary School polling station stream 2 which showed registered voters as 587, he admitted that the violence caused him to confuse the numbers.

It was also alleged that an explosion occurred at Wajir County Council Hall which was the Tallying Centre for Wajir East Constituency. This was explained by RW3 the Returning Officer for that Constituency that this happened on 5/4/2013 but it was outside the Hall; that he had announced results and was giving certificates to the Member of National Assembly and was preparing to give certificates to the County Representatives. He denied that voting was disrupted by the explosion because this was the second day after the elections.

I have carefully considered all the evidence in respect to allegations of use of violence, intimidation and other alleged irregularities such as issuing voters with eight ballot papers; running out of ballot papers, presiding officers marking of ballot papers for voters without asking them their choice at Wagberi Primary School polling station, lack of light and use of mobile phone light by presiding officers mark papers in some polling stations, changing of clerks in some that polling stations and that the presiding officer from another polling station voting at Kutulo Primary School polling station. I find no credible evidence to prove any of these allegations more so to prove that the Petitioner was denied victory due to these allegations.

### **Inaccurate and Inconsistent counting and tallying**

The Petitioner testified for one full day and a half. His evidence related mostly to the information received by his witnesses. On his part he took the court through a painstaking exercise of demonstrating errors in the tabulation of results. To do justice to the allegations he made in respect of the results, I undertook a very elaborate exercise of scrutinizing all the Forms 35 in the entire County. This was no mean task but it was necessary to inform this court's decision.

In Eldas Constituency, I found that the totals of registered voters in all Forms agree with those in Constituency Form 36; the distribution of valid votes to all the candidates in all Forms 35 tally with those in Constituency Form 36 except for Masalale Mobile Polling station where in Form 35 the distribution gives a total of 554 votes instead of 552 which are the valid votes cast. It seems this was corrected in Form 36 because it gives the number as 554.

Another discrepancy in the same station is that Mohamed Abdi Mahamud has 22 votes in Form 35 but 20 in Form 36 denying him 2 votes. Another anomaly is noted at ICF Primary School where valid votes ought to be 456 but is indicated at 457. However, the distribution gives a total of 456 votes. All the forms are stamped except one for Malkagufu South (Code 010); all forms have signatures of presiding officers; all are signed by either one or more agents but majority of the forms has no statutory comments.

In Tarbaj Constituency, all Forms 35 are stamped; some forms bear statutory remarks; registered voters in both Forms 35 and Forms 36 tally; all forms are signed by the presiding officers; all forms are signed by one or more agents; all entries tally except for totals votes for the 3<sup>rd</sup> Respondent who has 5,721 in County Form 36 and 5,751 in Constituency Form 36 thereby adding him 30 votes more. Other discrepancies in this constituency are found in Kubitula Dam where distribution gives of votes totals 135 instead of 136 losing one vote, the leading candidate is the 3<sup>rd</sup> Respondent with 75 votes; Haragal Primary where there are 338 valid votes but total distribution gives 334 losing 4 votes, the leading candidate there is Mohamed Abdi Mohamad with 314 votes; Hassan Yarrow Primary School where valid votes cast shows 258 votes, rejected votes are 2 leaving 256 as valid votes but this was changed to 258 and countersigned but the distribution totals 256, Mohamed Abdi Mahamud leads with 164 votes and Ausemudule polling station where votes cast are 248, there are no rejected votes but distribution gives 247 losing one vote, the 3<sup>rd</sup> Respondent leads with 179 votes.

In Wajir North Constituency, all forms except in Andaraka (053) and Sake Gamadha (006) are stamped;

majority of the forms are signed by one or more agents; majority bear statutory remarks; the coding of the stations is mixed up from Malkafugu with stream 1 of that station being given codes as though they were polling stations of 032 and stream 2 given 033, also Andaraka stream 1 and 2 bear 055 and 056. This has affected the coding but I have confirmed that the entry of the votes for each stream was not affected. In Gurar Primary School Form 35, Mohamed Abdi Mahamud got 246, Ahmed Abdullahi got 21, Maalim Mohamed Omar got 3 and Mohamed Ali Mursal got 20 but in Constituency Form 36 Mohamed Abdi Mahamud got 147 and was denied 99 votes; Ahmed Abdullahi Mohamad got 28 and was added 7 votes; Maalim Mohamed Omar got 0, was denied 3 votes and Mohamed Ali Mursal got 15, was denied 5 votes respectively. In Andaraka Primary (053) the 3<sup>rd</sup> Respondent garnered 225 votes in Form 35 but in Form 36 (Constituency) he was given 25 votes losing 200 votes. In Waititi B (068) the 3<sup>rd</sup> Respondent garnered 18 votes in Form 35 but in Form 36 (Constituency) he was given 318 votes, adding him 300 votes. It is worth mentioning that in Waititi B, the Petitioner leads with 352 votes.

Other than this, Rabsu Centre (025) distribution of votes gives a total of 467 votes but the valid votes cast are 472 losing 5 votes. The leading candidate at this station is Mohamed Abdi Mahamud with 238 votes. At Andaraka Primary School (053) valid votes are 369 but distribution totals 388 an increase by 19 votes (note this is where the 3<sup>rd</sup> Respondent who leads with 225 votes in Form 35 was given 25 in Form 36). In Kurow Centre (040) valid votes are 102 but total distribution gives 96 losing 6 votes.

In Wajir South Constituency, 9 Forms 35 have no IEBC stamp; majority of Forms 35 are signed by one or more agents and by the presiding officer and have statutory comments. At Serif Dispensary valid votes ought to be 88 after deducting 3 rejected votes from 191 votes cast but it is indicated as 187 and the distribution gives 187 losing one vote. The Petitioner leads with 168 votes. At Ildalate polling station (015) valid votes are 153 votes but distribution gives 154 votes, adding one vote. The Petitioner leads with 74 votes. At Mathah Baqay votes cast are 76, one rejected vote but this was not deducted giving 76 valid votes and the distribution totals 76 with Mohamed Abdi Mahamud leading with 49 votes. At Ibrahim Jilibey Centre (028) votes cast are 139 with one rejected vote but valid votes are given as 137 and distribution gives a total of 137 with two votes lost. The Petitioner is leading with 105 votes. In Gullet Dere Dam, votes cast are 82 with one rejected vote but valid votes are indicated as 82. The Petitioner leads with 63 votes. In Qoor Duba Centre (041) valid votes ought to be 217 but they are given as 216 and the distribution totals 216. Mohamed Abdi Mahamud is leading with 117 votes. Kiwanja Ndege Primary (043) valid votes ought to be 551 after deducting 6 rejected votes from 557 cast votes but it is indicated as 554 and the distribution totals 554 votes. The Petitioner is leading with 405 votes. In Habaswein Primary School (045) valid votes are 464 but distribution gives a total of 463 losing one vote. In Dilmanyale Dispensary (050) valid votes are 235 but distribution gives a total of 233 losing 2 votes. Mohamed Abdi Mahamud is leading with 113 votes. In Dalsan polling station (059) valid votes are 195 but distribution totals 196. The Petitioner is leading with 170 votes. In El-gal Primary School (069) valid votes are 391 but distribution totals 373 losing 18 votes. The Petitioner is leading with 279. In Khumbi Wells (079) votes cast are 520 with 3 rejected votes. Valid votes are indicated as 517 but distribution gives a total of 520. The 3<sup>rd</sup> Respondent leads with 213 followed closely by Mohamed Abdi Mahamud with 208 votes. In Abubakari Sadiq Primary (081) valid votes are 266 but distribution totals 269. The 3<sup>rd</sup> Respondent is leading with 117 votes. In Meygag Centre (091) valid votes are 113 but distribution gives 115. The Petitioner is leading with 101 votes. In Aktalabel Polling station (092) valid votes are 240 but distribution is 241. The 3<sup>rd</sup> Respondent is leading. In Diif Health Centre (095) valid votes are 620 but distribution is 619 losing one vote.

In Wajir East Constituency, total votes for all candidates agree; all Forms 35 are stamped except for Baraza Park Stream 2 (013) and Elbay Village (019); all Forms 35 have signatures of presiding officers and all except three have signatures of one or more agents. The three are Furaha Secondary School (020), Khorof Harar Primary School (028) and Qarsa Primary School (032). Other than lack of signatures

of agents and statutory remarks, the three forms are clean in terms of figures tallying. In Wajir Girls Secondary School (024) votes cast are 541 but valid votes are indicated as 538 and the distribution totals comes to 538 losing 3 votes. Mohamed Abdi Mahamud is leading with 251 votes. In Volunteer Primary School (003) the votes for the Petitioner in Form 35 are 14 against those of Maalim Mamahed Omar 1 but in the Constituency Form 36 this is interchanged and Petitioner given 1 and Maalim given 14.

In Wajir West Constituency, registered voters in both Forms 35 and Constituency Form 36 agree; all Forms 35 are stamped, all are signed by the Presiding Officer and majority bear signatures of one or more agents, few contain statutory declarations. Forms 35 in respect of Garsekhoftu, Athibohole, Jira Dam, Ademasajida Secondary, LMD Primary School, Mau Mau, and Bahati Primary School polling stations have not been signed by any agent. The pattern of which candidate got more votes in those stations is not defined and it cannot be said that the 3<sup>rd</sup> Respondent got the highest votes in all of the stations.

This constituency however has the highest number of discrepancies in figures respect to votes cast, rejected votes and valid votes. About half (30) of the polling stations have different figure for votes cast compared to the figures in Forms 35. Almost half (32) of the polling stations have different figures for valid votes. This does not worry me much because all the figures for registered voters in constituency Form 36 agree with those in Forms 35 and the totals in distribution in Forms 35 agree with those in Constituency Form 36 save for a few stations I will highlight.

In Adan Awale Primary School (002) votes cast are 378 with one rejected vote leaving valid votes as 377 but distribution gives 378. In Hadado North Primary School (014) after deducting 8 rejected votes from 421 votes cast, there ought to be 413 but it is indicated as 414 votes and the distribution gives 414 votes. In Wagalla Primary (041) valid votes are 257 but distribution is 256 losing one vote. In Barmish Centre (042.) valid votes are 312 but distribution is 311 losing one vote. In Badadi (050) valid votes are 103 but distribution is 104. In Athibohole Primary (015) Mohamed Abdi Mahamud got one (1) vote in Form 35 but zero (0) in Form 36.

This tedious exercise has disclosed that where discrepancies exist, they affect all the four candidates. I am concerned with figures in Forms 35 because these are the primary documents where data was captured first. A lot can happen in transferring this information to other forms. In an ideal situation this ought not to happen but ideal situations do not always exist. In scrutinizing all Forms 35 in the County I have established that after adding the 30 votes added to the 3<sup>rd</sup> Respondent in Tarbaj Constituency (assuming they were meant for the Petitioner, 1 vote lost in Kubitula, 4 votes lost in Haragal Primary, 1 vote lost in Ausemudule , all in Tarbaj; 5 votes lost in Rabsu, 6 votes lost in Kurow both in Wajir North; 1 vote lost in Serif Dispensary, 2 votes lost in Ibrahim Jilibey, 1 vote lost in Qoor Duba, 1 vote lost in Habaswein, 2 votes lost in Dilmanyale, 18 votes lost in El-gal Primary, 1 vote lost in Diif Health Centre all in Wajir South; 3 votes lost in Wajir Girls, 13 votes belonging to the Petitioner but given to Maalim in Volunteer Primary all in Wajir East; 1 vote lost in Wagalla Primary and 1 vote lost in Barmish both in Wajir West to the Petitioner's 22,919 votes he would have got a total of 23,010. This would have placed the margin between the 3<sup>rd</sup> Respondent's 40,622 votes and Petitioner's 22,919 votes 17,612.

We should all appreciate that the best way the mathematics would have fallen into place with precision would have been if the recount and scrutiny of all the ballots cast had been ordered. The Petitioner did not ask for a recount and scrutiny and going by his evidence he was satisfied with the results as captured in Forms 35 except for other anomalies like stamping, signing and making remarks on the forms.

After a careful consideration of all the evidence, it is my finding that errors exist as highlighted in this judgement. There are errors in the Forms, including alterations of the figures without countersigning; unsigned forms, figures that do not agree, lack of statutory declarations, lack of stamps on a few forms, arithmetical errors, among others. These are admitted by the Respondents and some termed as honest errors. What is the effect of these on the results of the elections"

Section 83 of the Act provides 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 non-compliance did not affect the result of the election.”***

**Regulation 79 (6)** provides that the refusal or failure of a candidate or an agent to sign a declaration form under sub-regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation 2 (a). The same case applies to absence of a candidate or an agent at the signing of a declaration form under **Regulation 79 (7)**.

In **Morgan and others v. Simpson and another [1974] 3 All ER** the court held that:

**“An election court was required to declare an election invalid if the irregularities in the conduct of the election had been such that it could not be said that the election had been ‘so conducted as to be substantially in accordance with the law as to elections, or if the irregularities had affected the results.’”**

In that case the 44 ballot papers had been rejected because they lacked the official stamp. A scrutiny was conducted and it was found that had the ballot papers been counted the losing party would have won the elections. I want to distinguish this case with our case in that no scrutiny was done and my own scrutiny of the Forms 35 did not change the wide margin between the Petitioner and the 3<sup>rd</sup> Respondent.

In **Bowe case above**, the court had this to say about the phrase ‘affected the result’:

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

On this issue see also **Ibrahim v. Shagari (1985) LRC (Const)** and **Lewanika v Chiluba (1999) 1 LRC**

I agree with the court in **Joho case** above in that there are two categories of irregularities, the innocent ones and deliberate ones. I wish to add that it is upon the Petitioner to prove that the irregularities were made deliberately with the sole purpose of denying him victory. I wish to state that the elections held on 4<sup>th</sup> March 2013 were complex and some errors like the ones committed in this case can be excused unless there is proof that there was a deliberate attempt to scuttle the process to the detriment of the Petitioner. This should not be viewed as excusing the 2<sup>nd</sup> Respondent. It is the view of this court that some errors cannot be excused. For instance it cannot be explained how figures from Forms 35 could

not be transmitted correctly to Forms 36 or why all forms do not have statutory declarations. Returning Officers had the responsibility of correctly transmitting all the data from all Forms 35 to the Constituency Form 36 without errors or with minimal errors. Kenya is coming from the history of lack of confidence by the citizens in some of the organs of the Government including the 2<sup>nd</sup> Respondent and especially its predecessor, the ECK. I think it was time for this institution to rise above board in order to give the electorate confidence that their political rights will be protected. I find the manner in which the Returning Officers handled the data rather casual and IEBC needs to do more than it did to ensure that the agents or officials they engage are professional in the discharge of the duty placed on them. The only consolation this court draws is from the fact that the data captured in the Forms 35 which is the primary document has minimal errors as highlighted in this judgement. Most importantly, the errors disclosed did not alter the results substantially as to make this court invalidate the elections.

### **Conclusion**

I wish to point out that this court has considered the cases presented before it by all the parties. It is not possible to have two cases with exactly similar circumstances and each case must be determined taking into account its own peculiar circumstances.

Coming back to the agreed issues, on the first issue, it is my finding, in absence of the evidence to the required standard and evidence to the contrary that the election for Wajir Governor was carried out in accord with the law. I have highlighted the irregularities and breaches with the some provisions of the law and I have indicated that these do not affect the election results. In **Joho case above** it was stated that:

***“It is not every non-compliance or every act or omission in breach of the election regulations or procedure that invalidates an election for being non-compliant with the law. As I have stated minor breaches will be ignored. An election is said to be non-compliant with the law as to elections when it is conducted in violation of the principles of an election by ballot.”***

Also in Morgan case above, Stephenson L.J stated on this point:

***“For an election to be conducted substantially in accordance with that law there must be a real election by ballot and no substantial departure from the procedure laid down by Parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot, instances of such substantial departure would be allowing voters to vote for a person who is not in fact a candidate or refusing a qualified candidate on some illegal ground or disenfranchising a substantial proportion of qualified voters.”***

Elections in Wajir County were by secret ballot. I have expressed myself that no witness came forward to state that they were denied a chance to vote for their preferred candidate. Even where it is alleged that illiterate voters had their ballot papers marked for them without being asked whom they preferred, none of such voters came forward to testify to this. My finding on this issue is that the elections for Governor Wajir County were conducted substantially in accordance with the law.

On the second issue, it is my finding that the irregularities complained of by the Petitioner did not substantially affect the results of the gubernatorial elections for Wajir County. The Petitioner went to great length to demonstrate irregularities and this court too has taken time to painstakingly examine all the Forms 35 and the result is that the errors disclosed, irregularities existing and breaches do not affect the results as to make this court invalidate the elections or alter the will of the voters of Wajir County.

On the third issue, it is my finding that having failed to prove all the allegations in this Petition, this court can only find and I so hold that the 3<sup>rd</sup> Respondent was validly elected as Governor Wajir County. The effect of this is that the Petition must fail and it is hereby dismissed with costs to the Respondents.

Rule 36 (1) gives this court powers to cap the costs. I have taken into account that this matter proceeded and was concluded fairly expeditiously. There were not many interlocutory applications other than the various objection raised in the course of these proceedings but the court was able to quickly deal with them and give a ruling within hours in the same day. This cut down on costs of transport and accommodation for parties. This court therefore caps the costs payable to the Respondents to a maximum of 2 million Kenya shillings to be shared equally between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, a maximum of 1 million and the 3<sup>rd</sup> Respondent a maximum of 1 million shillings. The sum deposited in court by the Petitioner shall be held by the court pending the taxation of costs. I make orders accordingly.

What is left now is for me to thank all counsels in this case. Each counsel presented their client gallantly and industriously facilitated this court. They have enriched this judgement and I say keep up the good work. These are the orders of this court.

**S. N MUTUKU**

**JUDGE**

**Dated, signed and delivered at Garissa this 5<sup>th</sup> August 2013**

**Counsels**

Mr. Thiga for the Petitioner

Mr. Oriaro for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mr. Issa for the 3<sup>rd</sup> Respondent

**Court Clerks**

Mr. Martin Musau

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Mr. Ahmed Mahat



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