



Case Number:	Kisii Petition.3 Of 2013
Date Delivered:	05 Sep 2013
Case Class:	Civil
Court:	High Court at Kisii
Case Action:	Judgment
Judge:	Esther Nyambura Maina
Citation:	Edward Akong'o Oyugi v Independent Electoral And Boundaries Commission & 2 others [2013] eKLR
Advocates:	Muenesi Advocate for the Petitioner assisted by Ogutu Murugu Advocate for the 1st and 2nd Respondents Sagana Advocate for the 3rd Respondent
Case Summary:	<p style="text-align: center;"><u>High Court upholds the elections of the Governor for Migori County in the March 4, 2013 General Elections</u></p> <p style="text-align: center;">Edward Akong'o Oyugi v Independent Electoral and Boundaries Commission & 2 others</p> <p style="text-align: center;">Petition No 3 of 2013</p> <p style="text-align: center;">High Court of Kenya at Kisii</p> <p style="text-align: center;">E N Maina, J</p> <p style="text-align: center;">September 5, 2013</p> <p>Reported by Nelson K Tunoi & Beatrice Manyal</p> <p>Issues:</p> <p style="padding-left: 40px;">i. Whether the election of the Governor for Migori County held on 4th March 2013, (was credible, free and fair), whether it was</p>

in conformity with the Constitution of Kenya 2010, the Elections Act and Regulations, and other Laws relating to elections.

- ii. Whether the declaration of Zacharia Okoth Obado (3rd respondent) as the Governor for Migori County was valid.
- iii. Whether the declaration of Zacharia Okoth Obado (3rd respondent) as the Governor for Migori County ought to be nullified and Edward Akong'o Oyugi (petitioner) declared the Governor.
- iv. Who should bear the costs of the Petition?

Constitution of Kenya, 2010 article 81(e) provided;

81(e) elections must be free and fair and shall be:-

- i. By secret ballot
- ii. Free from violence, intimidation, improper influence or corruption;
- iii. Conducted by an independent body
- iv. Transparent; and
- v. Administered in an impartial, neutral, efficient, accurate and accountable manner.

Electoral law – election petition – gubernatorial election – petition seeking to nullify and declare void the election of the 3rd respondent as the Governor for Migori County on the elections held on 4th March, 2013 –whether the election of the Governor for Migori County held on 4th March 2013, was credible, free and fair- whether it was in conformity with the Constitution of Kenya 2010, the Elections Act and Regulations thereunder and other Laws relating to elections- whether the declaration of the 3rd respondent as the Governor was valid or whether it ought to be nullified and the petitioner declared the Governor -Constitution of Kenya, 2010 articles 10,81,86 ; IEBC Act, 2011 section 25

Electoral law-election malpractices-claims that the agents did not sign Forms 35 or given copies of the form 35 - claims that there were two Forms 36 for Rongo Constituency, one handwritten and the other typed which bore different results; that the County Returning Officer for Migori County announced the results from a laptop computer –that the public did not know the details of the results as expected under the Law-that there was no simultaneous projection of the results onto a screen for public viewing and there was no printout posted at the door or entrance of the tallying center-where in some constituencies Form 36 exceeded the votes cast -Constitution of Kenya, 2010 articles 10, 81 and 86; Elections (Parliamentary and County Elections) Petition Rules, 2013 rule 12, 33(4); Elections(General)Regulations, 2012 regulations 73(3) (4),79,81 & 83

Electoral law– electoral offences - claims that there was intimidation, bribery and violence during the elections- whether the petitioner had proved the allegation to the required standard of proof.

Held:

1. Under section 83 of the Election Act an election could not be declared void for non-compliance with written law if it was conducted according to the principles of law. This position would however only apply where the IEBC and its officers conducted the elections in conformity with the principles laid out in the Constitution and the written Law but nevertheless errors and irregularities occur. Where the law was not complied with at all then there was no debate and the election had to be nullified.
2. The burden of proof in election petition lay with the petitioner as he was the person who sought to nullify an election. While the proof had to be done to the satisfaction of the court it could not be said that the standard of proof required in an election

petition was beyond reasonable doubt. Like in fraud cases, the standard was higher than on a balance of probabilities and where there were allegations of election offences a very high degree of proof was required.

3. There was no complaint regarding the manner in which the actual voting was conducted at the polling stations. The petitioner did however testify that his name was missing from the register but was nevertheless allowed to vote and that did not affect the result.
4. The allegation that some electors did not find their names in the register or that some of the polling stations opened late were not proved. No one swore an affidavit to that effect and that allegation was made only by the petitioner.
5. There was no evidence of violence, intimidation or bribery. It was not proved that the two people caught bribing voters were doing so on behalf of the 3rd respondent. Although the 3rd respondent disassociated himself from those two people he went out of his way and obtained the proceedings of the criminal case which he tendered as proof that the man was absolved from those allegations.
6. No agent swore an affidavit stating that the presiding officer did not give them a copy of the Form 35 and in any event one of the petitioners witness testified that the petitioner's Secretariat, which he headed, received those results. Even if it were true that copies were not given to the agents, no prejudice was occasioned to the petitioner. The Form 35s submitted by the 1st respondent were signed by agents. Moreover, Regulation 79(b) provided that the refusal or failure by a candidate or agent to sign a declaration or to record the reasons for their refusal to sign should not by itself invalidate the results announced.
7. The failure to affix the results at the polling stations and tallying centers was not proved by the petitioners.
8. Although the County Returning Officer did not announce the results of each constituency before declaring the final

result, the same was not a requirement under regulation 87(3)(a). The regulation did not require announcement of the results received from the Constituency and so once again that ground could not hold. There was evidence that results at the constituencies were tallied and announced at the constituencies in compliance with regulation 83(1).

9. Whereas there was openness in the tallying, the petitioner had proved that tallying was not done accurately. There were many errors in the transposition of results from Form 35 to Form 36. In some instances the results for the candidates were interchanged and in others the candidates were given more than they had garnered. In others they were given less. This however applied only to two polling stations. The errors in this case though negligent were not deliberate and had not been proved to have affected the result.
10. The law did not prohibit reading of results from the computer unless it was shown that it affected the results, which it did not. This would have been tantamount to "elevating technicalities to a fetish" which was forbidden by article 159 of the Constitution of Kenya, 2010
11. The declaration of the 3rd Respondent as the Governor for Migori County was valid.
12. There were errors established in the tally. These errors were admitted by the officers of the 1st respondent including the 2nd respondent. Even the 3rd respondent had a table of errors in his own tally and this court also confirmed the errors. The same were occasioned by the negligence and casual manner of the officers of the 1st respondent. The 1st respondent would do well to ensure that its officers are more diligent and efficient but for now it had to bear the costs of the petition

Petition dismissed; certificate under section 86 to issue; the 1st respondent shall bear the costs of the Petitioner and the 3rd Respondent, The 2nd Respondent shall bear his own costs.; That the costs be taxed by the Deputy Registrar but so as not to exceed Kshs 1 million (one million shillings)

for each party.

Cases

1. *Besigye, Kizza v Yoweri Kaguta Museveni* Election Petition No 1 of 2001 –(Mentioned)

2. *Gitau v Thuo & 2 others* [2010] 1 KLR 526–(Explained)

3. *Joho v Nyange & another (No 4)* (2008) 3 KLR (EP) 500-(Explained)

4. *Masaka v Khalwale & 2 others* Election Petition No 2 of 2008 –(Explained)

5. *Mbowe v Eliufoo* [1967] EA 240 –(Explained)

6. *Munyao v Munuve & 4 others* (2008) 2KLR (EP) 20 –(Explained)

7. *Nga'ng'a & Another v Owiti & another (No 2)* (2008) 1 KLR (EP) 9 –(Explained)

8. *Nyamweya, Manson Onyongo v James Omingo Magara & 2 others* Election Petition No 3 of 2008 –(Explained)

9. *Odinga, Raila Amolo & 2 others v Independent Electoral and Boundaries Commission & 3 others* Election Petition No 5 of 2013 –(Explained)

10. *Omiti v Osebe & 2 others* [2011] 2 KLR 181 –(Explained)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 2, 10, 81, 88 –(Interpreted)

2. Elections Act, 2011 (Act No 24 of 2011) sections 39, 64, 83, 86(1) –(Interpreted)

3. Elections (General) Regulations, 2012 (Act No 24 of 2011 Sub Leg) regulations 79, 83 38(a) –(Interpreted)

	<p>Advocates</p> <p>1.Mr Muenesi & Miss Ogutu for the Petitioner</p> <p>2.Mr Murugu for the 1st & 2nd Respondents</p> <p>3.Mr Sagana for the 3rd Respondent</p>
Court Division:	Civil
History Magistrates:	-
County:	Kisii
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

THE ELECTIONS ACT, 2011

KISII PETITION NO.3 OF 2013

IN THE MATTER OF ELECTION FOR THE GOVERNOR OF MIGORI COUNTY

THE PETITION OF PROFESSOR EDWARD AKONG'O OYUGI

BETWEEN

EDWARD AKONG'O OYUGI.....PETITIONER

VERSUS

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

JAIRUS OBAGA.....2ND RESPONDENT

ZACHARIA OKOTH OBADO.....3RD RESPONDENT

JUDGMENT

Following the Gubernatorial Elections held throughout the Republic on 4th March 2013 the 2nd Respondent declared the 3rd Respondent the Governor for Migori County with 123,821 votes. The Petitioner who was also a candidate was second with 123,658 votes, and being dissatisfied with the declaration of 3rd Respondent as winner he filed this Petition.

The Petition filed on 2nd April 2013 seeks orders as follows:-

- i. Tallying and examination of the votes cast and results declared.
- ii. A declaration that Zachary Obado-the 3rd Respondent is not duly elected as Governor for Migori County.
- iii. A declaration that the Petitioner- Edward Akong'o is the validly elected Governor for Migori County.
- iv. In the Alternative and without prejudice to the prayers above that the election of the 3rd Respondent be set aside and a fresh election be ordered.
- v. That a Certificate of the court's determination do issue to the 2nd Respondent and the speakers of the Migori County Assembly and the Senate.
- vi. That the 1st and 2nd Respondents bear the costs of this Petition and all interlocutory matters involved.

The Petition is based on grounds, inter alia that the election was not conducted in accordance with the Law. That majority of the Presiding Officers did not comply with Regulation 79 of the Elections (General) Regulations, 2012 in that they did not request the agents to sign Forms 35 and neither did they give copies of the Form 35 to the party agents. That the Orange Democratic Movement Party Chief Agent for Suna west constituency, Jared Billy Otieno, was not allowed to sign the declaration of results (Form 36) and was not given a copy. Further that Regulation 79 (2) (d) was not complied with in that copies of the election results were not affixed at the public entrances or any other convenient places at the polling stations. That the election was therefore not conducted in accordance with the national values and principles of openness, public participation and accountability in particular Article 10 of the Constitution. That in the Petitioner's stronghold of Suna West Constituency the final declared result was 22,000 while the tally obtained by his agents from the Constituency Returning Officer was 22,454. That there were two Forms 36 for Rongo Constituency, one handwritten and the other typed which bore different results; that discrepancies in the two forms are revealed in an audit report commissioned by himself and prepared by Jared Omach. That there is uncertainty as to the votes cast, valid votes tallied and the rejected votes tallied at the constituency level and county level. Further that the County Returning Officer- Mr. Jairus Obaga announced the results from a laptop computer contrary to the law and the public did not know the details of the results as expected under the Law. There was no simultaneous projection of the results onto a screen for public viewing and there was no printout posted at the door or entrance of the Migori Teachers Training College Hall which was the tallying center.

The other grounds are that the County Returning Officer did not give the results for the eight constituencies in the county. Instead he merely read out the total registered voters, valid votes cast and the votes garnered by the three candidates according to his laptop computer hence denied him, other candidates and the public information that they were entitled to under the Constitution. That the Form 36 availed to the Petitioner was printed after the announcement and the constituency results therein differed from the results in the eight constituency Form 36s the County Returning Officer had shown him and assured him would be used to tally and announce the final results. That for Awendo Constituency the County Form 36 does not tally with the constituency Form 36 where votes cast is concerned. That the same problem arises in Suna West Constituency where valid votes in the County are 27,988 and in the constituency Form 36: 28,549. That the valid votes cast, 28549 on the constituency Form 36 exceeds the votes cast (28136). He cites a similar problem in Kuria West Constituency.

He contends that the failure to tally strictly in accordance with the Law substantially affected the result of the election and renders the results announced and declared and published by the 1st and 2nd Respondents null and void. That 174 votes were stolen from him through manipulation of the figures by Mr. Jairus Obaga-the County Returning Officer assisted by the staff of the 1st Respondent and egged and urged on by the 3rd Respondent in a more deliberately calculated to deny him a well deserved victory. That therefore the 3rd Respondent is not the validly elected Governor of Migori County.

The evidence in support of the Petition is contained in his supporting affidavit sworn on 2nd April 2013, his further affidavit sworn on 20th May 2013, the affidavits of his six witnesses to wit Jared Omach (PW1), Peter Njagah (PW2), Anne Omodho Anyango (PW3), Simon Akoko (PW4), Manuel Odeny (PW5) and Tobias Omunga (PW6) and in their testimonies during cross- examination.

Briefly, the sum total of that evidence is that the election was not conducted wholly in accordance with the principles laid in the Constitution and the written Law. That to begin with when he went to vote at the Municipal Town Hall Polling Station where he was registered as a voter he found his name missing from the register. The name could not be found despite a diligent search at the two streams. Although he was allowed to vote on condition that a note would be made by the election officials he was not certain that was done. The incidence of missing names applied to several other electors. That some polling stations

opened late, Biometric Voter Registration kits malfunctioned and in a place called God Jope in Suna West Constituency two people who were supporters of the 3rd Respondent were arrested bribing voters. That one of them, Joseph Magolo, was in fact arraigned in the Rongo Magistrates Court and the case was ongoing. A charge sheet to that effect was produced as proof. That in Kengariso Polling Station the Petitioner's name did not appear in Form 35 and so the votes attributed to him were not his.

The Petitioner also testified that his agents were refused accreditation by IEBC and for this reason in some of the polling stations the agents had gone home. That whereas many agents signed the statutory forms (Form 35 and Form 36) they were not given copies and even where copies were obtained, they were not what was used in the tallying. Examples were given of Suna West and Rongo Constituencies where the court heard there were two Form 36s with different results. For Rongo one was handwritten and the other printed and both had markedly different results. The handwritten form which is what was given to Peter Njagah (PW2) and which he took to the Petitioner's tallying Secretariat was not used by IEBC for purposes of tallying. For Suna West Constituency which was the Petitioner's stronghold being his birth place the first Form 36 showed he had garnered 22,454 votes while the one used to tally indicated 22,000 votes. Evidence was led that the Returning Officers in those two constituencies unlawfully altered the results in favour of the 3rd Respondent thereby robbing the Petitioner of a well deserved victory; That there was doctoring of documents long after the election That the results were not affixed at the entrances or any other convenient places at the polling station and tallying centres. The court further heard that there were numerous errors during the transposition of results from Form 35s to Form 36 at the Constituency and also from the Constituency Form 36 to the County Form 36 and that these discrepancies resulted in the Petitioner being robbed of 174 votes which would have seen him emerge the victor in this election. That an audit commissioned by the Petitioner after the election and conducted by a team headed by Jared Omach attested to this. That the County Returning Officer declared the results from a laptop computer instead of from a hard copy Form 36 and hence contravened the Law. That he also announced the results and declared the 3rd Respondent the winner before receiving the results for two polling stations to wit Biamiti and Kubwaha in Kuria West Constituency while those for Mancha Polling Station were inter-changed so that his votes were given to another candidate. Further that while at the tallying center the 3rd Respondent was shouting at the tallying clerks accusing them of robbing him of his votes and also kept going in and out of the Hall with the Returning Officer prompting those inside to protest. That while inside the tallying center the Returning Officer showed the Petitioner Form 36s for all eight constituencies which forms contained results that matched those received by his tallying secretariat. That the Returning Officer assured him those were the forms that would be used to tally the results but he reneged and ended up using forms that had altered results.

That when the Petitioner and his running mate (PW3) protested, the police were asked to show them out; that the Returning Officer showed bias against the Petitioner; that because there were numerous discrepancies it was not possible to tell what the result was; that the Audit done by Jared Omach's team showed that the Petitioner won this election. That even broadcasts by the media indicated that he had won and that he received many congratulatory messages. That the discrepancies in the tallying only go to show that the election did not conform to the principles set out in the constitution and the written law and that the same affected the results of the elections. As such the court should order an examination of the tally, find that the 3rd Respondent was not validly elected and that the Petitioner was the winner and declare him the validly elected Governor for Migori County. In the alternative that election be nullified and a fresh election be ordered.

The 1st and the 2nd Respondent conducted their defence jointly. In their Answer to the Petition they aver that no breach or fundamental departure or contravention of the letter, spirit or object of the Constitution or written Law regarding elections occurred during this election. They dispute that grave errors were

committed and aver that indeed no errors or irregularities or discrepancies have been shown to exist capable of materially altering or affecting the final result. They also contend that they were facilitative and co-operative throughout the election and that they supplied the statutory forms to the legally recognized agents as envisaged under Section 30 and 42 of the Elections Act as read with Regulation 62 (1) (a) and (c) of the Elections (General) Regulations 2012. They aver that the election was conducted in a legal, free, transparent and fair manner.

They deny that they doctored or altered the results to suit any party.

The 1st Respondent avers that he lawfully declared the 3rd Respondent as the duly elected Governor for Migori County. They urge the court to find that the Petition is incompetent, misconceived and frivolous and to dismiss it with costs. Their evidence is in the depositions.

Briefly that evidence is that the election for Governor of Migori County was conducted in accordance with Article 81 of the constitution. That all statutory forms right from the polling stations were made available and affixed conveniently at the said polling stations, the Constituency tallying centers and County tallying centers as required under Regulation 79 (2) (d). That the laptop at the County tallying center was used to tally the results received from various constituencies and that it was done in the presence of the authorized agents and that they were satisfied with the tallied results and proceeded to append their signatures and names on the Form 36. They did this after confirming the results on the laptop were the ones in Form 36. That the results read from the laptop were the same ones on Form 36. That in regard to the missing results for Biamiti and Kubwaha it was admitted that those results were in fact not entered in the Constituency Form 36 that was sent to the County Tallying center. The court heard that the reason that was not done was stress and pressure at the Constituency tallying center. That the process of posting the results to the IEBC laptops they came in and the announcement thereafter was onerous and the clerks were tired and the members of the public at the Constituency tallying center impatient. That it was only while in Nairobi the next day that the Returning Officer for Kuria West was informed that the results for those two stations were missing. That since he had the Form 35s with him he sought to scan them and send them to the County Returning Officer only to receive a call that as the people were getting impatient it been agreed between the County Returning Officer, the candidates and party agents that the results be read without them. That as the results had already been announced at the polling stations and at the Constituency tallying center the agents were already aware of the result and it would not have made a difference. The court was told that the omission of those two stations was not deliberate but an accident by IEBC staff who had worked continuously for a period of over 48 hours.

In regard to Rongo constituency it was admitted that there were two Constituency Form 36s. The court was however told that what was used to announce the results was the handwritten form, EXB- EAO 11 at page 65 of the Petitioner's bundle of documents. When the figures were however posted to the computer it was found that there was an error in the arithmetic; that the aggregate votes for all three candidates were incorrect. Whereas the manual addition showed 1077 for Tom Joseph Mboya, 11,920 for Obado Zachariah Okoth and 20,249 for Oyugi Edward Akong'o the computer showed 1089 for Tom Joseph Mboya, 12119 for Obado Zachariah Okoth and 20,653 for Oyugi Edward Akong'o. There were also errors in votes cast and rejected votes. The arithmetic was corrected and the correct totals were subsequently used to do the tally. The court heard that the posting and corrections were done in the presence of the candidates' agents and that Peter Njagah (PW2), the agent for the Petitioner appended his signature to the corrected version just as he had done on the handwritten version. When it was put to the Returning Officer for Rongo (RW5) that even the printed Form 36-" EAO-11" had errors he admitted that there were indeed several errors but stated that those were small typographical errors which when corrected did not change the result. The court was told that these errors were detected when the Respondents were preparing for this case. That at the time of the actual tallying the transposed figures

not examined and all the Returning Officer was interested in was the totals. The court was told that those were human errors. That the clerks had not slept for 2 days and so the errors were expected. The errors cut across and did not favor a particular candidate.

It was further admitted that at Uriri Constituency a station called Midida was completely left out in the tally although it had 307 registered voters out of who 292 had voted. The court was told that that too was an error. The Returning Officer (PW1) admitted to numerous other transposition errors however, he denied that he was found holed up in a dark room with three other IEBC officials in a suspicious manner. He contended that the errors were not intentional. He stated that the conduct of the election at Uriri was excellent and rated his performance at 90% given that these were very complex elections. He reiterated that the errors cut across and conceded that they affected the result in that once corrected the winner's margin increased. He denied that the ODM Chief Agent was sent away from the tallying center and contended that he was allowed to sign Form 36.

In Kuria East there was only one transposition error where at Station 020 the 3rd Respondent was given 8 extra votes. The Petitioner's votes were however not affected.

In Kuria West apart from omitting Biamiti and Kubwaha Polling stations it was conceded that the name of the Petitioner was missing in Kengariso Polling Station Form 35. The court heard that that arose as a result of a mix up of names with a candidate for the Senate seat. Even then the result entered under his name in Form 36 was 137 votes yet Form 35 showed he had obtained 63 votes. The Returning Officer (PW3) attributed this to human error. He contended that the Form 35s had no errors but that there were arithmetic errors in Form 36.

In regard to the allegation that he doctored the results of his constituency long after the election he explained that all he did was to download and print a form for someone who wanted it; that because of his religion he stamped and appended the date on which he issued it rather than back date it to the date of the election.

At Nyamaharaga there were results for a nonexistent stream. The Returning Officer attributed this to an oversight.

Similarly the errors that occurred in the transposition of the results in Suna West were attributed to human error. It was conceded that the results for Mancha Primary School were wrongly keyed in so that instead of giving the Petitioner 154 votes which is what he had obtained those votes were posted to Tom Joseph Mboya's column. The Petitioner was given 18 votes which is what Tom Joseph Mboya got. The Returning Officer (RW4) however contends that the mix up did not in any way affect the results and may have occurred because of the order of names in Form 35 and 36 differed.

In respect of the tallying it was conceded that there were two Form 36s. the court heard however that one form had an error in the aggregate results for the Petitioner. That it showed he had garnered 22,454 votes but his aggregate should have been 22000 votes. The court heard that it was after announcing the results that the Returning Officer noticed the error in the aggregate/ totals. Since he had already left for Nairobi he called his Deputy and instructed him to sign a corrected copy which he then sent to the County Returning Officer. The court heard that the results for the polling stations were the same in both forms and that only the totals were different. That it was the corrected Form 36 that was sent to the County Returning Officer and which was used to do the final tally.

The County Returning Officer disputed that he announced the results from a laptop. He contended that he first tallied the results, the agents confirmed the same, and they signed the Form whereupon he

announced the same. He also contended that he gave the Petitioner the county Form 36 and contended that the Petitioner was not entitled to ask him for the constituency forms. He stated that there was only one original county Form 36 but that as many as were required were oriented while others were photocopied. He stated that regarding the announcement of the final results without those of Kubwaha and Biamiti it was after consultation with the agents of the parties that it was agreed that the results could be read. He denied that the results for Suna West were manipulated and contended that what occurred was correction of an error in the totals. He owned up to the error regarding to Mancha and stated that it was substantial. He denied that at the Tallying Center he engaged in unusual consultation with the 3rd Respondent. He stated that he only engaged the parties on official matters like when he was trying to bring them to a consensus. He denied that he colluded with the 3rd Respondent to deny the Petitioner his win.

The 3rd Respondent opposed the Petition. He filed his Answer to the Petition and Replying Affidavit on 30th April 2013. He also filed two further affidavits dated 21st May 2013 and 27th May 2013 respectively. He was also cross examined by the Advocates for the Petitioner and for the 1st and 2nd Respondents. His evidence is that in this election he was the Peoples Democratic Party (PDP) of Kenya candidate. That he was declared the winner, was gazetted as such and subsequently sworn in and issued with a certificate. He stated that before the results were announced at the Tallying Center the Returning Officer called all the candidates to verify the same. That the candidates together with their agents verified the Form 36s and once it was agreed that the results were correct the agents signed and the Returning Officer then announced the same and declared him the winner. He was thereafter issued with a certificate of results. He denied that his campaign team, agents and himself engaged in any electoral offence or irregularities. He testified that Magolo who is alleged to have been found bribing voters and who was said to be his supporter was arrested bribing on behalf of another candidate. He denied that he was his supporter and stated that he did not even know him. He produced certified proceedings and Ruling of the case in Rongo- **CR case No 92 Of 2013 Republic v Joseph Onyango Magolo** as proof that in any event the said Magolo was acquitted under section 210 of the Criminal Procedure Code as the prosecution did not establish a prima facie case sufficiently to warrant him to be put on his defence- (see EXB R31)

He disputed that the Petitioner lost 174 votes through manipulation of the figures by the 1st and 2nd Respondents and stated that the election was conducted in accordance with the Constitution, the Elections Act and the Regulations. He maintained that he was validly elected Governor of Migori County. Admitting that there were errors, irregularities or discrepancies in the tallying at the Constituency and County level he stated that the same affected him too. He told the court that accuracy is never 100%. He tabulated those errors at paragraph 25 of his Replying Affidavit but stated that the effect of all the errors is to increase the margin of his victory.

He stated that the Petitioner and his witnesses have been extremely economical with the truth and have selectively picked on the few discrepancies in their favour and also relied upon tallying and information from unauthorized sources. He contended that the 1st and 2nd Respondents' officers read out the results loudly in their respective stations and affixed the results at conspicuous place and that he witnessed such results torn by disappointed voters and/ or agents.

He further stated that he reviewed results from his various agents at the polling stations and tallying centers. That he obtained all the Form 35s and all that one required to do was make a request to IEBC. He disputed that the final results were read from a laptop and stated that it was the results read at the various constituency centers that were read at the County tallying center.

Regarding the failure of the electronic devices he contended that the problem was not unique to Migori

County. He denied that he consulted with the County Returning Officer in an unusual manner. He stated that he addressed the officers publicly and raised his concerns as a candidate with decorum from time to time.

He revealed that in respect of Kubwaha and Biamiti it was resolved by the candidates and chief agents that since their omission would not affect the result the same could be announced without them. He stated that he attributed the errors to human error and stated that the elections were free, fair and credible. He urged this court to find that the Petition is frivolous and is based on rumours and that it ought to be dismissed with costs.

On 13/6/2013 this court ordered a scrutiny and recount of all the ballots cast in respect of Ombo Polling Station and Kengariso Polling Station. It also ordered an examination of the tally in respect of all the eight constituencies that form Migori County. The Deputy Registrar was directed to look at the tally done by the Returning Officer and confirm if indeed there were errors in the posting of results from Form 35s to Form 36. He was then to correct those errors and come up with a correct tally. In so doing he was to examine all the Forms 35. The parties were permitted to have at most two agents at the scrutiny, recount and re-tally. The exercise went on smoothly and I must thank all those who were involved for their discipline, diligence and timeliness.

The Deputy Registrar's report was received by this court on 5/7/2013 and was availed to the Advocates as it was to form part of the proceedings. The report states that the ballot boxes for Ombo Polling Station and Kengariso Polling Station were received in good condition and with their seals intact. The only observation was that the box in Kengariso did not have Form 35 affixed. Once the team had subscribed to the oath of secrecy the boxes were opened (one after the other), and the results after the recount and scrutiny were as follows:

Ombo Polling Station

Edward Akong'o Oyugi- 303

Tom Joseph Mboya - 4

Zachary Okoth Obado - 147

Rejected votes - 4

Votes cast - 458

Kengariso Polling Station

Edward Akong'o Oyugi - 72

Tom Joseph Mboya - 74

Zachary Okoth Obado - 219

There was no notable observation made in respect of Ombo but for Kengariso one vote that had been validly cast for Tom Joseph Mboya was found to have been wrongly included in the rejected votes and so it was returned to him. The tallying sheet also showed that Oyugi's party was The National Alliance (TNA) instead of ODM. For the tally the Report states that the Deputy Registrar together with the agents

for all the parties went through the Form 35 in all polling stations and compared the entries therein with what was entered in Form 36 for the constituency. This was done in respect of all the eight constituencies. It is indicated that several errors were discovered and based on Form 35 the correct entries were made. The Deputy Registrar reports that parties were able to agree on the valid votes for each candidate. Save in three polling stations Nyamaharaga PAG Stream 2, Rosabara Primary School and Kubinto Primary School the exercise revealed that during the transfer of results (transposition) from Form 35 to Form 36, a candidate would be given less or more votes and their tallies would be interchanged in other cases. In Kuria West there were results for a polling station that did not exist. This was Nyamahanga ACK where Martin was given 10 votes, Obado 18 and Oyugi 300. Total valid votes and total votes cast were indicated as 328.

It was confirmed that the results for Biamiti and Kubwaha had been omitted in Form 36. In Nyamaharaga the agents of the two parties could not agree whether Obado garnered 158 votes or 159 given the cancellation in Form 35. In Rosabara 073 Kuria West the parties were unable to agree on whether Obado got 124 or 122 votes. In Kubinto, parties were unable to agree whether Oyugi got 39 votes or 139 votes but the Deputy Registrar adopted 139.

All in all the final tally as corrected showed the following results:

Tom Joseph Mboya	- 9,772 (nine thousand seven hundred and seventy two)
Zachary Okoth Obado	- 124,702 (one hundred and twenty four thousand seven hundred and two)
Edward Akong'o Oyugi	- 124,125 (one hundred and twenty four thousand one hundred and twenty five)
Valid votes	- 258,602 (two hundred and fifty eight thousand six hundred and two)
Rejected votes	- 2,267 (two thousand two hundred and sixty seven)
Total votes cast	- 260,801 (two hundred and sixty thousand eight hundred and one)

This court was left to make a final determination in respect of Nyamaharaga PAG Stream 2, Rosabara and Kubinto where the parties could not agree on the actual votes garnered by the candidates as the Form 35s were not clear.

The Advocates for the parties duly filed their submissions and also attended to highlight the same. Briefly, for the Petitioner it was submitted that he had adduced evidence to show that the 2013 Elections for Governor were not validly conducted; that the election was characterized by irregularities and breaches particularly of Regulations 79 and 83 of the General Regulations. That the election could not have been validly conducted when there was non compliance with the Law (Articles 2, 10, 81 and 88 of the constitution) and hence not transparent, impartial, neutral, efficient, accurate, accountable, free and fair as provided under Article 81 of the constitution. That the electorate in Migori were denied their right to vote in a free and fair election; that by granting prayer 1 of the Petition this court recognized there was a problem with the election and wanted to be sure and that Section 83 justifies the court to exercise its power to declare the election void.

It was submitted that the admission by the Returning officers for Rongo and Suna West to supplying two different Forms 36 to the County Returning Officer despite having announced the results put into question the integrity of those results.

It was submitted that the scrutiny and re-tally conducted by the Deputy Registrar showed that there were errors in all the counties. It was contended that those errors affected the result in terms of Section 83 of the Elections Act. On the meaning of 'result' Counsel cited the case of **Mbowe v. Eliufoo [1967] EA** where at page 242 it was held:-

“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 it was just determined.”

He submitted that the principle was restated by Kimaru J in **William Kabogo Gitau v. George Thuo and 2 Others (2010) eKLR** where he held:-

“The fact that the said results reflect that the 1st Respondent had won the Parliamentary by more than 19,000 votes is no reason why the irregularities and malpractices should be condoned..... The validity of an election is not dependent on the results alone but is a factor of the entire electoral process as recognized under the Constitution, the National Assembly and Presidential Elections Act and Regulations.... ”

Further that in **Bernard Shinali Masaka v. Dr. Boni Khalwale & 2 Others Kakamega E.P. No. 2 of 2008** Lenaola J nullified the election after finding that there were too many errors. That out of 74 inspected Forms 16A only 1 complied with the prescribed particulars.

Counsel also cited the findings of Magara J, as he then was, in **Joho v. Nyange & Another (supra)** and **Manson Oyongo Nyamweya v. Omingo Magara & 6 Others (2009) eKLR** Kisii. He submitted that the errors and irregularities in the Migori County Gubernatorial elections are not minor; that the same were deliberate intended to manipulate the final result. That the 3rd Respondent even confessed to a Parliamentary candidate in his party organizing for bribery of voters at God Jope.

The court was urged to find that this is a clear case for it to exercise its powers under Section 83 of the Elections Act. That the view that the errors should be ignored because they only increase the winner's margin runs counter to the authorities cited. That the margin of the Petitioner's loss was only 163 which is too close a call.

The Petitioner belabored the 2nd Respondent swearing of an affidavit on behalf of the 1st Respondent. He submitted that by the time he did so he was not an employee of the 2nd Respondent. That therefore the 1st Respondent does not have an affidavit of a principle officer.

Further that the 1st and 2nd Respondents should be responsible for the costs of this Petition.

Very briefly, Mr. Murugu, Advocate for the 1st and 2nd Respondent submitted that the Petitioner did not prove non compliance with the constitution, the Elections Act or the regulations made there under.

That the voting process, vote counting, announcement of results and the delivery of the ballot boxes and the results to the Returning Officers and the tallying and announcement of the final results were all conducted procedurally. He submitted that the 1st and 2nd Respondents witnesses admitted to transposition and arithmetic errors in the Constituency Form 36 but explained that those were inadvertent human errors which did not advantage or disadvantage a select candidate. He contended that the errors did not affect the result and that the outcome of the election was a true reflection of the will of the voters in Migori County. He invited this court to be guided by the finding of **Maraga J in Joho**

v. Nyange & Another (No. 4) that:-

“Errors are to human. Some errors in an election like this conducted under a frenetic schedule are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental they should always be excused and ignored. But where deliberate irregularities or forgeries are committed different considerations come into play. In their case, however, serious consideration should be given as to what effect if any, that those errors whether innocent or deliberate, have on an election before the same is vitiated.”

And that of Okubasu, Mbito & Mwera J in **Munyao v. Munuve & 4 Others (2008) 2KLR (EP) 20** where they pronounced themselves thus:

“We however find that the complaints raised were minor and could not have affected the results of the election. The grounds on which the Petition was based were very weak and have not in our view been proved.... In our judgment, whatever little deficiencies that may have occurred in the conduct of the elections have not been shown to have affected the outcome of the result thereof.....”

He accused the Petitioner of lack of candour for alleging in his submissions that he did not know the result of the election despite the re-tally ordered by the court. Also the submission that the final results were shrouded in secrecy yet his own witness Jared Omach states that the County Returning Officer called the Chief Party Agents to the table and asked them to confirm the figures before he announced the omission. That the audit by Jared Omach was done without the benefit of all the Form 36s yet in his own affidavit Jared Omach admits that the same had been supplied to their agents.

As to the allegation that the County Returning Officer flouted the law by announcing the results from a laptop and for failing to first announce the results from each constituency. He referred this court to Regulation 87 (3) and contended that there is no law that prohibits reading of results from a computer or requiring a County Returning Officer to announce the results from all the constituencies.

On the scrutiny and re-tally ordered by the court he admitted that the same noted many errors but submitted that the test is not on the number of errors but on their effect. Applying the test in the **Joho v. Nyange & Another(2008)3klr(EP)** case he submitted that the errors did not cumulatively reverse the results of the election and so the same should be confirmed.

That the 3rd Respondent garnered the highest number of votes and the 2nd Respondent was under a legal obligation to declare him the winner and thereafter to publish his win in the Kenya Gazette. He urged this court to find that the declaration and subsequent gazettement is valid.

On the submission that the 1st Respondent did not have authority to swear an affidavit on behalf of the 2nd Respondent he submitted that the same is sworn in respect of and limited to the happenings of 4th March 2013, General Election at which time the 1st Respondent was an authorized employee of the 1st Respondent. He urged this court to find that the affidavit is properly on record if not completely ignore that submission which in his view amounts to making an application in the submissions.

He also urged this court to disregard the submissions made by the Petitioner regarding his own findings during the scrutiny and re-tally. He submitted that it is without the law and constitutes an abuse of the court process. Referring to the Forms 35 for Biamiti and Kubwaha he contended that there is no requirement that the names of candidates on Form 35 should be printed. He contended that even the forms that did not have the names pre-printed were legal and authentic.

He dismissed the alleged statistical analysis of the results by Jared Omach saying that his evidence that his report was based on only two constituencies namely Rongo and Suna West and that he relied on the notes of the ODM Chief Agent rather than on Form 35 causes one to seriously doubt Jared Omach's competency and the soundness of the Report. He concludes that Jared Omach misled the Petitioner into believing that he won the election with 174 votes.

He further submitted that the Petitioner has abandoned the main prayer petition and is now pursuing the alternative prayer based on the report of the re-tally. He compares this with a student who having failed an exam but believing he passed asks for a remarking and when the same shows that he scored even lesser marks, he says he has proved that the marking was wrong and asks that the exam be nullified and another held. That such a student would undoubtedly not be taken seriously.

Quoting from The Black's Law Dictionary meaning of an alternative prayer he submits that the main prayer having been granted the alternative prayer is averted and is therefore available to the Petitioner.

On the issue of costs he has submitted that the Petition was based on an unfounded belief that the Petitioner won the election. That he has by his own prayer disproved his averments and as he has not proved the Petition to the standard required. He should be condemned to pay the costs of the 1st and 2nd Respondent.

These submissions are echoed by Mr. Sagana Advocate for the 3rd Respondent who further submits that a party is bound by their pleadings and allegations not raised in the Petition cannot be considered unless they are directly connected with the complaints in the Petition and the Petitioner's affidavits. He has cited the case of **Kizza Besigye v. Electoral Commission and Yoweri Museveni** and also **Hawi Shanker v. Gadhi (2002) 3 LRC.**

On the burden of proof he has cited the Supreme Court's decision in **Raila Odinga v. IEBC & Others** and **Mbowe v. Eliufoo (1967) EA** and s.83 of the Elections Act. He concludes by urging this court to find that the Petitioner has not proved his case and that the same should be dismissed with costs to the Respondents.

From the pleadings, evidence and submissions the following issues arise for determination:

i. **Whether the election of the Governor for Migori held on 4th March 2013, (was credible, free and fair), whether it was in conformity with the Constitution of Kenya 2010, the Elections Act and Regulations thereunder and other Laws relating to elections.**

ii. **Whether the declaration of the 3rd Respondent as the Governor was valid or whether it ought to be nullified and the Petitioner declared the Governor.**

iii. **Who should bear the costs of this Petition"**

iv. The Law governing elections is to be found in inter alia:

a. Article 81 of the Constitution which sets out the principles with which the electoral system must comply and Article 81(e) provides that elections must be free and fair and shall be:-

- i. By secret ballot
 - ii. Free from violence, intimidation, improper influence or corruption;
 - iii. Conducted by an independent body
 - iv. Transparent; and
 - v. Administered in an impartial, neutral, efficient, accurate and accountable manner.
- b. Article 86 of the Constitution which enjoins the IEBC, which is the body charged with the conduct of elections in Kenya, to ensure the following at every election:-
- a. Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
 - b. The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station
 - c. The results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
 - d. Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

Section 25 of the IEBC Act, 2011 provides the principles which the commission must observe in fulfilling its mandate. Principles (a) to (e) are a replica of Article 81 of the Constitution. In addition to that the commission must observe ethical conduct and fairness. The Act has also provided for a Code of Conduct for the officers and employees of the commission.

The Elections Act 2011 and the Regulations thereunder then provides for the conduct of the elections.

The officers of the Commissions are of course also bound by the national values and principles of governance as provided under Article 10 of the Constitution.

That is the law that the Petitioner must satisfy this court was not complied with for his Petition to succeed. He must do so on a standard though higher than a balance of probabilities is lower than proof beyond reasonable doubt and where he alleges an electoral offence that standard is higher. I am fortified on this by the decision of Maraga J, as he then was, in **Joho v. Nyange & Another (No.4) (2008) 3KLR (EP)** where he expressed himself as follows:

“..... (2) The burden of proof in election petition 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 an election petition is beyond reasonable doubt. Like in fraud cases, the standard is higher than on a balance of probabilities and where there are allegations of election offences a very high degree of proof is required.....”

This too was the standard of proof applied by the Supreme Court in **Election Petition No.5 of 2013 Raila Odinga v. IEBC & Others.**

The court must also be guided by the provisions of Section 83 of the Elections Act which provides that:-

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

While interpreting this section in Raila Odinga v. IEBC the Supreme Court Judges stated as follows at page 71:

“Where a party alleges non conformity with the electoral law, the Petitioner must not only prove that there has been non compliance with the law, but that such failure of compliance did affect the validity of the elections.....”

I do however agree with the position that this would only apply where the Commission and its officers conduct the elections in conformity with the principles laid out in the Constitution and the written Law but nevertheless errors and irregularities occur. Where the law is not complied with at all then there is no debate and the election must be nullified.

The evidence adduced must also be credible, cogent and consistent-see **Joho V Nyange (supra)**.

In this case there was no complaint regarding the manner in which the actual voting was conducted at the polling stations. The Petitioner did however testify that his name was missing from the register. He was however allowed to vote and clearly that did not affect the result.

The allegation that some electors did not find their names in the register or that some of the polling stations opened late were not proved. Nobody swore an affidavit to that effect and that allegation is made only by the Petitioner. There was no evidence of violence or intimidation and the allegation of bribery was also not proved. Anne Omondho (PW 3) did not prove her allegation that the two people caught bribing voters were doing so on behalf of the 3rd Respondent. Listening to her carefully it appeared like she was relying on something she had heard-hence hearsay. Although the 3rd Respondent disassociated himself from those two people he went out of his way and obtained the proceedings of the criminal case which he tendered as proof that the man was absolved from those allegations. Indeed the proceedings disclose that he was acquitted under Section 210 of the Criminal Procedure Code. The allegation of bribery cannot therefore hold.

The Petitioner also alleged that he did not have agents in the polling stations as the 1st Respondent refused them accreditation. It is instructive that not even one agent attended court to prove that fact and the Petitioner's star witness Jared Omach attested to the presence of party agents in the polling stations. The evidence on that issue was therefore contradictory.

He alleged that there was non-compliance with Regulation 79 of the Elections (General) Regulations in that the agents were not asked by the Presiding Officers to sign the Form 35s, and were not given copies. He was once again contradicted by Jared Omach who testified that many party agents signed the forms. He however alleged that they were not given copies of the forms. No agent swore an affidavit to say the presiding officer did not give them a copy of the form and in any event Jared Omach is on record however as stating that the petitioner's Secretariat, which he headed, received those results. My finding is that even were it true that copies were not given to the agents no prejudice was occasioned to the petitioner. Looking at the Form 35s submitted by the 1st Respondent I noted that they were signed by agents. It was upon the Petitioner to prove that his own agents did not sign. Moreover, Regulation 79 (b) provides that the refusal or failure of a candidate or agent to sign a declaration or to record the reasons for their refusal to sign shall not by itself invalidate the results announced.

The Petitioner also cited the failure to affix the results at the polling stations and tallying centers. He did not prove it. His evidence was that he visited only very few stations, which he did not even name. He emphasized that he could not be everywhere. So a question arises as to how he knew results were not affixed when he did not visit the polling stations. Needless to say there was no cogent evidence of that fact. The 3rd Respondent testified that the results were affixed in most polling stations that he visited but the same were destroyed by voters who were disappointed with the result. This was not rebutted.

The Petitioner further complained and testified that the County Returning Officer did not comply with Reg 83(1) in that he did not announce the results of each constituency before declaring the final result. The declaration of results at the county is governed by Reg 87(3)(a) and the same does not require announcement of the results received from the Constituency and so once again that ground cannot hold. There was evidence that results at the constituencies were tallied and announced at the constituencies in compliance with Reg 83(1).

The more serious allegations at the polling station were in regard to Kengariso Primary School where the Form 35 did not have the petitioner's name and Ombo primary School where there were cancellations on Form 35. It is in regard to these 2 polling stations that the court ordered a scrutiny and recount of the ballots. The report of the Deputy Registrar revealed that the votes attributed to the Petitioner in Form 36 were indeed his save that there was omission to include one vote. Mohamed Adan Ali, the Returning Officer (RW3) gave a plausible explanation as to why the petitioner's name was not on the form. He stated that instead of writing the Petitioner's name that of a candidate in another election was mistakenly inserted. It is common knowledge that there were 6 elections going on at the same time and this was a complex election and such mistakes were bound to happen. This was the only error of its kind out of the over 500 polling stations and no evidence was adduced to show that it was deliberate. This court would have been concerned if the Petitioner's name was found to have been missing from the ballot paper but that was not the case.

The problem at Ombo Stream One were the cancellations in Form 35 and the mix up of the total votes cast in words and figures. When the ballot box was opened and a physical count done the total was confirmed to be 458 votes and not 454 as shown on Form 35. Rejected votes were 4 just as in the form but the votes for the Petitioner and the 3rd Respondent were interchanged. The recount revealed that the Petitioner had garnered 303 votes and the 3rd Respondent 147 votes.

The pleadings and evidence only pointed out to problems in those 2 stations. Issues arising in other polling stations were only raised in the submission and the Respondents were not therefore in a position to call evidence on those. Many of the issues raised touched on tallying of results not what transpired at the polling stations. If the Petitioner wanted he could have asked for a scrutiny and recount of all the votes. It is instructive that although at the beginning he intimated he would do so he never got round to doing it. The scrutiny and recount ordered by this court was never intended to be a fishing expedition and any effort to treat it as such must be resisted. Submissions ought not to introduce new evidence and I am in agreement with the holding in **Nga'ng'a & Another V Owiti & Another (No.2) (2008) 1 KLR 9(EP)** where the 3 Judges stated:

“ A final submission is a way by which counsel or parties crystallize the substance of the case, the evidence and the law relating to the case. Final submissions are not strictly part of the case the absence of which may prejudice a part. They are not evidence and they may be heard or even dispensed with. The main basis of a decision in a case are the claim properly laid, evidence fully presented and the law applicable.”

All in all this court did not hear any complaint that the voting method used at the polling station was not simple, accurate, verifiable and transparent. There was also no complaint regarding the counting, tabulation and promptness of announcement of results by the presiding officer at each polling station. There was also no allegation that the 1st Respondent did not ensure that appropriate structures and mechanisms to eliminate electoral malpractice were put in place. It therefore my finding that the polling itself complied with the law (see Article 86 of The Constitution).

The problem that arose and which is faulted by the Petitioner was in the tallying of votes at the Constituency and the County. Article 86(c) of The Constitution enjoins the 1st Respondent to ensure that the results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer. Whereas there was openness in the tallying the Petitioner has proved that tallying was not done accurately. There were many errors in the transposition of results from Form 35 to Form 36. In some instances the results for the candidates were interchanged and in others the candidates were given more than they had garnered. In others they were given less. In Suna West an arithmetic error occurred in the aggregate results of the Petitioner so that instead of 22000 votes it was shown as 22454 votes. Similarly in Rongo Constituency there were errors in the posting of results. In Kuria West, results for 2 polling stations, to wit, Kubwaha and Biamiti were not posted to Form 36. The 1st and 2nd Respondents admitted these errors and more were to be discovered at the examination of the tally conducted by the Deputy Registrar.

Mr Mwenesi, Advocate for the Petitioner urged this court to nullify this election on account of these errors. He submitted that the same were deliberate, false, fictitious, unlawful and fraudulent and that they affected the result. That the scrutiny and recount of the 2 polling stations gave us a 100% positive result in irregularities so chances were 98.3% that all polling stations had irregularities. He contended that a flawed election cannot produce a legitimate result. My considered view on this is firstly that irregularities must be proved not guessed. Secondly the 2 polling stations were not picked at random but deliberately. As I have stated those were the only stations where errors had been pointed to in the evidence. The Petition, the supporting affidavit and the evidence dwell on the irregularities in the tallying especially in Suna West and Rongo. However for Suna West it is clear for anyone who cares to see it that there was an arithmetic error in the aggregate for the Petitioner. When Jared Omach did the arithmetic in court he conceded the total was 22000 but not 22454 as had been stated on the tallying form. Although the examination done by the Deputy Registrar found that even the figure 22000 was incorrect I must say that I found it very dishonest of Jared Omach to insist on hanging onto an erroneous tally even when simple arithmetic revealed the error. Again the Petitioner relied on unofficial sources for his results and by this I

mean the media. The 2 journalists who gave evidence admitted they got the figures from other colleagues. Clearly this was hearsay.

For Rongo the complaint was that there were 2 Form36s with different results hence making it impossible to know what the results were. The 2 forms were exhibited in court; one was handwritten and the other typed and indeed both had different results. The Returning Officer (RW5) when put to task stated that the posting of the results by pen and into the computer was done simultaneously but the manual posting was completed first and using that form he announced the result. However when posting into the computer was completed and the results were tallied electronically an error was discovered so that the Petitioner got 20653 votes instead of 20249 and the 3rd Respondent 12119 instead of 11920 which figures are what he had been promised would be used in the final tally. This court was urged to find as Lenaola J did in **Benard Shinali Masaka V Dr Boni Khalwale & 2 Others Kakamega Election** Petition No. 2 of 2008. My finding is that the circumstances in that case were very different. There the problems started right from the polling stations. Majority of the Form 16As which were the equivalent of our Form 35s were not signed by the Presiding Officers. The Judge found that out of 78 forms only one met the expectations of regulation 35 A. Page 51 of that judgment sets out several anomalies in regard to Form 16 A none of which occurred here. In the instant petition it was noted by the Deputy Registrar that save for 3 polling stations which were left to this court to determine all the agents for the respective parties agreed on the valid votes garnered by each candidate. This was unlike in the Boni khalwale case where because of the irregularities it was impossible to do so. For Rongo Constituency the final tally was found to be Martin Tom Mboya 711, Zachary Obado(3rd Respondent) 12414 and Edward Akongo Oyugi (the petitioner) 20669 which was even more than the tally his secretariat had. I could only compare this case to **Justus Mongumbu Omiti V Walter Enock Nyambati Osebe & 2 Others [2011]eKLR** but again there Makhandia J, as he then was, found that there was a deliberate interference of the tally by a tallying clerk who seemed to have been specifically positioned there to favour the Respondent. It was also amazing that even long after the election the returning officer could not with certainty say who the winner of that election was. That was not the position in this case. Here the errors in the tally cut across, a fact that was confirmed by the audits done by the parties and also by the Deputy Registrar's report. An allegation was made that the 3rd Respondent kept moving in and out of the tallying hall with the Returning Officer during the tallying a fact which he denied. No other evidence was adduced on this and it therefore remains the Petitioner's word against that of the 3rd Respondent. On the whole it is evident that the errors affect all the candidates and cannot be said to have favoured or prejudiced any one party.

The Returning Officer for Kuria West gave a plausible explanation for omitting the results for Kubwaha and Biamiti. It is also apparent that those present at the tallying center including the petitioner agreed that the results could be announced without those of the 2 polling station. It is clear from the Petitioner's affidavit that the only reason he protested was that the County Returning Officer announced the results using the Form 36s which had the corrected figures but not because the results of those 2 polling stations were missing. He conceded to have consulted with the County Returning Officer in the hall and so the contention that they were consulted on that issue cannot not be farfetched. The 3rd Respondent was candid enough to say that he already had the results from those 2 polling stations. I believe the Petitioner also had them as according to Jared Omach they had people in the field collating the results. Those results had been announced at the polling stations and I believe that the candidates were aware that they would not have made much difference in the final results. My finding is that the errors in this case though negligent were not deliberate.

In **Joho V Nyange & Others**(supra) Maraga J, as he then was, had this to say about such errors:

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

human activity. If the errors are not fundamental they should be ignored. But where deliberate irregularities or forgeries are committed different considerations come into play. In either case however, serious consideration should be given as to what effect if any that those errors whether innocent or deliberate have on an election before the same is vitiated .If they are minor and do not affect the result they should be ignored...Not every non-compliance or every act or omission in breach of the election regulations or procedure that invalidates an election. As I have said minor breaches will be ignored. An election is said to be none- compliant with the law as to an election when it is conducted in violation of an election by ballot....And the result of an election is affected when the cumulative effect of the irregularities reverse it.....”

I agree with this holding. I do also agree that in the context of our case where the actual voting was not faulted and the issues raised are mainly on the tallying the quantitative test alone will not do. The court must apply the qualitative test as well so that the entire process and not just the tallying is examined. As Musinga J,as he then was observed in **Manson Nyamweya V James Magara & 2 Others [2009] eKLR** the court is not here dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. He goes on to state as follows:

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

As I have stated the voting process was not faulted and the only irregularities raised in regard to what took place in the polling stations were not proved to the standard of proof required. As for the tallying the petitioner seemed to agree with the results in 6 out of the Constituencies as they corresponded to what his Secretariat and the Chief Agent of his party had. He would however have preferred that the results were announced based on forms with erroneous results even when those errors were obvious. That is not what should happen in a democratic state. I do not agree with his statement that the Returning Officer altered the results. In my view he had a duty to correct the errors which were detected before declaration of the results. He was after all expected to be efficient in his duties. The results in this case were verifiable by the paper trail left behind, to wit, the Form 35s which are the primary documents. As stated elsewhere in this judgment, during the re-tally conducted by the Deputy Registrar in a majority of the polling stations all the parties were in agreement on the valid votes garnered by each candidate. Only in 3 stations was it left to this court to make a determination and even then in 2 of those stations the dispute was in regard to one or two votes which would not affect the result. I here below reproduce the Deputy Registrar’s remarks for emphasis:

“ COUNT TALLY - MIGORI

After examination of all the form 35s and form 36s for the eight constituencies, the Deputy Registrar, together with all the agents computed the final tally for the three candidates at the county level by summing up the valid votes garnered by each in each constituency. It is worth noting that save for the three polling centers referred to the Hon. Judge's final determination (Nyamaharga PAG primary school stream 2, Rosabara primary school and Kubinto primary school), **all agents for the respective parties agreed on the valid votes garnered by each candidate.** Summing up the figures we had, the final tally for each candidate at county level was-:(emphasis mine)

NAME	VOTES IN FIGURES	VOTES IN WORDS
TOM JOSEPH MBOYA	9772	NINE THOUSAND, SEVEN HUNDRED AND SEVENTY TWO
ZACHARY OKOTH OBADO	124702	ONE HUNDRED AND TWENTY FOUR THOUSAND, SEVEN HUNDRED AND TWO
EDWARD AKONG'O OYUGI	124125	ONE HUNDRED AND TWENTY FOUR THOUSAND, ONE HUNDRED AND TWENTY FIVE
VALID VOTES	258602	TWO HUNDRED AND FIFTY EIGHT THOUSAND, SIX HUNDRED AND TWO
REJECTED VOTES	2267	TWO THOUSAND, TWO HUNDRED AND SIXTY SEVEN
TOTAL VOTES CAST	260801	TWO HUNDRED AND SIXTY THOUSAND, EIGHT HUNDRED AND ONE

I have examined the Form 35s for the 3 stations left for my determination. In Rosabare the total number of valid votes cast was 168 so Zachary Obado must have obtained 124 votes. In Kubinto the total number of valid votes cast was 136 and so the Petitioner could only have garnered 39 and not 139. To give him 139 would mean that those who voted were more than were registered to vote an allegation that was not made here It would have been very easy for me to say , that because there were errors in the tallying a by-election must be held. However the work of the court is not to take short cuts but to uphold the law and that law requires me to examine the entire process as I have done. Having done so I find that though only by a small margin the people of Migori expressed their will at the ballot. Errors were made by those who did the tallying but those errors were not proved to have affected the result. As can be seen from the Deputy Registrar's report rather than reverse the result the margin of the 3rd Respondents win increased from 163 to 577 proving wrong the Petitioner's averment that he won this election by 174 votes.

Regarding the allegation that RW 3 altered the results long after the elections I was satisfied with his explanation that he could only append the date on which he printed the form as to do otherwise would have been dishonest. There was no proof that other than the date anything else on the form had changed.

I must also comment on the issue raised by the Petitioner that the declaration was made from a computer rather than a hard copy in contravention of the law. I do agree with Mr. Murugu Advocate for the 1st and 2nd Respondents that the law does not prohibit reading of results from the computer. I also find that unless it is shown that it affected the results, which it was not, that would be tantamount to "elevating technicalities to a fetish" which is now forbidden by Article 159 of the Constitution.

Accordingly I find that the declaration of the 3rd Respondent as the Governor for Migori County was valid and that answers issue number 3.

Who then should bear the costs of this Petition" The Petitioner has established that there were errors in the tally. These errors were admitted by the officers of the 1st Respondent including the 2nd Respondent. Even the 3rd Respondent had a table of errors in his own tally and this court also confirmed the errors. The same were occasioned by the negligence and casual manner of the officers of the 1st Respondent. The 1st Respondent would do well to ensure that its officers are more diligent and efficient but for now it must bear the costs of the Petition.

In the end this court makes the following orders:

- a. **That this Petition is hereby dismissed.**

- b. **A certificate under Section 86 to issue.**

- c. **That the 1st Respondent shall bear the costs of the Petitioner and the 3rd Respondent. The 2nd Respondent shall bear his own costs.**

- d. **That the costs be taxed by the Deputy Registrar but so as not to exceed Kshs 1 million(one million shillings)for each party bearing in mind that this matter proceeded very expeditiously thereby saving parties costs.**

Before signing off I must thank Counsel for their diligence and commitment and for their immense legal contribution which has enriched this judgment. Together with their clients and witnesses they also persevered long hours and that is commendable. I must also thank those who attended to listen to the proceedings for their decorum in court. The Legal Researcher, Deputy Registrar and the team that did the recount, scrutiny and examination of the tally must also be commended for their hard work and patience.

Signed, dated and delivered in open court in Homa Bay this 5th day of September, 2013

E. N. MAINA

JUDGE

IN PRESENCE OF:

Mr. Muenesi Advocate for the Petitioner assisted by Miss Ogutu

Mr. Murugu Advocate for the 1st and 2nd Respondents

Mr. Sagana Advocate for the 3rd Respondent

Eudice Okombo Interpreter



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