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Case Class:	Civil
Court:	High Court at Kisii
Case Action:	Judgment
Judge:	Esther Nyambura Maina
Citation:	Odalo Makojwando Abuor v Dalmás Otieno Anyango & 2 others [2013] eKLR
Advocates:	Ouma Advocate for the Petitioner Ngani Advocate for the 1st Respondent Murugu Advocate for the 2nd and 3rd Respondents
Case Summary:	-
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Kisii
Docket Number:	-
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Case Outcome:	Petition Dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	Kshs.800,000
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII.

ELECTION PETITION NO. 11 OF 2013

IN THE MATTER OF PARLIAMENTARY ELECTION IN RONGO CONSTITUENCY 2013

AND

IN THE MATTER OF THE ELECTIONS ACT NO. 24 OF 2011

BETWEEN

ODALO MAKOJWANDO ABUOR.....PETITIONER

VERSUS

DALMAS OTIENO ANYANGO.....1<sup>ST</sup> RESPONDENT

THE RETURNING OFFICER RONGO CONST.....2<sup>ND</sup> RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT

**JUDGMENT**

By the Petition dated 10<sup>th</sup> April, 2013 filed on even date, the Petitioner challenges the results of the 4<sup>th</sup> March, 2013 General Election for Member of The National Assembly for Rongo Constituency. Out of the 6 candidates in that election, the 1<sup>st</sup> Respondent was declared the winner with 18,994 votes. The Petitioner came second with 11,506 votes. The petition was filed in the High Court at Kisii but the Hon. The Chief Justice in exercise of his powers under Section 75 of the Elections Act and Rule 6 of the Elections (Parliamentary and County Elections) Petition Rules 2013 gazetted the Judge sitting at Homa Bay High Court as the election court.

The Petitioner seeks the following prayers:-

- a. **A scrutiny of all the votes cast**
- b. **A scrutiny of the counterfeits (sic) of the votes cast**
- c. **A declaration that the results are null and void and a certificate to issue to that effect to the Speaker of National Assembly.**
- d. **An order that the 1<sup>st</sup> Respondent was not validly elected...**
- e. **A recount of the votes in all the polling stations and if the results are in the Petitioner's favour a declaration that he is the winner.**
- f. **An order that the 1<sup>st</sup> Respondent bear the costs of this Petition and matters incidental thereto.**

The Petition is premised on 9 grounds which briefly are that:

- i. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent failed to take care while operating the BVR and other electronic mechanisms culminating into their actual collapse hence reverting to the manual voting system thus allowing unauthorized persons to vote, stuffing of ballot boxes and double/multiple voting;
- ii. There was a huge disparity between the numbers of votes cast for other elective posts on the one hand and that of the Parliamentary Candidates which is a demonstration that the entire voting or tallying process was marred with irregularities and as such there could be no valid winner of the election as declared by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents;
- iii. That the agents/supporters of the 1<sup>st</sup> Respondent openly bribed voters and induced them into voting for him hence committing an election offence under section 64 of the Elections Act, 2011;
- iv. That on days preceding the general election, the Petitioner's supporters were harassed, assaulted and robbed by the 1<sup>st</sup> Respondent's supporters hence causing immense fear in a number of voters who subsequently voted for the 1<sup>st</sup> Respondent due to fear of repercussion if they voted for the Petitioner hence the election was not free and fair;
- v. That the Petitioner's agents were prevented from accessing the constituency tallying center at Kuja School for the Deaf by both officers of the 3<sup>rd</sup> Respondent, security agents and supporters/agents of the 1<sup>st</sup> Respondent. As such the 3<sup>rd</sup> Respondent failed to ensure that the agents of the Petitioner were present at the tallying center which is a mandatory provision of the law thus compromising the entire process and outcome of the said election;
- vi. That the tallying of the votes was deliberately meddled with in favour of the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent;
- vii. That Form 36 indicated various alterations and the Petitioner's own audit shows a different figure from what the 2<sup>nd</sup> Respondent declared as the results;
- viii. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents allowed unauthorized persons to participate in the electoral process;
- ix. That in Lwala, Minyenya, Nyamuga, Sare-Kamagambo, Ngere, Rakwaro, Rare and Kanga primary schools the votes cast exceeded registered voters.

### **THE PETITIONER'S CASE.**

A total of 11 witnesses filed depositions in support of the Petition and all were cross-examined by the Advocates for the Respondents.

On his part the Petitioner testified that he contested this election under the umbrella of **The Independent Party (TIP)** and that his main contention is not that he lost but that the election was not credible, independent and fair. He stated that although the identification of voters was intended to be

done electronically, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents deliberately caused the electronic devices not to work so that even the dead could vote. He contended that the explanation for the electronic failure at Kangeso which was the 1<sup>st</sup> Respondent's stronghold was not convincing.

On intimidation he stated that one Boy Ochieng a supporter of the 1<sup>st</sup> Respondent harassed and robbed his supporters. He singled out one David Owuor who he stated was robbed of a phone on 29<sup>th</sup> January, 2013. He stated that 3 days later a lady by the name Meresa was also robbed. He contended that they were harassed so that they could vote in a certain way and that that violence affected the result of the election. He further stated that the harassment and intimidation took place in Rongo Town and Opapo center although he could not remember the names of the victims. He made only a verbal report to the Returning Officer. He stated that as a result of that intimidation about 1000 people in Rongo Town, 150 at Opapo and 50 in Kangeso did not vote for him. His evidence was corroborated by Kings Ochieng Adera (PW11) who testified that David Oduor told him that he was beaten by Boy Ondiek. He accompanied him to record a statement which they gave to an Advocate. He also stated that on the eve of the elections youths allied to the 1<sup>st</sup> Respondent drove around town telling people how to vote. He stated that they used a white Probox written Rock at the back but he did not note its Registration number.

The Petitioner went on to state that the 1<sup>st</sup> Respondent colluded with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to employ his supporters as Presiding officers and clerks in majority of the 65 polling stations. He stated that he got this information from one of the other aspirants when they attended a meeting called by the Returning Officer on 3<sup>rd</sup> March, 2013. He could not however verify that information as it came too close to the day of the election.

On bribery, he named 2 people Naftally and Omolo as those who doled out bribes to voters. He stated that although he did not know the names of those who did not vote for him because they were bribed they could be in hundreds or thousands. This was echoed by **Philip Ojuando Abuor (PW1)** who was his Chief Agent and who testified that Orange Democratic Movement Party agents who were campaigners and agents of the 1<sup>st</sup> Respondent bribed votes. He stated that he was told so by his agents but did not know how much money was used. He stated that **The Independent Party (TIP)** had 2 days to the election formed an anti-rigging team and once bribery was reported to him he in turn telephoned the Returning Officer and reported the matter. He also notified the Police but did not make a formal report. He stated that he did not personally witness any act of bribery. Erastus Onyango Nyamori (PW6) initially testified that one Joseph Owino was bribed with 200/=. He stated that he did not know the person who bribed him. He however later reneged and stated that there was only an attempt to bribe Joseph Owino.

**Peter Ogweno Malimu (PW7)** who also testified on the issue of bribery stated that Naftally Omollo and Charles Omolo are the ones who paid the bribes. He stated that he was in the antirigging team and his role was to monitor bribery and to prevent it. He stated that he saw the 2 people bribing people who he knew by physical appearance but not by name; that the cash was folded so he could not tell how much it was but that milk and bananas were also used to influence the voters. He stated that the 1<sup>st</sup> Respondent was at St. Jonathan Polling Station and also at Kanga Polling Station when the bribes were given; The 1<sup>st</sup> Respondent was however not at Toku where bribery also took place. He stated that he went to those 3 polling stations when he was alerted that voters were being bribed.

The petitioner further testified that the 1<sup>st</sup> Respondent took strangers to the polling stations; that only parties were allowed to have agents in the stations but the 1<sup>st</sup> Respondent had his own people too. On this he was supported by **George Obuya Owuor PW4** who testified that he was the Chief Agent for the Orange Democratic Movement and that it was him who prepared the list of the party agents and

issued them with letters of appointment signed by the Orange Democratic Movement Secretary General Prof. Anyang Nyongo. That those agents were however replaced by people sent to the polling stations by the 1<sup>st</sup> Respondent. He also testified that he was not allowed to take his place at the Kuja Tallying center. He stated that those who signed Form 36 at the tallying center were the personal assistants of the 1<sup>st</sup> Respondent.

On ballot stuffing the testified that at Kanga Primary School the total votes cast exceeded the number of registered voters by 1500. That thereafter there was an attempt to remove some of the ballots but that was abandoned as there was no agreement as to whose votes would be removed. He stated that Form 35 for that station was filled in a manner that concealed the excess. He stated that the same happened in Rakwaro Primary School where the votes cast were 824 yet the registered voters were 822. He stated that the forms were then doctored to conceal the ballot stuffing.

He further stated that at Minyenya Primary School (No.6) the candidates got the exact same votes in both streams and one need not be a rocket scientist to know something fishy was going on. He disputed that there was an error of double entry and told the court that it was merely a method of manipulating the results so they could fit in the printed Form 36. He also took issue with the figures recorded at Minyenya and Aila Primary School.

He further testified that double voting took place at Nyaburu Polling center. That in that station the number of registered voters was 651 and as there was a 100% voter turnout, 651 voted yet the Returning Officer is on record as saying that there were 9 misplaced voters in that station. That the 9 voters were registered at Winyo Primary School where they also voted. He wondered how Nyaburu would have had a 100% voter turnout if the 9 voted at Winyo. **Charles Ogutu Maduma (PW10)** stated that agents of 1<sup>st</sup> Respondent marked ballot papers. They were supported on this by **Charles Okeyo Abuoro PW2** an official of IEBC an the Presiding Officer at Winyo Primary School who testified that those who voted at Winyo Primary School exceeded the number of registered voters. That the Returning Officer called him and instructed him to allow 9 people whose names were written on the back of the register to vote. He used their identity cards to check their particulars and allowed them to vote. He stated that the explanation given him was that they were misplaced voters. He stated that he allowed them to vote because he was compelled by the Returning Officer.

On the signing of Form 35s it was the Petitioner's evidence that although he had agents in all the 76 polling stations only 33 signed Form 35. That the rest were either chased away or were not allowed to sign or failed to sign because they were not satisfied with the result. He stated that no reasons were given for the omission. He stated that where his agents signed Form 35 the results tallied with what IEBC gave him.

Regarding the Form 35s supplied to this court by IEBC he stated that some were not signed by agents, others were signed by up to 11 agents and most by 6 agents and that in some the figures posted to form 36 were different.

He went on to further state that the tallying was deliberately meddled. That the alterations in respect of polling station No. 8 (Kadiaga) and 30 (St. Dalmas) show that someone was playing with figures; that in Kanga where he garnered 190 votes only 90 votes were posted to form 36. That at Kandiaga the votes cast are 471 yet the figures add up to 468; that at St. Dalmas Primary School there is an alteration that is not countersigned. He contended that only 2 agents signed form 36 and it has no statutory comments. He contended that the form 36 filled by hand and the printed one had different results making it difficult to know the margin between his votes and those of the 1<sup>st</sup> Respondent. He stated that a recalculation reduced the votes of the 1<sup>st</sup> Respondent by 51 votes and his by 193. For

emphasis he stated that going by the figures given to him by IEBC he lost the election by 7,344 votes yet in the declared result he lost by 7,488 votes.

On dead persons voting it was his testimony that he heard it from credible sources and he had no reason to doubt it occurred. **Michael Oloo Mwai (PW8)** testified that 3 dead people voted. That they were registered to vote at Toku and that he had exhibited the death certificate of Ondiegi Ogwaro as proof. He stated that the said Ondiegi was his kin and that it is him who obtained that death certificate as the deceased's parents were also deceased.

Still on his agents the Petitioner testified that they were not allowed to accompany the ballot boxes to the tallying center. He contended that this went against Regulation 81(4). He went on to state that him and his agents were denied entry into the tallying center; that supporters of the 1<sup>st</sup> Respondent jammed the entrance making it impossible for him to enter; that this happened as a result of collusion between the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and that the 3<sup>rd</sup> Respondent neglected to provide security to ensure the entrance was not jammed. He contended that only supporters of the 1<sup>st</sup> Respondent were allowed to move freely. **Philip Ojuando Abuor (PW1)** stated that he was refused entry into the tallying center by agents of the 1<sup>st</sup> Respondent when he went there at 10pm. That when he called the Returning Officer he did not take his call. He called the security officer who told him to call the Returning Officer. He contended that even when he identified himself the security agents did not allow him to enter and when he asked them why one of them said those were their instructions and that **The Independent Party (TIP)** already had an agent inside.

Regarding the discrepancy between this election and the other 5 elections that took place on that day he stated that the biggest margin was between this election and that of the Senator. He gave that margin as 375 votes. He contended that the discrepancy only goes to show that the election was not transparent and that had the 375 votes been given to him the margin would have narrowed by that number.

He further testified that officials of the 3<sup>rd</sup> Respondent canvassed for the 1<sup>st</sup> Respondent. He did not however know those officials by name or the places where canvassing took place. He left it to his witnesses to confirm the number of votes he lost because of that canvassing.

### **THE 1<sup>ST</sup> RESPONDENT'S CASE.**

The 1<sup>st</sup> Respondent filed his Answer to the Petition and swore an affidavit thereto. He also called three witnesses who swore affidavits denying the allegations leveled by the Petitioner and his witnesses.

The Petitioner stated that he was not aware of any bribery of voters or harassment and intimidation of any supporters of the Petitioner. He denied that his supporters threatened, robbed or coerced voters to vote for him and contended that the incident alleged to have occurred on 29<sup>th</sup> January, 2013 was strange to him and was over a month before the election and outside the campaign period. He denied that he went to Kanga, St. Jonathan and Toku on election day. He also denied that he colluded with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to employ his supporters as Presiding Officers so as to aid his election. On the malfunction of the Electronic Voter Identification Device and Biometric Voter Registration he contended that the same was widespread all over the country and not confined to Rongo Constituency and that the elections in Rongo were well conducted.

He disputed that he prevented the Petitioner's agents from accompanying the ballot boxes to the tallying center or that his supporters prevented the Petitioner and his Chief Agent from accessing the tallying center.

Regarding the difference between this election and the others held on the same day he stated that there were very minimal differences. He gave those differences as Presidential – 31, Senate +375, Governor +62, Women Representative +355, and County Representative +26. He stated that these were within possible casting error in 65 polling stations.

He contended further that the petitioner was defeated by a margin of 7,488 votes and the differences neither specifically prejudiced the Petitioner nor could they change the Parliamentary election outcome.

He stated that the irregularities complained of are in the imagination of the Petitioner and his agents and that the Petitioner has in paragraph 29 of his own affidavit admitted by his own recalculation that he lost the election by a margin of 7,244 votes.

He further disputed that there was ballot stuffing and contended that the votes cast were well tallied and there was no probability that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents could have meddled in his favour.

It was also his testimony that no unauthorized persons participated in the elections. He stated that agents belonged to political parties that sponsored candidates and as the Orange Democratic Movement candidate he knew the true party agents on the ground. He disclosed that there are two Orange Democratic Movement factions in Rongo but that none of them is recognized by the Head Office as there is a dispute still pending. He stated that he indeed sent 2 agents of his own to each of the polling stations. He contended that the law allowed a candidate and a party to appoint agents and said that Orange Democratic Movement had one agent and he had two. He told the court that the agent who accompanied him to the tallying center was the one he himself had appointed and he did not know if Orange Democratic Movement sent one too. He conceded that the agent he took with him was his Personal Assistant. He stated that by the time he went to the tallying center he already had received his results from his agents and the results IEBC had were not far from their own computation and so his agent signed Form 36. He stated that he did not expect and neither did he receive any special attention from the 3<sup>rd</sup> Respondent and that the election was free and fair. He urged this court to dismiss the Petition with costs.

**Naphtally Ochieng Omollo (1RW1) and Charles Omollo Orwa (1RW2)** denied that they bribed voters at Toku, Kanga and St. Jonathan Polling Stations. Naphtally testified that he voted at Kitere polling center at 3pm and that he went to his shop and stayed there until 6pm. He denied that he went to Toku, Kanga and St. Jonathan Polling stations. He denied that he met Peter Ogweni, Michael Oloo Mwai and Philip Ojuando on that day. Charles Omollo stated that he reached St. Jonathan Primary School, where he was registered to vote, at 9:30am and by 9:45am he had voted. He left and was at his home by 10:15am. He contended that whoever accused him of bribing voters may have confused him with another person. He denied that he went to Toku Primary School.

Francis Omwango Ondiek alias Boy Ondiek conceded that he was a supporter of the 1<sup>st</sup> Respondent but denied he was his bodyguard. He denied that he harassed and intimidated people to vote for the 1<sup>st</sup> Respondent.

### **THE 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS' CASE**

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents called a total of 15 witnesses. Their evidence is in their depositions as well as their testimonies during cross-examination. All were election officials – presiding Officers – in different polling stations. They all denied that bribery occurred in their stations and contended that they received no reports to that effect. All testified that the Form 35s for their stations were signed by the agents who were present. The number of agents who signed varied from polling station to polling station. The court

heard that where an agent did not sign Form 35 it was their responsibility to state the reasons in the space provided. Linet Aluoch (2RW12) stated that the reason the agents did not sign Form 35 for Nyangao Primary School is that they left immediately the results were announced. Beatrice Magambo (2RW5) denied that at Toku Primary School votes were cast on behalf of dead voters. The court also heard that those who were illiterate were assisted in the presence of the agents. The court was also told that the reason EVID did not work at Kangeso was that the clerk forgot the password and keyed in the wrong one.

Noah Kipkosgei Bowen, the 2<sup>nd</sup> Respondent confirmed that he was the Returning Officer in respect of this election. He stated that the law allows a party to appoint only one agent and that a candidate sponsored by that party is also entitled to appoint an agent. He contended that whereas the law gave parties 48 hours before counting starts to avail their lists of agents no party furnished him with a list.

He disputed that there was violence, harassment and intimidation of voters in Rongo and also denied that any incidence of bribery was reported to him. On the tallying he stated that there were no irregularities and attributed the discrepancies in Form 35s and Form 36 to human error. He denied that he allowed unauthorized agents into the tallying center.

On ballot stuffing it was his evidence that there was not even one station in Rongo where the number of the votes cast exceeded the number of registered voters. In the case of Winyo and Nyaburu he explained that the 9 voters were misplaced. That Biometric Voter Registration was being shared and that the 9 found their names in Nyaburu whereas they had registered to vote at Winyo. That such correction should have been made by the Head Office in Nairobi but the same was not done although the data was sent there. As the Returning Officer he inserted the names of the 9 voters at the back of the register for Winyo Polling Station and informed the Presiding Officer before the election that they could vote at Winyo. That he was allowed by the law to do so and that there was nothing sinister about it.

He further stated that he used the handwritten Form 36 to announce the results and the typed Form 36 to test the accuracy of the results. He contended that the election was largely manual as the issuing of ballots, marking and casting of the same as well as the counting and tallying were all manual and only identification was to be electronic. He contended that in polling stations with electricity Electronic Voter Identification Device worked very well. He gave the example of Koderu Bara. The court heard that at Kangeso Primary School the clerk entered a wrong password and hence the reason Electronic Voter Identification Device did not work.

On the tallying he conceded that there were errors in Aila, Minyenya 2, Lwala and Kanyimach. He stated that the errors occurred when the figures in Form 35 were being posted to Form 36. He contended that the Form that had errors was the typed one. He stated that he believed in both forms after factoring the errors.

He denied that he prevented some agents to enter the tallying center and contended that there were many agents there. He also stated that the letter **George Obuya (PW4)** did not allow him to enter the tallying center. He stated that it was well within the law that Form 36 was signed by only 2 agents. He contended that after correction of the errors the margin would still be more than 7000 votes. He contended that those errors were not intentional, were minimal and did not affect the result. He also contended that the election was free and fair.

## **RECOUNT AND SCRUTINY.**



On 20<sup>th</sup> June, 2013 this court made an order for a scrutiny and recount in the following stations:

- \* **Kanga Primary School (stream 1 and 2)**
- \* **Rakwaro Primary School (stream 1 and 2)**
- \* **Minyenya Primary School (stream 1 and 2)**
- \* **Aila Primary School**
- \* **Rongo Showground**
- \* **Kangeso Primary School**

The parties were allowed to have at most 2 agents and the exercise was to be supervised by the Deputy Registrar of this court. It was done and on 16.7.2013 the Deputy Registrar's report was received by this court. The court ordered that copies of the report be availed to the Advocates. The contents of the report shall be discussed in due course.

### **SUBMISSIONS**

Written submissions were received from the Advocates for all the parties and were highlighted orally on 14<sup>th</sup> August 2013.

### **ISSUES FOR DETERMINATION**

There were 6 agreed issues out of which only 3 remain for determination the others having been dealt with during the trial.

The three that remained are:-

**A. Whether the election for Rongo Constituency was conducted in a free, fair and credible manner.**

### **SUB-ISSUES**

- i. Whether there was a deliberate interference with the electronic gadgets by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
- ii. Whether unauthorized persons were allowed to take part in the electoral process
- iii. Whether the voting and tallying processes were marred by gross irregularities such as to have affected the outcome of the election.
- iv. Whether there was bribery of voters by the 1<sup>st</sup> Respondent.
- v. Whether there was harassment of supporters of the Petitioner by the 1<sup>st</sup> Respondent.

vi. Whether the votes cast exceeded the number of registered voters.

**B. Whether the 1<sup>st</sup> Respondent was validly elected as Member of Parliament of National Assembly for Rongo Constituency.**

**C. Who shall bear the costs of this Petition.**

### **FINDINGS.**

I am in agreement with Mr. Ouma's submission that this Petition is before me pursuant to the authority bestowed upon this court by Article 159 of the Constitution. I do also agree that the Petitioner comes in pursuit of his constitutionally founded political rights under Article 38(2) as read with Article 86 of the Constitution. The said Article 86 sets the standard which the Independent Electoral and Boundaries Commission which is here sued as the 3<sup>rd</sup> Respondent, must meet at every election. It provides that the commission shall ensure that:-

- 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.

Under Article 81(3)(i) –(v) our electoral system must comply with the principles of free and fair elections which are by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an Independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.

It is the Petitioner's contention that in fulfilling its mandate under Article 88 of the Constitution and Section 25 of the Independent Electoral & Boundaries Commission Act the 3<sup>rd</sup> Respondent did not uphold those principles and standards. He contends also that it acted in breach of the Elections Act and the Regulations made there-under.

Reading through the submissions I came to the conclusion that in this case there is consensus that

the burden of proof lies on the Petitioner. The authorities cited by the Advocates for the parties all point to this and I indeed agree that it is so. As to the standard of proof the Supreme Court in Election Petition No. 5 of 2013 **Raila Odinga & others V. Independent Electoral & Boundaries Commission and Others**, after doing a comparative analysis of cases from other jurisdictions, held thus:-

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

It was Maraga J, as he then was, who in **Joho V. Nyange & another (No. 4)(2008) 3 KLR EP**, held and I agree with him that:

**“Where there are allegations of election offences having been committed a very high degree of proof is required.”**

To succeed therefore the grounds the Petitioner relies upon must be shown to have been proved to a standard which though not beyond reasonable doubt is above a balance of probabilities, and allegations of election offences must be strictly proved.

Having set out the principles within which I must examine the evidence adduced by the Petitioner let me now start with issue **A which is whether this election was conducted in a free, fair and credible manner;**

To prove that it was not the Petitioner raised six grounds which we fashioned as sub-issues. The first one was that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents deliberately manipulated the electronic gadgets so as to manipulate the elections. It is his Advocate's submission that “the failure of the system to operate meant that the commission reverted to the manual system that gave so much room for manipulation and rigging of the elections in favour of the 1<sup>st</sup> Respondent.” He goes on to state:-

**“The fact that the machined (sic) failed to operate at the very outset, in all the polling stations, clearly projected the malicious intentions of the 3<sup>rd</sup> Respondent to achieve its goal considering that the reasons given for their failure was at best lame and one that could easily have been averted. Its negative effects on the transparency of the results that were eventually tallied was quite evident and particularly when one closely discerns the extent of the disparities in the results indicated in Form 35 and 36 that were provided as exhibits by the 3<sup>rd</sup> Respondent in answer to this Petition.”**

He submitted further that the fact that the system failed all over the country cannot be justification in this petition.

On their part the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that they did in fact employ the Biometric Voter Registration but that although the Electronic Voter Identification Devices (EVID) and the Results Transmission systems (RTS) failed it was not deliberate; that any claim that this was calculated to assist the 1<sup>st</sup> Respondent as against the Petitioner cannot stand. Their Advocate goes on to state that due to the strict and limited time to prepare for the elections some of the presiding officers had no proper training on the use of the electronic kits leading to some entering wrong codes and others in not properly charging the battery. On this issue I am in agreement with the observations made by the Advocates for the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that these elections were largely manual; that only the registration and identification of voters were intended to be electronic. Thereafter the transmission of results to the commission would have proceeded electronically as well. The other processes – marking

of ballots, casting of ballots and the subsequent counting of the ballots was manual. For the register, IEBC had printed a hardcopy of the Biometric Voters Register and supplied the same to the Polling Stations. According to the Returning Officer they also had a Green Book as a fall back. When EVID therefore failed it would not have been expected that the elections would stop, and indeed the elections went on as the law stipulated.

It is common knowledge that there is nowhere in this country that the electronic devices worked perfectly. I even doubted it when the 2<sup>nd</sup> Respondent testified that EVID worked in most parts of Rongo. Faced with the same argument the Supreme Court had the following to say in *Raila Odinga & others V. IEBC & others* (Supra) at page 87:-

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

Likewise I find that this ground is not sustainable and more so because the Petitioner did not adduce any iota of evidence that there was deliberate or malicious tampering of the gadgets by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent.

On the issue of the presence of unauthorized persons taking part in the electoral process the Petitioner’s Advocate submitted that the law requires that a party sponsoring a candidate would only commission one agent into the polling station. That the law also requires that names of agents be forwarded to the 3<sup>rd</sup> Respondent at least 48 hours before elections begin with a view to ensuring that no strangers may find their way into the polling stations with ulterior motives. He contended that it was proved that in this case the 1<sup>st</sup> Respondent in collusion with the 3<sup>rd</sup> Respondent unlawfully and irregularly crowded the polling stations with his own cronies in the name of agents at the exclusion of agents from other parties so as to manipulate the results in his favour. He emphasized the role of agents in an election and submitted that any compromise of the quality of agents and compliance with the law automatically renders the whole exercise opaque, unfair and one that lacks integrity.

It is instructive that the Petitioner’s evidence was that he had agents in all the 76 polling stations in the constituency. He testified that they were all appointed by his party **The Independent Party (TIP)**. The court also heard that the **Orange Democratic Movement (ODM)** which is the party that sponsored the 1<sup>st</sup> Respondent’s candidature also had agents in the polling stations. The agents who are in contention were those who were sent to the polling stations by the 1<sup>st</sup> Respondent himself. Reading between the lines it is apparent that the real bone of contention was not that there was no openness or transparency but that the 1<sup>st</sup> Respondent seemed to have an upper hand in regard to the number of agents he had. Regulation 62(2) of the Elections (General) Regulations 2012 provides that the Presiding Officer shall admit not more than one agent for each candidate or political party. Going by this regulation **Orange Democratic Movement** the 1<sup>st</sup> Respondent’s Party should only have had one agent in each polling station. I believe the requirement for one is intended to prevent overcrowding. However section 30(2) of the Elections Act seems to allow a candidate to appoint an agent of his own. Section 30 provides as follows:-

- (1). A political party may appoint one agent for its candidates at each polling station.
- (2). A candidate nominated by a political party may appoint an agent of the candidate's choice.
- (3). An Independent candidate may appoint his own agent.

It is noteworthy that regulation 62(1) (c) refers to authorized agents and sub regulation (2) makes reference to one agent for each candidate or political party.

Section 30(2) of the Elections Act having permitted a candidate such as the 1<sup>st</sup> Respondent to appoint an agent of his choice it cannot be said that the people he had in the polling stations were strangers. They were for all intents and purposes authorized agents. He indeed testified that he appointed those people in accordance with the law and cited section 30(2) of the Elections Act. Once the substantive law grants him that right it cannot be taken away by application of subsidiary legislation.

The court heard that there were disputes between Orange Democratic Movement agents as to which of them were entitled to be at the polling stations. This was the testimony of George Obuya Owuor the Orange Democratic Movement Chief Agent who tendered a list of the agents appointed by ODM. Those disputes would be referred to the Returning Officer by the Presiding Officers concerned and would be settled. The court did not hear of any squabbling that occurred between the agents appointed by the TIP and those of the 1<sup>st</sup> Respondent. There was also evidence from the Presiding Officers that all those who entered the polling stations had letters from their parties and had taken the oath of secrecy. My finding on the second sub-issue is therefore that no unauthorized persons were allowed to take part in this election.

Moreover I did not hear the Petitioner allege and he did not call evidence that his own agents were prevented or restricted in the performance of their duties in the polling stations by the presence of the 1<sup>st</sup> Respondent's agents so that even if we were to find it an irregularity it has not been shown that it affected the result –see section 83 of the Elections Act.

On the third sub-issue evidence was led that; firstly the 1<sup>st</sup> Respondent colluded with the 2<sup>nd</sup> Respondent to prevent the Petitioner's Chief Agent from accessing the Tallying center at Kuja School for the Deaf so that they could doctor/manipulate the results in his favour. That in fact only agents of the 1<sup>st</sup> Respondent who were not even authorized were allowed in. The relevant regulation here is Reg. 85(1) and the same provides that among the persons to be present at the tallying center are authorized agents. The person who accompanied the 1<sup>st</sup> Respondent to the tallying center was nominated by him under Section 30(2) of the Elections Act and was therefore his authorized agent. It is immaterial that he was also his personal assistant. As for the allegation that the 1<sup>st</sup> Respondent colluded with the 2<sup>nd</sup> Respondent to prevent the Petitioner's Chief Agent from entering the tallying center it was his own evidence that he was refused entry by security agents and by this I believe he meant the police manning the gate. He stated that he went to the tallying center at 10pm contradicting the Petitioner who had testified that he went there at 7pm. Be that as it may, he did not prove there was collusion between the Respondents. He did not also prove that the security agents were acting on the instructions of the 1<sup>st</sup> Respondent. Regarding the 2<sup>nd</sup> Respondent it was his own evidence that he did not reach him so how then can he say that there was collusion. It could be that had he reached the 2<sup>nd</sup> Respondent his entry into the tallying center would have been facilitated. In **Joho v. Nyange & another (Suppra)** the Court observed that evidence adduced must be cogent, credible and consistent and that generalized allegations will not do in an election Petition. The evidence adduced by the Petitioner on this issue was not consistent.

Indeed the two other witnesses who allege were prevented from entering the tallying center were even

more inconsistent. Although **George Obuya (PW3)** testified that he went there at 8pm. **Erastus Onyango Nyamori (PW6)** who alleged they went there together stated that he was there from 6pm. PW6 also testified that he disguised himself as an Orange Democratic Movement agent. If that was the case then he lied and his evidence cannot be trusted. It could even be that it is him who caused PW3 not to be admitted as he was already there as an Orange Democratic Movement agent. That notwithstanding it is worth noting that PW3's letter did not accredit him to the tallying center but to the polling stations.

It is also noteworthy that PW6 who confessed to being at the tallying center from 6pm on 4<sup>th</sup> March, 2013 to noon of the next day did not allude to anything sinister that would have affected the result taking place. He did not give evidence of doctoring of figures and results as submitted by counsel for the Petitioner. The Petitioner seems to have been under the mistaken belief that it was the duty of the 2<sup>nd</sup> Respondent to ensure that candidates and their agents attended the tallying. With due respect that is not the law. Regulation 85(1) only provides a list of the persons that the Returning Officer should allow to be present at a tallying center but does not obligate him to ensure that they are present.

As for the submission that there were no agents as no lists were furnished to the Returning Officer within 48 hours as required by Regulation 74(1) my finding is that the rule only affects counting and in any case the Petitioner himself stated that he had agents in all the polling stations so his Advocate is estopped from making such a submission.

The more serious issue raised regarding the tallying were the discrepancies between the Form 35s and the Form 36. It was admitted by the Returning Officer that there were 2 Form 36s – one handwritten and the other typed. He explained that the typed Form 36 was generated to test the accuracy of the figures. However he conceded that there were several discrepancies. He attributed them to human error. The Petitioner believes that it was a manipulation of the results so as to favour the 1<sup>st</sup> Respondent. His Advocate submitted as follows on this issue:-

**“The Petitioner led evidence to show that the entries into Forms 35 and 36 did not quiet (sic) corresponds with the results that were announced at the polling stations and the same were executed with a view to accelerate the results of the 1<sup>st</sup> Respondent. He indicated that a look at the entries in form 35 as exhibited by the 3<sup>rd</sup> Respondent varies in a big way with the entries made into form 36 during the tallying process..... The form 36 that was prepared and filled by the 2<sup>nd</sup> Respondent at the tallying center at Kuja shows that it was only signed by the purported agents of the 1<sup>st</sup> Respondent at the exclusion of all others, a fact that is not only curious but also utterly unlawful and irregular and greatly compromised the integrity of the results tallied to the disadvantage of the Petitioner.”**

Mr. Ouma crafted a table showing the discrepancies in the tallying. The same has all the 66 polling stations but I shall only show here the ones with differences in Form 35 and Form 36:-

POLLING CENTER	INFORMATION IN FORM 35	INFORMATION IN FORM 36
Minyenya Primary School	<ul style="list-style-type: none"> <li>• Rejected votes -2</li> <li>• Total votes cast in stream 2 – 413</li> <li>• Dalmas Otieno – 236</li> <li>• Erick Otieno – 2</li> <li>• Gradus Oluoch – 13</li> <li>• Odalo Makojuando - 147</li> </ul>	<ul style="list-style-type: none"> <li>- No rejected votes</li> <li>- Votes cast 488</li> <li>- 289</li> <li>- 3</li> </ul>

		- 8
		- 141
Nyamuga Pri. School	• Registered voters – 725	• 707
Sigiria Pri. Sch	• Registered voters - 725	• 707
Ofwanga Primary School	• Registered voters – 692	• 686
Tonye Primary School	• Registered voters – 483	• 478
Kanyimach Pri. School	• Petitioner – 52 votes	• 55 votes
Aila Primary School	• Petitioner – 190 votes	• 90 votes
Lwala Pri. Sch.	• Votes cast – 405 • Valid votes - 403	- Votes cast – 413 - Valid votes – 411
Rongo Stream 3	• Votes cast – 694 • Rejected votes – 7 • Valid votes - 687	• 697 • 0 • 697
Kudho Pr. School	• Rejected votes – 1	- 0
Kangeso Pr. School	• Valid votes – 418	• 412
Nyarach Pr. School	• Rejected votes – 4	• 3
Kuja Deaf Pr. School	• Registered voters – 704	• 702
Kitunja Pr. School	• Votes cast – 238	• 236

He submitted that those discrepancies make it difficult to verify the results of the elections in those specific polling stations. He submitted further that it is even more curious that the final tallying was not verified by agents of the parties or candidates as required by the rules. That Form 36 was only signed by two ODM agents as the other agents were shut off the tallying center. He wondered how such results would be verified or determined to be credible.

Article 8(e) (v) of the Constitution requires that elections be administered in an impartial, neutral efficient, **accurate** and **accountable** manner (emphasis mine) and Article 86(c) enjoins the IEBC to ensure that the results from the polling stations are openly and **accurately collated** (emphasis mine) and promptly announced by the returning officer.

It is indeed correct that there was inaccuracy in the collation of results from some of the polling stations. However as can be seen from the table above the discrepancies were not fundamental. It is only in Minyenya, Aila and Kanyimach where the votes garnered by the candidates were not properly posted to the Form 36. In Minyenya Primary School the Petitioner garnered 147 votes but 141 were posted to Form 36. The 1<sup>st</sup> Respondent obtained 236 votes but 289 were posted to Form 36. Gradus Oluoch got 13 but what was posted to Form 36 was 8. Erick Otieno got 2 but 3 were posted to Form 36. In Kanyimach whereas the Petitioner obtained 52 votes 55 were posted to Form 36 and in Aila Primary School he garnered 190 votes but only 90 were posted to Form 36. The other discrepancies were

mainly on the votes cast, valid votes and number of registered voters. Looked at critically the difference in the figures in Form 35 and in Form 36 give the 1<sup>st</sup> Respondent an extra 53 votes and reduce the Petitioner's votes by 105 votes. This to me does not give rise to gross disparities as submitted by Mr. Ouma. I would like to say as was said by Maraga J, as he then was, in **Joho V. Nyange & another:-**

**“...Error is to human. Some errors in an election like this conducted under a frenetic schedule are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental they should always be excused and ignored. But where deliberate irregularities or forgeries are committed different considerations 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. As I have said if they are minor and do not affect the election or its result they should be ignored. This is what I understand section 28 of the National Assembly and Presidential Elections Act to be providing for when it declares.....”**

The section 28 he refers to is in the exact same words as section 83 of the Elections Act 2011. As I have stated no concrete evidence was adduced that the errors in this case were deliberate. The Returning Officer attributed them to fatigue and I would agree. This case is nowhere similar with the **Benard Shinali Masaka vs. Dr. Boni Khalwale & Others** [2011) eKLR case cited by counsel for the Petitioner. As shown in his own table majority of the Form 35s were signed by agents and even the Petitioner admitted that 33 of his agents signed Form 35s. He takes issue with some of the forms having been signed by more agents than were candidates but as discussed earlier even candidates nominated by parties were permitted by the law to have their own agents. There would therefore be nothing sinister for a form to have been signed by more agents than were candidates. It was not ruled out through evidence that those who signed were not authorized agents in terms of Section 30 of the Elections Act and Regulation 62 (1) & (2) of the Regulations. In any event the Petitioner would have to demonstrate how that affected the result and he has not. This is more so in light of Regulation 79(6) which provides as follows:-

**“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 the sub regulation (2) (a).”**

It is not sufficient therefore to assert that the agents did not sign Form 35 For the results to be invalidated there must be more... Again I would say as Maraga J. does in **Joho V. Nyange & Another (Suppra):-**

**“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 said minor breaches will be ignored.”**

This was upheld by the Supreme court in **Raila Odinga & others V. Independent Electoral & Boundaries Commission & Others** – Election Petition No. 5 of 2013 when at page 71 it held:-

**“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.”**

To conclude this sub-issue my finding is that the discrepancies between the form 35 and 36 both in terms of votes garnered by the candidates and especially the Petitioner and the 1<sup>st</sup> Respondent, the total votes cast and the number of registered voters are not fundamental and do not affect the result. Neither does the fact that some forms are signed by more agents than candidates or that no reasons are given



by some agents for refusal to sign. That ground cannot therefore stand.

On bribery the Petitioner contends that agents and supporters of the 1<sup>st</sup> Respondent openly bribed and induced voters to vote for him hence committing an election offence contrary to section 64 of the Elections Act. He personally did not witness bribery but he called five witnesses, **Phillip Ojuando Abuor (PW1) Erastus Onyango Nyamor (PW6), Peter Ogweno Malimu (PW7), Fred Otieno Mwango (PW9) and Vitalis Ojuang Odero (PW10)** to demonstrate that bribery took place. His Advocate submitted that detailed cases of bribery and attempts to bribe were given by the Petitioner and cases of reports having been made but ignored by the officials of the 3<sup>rd</sup> Respondent mentioned. He submitted that bribery as an act is not one that would be done in the open and it is only sufficient that circumstances are shown to clearly justify this fact. That the Petitioner was categorical in his testimony and even in cross-examination that such cases occurred. This however is not borne by the evidence. In the first place counsel contradicts the Petitioner when he says that “bribery as an act is not one that would be done in the open.” It is the Petitioner’s case and evidence was led by his witnesses that bribery was done openly. Secondly I do not agree with his submission that it is sufficient that circumstances are shown to justify that there was bribery. Bribery being an election offence must be proved strictly. In **Wekesa V. Ongera & another (No.2) (2008) 2 KLR EP page 66** the three judges held as follows:-

**“So where bribery is alleged this court would expect a higher degree of proof than that envisaged in civil cases but not quite to the degree of proof in a criminal case. Being found guilty of the election offence of bribery puts those involved in dire consequences....”**

The same judges found as follows in **Nganga & another V. Owiti & Another (No. 2) (2008) 1KLR (EP) page 799:-**

**‘The allegation in the petition as laid above is a grave one indeed. Consequently the party laying it is expected to present evidence that is cogent, consistent and credible, Election offences approximate to criminal charges. It has been said proof thereof should be beyond reasonable doubt. On our part the proof should be at such a high standard as to be above, and quite above the balance of probabilities in civil litigation.’**

In the recent Election Petition No. 5 of 2013 **Raila Odinga & others V. Independent Electoral & Boundaries Commission & Others** the Supreme Court Judges finding was:-

**“The threshold of proof should, in principle, be above the balance of probability though not as high as beyond reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election are in question” (emphasis mine)**

Clearly therefore the burden of proof must be higher where an election offence such as bribery is alleged. The evidence must also be cogent, consistent and credible. My finding is that that is not so in the instant Petition. Both the Petitioner and his **Chief Agent (PW2)** were candid that they did not personally witness any incident of bribery. They merely received reports of the same. **Erustus Nyamori (PW6)** who initially stated that he had witnessed one Joseph Owino being bribed with 200/= when cross examined changed to say that he did not say that Owino was bribed but that there was an attempt to bribe him. His evidence was therefore inconsistent. This is also a witness who confessed to lying in order to gain entry into the tallying center so how can we trust he did not also lie about bribery. As for **Fred Otieno Mwango (PW9)** he does not seem to have witnessed the bribery himself because during cross examination it was his evidence that the reason he said bribery was open was because he received that information from a credible source. He did not disclose that source and clearly that was

hearsay.

As for **Vitalis Ojuang Odero (PW10)** his evidence was not credible. Although he alleged to have witnessed bribery he would not say the full name of the person who was paying the bribes and he could not even say how much was paid as according to him it was not an open exercise. This would appear to be what Mr. Ouma refers to as circumstances. Evidence of bribery must however be cogent: Suspicion that it took place will not do.

That leaves us with the evidence of Peter Ogweno Malimu (PW7) – one of the Anti-Rigging Team. He testified that he saw Naftally Omollo and Charles Omolo who were supporters of the 1<sup>st</sup> Respondent bribing voters at St. Jonathan, Kanga and Toku. It is however doubtful that he did. As can be seen from the affidavit of Michael Oloo Mwai it is him who called Ogweno to report that Naftally Omollo, Cantrel Onduru and Okeyo Ojwando had gone to Toku and engaged the Presiding Officer for a long time. He also deposes that when they protested the three people left the voting hall and went outside and treated people to bananas and milk. This witness states that Ogweno went to Toku later. This witness does not tell at what time he arrived and whether the three people were still there. It would appear that Ogweno simply received a report. It is possible that he did not find the three at Toku. It is also instructive that Michael Oloo Mwai does not mention Charles Omolo as one of the people who was at Toku. It could also not be possible for Michael Oloo Mwai to have left out that detail. Certainly one of them was not telling the truth and my suspicion is that Ogweno's evidence is exaggerated and hence the reason he does not know how much money was used to bribe the voters or who was bribed. He also did not report the matter to Independent Electoral & Boundaries Commission or to the police yet being an 'elected' member of the anti-rigging team he had authority to do so. The law requires that such matters be reported but even the Petitioner and his Chief Agent did not have proof that they reported the same. All we have are mere allegations not backed by proof and that ground must fail too.

In regard to harassment and intimidation the law is that the electoral process shall be free from violence and intimidation – see Article 81(e) (iii) and the IEBC is required to observe that principle in fulfilling its mandate – see Section 25(e) of the IEBC Act, 2011 and Section 65 of the Elections Act makes use of force or violence during the election period an offence punishable with a fine not exceeding one million shillings or imprisonment for a term not exceeding five years or both. This court heard that Boy Ondieki – a supporter of the 1<sup>st</sup> Respondent – harassed and robbed supporters of the petitioner. One such person he is said to have robbed was David Oduor. It was also alleged that he went around Rongo Township on the eve of the election and threatened the non-natives of Rongo with dire consequences if they did not vote for the 1<sup>st</sup> Respondent. The Petitioner when cross examined by counsel for the Respondents stated that he lost about 1000 votes as a result of that intimidation. His Advocate submitted that security meetings were called and were attended by officials of the 3<sup>rd</sup> Respondent and candidates as a result of rampant cases of violence and threats to voters. The Petitioner's evidence however was only of one meeting called by the 2<sup>nd</sup> Respondent on the eve of the election. He testified that the meeting was called to discuss issues pertaining to the election and does not say that the meeting was called by security agencies. With due respect, counsel's submission is an exaggeration. The Petitioner himself did not witness any incident of violence or voter intimidation. The person who claimed to have witnessed the same was **Kings Ochieng Odera (PW11)**. On being cross examined by counsel for the 1<sup>st</sup> Respondent he conceded that he was not present when David Oduor was assaulted by Boy Ondiek. He also did not give the names of the youths who patrolled Rongo threatening and intimidating non-natives on the eve of the election. He could not even give the registration number of the vehicle they were using yet he alleges it was in broad daylight. In his affidavit he mentions the names of the people who were doing it but gives a very lame excuse for not reporting such a serious matter. David Oduor was not called as a witness and no explanation was given. Only he was in a position to give evidence of the assault and the circumstances thereof.

As for the petitioner he did not adduce concrete proof of 1000 people not voting for him because they were intimidated. Nobody came to testify that they never voted because they were threatened. The dates, time and places and even names of those who were threatened should have been given if any weight was intended to be given to this allegation. As has been stated before generalized allegations cannot suffice.

On the issue of votes cast exceeding the number of registered votes the Petitioner avers as follows:-

**“The corrective analysis of the votes as announced from polling station showed that the votes cast exceeded registered voters in the following areas: Lwala Primary School, Minyenya Primary School, Nyamuga Primary School, Sare Kamagambo Primary School, Ngere Primary School and Kanga Primary School.”**

At paragraph 23 of the affidavit in support of the Petition he deposes that at Kanga Polling station where ballot stuffing took place there was a plea by the Presiding Officers to remove some of the papers but the agents refused. At the hearing he testified that in that station the total votes cast exceeded the registered voters by 1,500. He was sure that if the ballot box for Kanga was opened the excess votes would be found. He also alleged that there was multiple voting and that in one station dead voters cast ballots. **Charles Okeyo Abuoro (PW3)** who was a presiding Officer at Winyo testified that he was compelled by the Returning Officer to allow 9 people who were not on the register to vote, while Michael Oloo Mwai (PW8) testified that a clerk by the name Mrs. Ogutu crossed out the names of 3 people to wit Ondiegi Ogwari, Odindo Mumbo and Abich Opala and cast ballots on their behalf even when he told her that they were deceased. The court further heard that at Kangeso polling station agents of the 1<sup>st</sup> Respondent and 3<sup>rd</sup> Respondent marked ballot papers for all voters in the pretext that they were illiterate. That when Charles Ogutu (PW5) the agent for TIP protested he was shouted down and told that that being an ODM Zone voters had to vote six (6) piece and he should not create confusion. He reported the matter to Philip Ojuando – The Independent Party’s Chief agent who went and witnessed the same. It is instructive however that Philip Ojuando makes no mention of this in his affidavit hence raising suspicion that it was not true that he was notified. Moreover PW5 signed Form 35 and it is only when that was put to him by counsel for the Respondents that he said he signed due to pressure. We have heard of many agents who did not sign Form 35 and so pressure cannot be an excuse for one to sign for results that one did not believe in. The Form 35 for Kangeso is to be found at page 39 of the results supplied to this court by the 3<sup>rd</sup> Respondent under rule 21(b) of the Petition Rules. The same shows that 20 people voted for the Petitioner in that station. Kangeso is also one of the stations where scrutiny and recount took place. The Deputy Registrar states that when the box was brought in all its seals were in place and intact. It had a form 35 which showed the exact same figures as the one at page 39 of the results produced by the 3<sup>rd</sup> Respondent. If then it was true that the ballots were all marked by the agents of the 1<sup>st</sup> and 3<sup>rd</sup> Respondent how did the Petitioner get 20 votes" The witness could not have been telling the truth.

Kanga Polling Station had 2 streams and as conceded by the Petitioner the aggregate total of registered voters there was 889. After the scrutiny and recount the Deputy Registrar observed that for stream 1 total votes cast were 480 while in stream 2 they were 389 hence a total of 869 which clearly did not exceed the registered voters. The excess 1,500 votes were not found in the ballot box. The observation of the Deputy Registrar was that for stream 2 the ballot box looked intact. For stream 1 three seals on the sides were entered in the wrong hole and they could be opened easily. Inside it there were 4 broken seals and the counterfoils were missing. There was however no allegation that the box had been tampered with prior to the scrutiny and recount. The Deputy Registrar remarked that the box looked ok. The allegation that there was ballot stuffing at Kanga was therefore not proved. Indeed the

scrutiny and recount did not reveal the 1500 ballots alluded to by the Petitioner.

Also not proved was the allegation that dead people voted at Toku. According to **Michale Oloo Mwai (PW8)** votes were cast in respect of 3 deceased persons by a clerk who he only knew as the wife of Gordon Ogutu. Asked what proof he had of that he stated that he had produced the certificate of death of one of them Ondiegi Ogwari and that that was the proof. The death certificate No. 286450 was however that of John Otieno Ondiegi and I agree with counsel for the 1<sup>st</sup> Respondent that there is nothing to demonstrate those are one and the same person. In any case production of the death certificate which this witness admits he processed and obtained himself is not proof that three dead people voted. It is only proof of the death of one John Otieno Ondiegi. It is also noteworthy that this witness signed Form 35 although in his affidavit he alleges to have been thrown out. If many other agents did not sign one wonders if he was telling the truth when he says that he was told to sign or else he would not leave the room. If he was thrown out then there was no chance of him being forced to sign the form. His signing Form 35 validated the results and he cannot be heard to say otherwise.

For Winyo Primary School both PW3 and the 2<sup>nd</sup> Respondent agree that there were 9 people who voted whose names were not on the main register. The 2<sup>nd</sup> Respondent explained that because some stations shared the Biometric Voters Register some voters found their names in stations other than those they were registered to vote. That this is what happened to the 9 voters who found their names at Nyaburu whereas they should have voted at Winyo. That once corrections were done their names were put at the back of the register at Winyo and the Presiding Officer (PW2) was advised accordingly. There was therefore nothing sinister in their voting at Winyo. PW3 was very inconsistent in his evidence, on the one hand saying what he did was lawful but on the other saying he was forced to by the Returning Officer. This is a witness who could not be trusted. He admitted in court that he was a much sought after witness and the only reason he agreed to give evidence for the Petitioner and not for the 3<sup>rd</sup> Respondent was because the petitioner's Advocate took the affidavit to him to sign. Question is would his evidence have changed to suit the 3<sup>rd</sup> Respondent had their Advocate reached him first? My guess is that it would have changed hence fortifying my finding that he is not a trustworthy witness. His evidence was not credible.

The scrutiny and recount also discounted the Petitioner's allegation of ballot stuffing. In Minyenya, Rakwaro, Aila and Rongo show ground, the votes cast did not exceed the registered voters and in the final tally there were no excess ballots.

The allegation of multiple voting was not proved at all and that ground is dismissed as well.

As for the allegation that there was great disparity between the votes cast in this election and the other elections held on the same day more so for the Senator, Governor and Women Representative it turned out that the largest difference was 375 and that was in respect of the Senator. The 2<sup>nd</sup> Respondent attributed this to the voting patterns and I find this a real possibility.

The allegation that the 1<sup>st</sup> Respondent influenced the hiring of his cronies as presiding officers was not proved either. It was just an allegation.

As for the agents of the Petitioner not being allowed to accompany the ballot boxes to the tallying center the Petitioner himself conceded that the vehicle used was a saloon that could only accommodate IEBC officials and security agents. In any event the results had been announced at the polling stations and so his own agents should have had the results. On this I can only echo the words of Kimaru J. in **John Kiarie J Waweru V. Beth Wambui Mugo & 2 others [2008] eKLR**, that:-

**“I accept the explanation given by the 1<sup>st</sup> respondent that any diligent candidate was expected to have tallied the results from the various polling stations before the results were finally officially announced by the 2<sup>nd</sup> Respondent as a Returning Officer at the tallying center.”**

The Petitioner stated that he had agents in all the polling stations out of which 33 signed form 35 yet he did not have a tally of his own results. That was not convincing. It is also noteworthy that no evidence was led that agents of the 1<sup>st</sup> Respondent accompanied ballot boxes to the tallying center or that the results were meddled with between the polling stations and the tallying center.

Taking the evidence as a whole my finding is that the Petitioner did not prove the grounds cited to the standard required. Some of the allegations amounted to election offences which require strict proof but that was not attained. The Petitioner made generalized allegations which at a glance paint a very grim picture of the manner in which the election was conducted. However when the evidence was tested through cross examination it fell far short of the standard required.

I now turn to issue B which is **whether the 1<sup>st</sup> Respondent was validly elected as member of the National Assembly for Rongo Constituency.**

Mr. Ouma, for the petitioner has urged this court to rely on the 5 following cases which had similar circumstances to find that the elections were not free, fair and credible and that consequently the 1<sup>st</sup> Respondent was not validly elected. Those cases are:-

1. ***NBI HCC ELECTION PETITION NO. 35 OF 2008***

***IBRAHIM AHMED V. SIMON MBUGUA & OTHERS.***

2. ***KAKAMEGA HCCC ELECTION PETITION NO. 2 OF 2008***

***BENARD SHINALI MASAKA V. DR. BONI KHALWALE***

3. ***KISII HCC ELECTION PETITION N. 2 OF 2008***

***SIMON NYAUNDI OGARI & ANOTHER V. JOES ONYANCHA.***

4. ***NBI HCC ELECTION PETITION NO. 11 OF 2008***

***REUBEN NYANGINJA NDOLO V. DICKSON WATHIKA***

5. **KISUMU CCCA NO. 8 OF 2010**

**JAMES OMINGO MAGARA V. MANSON NYAMWEYA.**

He relied on the results of the recount and scrutiny conducted by the Deputy Registrar of this court to say that the circumstances in this case were similar to those in the 5 cases cited.

Mr. Ngani for the 1<sup>st</sup> Respondent on his part submitted that the irregularities and malpractices were not proved and whatever errors were admitted were minor and did not affect the results. He contended that the 1<sup>st</sup> Respondent won by a margin of close to 8000 votes and the will of the people of Rongo was therefore known.

For the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent it was submitted that the 1<sup>st</sup> Respondent garnered the highest number of votes in the subject election. That this fact was conceded by the petitioner. The 2<sup>nd</sup> Respondent thus issued him with a certificate as provided under Regulation 87 (2) (b) and thereafter the 3<sup>rd</sup> Respondent published his name in the Gazette as provided under Reg. 87 (4)(b). It was contended that he was validly contended.

I have had ample opportunity to peruse the authorities cited in support of these submissions. Of course no two cases are exactly the same and indeed this case is in no way similar to those cited by Mr. Ouma. In the Omingo Magara and Boni Khalwale cases for instance the courts found massive breaches in the conduct of the elections. For instances most of the Form 16A's which were the equivalent of our Form 35 were not signed by the Presiding Officers. In the Boni Khalwale case only one out of 78 forms complied with Regulation 35. Again when the scrutiny was done not all the ballot boxes were availed to the court and many did not have the relevant documents inside counterfoils, to wit, Form 35 and the register of voters. The court found it was impossible to trace the results from the paper trail. The courts also found that there had been a deliberate attempt to tamper with the election materials. In the Omingo Magara case there was attempted arson. The circumstances here were different in that all the Form 35s were signed by the Presiding Officers. Majority were also signed by agents. During the scrutiny only in Minyenya Stream 1 and Kangeso were the counterfoils found missing. Whereas it is true that one of the reasons the courts in those cases relied on were the missing registers it is to be appreciated that the elections held this year were totally different. There were 6 elections held on the same day all using the same register and there is no requirement that the register was to be put in the ballot box for the National Assembly. I am not therefore unable to make much of the omission of the registers in the ballot boxes. The main complaint in this case was that the 1<sup>st</sup> Respondent jammed the polling stations by having his own agents in addition to those appointed by his party. We did however confirm that S. 30(2) permitted him to have his own agents in the polling stations hence it was not unlawful to do that. He was also accused of having his own cronies as Presiding Officers but as I found that was not proved. The allegation that there was deliberate interference with the electronic gadgets to favour him were also not proved. The allegations of ballot stuffing bribery and intimidation were also not proved and neither was the serious matter of dead voters.

The Petitioner did demonstrate that there were errors made while posting the results from Form 35 to Form 36. My finding however is that those errors were minimal. Moreover Sec. 83 of the Elections Act provides:-

**“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 principles laid down in the constitution and in that written law or that non compliance did not affect the result of the election.”

The Petitioner has not demonstrated that the errors in this case affected the result. As I have stated before as was observed by Maraga J, in **Joho v. Nyange & Another (Suppra)** these were no more than human errors. They were not shown to be deliberate. In **John Fitch V. Tom Stephenson & Three Others [2008] EWHC 501 QB** the court held:-

**“The decided cases, including those which Lord Denning considered in Morgan V. Simpson established that the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches... This is because where possible, the courts seek to give effect to the will of the electorate.”**

The Petitioner stated that he believed he had won because the opinion polls predicted that much. The people of Rongo decided otherwise. I have turned the evidence over and over for proof of manipulation of the results by the 1<sup>st</sup> Respondent, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent but could not get any. As I have stated the fact that the 1<sup>st</sup> Respondent had his own agents in the polling station was permitted by the law. Manipulation should not be left to conjecture; it must be proved by cogent and consistent evidence. Having his own agents could only mean that he was more aware of his rights than the Petitioner was. Even applying the qualitative test I find that the 1<sup>st</sup> Respondent won fairly. Accordingly I hold that he was validly elected as the Member of The National Assembly for Rongo Constituency.

#### **WHO BEARS THE COSTS OF THIS PETITION"**

Mr. Ouma submitted that they too have worked very hard and are entitled to costs. The Advocates for the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent however maintain that costs should follow the event. I agree with them that the costs in this case shall follow the course and that the petitioner shall bear the same.

#### **FINAL ORDERS**

- i. That the Petition is hereby dismissed.**
- ii. That the 1<sup>st</sup> Respondent was validly elected as the Member of the National Assembly for Rongo Constituency.**
- iii. A certificate under S. 86(1) of the Elections Act to issue.**
- iv. That the petitioner shall bear the costs of the Petition. Such costs shall be taxed by the Deputy Registrar but so as not to exceed Kshs.800,000 (eight hundred thousand) for each Respondent. Those of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent being taxed together.**

**It is so ordered.**

Signed, dated and delivered at Homa Bay this 10<sup>th</sup> day of September, 2013.

**E.N. MAINA**

**JUDGE**

**In the presence of:**

Mr. Ouma Advocate for the Petitioner

Mr. Ngani Advocate for the 1<sup>st</sup> Respondent

Mr. Murugu Advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Eudice Okombo Court Interpreter



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