



Case Number:	Election Petition 5 of 2013
Date Delivered:	27 Sep 2013
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	Judgment
Judge:	Fred Andago Ochieng
Citation:	Mwamlole Tchappu Mbwana & another v Boy Juma Boy & 2 others [2013] eKLR
Advocates:	-
Case Summary:	<p style="text-align: center;"><b><u>Court upholds results of Kwale County Senatorial Election</u></b></p> <p style="text-align: center;"><b>Mwamlole Tchappu Mbwana &amp; another v Boy Juma Boy &amp; 2 others</b></p> <p style="text-align: center;"><b>Election Petition No. 5 of 2013</b></p> <p style="text-align: center;"><b>High Court at Mombasa</b></p> <p style="text-align: center;"><b>F. A. Ochieng, J</b></p> <p style="text-align: center;"><b>September 27, 2013</b></p> <p style="text-align: center;"><b>Reported by Lynette A. Jakakimba</b></p> <p><b>Issues</b></p> <ul style="list-style-type: none"> <li>i. Whether the Kwale County senatorial election conducted on 4<sup>th</sup> March, 2013 was substantially free, fair and transparent.</li> <li>ii. Whether the 1st respondent, Boy Juma Boy was validly elected and declared the winner of the Kwale County senatorial elections.</li> <li>iii. Where there widespread irregularities in the conduct of the Kwale County senatorial</li> </ul>

elections which materially affected the outcome of the election.

- iv. Whether the transmission of results in the Kwale County senatorial election from the polling stations to the gazetted tallying venues was not transparent.
- v. Whether the discrepancies in the results shown on Forms 35 and 36 were substantial errors that materially affected the outcome of the results.
- vi. Whether a petitioner could be allowed to rely on other facts which came to light during the trial proceedings.

***Election law – election petition –senatorial election- conduct of the election – where the election for the position of Senator , Kwale County was contested for having been conducted contrary to the provisions of the Constitution of Kenya 2010 and the Election Laws – where there were allegations of widespread irregularities in the conduct of the election which affected the outcome of the election – where there were allegations that Forms 35 had alterations these were serious irregularities which ultimately affected the results of the elections – where there were allegations of rampant pre-marking of ballot papers and tampering with ballot boxes – where there were allegations of voter bribery– where there were allegations that the transmission of results was not transparent and not in accordance with the law– Elections (General) Regulations 2012, regulation73 and 82 – Elections Act 2011 section 83 and 87– Constitution of Kenya 2010 articles 87***

**Held**

1. The petitioners failed to discharge their obligation, which was to prove a firm and unanswered case, founded on the petition.
2. The failure of the electronic transmission of results affected all candidates and there was no evidence to support the petitioner’s contention that the

Independent Electoral and Boundaries Commission (IEBC) caused the electronic equipment to fail.

3. The petitioner also failed to prove that any IEBC officials altered the results on the Forms 35 after results had already been announced at any particular polling station. It defied logic that the Presiding Officers could have tampered with Forms 35, after they had announced the results at the respective polling stations, and thereafter provided the court with the Forms 35 which had been signed by the agents at the polling stations. It was true that the results shown on the Forms 36 did not tally with the results on the respective Forms 35, but there was no legal basis for the petitioners' contention that any discrepancies between those forms was only as a result of alterations made by IEBC, deliberately.
4. In all litigation a petitioner was bound by his pleadings. It was common that a petitioner would file a petition and would, in the course of the proceedings, veer away from the initial track. However this would put the opponents in a difficult position in knowing what the real case they had to answer was, and what it was the court had to determine. (*Ferdinand Ndungu Waititu v The IEBC & 8 Others (Nrb) Election Petition No. 1 of 2013*). That was what happened in the present petition with regard to the issue of figures posted in Forms 36. Whilst there were some errors in the figures posted in Forms 36, the petitioners' case had never been that there were such errors. Their case was that the returning officers in Kwale County altered entries made in respect of senatorial votes. Indeed, it was those very forms that the petitioners had relied upon to try and show that the figures posted on the Forms 36 were incorrect, in some instances. By the time that the Forms 36 were being filled, the results had already been announced by the presiding officers, at the polling stations. Therefore, the errors made in the posting could not, and did not affect the conduct of the actual voting exercise or the counting of votes.

	<p><i>Petition dismissed, with costs to the respondents.</i></p> <p><b>Cases</b></p> <p><b><i>East Africa</i></b></p> <p>1. <i>Sirat v Abdirahman &amp; 2 others</i> [2010] 1 KLR 741 –(Explained)</p> <p>2. <i>Waititu, Ferdinand Ndungu v Independent Electoral and Boundaries Commission &amp; 8 others</i> Election Petition No 1 of 2013 –(Explained)</p> <p><b>Statutes</b></p> <p><b><i>East Africa</i></b></p> <p>1. Elections Act, 2011 (Act No 24 of 2011) sections 59(a)(d); 83</p> <p>2. Elections (General) Regulations, 2012 (Act No 24 of 2011 Sub Leg)</p> <p><b>Advocates</b></p> <p>1. Mr Kadima, Mr Munyalo, Mr Wanga, Mr &amp; Mrs Kibe Advocates for the Respondents</p>
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

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

**THE ELECTION ACT 2011**

**ELECTION PETITION NO. 5 OF 2013**

**IN THE MATTER OF SENATORIAL ELECTION OF KWALE COUNTY**

**IN THE MATTER OF ELECTION ACT NO. 24 OF 2011 AS AMENDED BY THE ELECTIONS (AMENDMENT ACT) NO. 31 OF 2012, THE ELECTIONS (AMENDMENT ACT NO. 32 OF 2012 AND THE ELECTIONS [AMENDMENT] [NO.3], ACT NO.48 OF 2012**

**AND**

**IN THE MATTER OF PETITION OF MWAMLOLE TCHAPPU AND KALIMBO NAVEED MWAEGA, REGISTERED VOTERS IN BARAZA PARK POLLING STATION, KWALE TOWN IN MATUGA CONSTITUENCY AND MATUMBE POLLING STATION IN KINANGO CONSTITUENCY, KWALE COUNTY RESPECTIVELY BROUGHT UNDER ARTICLE 87 OF THE CONSTITUTION OF KENYA, 2010 AS READ WITH SECTION 75 AND 76 OF THE ELECTION ACT, 2011 AS READ WITH PART IV OF THE ELECTION [PARLIAMENTARY AND COUNTRY ELECTIONS] PETITIONS RULES, 2013, L.N. NO. 54 OF 2013 AND THE ELECTIONS [GENERAL] REGULATIONS, 2012, L.N. 128**

**BETWEEN**

**1. MWAMLOLE TCHAPPU MBWANA**

**2. KALIMBO NAVEED MWAEGA.....PETITIONERS**

**-VERSUS-**

**1. BOY JUMA BOY .....1<sup>ST</sup>  
RESPONDENT**

**2. MR. RASHID SOUD, COUNTRY**

**RETURNING OFFICER, KWALE COUNTY.....2<sup>ND</sup>  
RESPONDENT**

**3.THE INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION OF KENYA .....3<sup>RD</sup>  
RESPONDENT**

**JUDGMENT**

The petition before me was filed by two voters, **MWAMLOLE TCHAPPU MBWANA** and **KALIMBO**

## **NAVEED MWAEGA.**

They filed the petition to challenge the results which were declared by the INDEPENDENT ELECTORAL and BOUNDARIES COMMISSION (the IEBC), in respect of the elections for the SENATOR of KWALE COUNTY.

The respondents were **BOY JUMA BOY**. (who was declared the validly elected Senator); The Returning Officer for Kwale County; and the IEBC.

It was the petitioners' contention that the elections were not open, accurate, fair, transparent, verifiable, secure or accountable, as required by the law.

The petitioners cited seven (7) grounds as the basis for the challenge they mounted against the first Respondent's election. The said grounds were cited as follows:

### A. RAMPANT BRIBERY AND UNDUE INFLUENCE ON VOTERS.

The two instances cited under that ground were as follows:

“(i) On 3<sup>rd</sup> March 2013, Mr. Gonzi Rai, a candidate for the Kinango Parliamentary seat, offered women group at Tsunza Village, Gadini Ward, Kinango Constituency, money (i.e. Kshs.10,000/-), with an open request that the members of the women group and other members of the public who were attracted to the said meeting, vote for the said Mr. Gonzi Rai and his Senatorial mate (i.e. Boy Juma Boy) and Gubernatorial mate (Salim Mvurya), respectively.

(ii) That there was rampant bribery in Lunga Lunga Constituency, Kwale County, by a candidate for National Assembly seat for Lunga Lunga constituency who sought his election for that position, and that of his senatorial mate (Boy Juma Boy) and gubernatorial mate (Salim Mvurya), by giving and promising to give cheques for secondary school students, supply of building materials to schools and water tank for schools, donations of money to churches and schools, and many other election malpractices;

Further particulars will be supplied upon discovery, as bribery information is predominantly within the knowledge of the giver, and there is need to discover data to establish the particulars of the beneficiaries of the goods and cheques offered.”

The second ground cited by the petitioners was as follows;

### “B. THE TRANSMISSION OF RESULTS IN THE SENATORIAL ELECTION FROM POLLING STATIONS TO THE GAZETTED TALLYING VENUES WAS NOT TRANSPARENT,NOR FOOLPROOF”

A total of nine instances were cited, under that ground, and the same can be summarized as follows;

(i) None or very few Presiding Officers submitted the provisional results in electronic form, to the Returning Officer, at the Tallying Centres.

(ii) None or very few Presiding Officers maintained and made entries in the Polling Day Diaries.

(iii) It was impossible to verify the veracity and accuracy of the counting of votes, as Presiding Officers and Returning Officers disregarded Part XIII of the Elections (General) Regulations, 2012.

(iv) The Senatorial Ballot boxes ferried to the Tallying Centres, were not accompanied by the requisite Forms 33, 35 and 36, sufficiently completed and attested by candidates' agents.

(v) All Returning Officers did not compare the results that were physically ferried to the Tallying venues with the data, if any, which was transmitted in electronic form.

(vi) All the Returning Officers unilaterally altered entries on the forms which were ferried to them.

(vii) The results for Amb. Chirau Ali Mwakwere were only announced after the Returning Officers held consultations with the Commission staff, and after altering the tally forms.

(viii) The Returning Officer for Matuga Constituency was biased against Amb. Chirau Ali Mwakwere.

(ix) The conduct of the Returning Officers in Kwale County adversely affected the result of the Senatorial election.

The third ground listed by the petitioners was;

“(C) WANT OF TRANSPARENCY AND ACCURACY IN KWALE COUNTY SENATORIAL ELECTION PROCESS”

The petitioners cited the case of a voter named HAMISI SWALE KURICHWA, who voted at Bowa Primary School polling station. He was allegedly given a ballot paper which had already been pre-marked in favour of Boy Juma Boy.

The petitioners further asserted that there was rampant pre-marking of ballot papers, in favour of Boy Juma Boy.

“(D) TAMPERING WITH BALLOT BOXES”

The particulars of that particular complaint were as follows;

1. The Presiding Officers in most polling stations in Matuga, Kinango, Lunga Lunga and Msambweni constituencies did not transmit the results to the Returning Officers by electronic form.

2. The Presiding Officer at Vuga Primary School broke the seals and the ballot box insertion apertures, and put into the ballot box, extraneous materials.

3. The Presiding Officer at Uwanja wa Jogoo Polling station issued 2 extra senatorial ballot papers to a voter.

4. A voter was denied the opportunity to vote at Boyani Primary School polling station, as an unknown person had voted in his place.

5. The Presiding Officer contravened **Section 59 (a) and (d)** by crossing-out the name of the voter,

when he had not voted.

6. By allowing somebody else to vote, instead of the registered voter, the Presiding Officer condoned and procured personation at the election.

The next ground raised by the petitioners was as follows;

“(E) CAMPAIGNING AND PROHIBITED COMMUNICATION AT TIRIBE PRIMARY SCHOOL POLLING STATION ON ELECTION DAY.”

The particulars provided were that;

(i) Swaleh Athumani Ndaro (alias Skonyo) openly and loudly campaigned for Boy Juma Boy, within the precincts of Tiribe Primary School. He did so, with the connivance of the Presiding Officer.

(ii) The actions of Skonyo were intended to disrupt or unduly influence the election in favour of Boy Juma Boy. The actions influenced the process and the outcome of the elections.

iii. The silence of the Presiding Officer at Tiribe Primary School was a blatant breach of duty.

iv. The County Returning Officer and the Polling Stations Presiding Officers excluded the URP party agents from many polling stations, thus preventing them from participating in their over-sight roles in the following nine polling stations;

(a) Kilole Primary School

(b) Muhaka Primary School.

(c) Boyani Primary School

(d) Mabamani Primary School

(e) Guru Primary School

(f) Lunguma Primary School

(g) Mwakigwena Primary School

(h) Matuga Primary School

(i) Kinondo Primary School

“(F) Election Offences (Part VI of the Elections Act, 2011)”

- i. The actions of the County Returning Officer, Constituency Returning Officers, Commission staff and election officials at the polling stations, violated the tenets of secrecy, transparency, openness, accuracy and fairness, which are central to a secret ballot in a democratic society.
- ii. Some registered voters were disenfranchised when they stopped from voting. Meanwhile, some persons voted when they were not registered as voters.
- iii. Had there been no bribery, undue influence, hand-outs, acts of violence and murder, Boy Juma Boy would not have been declared the Senator.
- iv. Had the IEBC been impartial, the results would have been different.

It was the case of the petitioners that IEBC enabled Boy Juma Boy to enjoy undue advantage over all other candidates, and that therefore, there was no level playing ground in the elections. This court was invited to declare the results as void, because they were skewed.

The Petitioners also pointed out that some campaigners for the URP candidate were either fatally injured or otherwise seriously injured. The violence, which the petitioners attributed to unknown individuals, was said to have been intended to instill fear and panic on the supporters of URP. As a result, the petitioners believed that well over 5,000 voters were disenfranchised.

Having set out the grounds for the petition, the petitioners asked this court for six reliefs, as follows;

**“(a) Mr. Boy Juma Boy was not validly, fairly and openly elected Senator, Kwale County;**

**(b) Scrutiny and Recount of Senatorial votes in all the constituencies of Kwale County is ordered to establish the validity of the votes cast, and the veracity and validity of the entire election exercise;**

**(c) Amb. Chirau Ali Mwakwere was the senatorial candidate validly elected as Senator, Kwale County;**

**d. In the alternative, an order is made that a**

**fresh senatorial election shall be held in Kwale**

**County, in accordance with the law;**

**(e) The costs of this petition are provided for;**

**(f) The court is pleased to grant such other relief as it may deem fit and just in the circumstances of this petition.”**

In support of the Petition, the petitioners filed affidavits of seven (7) witnesses, in addition to their own

affidavits.

However, at the trial, one of the witnesses did not turn up in court.

The court had made it clear, from the outset, that if a party fails to make available his witness, so that the other parties can cross-examine him, the affidavit of that witness would be deemed to have been expunged from the record. The rationale for that direction was that unless a witness presented himself for cross-examination, the parties who wished to test the credibility of the witness would have been denied their right to do so. In those circumstances, it would then be unfair to such parties, if the court was to place reliance upon such un-tested evidence.

In answer to the Petition, the Respondents denied all the assertions made by the petitioners.

The 1st petitioner testified as **PW 1**.

In his affidavit he deponed that most presiding officers allowed voters to vote without verification of the particulars of such voters through the electronic register.

In his view, the failure of the “electronic gadgets” made the voting process complex and deprived it of any transparency.

He further deponed that because the electronic gadgets failed, the provisional results could not be relayed by the Presiding Officers (at the Polling stations), to the Returning Officer. The said Returning Officers, therefore, had to wait for the Presiding Officers to deliver the Forms.

As a result of the failure of the electronic transmission process, **PW 1** deponed that the results of the senatorial election in Kwale “County, cannot have been simple, fair, accurate, transparent, and representing the will of the people of Kwale County.

**PW 1** said that ballot boxes and ballot papers were tampered with at some polling stations, as well as at the Constituency tallying centres.

He then specified that at Vuga Primary School, the Presiding officer fainted; whilst at Matuga Constituency tallying centre, ballot boxes had no seals and others contained extraneous material.

**PW 1** further said that the URP agents in the polling stations set out in ground (E) above, were locked out of their polling stations.

On the issue of alleged bribery, **PW 1** said that some candidates in the senatorial election, bribed and unduly influenced voters to vote for them. In particular, he said that parents of Lunga Lunga constituency were given cheques for secondary school going students, on condition that they voted for Boy Juma Boy.

During cross-examination, **PW 1** said that Gonzi Rai offered an incentive of Kshs.10,000/-, to a women group, so that they would vote for Boy Juma Boy.

However, **PW 1** did not know the name of the women group that was allegedly paid that amount of money. He said that his co-petitioner would provide the details about the said women group.

When **PW 2** testified, he said that four (4) cheques were issued by MWASHETANI FOUNDATION, to

Ribe Boys, Perani Secondary School (2 cheques) and Ngozi Girls High School.

It was the evidence of **PW 2** that those cheques were issued on condition that the recipients voted for Mwashetani, Mvuria and Boy Juma Boy, respectively.

However, **PW 2** conceded that he was not present when the cheques were being issued. Therefore, **PW 2** did not hear the conditions being given by the person who issued the cheques.

**PW 2** did not have the names of the persons to whom the cheques were issued.

Furthermore, **PW 2** conceded that he did not know the identities of the officials of Mwashetani Foundation. He had not conducted any search to ascertain the identity of the said officials.

In the result, **PW 2** conceded that he did not know if Boy Juma Boy was associated with Mwashetani Foundation.

**PW 2** admitted that he had no evidence linking the Foundation to Boy Juma Boy.

**PW 2** also admitted that he never heard Boy Juma Boy tell the recipients of the cheques to vote for him.

**PW 2** did not testify about the alleged incident in which Gonzi Rai or Nyenye gave a sum of Kshs.10,000/- to a women group.

The identity of the women group remains a mystery, as is the identity of the recipients.

Similarly, I find that the petitioners failed to lead any evidence connecting Boy Juma Boy to Mwashetani Foundation.

There is also no evidence at all about the conditions which were given to the recipients of the four cheques, requiring them to vote for Boy Juma Boy.

In a nutshell, the petitioners failed to prove the allegations of bribery.

The second issue raised by the petitioners was that the transmission of results from the polling stations to the tallying centres was not transparent, nor foolproof.

Largely, that complaint was premised on the failure of the “electronic gadgets” which were supposed to be used by the Presiding Officers, to transmit Provisional Results to the Returning Officers.

**PW 1** alleged that the electronic equipment did not just fail. As far as he was concerned, it was the IEBC who deliberately caused the equipment to fail.

He testified that the IEBC should have tested their equipment before the voting day. Instead, the IEBC is said to have put out the solar panels in the sunlight, on the day of the elections.

However, **PW 1** did not specify where exactly the solar panels were only put out in the sunlight on the day of the elections.

In any event, the petition had not alluded to the alleged deliberate sabotage by IEBC.

**PW 1's** affidavit had made reference to the inability of the Presiding Officers to;

***“forward by electronic means, the provisional results noted in the presence of the agents at the polling***

***station, to the constituency returning officer, as they either did not know how to use the electronic gadgets, or they were ignorant of the requirements under regulation 73 (2) and 82 of the***

***Elections (General) Regulations, 2012.”***

**PW 1** went on to say that the Forms 35 were changed or altered by IEBC officials after the said forms had been filled in at the polling stations.

He expressed the view that the forms must have been altered by the IEBC officials, when they were being ferried from the polling stations to the tallying centres.

However, when he was asked to specify which particular Forms 35 had been altered, **PW 1** said he was unable to do so.

Thereafter, **PW 1** admitted that if the agents of parties signed the Forms 35, that would constitute their confirmation that the results contained in the said Forms were accurate.

This is what he said:

***“There is no Form 35 which was not signed by URP agents, who then gave their reasons for not signing such forms. I agree with you that the results that were announced at the tallying centres were the same as those first announced at the polling stations. Therefore, there would have been no benefit in altering the contents of forms 35, after***

***the results were announced at the polling stations.***

***The electronic transmission did not fail in the whole county. But I agree that the electronic transmission could not, itself, alter the results already announced. The electronic transmission was justprovisional, awaiting the physical forms 35.”***

Thereafter, when **PW 2** was being cross-examined by Mr. Kadima, the learned advocate for the 1st Respondent, he said;

***“The documents from IEBC show forms 35 which have accurate results.”***

Both petitioners also conceded that the failure of the electronic transmission affected all candidates.

I therefore find, that by their own express concessions, the petitioners' evidence does not support their contention, that the IEBC caused the electronic equipment to fail.

They also failed to prove that any IEBC officials altered the results on the Forms 35 after results had already been announced at any particular polling station.

There was no evidence at all that the results for Amb. Chirau Ali Mwakwere were only being announced

at the tallying centres, after the Returning Officers consulted with the staff of IEBC, and after there had been alteration in the original results.

It is to be noted that the Court did allow **PW 1** time to identify the Forms 35 which some agents had signed one week after the elections.

After perusing the said forms, **PW 2** told the court that he had not found any complaint in the entire Petition, that the Forms 35 were later changed by URP agents or by IEBC officials.

The third issue raised by the petitioners was in relation to the lack of transparency and accuracy in the electoral process.

**PW 1** said that HAMISI SWALEH KURICHTWA was given a pre-marked senatorial ballot paper.

**PW 1** was not present at Bowa Primary School polling station when that allegedly happened.

**PW 6** was the voter who was allegedly given a pre-marked ballot paper. He said that the ballot paper was for the senatorial election. He denied the suggestion by the IEBC, that the ballot paper in issue was in relation to the Presidential election.

After **PW 6** complained to the Presiding Officer, he was given a replacement ballot paper. He then cast his vote for the candidate of his choice.

**PW 6** confirmed that the ballot paper in issue was taken by the Presiding Officer. However, **PW 6** did not follow up the issue, to ascertain that the "pre-marked" ballot paper was put inside a sealed envelope.

**RW 4, MWANASITI ATHUMAN ZONGO**, was the ODM agent at Bowa Primary School. She testified that after **PW 6** had been given six (6) ballot papers, and after **PW 6** had gone to mark the said ballot papers, he alleged that he had been given a pre-marked ballot paper.

After the ballot paper was replaced, **PW 6** voted for the presidential candidate of his choice.

According to **RW 4**, the ballot paper which had been wrongly marked, was treated as a spoilt vote.

**RW 7, PETER IRUNGU MURATHE**, was the Presiding Officer at Bowa Primary School polling station.

He told the court that the ballot paper which **PW 6** complained about was for the presidential elections.

Although **PW 6** complained that one ballot paper had been pre-marked, the investigations of **RW 7** revealed that there was no pre-marked ballot paper.

In any event, the ballot paper in issue was not in relation to the elections for the Senator.

The results from the Bowa Primary School polling station reflect one SPOILT VOTE, in the presidential election. There was no other spoilt vote, at all.

Those results are consistent with the evidence tendered by the Respondents, that the ballot paper which **PW 6** complained about, was for the Presidential election.

There is no evidence to support the petitioners' contention that the "spoilt vote" was in relation to the elections for the Senator of Kwale County.

Secondly, there was no evidence of the alleged rampant "pre-marking" of ballot papers in favour of Boy Juma Boy.

The next issue that was raised by the petitioners was in relation to alleged tampering with ballot boxes.

It was said that the presiding Officer at Vuga Primary School polling station, or other members of the IEBC broke the seals and ballot box insertion apertures, and then put into the senatorial ballot box, some extraneous material.

**PW 4, ALI SAID MWAVIDZO**, testified that on the elections day, he was an agent for the Democratic Party (DP). He explained that although his affidavit said that he was an agent for the United Republican Party (URP), that was incorrect.

However, **PW 4** did not sign the Polling Day Diary at the Vuga Primary School polling station.

**PW 4** confirmed that the DP agent who signed the Polling Day diary was **RAJAB MWAKUYUMBA**. That person also signed the Form 35.

However, **PW 4** insisted that extraneous materials were placed in the Senator's Ballot box in Stream 2. The person who did so was the Presiding Officer in Stream 2.

According to **PW 4**, the Presiding Officer had fainted. Thereafter, when he came to, the Presiding Officer collected materials, including the extraneous ones, and put them into the ballot box.

**PW 4** identified the extraneous materials as being an exercise book and un-marked ballot papers.

However, **PW 4** confirmed that he was not present when the Presiding Officer actually put the extraneous materials into the ballot box. He explained that he (**PW 4**) was in Stream 1, whilst the incident was in Stream 2.

When the ballot boxes from Vuga Primary School got to the tallying centre, **PW 4** heard **PW 1** say that the boxes could not be opened in the absence of responsible officers. Thereafter, **PW 1** was arrested "for trying to teach him (the Returning Officer) the job."

However, **PW 4** appreciated the following;

***"The ballot boxes had to be opened if the results were to be announced. The boxes were opened***

***in my presence. Agents of some parties were present. Some agents were absent. We were pained when 1st Petitioner was arrested. I moved out of the Tallying hall, to follow what was happening to 1st Petitioner.***

***What happened did not affect the results."***

From the foregoing testimony, it is clear that the witness for the petitioners confirmed that the extraneous materials, (which were an exercise book and un-marked ballots), did not affect the results.

He also confirmed that the ballot box had to be opened, before results could be announced.

**RW 5, ABDALLA IDI NARIRI**, was the ODM agent at Vuga Primary School polling station.

He signed the polling Day Diary, which was also signed by agents of UDF, TNA, CCU, DPK, KANU and URP.

**RW 5** said that the seals were affixed on the ballot boxes in his presence.

The said seals were still intact when **RW 5** next saw the ballot boxes at the Tallying Centre. And the seals were opened in the presence of both **PW 4** and **RW 5**.

In effect, nothing had been interfered with between the time the ballot box was sealed at the polling station, and the time the ballot box was opened at the Tallying Centre.

**PW 2** confirmed that the URP agent at Vuga Primary School was ALI OMARI SIRI. The said agent signed the Form 35. Therefore, the 2nd Petitioner had no more complaints in that regard.

As the 2nd Petitioner had no more complaints, the court is unable to understand why he and his co-petitioner nonetheless decided to raise the issue in this Petition.

Both **PW 2** and **RW 3** confirmed that the contentious ballot box from Vuga Primary School polling station, was opened in their presence. The reason why the ballot box needed to be opened was that the tallying sheet had been placed in it.

**RW 6, HELLEN SIDI KAHINDI**, was the Returning Officer in Matuga Constituency. She explained that the 1st Petitioner (PW 1) was arrested after he objected to the opening of a ballot box from Vuga Primary School polling station.

**RW 6** said that although the Chief Agents were present at the Tallying Centre, she insisted that the agents from the polling station had to be present when the ballot box, in issue, was being opened.

That explanation is in tandem with the Petitioners' position. I therefore find that the alleged tampering with a ballot box from Vuga Primary School polling station was a non-issue.

I also find that the Petitioners failed to lead any evidence about the allegation that one voter at the Uwanja wa Jogoo Polling Station was issued with two (2) extra senatorial ballot papers.

There was no evidence at all that a registered voter at Boyani Primary School Polling Station was turned away after an unknown person voted in his place.

On the question of prohibited campaigns which took place at Tiribe Primary School Polling Station, on the polling day, **PW 1** said that "Skonyo" campaigned for Boy Juma Boy. However, **PW 1** was not present when that incident happened.

**PW 3, RASHID KASSIM MWAMBENI**, was the URP agent in the senatorial elections in Kwale County.

On elections day, at about 3.00p.m, **PW 3** visited Tiribe Primary School. It is stated in his affidavit that he entered into the hall and found people discussing loudly about a man known by the nickname "Skonyo".

The said Skonyo was inside the hall, where he claimed that Amb. Chirau Ali Mwakwere had not undertaken any development, like water or roads. Whilst Skonyo was talking, he also marked his ballot papers, which he then put into their respective ballot boxes.

According to **PW 3**, he complained to the Presiding Officer, who responded that Skonyo was drunk. **PW 3** was dissatisfied with that response. He, therefore, literally threw out Skonyo from the polling station.

Meanwhile, **PW 1** had said that Skonyo had been thrown out by the security.

When **PW 3** was asked whether or not it was the security who threw out Skonyo, he answered in the affirmative.

**PW 3** then added that Skonyo had been campaigning at the queuing line, outside the polling station.

In effect, the testimony of **PW 3** is inconsistent in itself. On the one hand, Skonyo was inside the voting hall, marking ballot papers, whilst deriding the URP candidate. On the other hand, the said Skonyo was campaigning outside the polling station, along the queues.

Again, **PW 3** first said that he actually saw Skonyo cast his votes. But during further cross-examination, **PW 3** said that he was not aware if Skonyo returned and voted later, when he was sober.

Meanwhile, **PW 5, JUMA HASSAN MWACHANGOMA**, also testified about having been at Tiribe Primary School polling station. He said that Skonyo was marking his own ballot papers, whilst he was talking.

**PW 5** said that he knew that it was an election offence for someone to be campaigning at a polling station. **PW 5** also knew that if someone was committing an election offence, the agents should report to the Presiding Officer. Therefore, **PW 5** reported to the Returning Officer at the Tiribe Polling Station.

The Returning Officer did not take any action. Therefore, in the understanding of **PW 5**, he should have complained to the boss of the Returning Officer. However, **PW 5** decided not to report to the boss of the Returning Officer.

Interestingly, **PW 5** decided to report to the Election Committee that had been set up by Mr. Mwakwere. That Committee then wrote to Ms Sidi Kahindi.

Although **PW 5** took the letter personally to Ms Kahindi, he could not recall whether the letter had been signed by Mr. Mwakwere or by Mr. Makopa who was the secretary to the Committee.

**PW 5** was unable to show the letter to the court because he was *“not the secretary of the committee.”*

Finally, **PW 5** said that he is the person who removed Skonyo from the polling station.

He said;

**“The police officers were at a distance; they only approached after I had removed Skonyo.”**

Another witness of the incident at Tiribe Primary School polling station was **PW 7, OMAR RAMADHANI NJAMA**.

Whereas **PW 3** said that Skonyo was behaving as if he was drunk, and **PW 3** did not know if Skonyo was actually drunk; **PW 7** said;

***“Skonyo was drunk. I went very close to him, and smelt his breath had alcohol. It was a traditional brew i.e. either mnazi, muratina or busaa. It was not beer.”***

Because Skonyo was campaigning, **PW 7** saw a gentleman who was going round the polling stations, who complained to the presiding Officer and the agents, for not acting against Skonyo.

**PW 7** also said that Skonyo had uttered the words in question, just before he voted. **PW 7** emphasized that Skonyo did not vote later. Therefore, in the opinion of that witness, if any person suggested that Skonyo only voted later, that would be incorrect.

From the foregoing pieces of evidence, it is not clear what exactly happened.

In any event, according to **PW 7**;

***“Skonyo should have been removed, and that is what happened. He should have been arrested and charged as he was campaigning at the polling station. But Skonyo was never arrested or charged. A report should have been made to IEBC and the police, for Skonyo to be arrested.***

***But I did not report to the IEBC or to the police, about Skonyo. We did not take up the matter seriously.***

***As an agent for URP, I know that the party did not complain. I reported to the party, but they said it was not necessary to lodge a formal complaint about a person who was simply drunk. I did not complain officially. I only grumbled.”***

To my mind, that sums up the complaint about Skonyo. Not only is the evidence unclear, but it was not an issue which the political party or its agents took seriously. I therefore do not understand why thereafter, the petitioners decided that it was so serious a matter that needed to be raised in an election petition.

Both **PW 3** and **PW 7** testified that they did not have any evidence that Skonyo's alleged campaign either affected the URP candidate or that it caused any person to vote in a manner which such person had not intended.

In any event, the actions of the said Skonyo if they took place, were not linked to any of the respondents. The petitioners have only themselves to blame for failing to report the incident to the IEBC or to the police for appropriate action.

And by the admission of the petitioners' witnesses, the incident was not shown to have had any impact on the elections. It cannot therefore be the foundation for granting any of the reliefs sought in the Petition.

The Petitioners other complaint was in relation to nine polling stations, where the agents of URP were excluded.

However, the 1st Petitioner (**PW1**) conceded that the petitioners had not filed any affidavit by any agent

who had been denied entry into any polling station.

During cross-examination, both petitioners confirmed that URP had agents at all the nine polling stations which the Petition has specified as being those that the agents of that party had been excluded from.

Having also acknowledged that the said agents signed the respective Forms 35, the 1st petitioner revised his complaint; saying;

***“My evidence is not that there were no agents.***

***They were denied entry until late in the day.”***

But even in that respect, **PW 1** agreed that;

***“None of the agents indicated on the forms 35 that they were only allowed to enter the polling stations late.”***

The IEBC responded through **RW 6**, who said that no agent was blocked from accessing the polling stations.

Even in the absence of that response, it is clear that the petitioners led no evidence to prove the assertion that URP agents were excluded from;

- (a) Kilole Primary School
- (b) Muhaka Primary School.
- (c) Boyani Primary School
- (d) Mabamani Primary School
- (e) Guro Primary School
- (f) Lunguma Primary School
- (g) Mwakigwena Primary School
- (h) Matuga Primary School
- (i) Kinondo Primary School

The Petitioners' other complaint was in relation to violence meted out against the village chairman of Bahakanda Village in Matuga Constituency.

It was their case that Mr. MRISA KOMBO and MR. OMAR were fatally wounded, whilst MRS OMAR and MR CHARO were seriously wounded.

The four victims were described as campaigners for the URP candidate, Amb. Chirau Ali Mwakwere.

Therefore, when they were attacked, the intention was said to be that fear and panic be instilled in the

supporters of the URP senatorial candidate.

The violence was alleged to have disenfranchised well over 5,000 people.

Although the petitioners promised to file an affidavit or affidavits in support of those facts, no such affidavits were ever filed.

Furthermore, **PW 2** said that if the wife of the chairman of Mwaluphaba or Buhakanda Village said that her late husband was a supporter of ODM, the petitioners could not deny the contention.

**PW 2** also admitted that the police had attributed the violence to the MRC, as opposed to any political party

Therefore, I find that the Petitioners failed to lead any evidence to show that violence was directed against either the URP party or that party's candidate.

There was absolutely no evidence that "over 5,000 people were disenfranchised" by the violence.

In their written submissions, the petitioners have gone to great lengths to analyse the results on the Forms 35 which were exhibited by the IEBC.

The petitioners submitted that there was no explanation offered for the discrepancies in the total votes assigned to each of the candidates, and the total valid votes.

In the Form 36 for Matuga constituency, it is indicated that the total valid votes cast were 31,297. However, when one adds the votes assigned to each of the candidates, the total is 32,560.

The difference is 1,263 votes.

That analysis is accurate. However, it must be borne in mind that it is when a witness was giving his evidence that he can be called upon to tender such explanations as he may have.

In this instance, the petitioners could have raised questions with the IEBC, when their witnesses were in the witness box. They did not do so.

Secondly, the issue of those particular discrepancies were not raised in the Petition. Therefore, the respondents could not have been required to respond to it.

As regards Vuga Primary School, the petitioners' complaint had been about the alleged breakage of the seals and ballot box insertion apertures, after which extraneous materials were put inside the senatorial ballot box.

The extraneous materials were an exercise book and un-marked ballot papers, said the petitioners' witnesses.

The petitioners accepted that those materials could not have affected the results.

But what were the results"

**RW 6** testified as follow;

***“In Stream 1, votes cast were 167. Juma got - 156***

***Mwakwere got – 108***

***Kombo got – 03***

***Those votes for each of the candidates adds up to more than 168. So the total number of votes is 268. There is an error in the totaling of the total votes cast. But there was no error in the votes cast for each candidate.”***

It is therefore clear to me, that the figure of 167 in the Form 36 is simply an error. I so find because the votes assigned to the 3 candidates adds up to 267 votes. Then to that sum, should be added the one rejected vote, to bring the total numbers of votes cast to 268.

The IEBC gave a completely sound explanation or the alleged discrepancies, at Vuga Primary School polling station, Stream 2.

I have carefully perused the results on the Forms 35, and compared them to those on the Forms 36.

A look at only the polling stations cited in the petitioners submissions shows that the votes for Boy Juma Boy, in the form 36, should be reduced by an aggregate of 650; whilst the votes for Chirau Ali Mwakwere should be increased by 637.

Even if that mathematical exercise was conducted, on the basis of the Forms 35, it should be possible to ascertain who won the elections.

If the petitioners had provided the court with some Forms 35, which had results that were different from those in the Forms 35 exhibited by the IEBC, it may have been possible for them to advance an argument that the Forms 35 were tampered with.

To my mind, it defies logic that Presiding Officers could have tampered with Forms 35, after they had announced the results at the respective polling stations, and thereafter provide the court with the Forms 35 which had been signed by the agents at the polling stations.

It is true that the results shown on the Forms 36 did not tally with the results on the respective Forms 35. But there is no legal basis for the petitioners' contention that any discrepancies between those forms was only as a result of alterations made by IEBC, deliberately.

As the petitioners pointed out in their submissions, the figures in the Forms 36 were not only different, (in the instances where that happened), for either Chiaru Ali Mwakwere or Boy Juma Boy. The mistakes in posting the numbers was cross-cutting, although it would appear that Boy Juma Boy was the biggest beneficiary of the mistakes.

I have gone into great detail on the question only because it was raised in the Petitioners' written submissions. Had I ignored those issues, it is possible that the unrepresented petitioners may have felt that an important matter had been left unresolved.

However, I must reiterate that to the extent that the submissions were not founded on the issues raised in the Petition, and on the evidence adduced by the petitioners, the court would have been entitled to ignore them.

In that regard, I share the following view, which was expressed by Kimaru J. in **MAHAMUD MUHUMED SIRAT Vs ALI HASSAN ABDIRAHMAN & 2 OTHERS (NRB) PETITION NO. 15 of 2008;**

***“From the outset, this court wishes to state***

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

But why should not a petitioner be allowed to rely on other facts which come to light during the trial, even if he had not originally made out a case on basis of such “facts”

In **FERDINAND NDUNGU WAITITU Vs THE IEBC & 8 OTHERS (NRB) ELECTION PETITION NO. 1 of 2013,** Mwongo, Principal Judge provided what I regard as the answer to that question. He said;

***“The third principle is that, as in all litigation, a petitioner is bound by his pleadings. It is***

***common that a petitioner will file a petition and will, in the course of the proceedings, veer away from the initial track. This puts the opponents into a difficult position in knowing what the real case they must answer is, and what it is the court must determine.”***

That is what has happened here, with regard to the figures posted on Forms 36. Whilst there were some errors in that regard, the Petitioners' case had never been that there were such errors. Their case was that the Returning Officers altered entries made in respect of senatorial votes.

However, there was no evidence that was adduced to prove any alteration. The Forms 35 remained in exactly the same state they were in when they left the respective polling stations. Indeed, it is those very forms that the petitioners have relied upon to try and show that the figures posted on the Forms 36 were incorrect, in some instances.

By the time that the Forms 36 were being filled, the results had already been announced by the Presiding Officers, at the polling stations. Therefore, the errors made in the posting could not, and did not affect the conduct of the actual voting exercise or the counting of votes.

In this case, the court has come to the conclusion that the petitioners failed to discharge their obligation, which was to prove a firm and unanswered case, founded on the petition. The IEBC declared the following results for the position of Senator, Kwale County;

Boy Juma Boy - 60,886

Ali Chirau Mwakwere - 41,753

Zani Nicholas Stephen - 7,155

Mwero Kombo 14,292

Therefore, even if the errors in the Forms 36 were corrected, so as to conform to the particulars cited in the respective Forms 35, that would not affect the results of the elections.

**Section 83 of the Elections Act** provides as follows;

**“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears**

**that the election was conducted in accordance with the principles laid down in the Constitution**

**and in that written law or that the non-compliance did not affect the result of the election.”**

I find and hold that the petition has no merit. It is therefore dismissed, with costs to the respondents.

The results declared by the IEBC are held to be a true reflection of the exercise of the democratic rights of the people of Kwale County.

I therefore now order as follows;

(a) This Petition is hereby dismissed.

(b) A Certificate do issue to the IEBC confirming the validity of election of **BOY JUMA BOY** as the Senator for **KWALE COUNTY**, for the Petition challenging the election has been found to have no merit.

(c) Pursuant to **Section 87(1) of the Elections Act**, I do hereby report that no election offence was proved to have been committed by any person, in connection with the Senatorial elections in Kwale County.

(d) The Petitioners will pay the costs of the Petition to the three Respondents.

(e) The costs payable to the 1st Respondent shall be capped at **Kshs.1,000,000/-**.

(e) The costs of the 2nd and 3rd Respondents will be capped jointly at **KShs.1,500,000/-**

(f) The Taxing Master will tax the actual costs payable to the Respondents, unless the parties will have agreed on the same.

(h) The security deposited in court shall be utilized towards the payment of the costs. The sum will be divided equally between the 1st Respondent on the one hand and the 2nd Respondent and 3rd Respondents jointly, on the other hand.

Finally, I do sincerely thank the Petitioners for a sterling job, even when their lawyers left them alone. I also commend **Mr. Kadima, Mr. Munyalo, Mr. Wanga, Mr & Mrs Kibe, Avocates**, for assisting the court to handle the trial smoothly and expeditiously.

My researcher, **Mr. Willis Oluga** deserves special commendation for the support he offered to the court, all through the proceedings.

My court clerk, **Mr. Ibrahim**, I thank you most sincerely for doing a commendable job.

**Milka** and **Christine**, you performed exceptionally well as my secretaries, during this trial. I thank you. I also thank **Lucy Maruga** for typing the final judgment.

**Dated, Signed and Delivered at MOMBASA, this 27th day of September 2013.**

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**FRED A. OCHIENG**

**JUDGE**



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