



Case Number:	Election Petition 4 of 2013
Date Delivered:	20 Sep 2013
Case Class:	Civil
Court:	High Court at Kakamega
Case Action:	Judgment
Judge:	Said Juma Chitembwe
Citation:	Joseph Amisi Omukanda v Independent Electoral and Boundaries Commission (lebc) & 2 others [2013] eKLR
Advocates:	-
Case Summary:	<p><b>Electoral Law</b> – elections malpractices – election petition to challenge the elections results for Navakholo constituency in Kakamega County – claim that the elections procedures had been marred with various anomalies – that two different and inconsistent forms 36 had been issued instead of one – claim that the Petitioner’s agents were not allowed to sign forms 35 - claim that the tallying of votes was not properly done – that results of one polling station ( Emuhuni polling station) were excluded – claim that the results for another polling station (Kaunda market polling station ) were wrongly posted in form 36 - where the Petitioner wanted the court to make an order of scrutiny and recount of votes cast in Navakholo constituency – whether the elections for Navakholo constituency in Kakamega County were conducted in compliance with electoral laws and constitutional principles – Constitution of Kenya 2010 article 86, Elections Act 2011 section 83, Elections (General) Regulations 2012 regulation 76; 79, Evidence Act section 107;108</p>

Court Division:	Civil
History Magistrates:	-
County:	Trans Nzoia
Docket Number:	-
History Docket Number:	-
Case Outcome:	Dismissed
History County:	-
Representation By Advocates:	Neither party represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

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

**THE ELECTION ACT 2011**

**ELECTION PETITION NO. 4 OF 2013**

**JOSEPH AMISI OMUKANDA ..... PETITIONER**

**V E R S U S**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (IEBC) ..... 1<sup>ST</sup> RESPONDENT**

**WILSON KIMUTAI KIPCHUMBARETURNING OFFICER**

**NAVAKHOLO CONSTITUENCY ..... 2<sup>ND</sup> RESPONDENT**

**EMMANUEL WANGWE ..... 3<sup>RD</sup> RESPONDENT**

**J U D G M E N T**

**Introduction**

The petitioner was a candidate for the election of Member of National Assembly for Navakholo constituency in Kakamega County conducted on 4.3.2013. There were eight candidates and the petitioner came second while the 3<sup>rd</sup> respondent was declared the winner with a margin of 32 votes. Being dissatisfied with the declared results the petitioner preferred this petition.

**The Petition**

This petition was filed on the 2.4.2013. It is stated in the petition that the 2<sup>nd</sup> respondent who was the returning officer for the elections for Navakholo constituency gave two different forms 36 which had different results. The tabulation, tallying and collating of the results by the 2<sup>nd</sup> respondent was handled casually and that led to anomalies in the results. According to the petition the number of rejected votes entered in the form 36 is different from the number indicated in the forms 35. The total votes received by all candidates are more than the total valid votes cast. The petitioner did indicate in the petition that he did not require any other determination except a recount of all the votes cast and examination of the tallying. The petition has three prayers namely:-

- a. *An order for scrutiny of all ballot papers cast, recount of votes cast for all candidates and examination of the tallying.*
- b. *THAT upon the recount and re-tallying a declaration that the candidate with the highest number of votes is the one validly elected Member of National Assembly for Navakholo Constituency.*
- c. *THAT the 1<sup>st</sup> and the 2<sup>nd</sup> respondents do meet the costs of this petition.*

### **Petitioner's Evidence**

The petitioner **JOSEPH AMISI OMUKANDA** testified as **PW1**. His evidence is that he has been a councilor in Kakamega since 1997. He was a candidate for Member of Parliament for Navakholo constituency in the election conducted on 4.3.2013. He was nominated by the Maendeleo Democratic Party (hereinafter referred to as MDP). The election was conducted peacefully in all the 82 polling stations and thereafter the petitioner went to the tallying centre at Chebuyusi with his chief agent (PW5).

While the tallying was going on at the Chebuyusi tallying centre he complained that some of the forms 35 were not correct. All the forms 35 were not given to the candidates at the tallying centre to enable them verify the results. None of his agents signed the forms 35 for Shikomari and Kaunda polling stations. The petitioner informed the court that he could not tell whether there was change of his votes at any given polling station. As the tallying was ongoing he had garnered 10,228 votes before Shikomari Polling station had been announced. The 10,228 votes were from 81 out of the 82 polling stations. According to the petitioner the 3<sup>rd</sup> respondent was given the rejected votes as the form 36 showed that the total votes cast were 33,863 while the valid votes were 33,454.

The petitioner further testified that the election was done properly and there were no incidents. His main complaint is what happened during the tallying process. The 2<sup>nd</sup> respondent did not tally the votes correctly. The petitioner had agents in all the polling stations. His agents at Shikomari and Bushiri polling stations recorded complaints that they were not given the forms 35 to sign. There are rubbings and corrections on some of the forms 35. After the elections were completed and the results announced he called for copies of the forms 35 and form 36 and he was given a form 36 which had results that were different from those declared at the tallying centre. The results that were declared at the tallying centre gave him 10,214 votes while the winner got 10,246 votes. While at the tallying centre his agents were sending him the results and his chief agent was also receiving the results. By the time he went to the tallying centre he did not know his full results.

**PW2 CHARLES ONG'AYO DIAS**, was the petitioner's agent at Shikomari polling station Stream II. He swore his affidavit on the 2.4.2013. His evidence is that Shikomari polling station had two streams and he was in stream 2 while the other agent by the name Alloys Omutsembi was in stream 1. The petitioner got 387 votes in stream 1 and 266 votes in stream 2. In stream 2 the 3<sup>rd</sup> respondent got 22 votes. He went to the tallying centre and found that the tallying was going on. He did not hear the results for Shikomari being announced. The returning office later announced the final results. According to PW2 the petitioner got a combined total of 633 votes at Shikomari polling station.

**JAMES WANDERA ZALO** testified as **PW3**. He swore an affidavit on the 2.4.2013. He was the Deputy Presiding Officer at Bushili Primary School polling station. According to him he did not sign the form 35 for the polling station and yet it is alleged that he had signed it. It is his evidence that it was the presiding officer **HUTTON WANYAMA (DW1)** who signed the form 35. The presiding officer signed the form 35 at the tallying centre. He denied that the signature appearing on the form 35 was his. There was an aggregate form which he signed but it did not have the results for one of the candidates, **Mr. Saleh Mung'ang'a**. The total votes cast for the polling station were 402 for stream 2 yet the form 35 gave a figure of 396 votes. PW3 is a teacher by profession. The petitioner got 310 votes in stream 1 and 305 votes in stream 2 giving a total of 615 votes. The 3<sup>rd</sup> respondent got 18 votes in stream 1 and 21 votes in stream 2 giving a total of 39 votes. The results for both candidates were correctly posted on the form 36. It is PW3's further evidence that the presiding officer signed the form 35 at Chebuyusi tallying centre.

**PW4 is DINAH AYAKO WERE.** She swore her affidavit on the 2.4.2013. It is her evidence that she was the petitioner's agent at Bushili Primary School polling station stream 2. There was no incident at this station. The votes were counted at the polling station but the agents were not given the forms 35 to sign. The presiding officer at the station was HUTTON WANYAMA. There was an aggregate form which contained the results of seven of the candidates but the 8<sup>th</sup> candidate, SALEH MUNG'ANG'A was not included. She signed the aggregate form at the back. The petitioner got 305 votes in stream 2 while the 3<sup>rd</sup> respondent got 21 votes. She was present during the counting of the votes and there was no complaint relating to the voting process. The rejected votes were shown to the agents and nobody benefited from the rejected votes. The other agent at the polling station for the petitioner for stream 1 was one NASHON AMBUNDO. The petitioner got 615 votes at the polling station. PW4's main complaint is that she did not sign the form 35 for Bushili polling station yet the form 35 issued by the 2<sup>nd</sup> respondent to the petitioner indicates that she signed.

**PW5 is NICANOR ERIC S. WANGWE.** He swore his affidavit on the 2.4.2013. PW5 was the chief agent for the petitioner and vice secretary for MDP. He testified that on the 4.3.2013 voting went on well in all the 82 polling stations. There was no incident recorded. The petitioner had an agent by the name **GIDEON LUKWA** at the Chebuyusi tallying centre. The petitioner and PW5 went to the tallying centre after the polling stations had closed. The 2<sup>nd</sup> respondent was at the tallying centre with about five other staff. The tallying went on well but the 2<sup>nd</sup> respondent stopped the process at about 9.00 p.m. The 2<sup>nd</sup> respondent left for unknown destination only to return after a period of two hours. The presiding officers were arriving at the tallying centre with the ballot boxes and they handed the results to the other Independent Electoral and Boundaries Commission, hereinafter (IEBC) staff who were manning the tallying centre.

PW5's further evidence is that at the tallying centre he was not asked to scrutinize the results as they were being brought by the presiding officers. He was receiving the results from his party agents. According to his list of results Bushili and Shikomari polling stations had differences. Their agent at Bushili polling station was not allowed to sign the form 35. At that polling station the petitioner got 310 votes in stream 1 and 305 in stream 2 and this was in line with his results as posted by the IEBC. At Shikomari the petitioner got 367 votes for stream 1 and 266 votes for stream 2. However, according to him the petitioner's votes for the two polling stations ought to have been 653 as he got 387 votes in stream 1. The problem at Shikomari polling station was that there was no form 35 given to the agents, that the agents were not allowed to accompany the presiding officer to the tallying centre and lastly that the presiding officer pinned the results on the door but later removed them. The petitioner therefore lost 20 votes at Shikomari as the IEBC posted 633 votes for the petitioner on the form 36. The party's agent at Bushili polling station was DINAH WERE and she did not record any discrepancy in the number of votes. The results for Bushili polling station were publicly announced at the tallying centre and they did tally with those of the IEBC.

According to PW5 the 2<sup>nd</sup> respondent left the tallying centre for two hours and returned at about 11.00 p.m. PW5 was receiving the results from the party agents through SMS in advance before they were announced at the tallying centre. It is his evidence that a comparison of the forms 35 and 36 give a variance of 1,282 votes. The total rejected votes were changed from 417 to 409 giving a variance of 8 votes. The election process went on very well but it was the tallying process which had problems. It is PW5's evidence that when the results were being announced at the tallying centre the petitioner was leading with 10,228 votes while the 3<sup>rd</sup> respondent had 9,776 votes. The results for Shikomari Primary School polling station had not been announced at that time.

**PW6 is VANCE PAUL UDOTO.** He was a candidate for Member of National Assembly position during the election. He swore his affidavit on the 10.5.2013. His evidence is that when the results were

announced he was given **7,795** votes but the form 35 gives him a total of **6,185** votes. It is his evidence that there was no complaint about the voting process in all the 82 polling stations. He was at the tallying hall from 6.00 p.m. until when the results were announced. The top three candidates and himself were present when the results were announced. The returning officer left the tallying centre and returned after about 20 minutes. To the best of his knowledge the voting went on very well and there was no incident in any given polling station. An audit was done after the results had been announced and the audit gave him different results. One result was **7,795** votes. Another gave him **6,184** votes. The third one gave him **6,249** votes while the fourth one gave **6,334** votes.

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

The respondents maintain that the election for Navakholo constituency Member of Parliament was free and fair. The results were announced on the 5.3.2013 at Chebuyusi Secondary School tallying centre at about 11.00 p.m. as follows:-

- |                                   |   |        |
|-----------------------------------|---|--------|
| i. <i>Emmanuel Wangwe</i>         | - | 10,246 |
| ii. <i>Emmy Nawanjaya Siganga</i> | - | 297    |
| iii. <i>Joseph Amisi Omukanda</i> | - | 10,214 |
| iv. <i>Leonard Mayende</i>        | - | 298    |
| v. <i>Moni Wekesa</i>             | - | 6,156  |
| vi. <i>Saleh Mung'ang'a</i>       | - | 258    |
| vii. <i>Stanley Kevin Bushuru</i> | - | 210    |
| viii. <i>Vance Udoto</i>          | - | 6,184  |
| ix. <i>Rejected Votes</i>         | - | 409    |

The petitioner did not fault the manner in which the elections were conducted in all the polling stations. His main complaint is the tallying process. It is indicated in the response that after the elections were announced the 2<sup>nd</sup> respondent conducted an audit and filled in another form 36. The audit showed that the results on the form 35 for Kaunda market polling station was wrongly posted on the form 36. The 3<sup>rd</sup> respondent got 263 votes at the polling station but the same was erroneously entered in the form 36 as 43 votes. Secondly, whereas Emuhuni Primary School polling station had two streams, the data entry clerk only picked one stream and all the candidates were affected by the loss of one stream. The audit gave the subsequent results as follows:-

- |                                   |   |        |
|-----------------------------------|---|--------|
| i. <i>Emmanuel Wangwe</i>         | - | 10,574 |
| ii. <i>Emmy Nawanjaya Siganga</i> | - | 303    |
| iii. <i>Joseph Amisi Omukanda</i> | - | 10,233 |

- iv. *Leonard Mayende* - 301
- v. *Moni Wekesa* - 6,390
- vi. *Saleh Mung'ang'a* - 261
- vii. *Stanley Kevin Bushuru* - 208
- viii. *Vance Udoto* - 6,249

The respondents maintain that in whatever manner the results are analyzed still the 3<sup>rd</sup> respondent emerges the winner. The petitioner caused chaos when the results were announced and threatened the 2<sup>nd</sup> respondent. The incident was reported at the Kakamega police station and the respondents would like the petitioner to be charged with an election offences.

#### **Evidence for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

Three witnesses testified for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. **DW1 HUTTON WANYAMA** was the presiding officer for Bushili Primary School polling station. He swore his affidavit on the 19.4.2013. His evidence is that after the votes were counted, he noted that there was a shortage of form 35. He went to the nearby Ematiha polling station and borrowed a form 35. He cancelled the word Ematiha and replaced it with Bushili. The form 35 gives the same results as the aggregate form. His deputy presiding officer **JAMES WANDERA ZALO** signed the form 35 as well as the party agents including Dinah Were, the petitioner's agent. The form 35 had a slight error in that the total valid votes were 398 while the form 35 gives 396. However the results for each candidate is correct. The witness denied that the form 35 was filled at Chebuyusi tallying center. It is the evidence of DW1 that the voting exercise at the polling station went on very well and there was no complaint from any agent.

**WILSON KIMUTAI KIPCHUMBA (DW2)** was the returning officer for Navakholo constituency. He swore his affidavit on the 18.4.2013. He testified that at the Chebuyusi tallying centre the candidates and their agents were allowed in the tallying hall. There were 82 polling stations and 11 of them had two streams each making a total of 93 polling centres. He tallied the results and announced the winner on the 5.3.2013. When he announced the results the difference between the first and second candidate was 32 votes. He later conducted an audit and discovered that the results for Kaunda market and Emuhuni polling stations were erroneously posted on the form 36. The audit gave the winner extra votes. All the candidates benefited from the correction of Emuhuni polling station as only one stream had been posted.

DW2's further evidence is that the results for Shikomari polling station were announced at the tallying centre at about 2.00 p.m. The witness informed the court that the form 36 has an error in that instead of adding the rejected votes to the total **valid** votes so as to get the total number of votes cast, he subtracted the rejected votes from the **valid** votes. On the 9.3.2013 he saw an article in the Daily Nation Newspaper indicating that the petitioner was the winner. Many people called him accusing him of having changed the results. This led to the audit and he signed the second form 36 on the 23.3.2013. The errors on the form 36 are not intentional. His work was just to tally the votes but not to recount them. The presiding officers would present the results as contained in the forms 35 in the full view of all those present at the tallying centre and he would then announce the results. The witness denied that he

left the tallying centre for an unknown destination during the tallying exercise. There was no dispute from any agent relating to the results from the polling stations. Although there were errors in the tallying process, the winner did not win because of the errors. The total votes cast should be 35,051 and valid votes were 34,634 with 417 rejected votes.

**WILSON KIPRUTO KOSGEI** was **DW3**. He swore his affidavit on the 19.4.2013. He is a Superintendent of Police and was the Deputy OCPD Kakamega County. He was in charge of security at the Chebuyusi tallying centre on the 5.3.2013. His evidence is that immediately the results were announced the petitioner and his supporters threatened the returning officer (DW2). The petitioner and his supporters stood up when the results were announced and wanted to snatch the computer which contained the results. The returning officer asked the petitioner to leave the tallying hall. The life of DW2 was in danger. DW3 asked the petitioner to leave the tallying hall and he left peacefully with his supporters. The petitioner and his supporters had no weapons. The incident was later reported by DW2 at Kakamega police station as OB number 13 of 10.3.2013. The petitioner was not charged with any offence and the matter is still being investigated by the Criminal Investigation Department office.

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

According to the response by the 3<sup>rd</sup> respondent, the election was free and fair. The 3<sup>rd</sup> respondent won the election having garnered 10,246 votes against 10,214 votes for the petitioner. The petition does not challenge the voting process and the counting at the polling stations. The fact that the 2<sup>nd</sup> respondent did an audit and issued another form 36 does not amount to wrong doing but only shows openness by the IEBC. The subsequent audit still shows that the 3<sup>rd</sup> respondent is the winner. The results were properly tallied. Further, that when the results were announced the petitioner caused chaos at the tallying centre. The petitioner has not laid any basis for recount of the votes.

### **Evidence for the 3<sup>rd</sup> respondent**

**ISMAEL OSUNDWA BARASA** was **DW4**. He swore his affidavit on the 18.5.2013. He was an agent of the UDF party based at Shikomari Primary School polling station stream 1. The results were announced at the station and his candidate, the 3<sup>rd</sup> respondent, got 22 votes while the petitioner got 367 votes in that stream. He did not sign the form 35 as people were making noise after the results were announced. **DW5** is **EUBERT AMATSIMA TATWA**. He was an agent for the UDF party for Shikomari polling station stream 2. He swore his affidavit on 18.5.2013. According to his evidence the 3<sup>rd</sup> respondent got 12 votes while the petitioner got 266 votes in that stream. He did not sign the form 35.

**JUSTUS MASAI OTUNGA** was **DW6**. He was also a UDF party agent based at Bushili polling station stream 2. He signed the aggregate form and his candidate, the 3<sup>rd</sup> respondent, got 21 votes while the petitioner got 305 votes. The form 35 for the station was borrowed from Ematiha polling station. None of the agents complained about the results. The presiding officer HUTTON WANYAMA and his deputy JAMES WANDERA ZALO were present when the agents signed the aggregate forms. **DW7** is **FREDRICK MBALILWA LUKALIA**. He swore his affidavit on the 18.5.2013. DW 7 was an IEBC clerk at Bushili Primary School polling station stream 1. His evidence is that the clerks in stream 1 finished their work early and at around midnight he went to stream 2 to check on his friend, James Zalo, who was a clerk in that stream. He saw the agents sign forms after the votes were counted. He can't tell whether James Zalo signed the form 35. His further evidence is that after the elections were over he was asked to support the petitioner in his petition.

**DAVID MUSIKHA BARASA (DW8)** was the chief agent for the 3<sup>rd</sup> respondent. It is his evidence that the elections were conducted fairly in all the polling stations. There was no report of a complaint by any

agent in the polling stations. He went to the tallying centre at 2.30 p.m. and remained there until when the results were announced at 11 p.m. He was given the form 36 by the returning officer. The results were being announced after they were received from the polling stations. He was satisfied with the results from the polling stations.

**DW9** is **EMMANUEL WANGWE**, the 3<sup>rd</sup> respondent. He swore two affidavits on 18.4.2013 and 18.5.2013 respectively. His evidence is that he won the election with 10,246 votes while the petitioner got 10,214 votes. He was in the tallying hall on the 5.3.2013. The returning officer started receiving the results and he was reading them from the forms 35 as they came. No one claimed that the results that were being read were different from those announced at the polling stations. The petitioner did not call for a recount at the polling stations. Whereas there are some errors on the totaling of the results in some forms 35, the same does not affect the distribution of the votes to the candidates. The election was free and fair and the residents of Navakholo are happy.

### **Petitioner's Submissions**

Counsels for the petitioner maintain that the petition raises three issues.

1. Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents complied with the electoral laws in the declaration of the Parliamentary results for Navakholo constituency and whether the petitioner has laid a basis for an order of scrutiny.
2. Whether the 3<sup>rd</sup> respondent was validly elected as a Member of National Assembly for Nvakholo constituency.
3. Who should bear the costs.

The petitioner contends that the results were announced and the 3<sup>rd</sup> respondent declared the winner without some polling stations having been included in the final tally. Counsels submit that the forms 35 contain discrepancies and irregularities. A summary of those irregularities are:-

- i. Cancellations and alterations in about 50% of the forms 35 without being countersigned.
- ii. Lack of signature of party agents without reasons and statutory comments.
- iii. Mathematical errors in the addition of votes in both forms 35 and 36.
- iv. Wrong entries of votes garnered by each candidate as posted in forms 35 and 36.
- v. Failing to give party agents and the petitioner copies of form 35 for verification during the tallying
- vi. Having more people/agents signing the forms 35 than allowed by the law.
- vii. Tallying of forms 35 and 36 not agreeing.
- viii. Production of several forms 36 each giving different results, signed on different dates and by different agents.

- ix. Announcing of votes before tallying of all polling stations.
- x. Giving different results for all candidates.
- xi. Filling of forms 35 at the Chebuyusi tallying centre instead of at the polling stations.
- xii. Adding of rejected votes to the valid votes.

It is the petitioner's contention that the final results were announced before the votes from Shikomari polling station had been included. The petitioner complained to the 2<sup>nd</sup> respondent and even the Deputy OCPD, Wilson Kosgey (DW3), heard the petitioner's complaints. Before the results for Shikomari polling station were included, the petitioner was leading with over 10,000 votes while the 3<sup>rd</sup> respondent had 9,000 votes giving a margin of about 1,000 votes. Shikomari was the petitioner's strong hold and he garnered over 600 votes while the 3<sup>rd</sup> respondent got less than 30 votes. The 2<sup>nd</sup> respondent admitted that he announced the results without including the results for Kaunda and Emuhuni polling stations. The 2<sup>nd</sup> respondent purported to conduct some audits on the results which are unlawful and contrary to the provisions of Article 86 of the Constitution and Rule 83 of the Election Rules. The results are void *ab initio* and cannot be validated by the subsequent audits.

The petitioner maintains that the results were incomplete and therefore invalid. The contentions by the respondents that the subsequent audits still make the 3<sup>rd</sup> respondent to be a winner is not admissible. Counsels maintains that it is the position of the petitioner that once the results were declared and gazetted, the subsequent results given after the audit do not amount to results as envisaged by the law. Counsels rely on the case of **MANSON NYAMWEYA V JAMES MAGARA & 2 OTHERS [2009] eKLR** and that of **BENARD SHINALI MASAKA V DR. BONI KHALWALE & 2 OTHERS** [unreported Kakamega Election Petition No. 2 of 2008] where the court stated the following:-

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

The returning officer admitted that 220 votes that were garnered by the 3<sup>rd</sup> respondent at Kaunda polling station were not included in the gazetted results and that **Emuhuni** polling station had two streams but only one stream was posted on the final tally. The results show that one of the candidates, Stanley Kevin Bushuru, lost two votes from 210 votes to 208 votes after the alleged audits which cannot be possible as the reason given is that two polling stations had not been included and one cannot get a negative vote after the inclusion of the two polling stations. The subsequent audits are not credible, verifiable, accurate, accountable and transparent. The 2<sup>nd</sup> respondent was supposed to have sealed the results and forward them to the 1<sup>st</sup> respondent but kept the results and continued to audit them. Counsels for the petitioner urge the court to order a scrutiny and recount so as to confirm the authenticity

of the results.

Counsels also maintain that the forms 35 provided to the court are not authentic. It is the petitioner's submission that PW6, Vance Udoto examined the forms 35 that were given to the court and confirmed that they were not authentic as they did not have the signatures of the agents of the 3<sup>rd</sup> respondent. Counsels maintain that the forms 35 for **Shinoyi** polling station stream one, **Shikomari** stream one, **Ebushibo**, **Kaunda** and **Sienga** polling centres were not signed by any agents contrary to the provisions of Rule 79 of the Election Rules. The presiding officers in those polling stations did not record any reasons as to why the agents did not sign. The comments posted in some of the forms 35 cast a lot of doubt as to the authenticity of the forms. In the form 35 for **Sienga** polling station it is indicated that the agents were tired and left even before the counting. This raises the question as to how the results were counted in the absence of the agents.

It is contended that about 50% of the forms 35 have cancellations and alterations. This makes the results contained in those forms not to be authentic. The alterations and erasures have not been countersigned and that raises doubt on the results. Counsels rely on the case of **WILLIAM KABOGO GITAU V GEORGE THUO & 2 OTHERS [2010] eKLR** where Justice Kimaru stated as follows:-

**“there are other complaints which were raised by the petitioner that are in the genre addressed by the court. They relate to form 16 As where specific results of specific candidates [were cancelled] altered the 3<sup>rd</sup> respondent explained away the alteration to be on account of once again, human error which, according to him, was to be expected in the circumstances. Having evaluated the forms 16 A it was clear to the court that whereas the regulations did not specify what ought to be done where there are cancellations and alterations, common sense dictates that where there is a cancellation and alteration in a statutory form the same should be countersigned by the concerned official. In electoral documents it is important that the statutory forms which contain results that will invariably be required to be verified by other parties, including the members of the public, should be written without any alterations or cancellations. The cancellations and alterations in forms 16 A produced in this court raise question regarding the veracity and authenticity of the said results. The said form 16As cannot in the circumstances be said to contain valid results of the polling stations in question.”**

The petitioner maintains that the alterations and cancellations are quite substantive and affect the final results of the election substantially. The 3<sup>rd</sup> respondent benefited from the irregularities. 36 polling stations were affected by the alterations and cancellations. These are **Bushiri stream one, Ematiha, Ewamakhumbi, Ingotse market, Naluchira, Shikomari stream one, Shing'oto stream one, Eshikhoni, Bumamu, Ebushibo, Mushulilie, Mwikoli, Buhayi, Sisokhe, Kamuli, Bukhubalo, Mungakha, Kaunda, Namakoye, Lusumu Dispensary, Butieri, St. Mary Situkhumi, Sivilie, Namirama, Chekata, Makhima, Muregu, Konyero, Lutaso, Buchangu, Simuli, Nambacha, Sihanikha, Chebuyusi Primary, Matoyi and Good Shepherd.**

The petitioner maintains that the results recorded in the forms 35 did not tally and was therefore not accurate. The mathematical errors in the collating and tallying of the votes cast interfere materially with the final tally of the results. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents admitted during the hearing the existence of these mathematical errors. These errors affected the final results and cannot be classified as mere human errors. The winner had a margin of only 32 votes and the errors are material enough to vitiate the final tally. The anomalies raised by the petitioner amounted to exactly the 32 votes which separated the winner and the petitioner. The errors made were prejudicial to the petitioner. The 2<sup>nd</sup> respondent was also not able to explain to the court how the rejected votes amounted to over 35,000 and this cannot be held to be another human error.

Counsels for the petitioner submitted that there are variances between the aggregate votes for each candidate and the valid votes in the forms 35 in 8 polling stations namely **Bushili, Ematiha, Ewamakhumbi, Kharanda, Sikubile, Tanga, Buchangu** and **New Life Academy**. There are also variances in the vote tallies in the forms 35 in 8 other polling stations namely- **Shikomari, Eshikhoni, Ebushibo, Namakoye, Lusumu, Sivilie, Muregu** and **Naulu Primary**. In other polling stations more than the required number of party agents signed the forms 35. This is contrary to the provisions of Regulation 74(4) of the Election Regulations. This means the forms 35 were signed by persons who were not accredited and it is not clear how these people entered the counting room and raises the authenticity of the forms 35.

The 2<sup>nd</sup> respondent announced the results not from the prescribed forms 35 and 36 but from a piece of paper. The circumstances under which the form 36 was signed is questionable and makes the results not to be authentic. Counsels rely on the case of **REUBEN NDOLO V DICK WATHIGA & 2 OTHERS (EP 11/2008 NAIROBI)** when Justice Rawal stated as follows:-

**“where in the same circumstances as in the case the form 17 A had arithmetical errors, the form 16 As were not signed by presiding officer, candidates and/or their agents, the court [must nullify] the election of the 1<sup>st</sup> respondent. The ... “upshot of all the above is that [where evidence of] serious and admitted or undisputable anomalies and noncompliance of important and mandatory provisions of the electoral law by electoral officials are placed before court [then] this court in all fairness has no option but to come to the conclusion that the parliamentary election of madaraka constituencies was not free and fair and transparent and that the 1<sup>st</sup> respondent was not validly elected as member of parliament for the said constituency.”**

Counsels for the petitioner contend that given all the anomalies and irregularities in the election, the 3<sup>rd</sup> respondent was not validly elected as Member of National Assembly for Navakholo constituency. The 2<sup>nd</sup> respondent produced two forms 36, one dated 5.3.2013 and the other one dated 23.3.2013 and this undermined the validity of the results. The petitioner’s claim is valid and should be granted.

#### **Submissions for the 1<sup>st</sup> and 2<sup>nd</sup> respondents**

Mr. Lubulelah, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the main issues for determination is whether the 3<sup>rd</sup> respondent was validly elected as a Member of the National Assembly for Navakholo constituency and whether the petitioner deserves the prayers in the petition and who should bear the costs. Counsel submits that the petition contains only two prayers namely – an order for scrutiny of all ballot papers cast, recount of votes and upon recount and re-tallying an order that the candidate with the highest number of votes be declared as the validly elected Member of the National Assembly for Navakholo constituency. According to Mr. Lubulelah the petition and the affidavits of the petitioner’s witnesses raises the following grounds:-

- i. Breaches of Article 86 of the Constitution.
- ii. Failure to accurately collate the results from the polling stations.
- iii. Failure to give the petitioner and his agents forms 35 and 36 for verification.
- iv. Supplying the petitioner with two forms 36 containing different results which did not tally with the results in forms 35.
- v. Total votes received by all candidates are more than the total valid votes.

vi. Rejected votes were not accounted for and it is not clear whether the rejected votes were 409 or 417.

Counsel submits that the petitioner has not discharged the burden of proof as required by the law. The burden of proof lies on the petitioner and the purported errors were just minimal and had no effect on the final results. On the issue of burden of proof counsel cited the cases of **JOSIAH & 4 OTHERS V OGUTU [208]1 KLR (EP) 73**, **BUHARI V OBASANJO [2005] CLR 7**, among others. Counsel maintains that the allegations and complaints in the petition are merely generalized and lack specificity and particulars. The petition gives different grounds while the affidavits of the witnesses raise other issues. It is contended that the petitioner should be restricted to his petition and should not be allowed to raise other issues through the affidavits. All the issues raised in the petition should be the ones to guide the court and not the averments in the affidavits of witnesses. Counsel relies on the case of **JUSTUS MUNGUMBU OMITI V WALTER ENOCK NYAMBATI OSEBE & 2 OTHERS (EP No.1 OF 2008 Kisii)** where the court stated the following:-

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

It is submitted further that scrutiny and recount is not a standalone legal process which can be separated from the trial. The petitioner and the respondents closed their respective cases and what is remaining is a final decision.

On the issue of counting, collating and tallying of the results counsel submits that the evidence on record shows that the voters did cast their votes in all the polling stations, the votes were counted and the results announced at the polling stations without any incident or complaint. The results were forwarded to the tallying centre at Chebuyusi and the same were announced as they came and later entered into the electronic form 36 by data clerks. The results were displayed on a screen for all to see. The returning officer under Regulation 83 of the Election Regulations is only required to tally the results from the polling stations in respect of each candidate without recounting the ballots that were not in dispute. Therefore the returning officer was not obliged to open the ballot boxes forwarded to him by the presiding officers.

The petitioner's evidence is merely allegations which are not proved. There is no evidence showing that the results announced at the tallying centre were different from those announced at the polling stations. The petitioner ought to have brought evidence by way of his agents who were at the polling stations to testify that the returning officer announced different results. There is no evidence that the results for

**Shikomari** polling station were not included in the final tally. No agent for the petitioner for Kaunda polling station testified to contradict the evidence by the respondents. The mistakes and errors were innocent and unintentional. There is no evidence to prove that the errors were deliberate or actuated by malice or ill-will.

It is contended for the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the allegations that the petitioner was leading with over 10,000 votes while the 3<sup>rd</sup> respondent had 9,000 votes is not proved by any evidence. The petitioner did not present any other results other than those presented by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Although the 2<sup>nd</sup> respondent conducted further audits after the declaration of the results, these were just attempts to re-look at the results and did not purport to issue a second official result. The 2<sup>nd</sup> respondent, upon declaration of the results, became *functus officio*. Therefore the gazetted results are the official results. Counsel further submits that it is permissible for the returning officer to announce the results without receiving results from other polling stations if the remaining results will not affect the overall final results. The results for Kaunda and Emuhuni polling station were not included in the final tally but upon inclusion the winning margin increased to 363 votes. Therefore the admission by the 2<sup>nd</sup> respondent that **Kaunda** and **Emuhuni** (stream one) were not included in the final tally did not affect the results. There are no specific complaints in the 36 polling stations where the petitioner alleges to contain variances. It is contended further that although the petitioner alleges that the forms 35 for **Shinoyi, Shikomari, Ebushibo, Kaunda** and **Sienga** polling stations were not signed by party agents, this is not true as the forms for **Shinoyi, Shikomari** and **Ebushibo** were signed. The petitioner did not give evidence in relation to the other two stations. No agents were called to testify as to why they did not sign the forms. The chief agent also did not testify on those polling stations.

Mr. Lubulelah contends that the alleged cancellations and alterations on the forms 35 of 36 polling stations does not flow from the pleadings or any of the witnesses' affidavits. Arithmetic errors are easy for the court to deal with by collating and adding the results in the forms 35 so as to confirm the entries in the form 36. The errors did not affect the results and therefore are not fatal. There is no evidence that there are 32 votes which are not accounted for and this is not also pleaded in the petition. The petitioner is on a fishing expedition and is on the mistaken belief that the court can assist him without producing the required evidence. The law caters for situations where the agents do not sign the forms 35. There are no complaints in the petition for any specific polling stations and therefore the elections were properly conducted and the results represent the Will of the voters. Counsel relies on the case of **PHILIP MUKUI WASIKE V JAMES LUSWETI MUKWE Bungoma Petition No. 5 of 2013** where the court opined that even where the alterations are not countersigned the court could not ignore the results which are verifiable from the entries on the face of forms 35. The petitioner failed to seek a recount of the votes at the polling stations and he is now estopped from doing so.

### **Submissions by the 3<sup>rd</sup> Respondent**

Counsels for the 3<sup>rd</sup> respondent submitted that the petition only raises two issues. These are whether an order for scrutiny of all the ballot papers and recount of the votes cast is available to the petitioner and whether the petitioner has shown sufficient reason or cause in this petition to warrant the orders being sought. Counsels maintain that no basis has been made to warrant the prayer for scrutiny and recount. The petitioner has not laid out any specific polling station in which he disputes the results. There is no single polling station where the petitioner's agents made a written or any form of complaint about the voting, counting of the votes cast and the final results.

Mr. Namada for the 3<sup>rd</sup> respondent submitted that the petition itself does confirm that the voting began and ended well in all the 82 polling stations. Whereas the petitioner alleges that the final tallying did not include the results from Shikomari Primary School polling station, the petitioner's own agent

Charles Ongayo (PW2) testified that the results for Shikomari Primary School polling station were correct. The same results were entered on the form 36 and were part of the total votes garnered by the petitioner. Counsel maintains that the results in the form 36 is the total of all the forms 35 except for the omissions of Kaunda polling station and Emuhuni Primary School polling station (stream one) which were reconciled later. The petitioner's chief agent, **Nicanor Eric S. Wangwe (PW5)** did not name any polling station where the results as entered in the forms 35 were wrong or fraudulent. The only complaints are that of **James Wandera Zalo (PW3)** and **Dinah Ayako Were (PW4)** whereby it is alleged that a form 35 was borrowed from Ematiha polling station and used for Bushili polling station. This was a minor issue and the witnesses did confirm that the results in the borrowed form were correct.

Counsel for the 3<sup>rd</sup> respondent submits that the alleged errors do not constitute a sufficient cause as required by the law. Counsel relies on the cases of **PHILIP OSORE OGUTU V MICHAEL ARINGO ONYURA & 2 OTHERS (EP NO.1 OF 2013 BUSIA)**, **PETER GICHUKI KING'ARA V IEBC & 2 OTHERS (EP NO.3 OF 2013 NYERI)**, **MUNYAO V MUNUVE (EP NO. 73 OF 1993 NAIROBI)**, **MASINDE V BWIRE & ANOTHER (EP NO. 9 OF 1993 NAIROBI)** among others. Counsels maintain that in all the above cases the courts held that a petitioner must show sufficient cause and the case has to be proved. Minor errors will not be cause enough to go to scrutiny and recount or annul an election.

### **Issues for Determination**

During the pre-trial all the parties herein agreed that the issues filed by M/S Lubulelah & Associates were the agreed issues in this petition. The issues are:-

1. Whether the Petitioner has laid a basis for an Order of scrutiny and/or recount of votes or any of the Orders sought in the Petition.
2. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondent complied with the Constitution, the Elections Act and Regulations in the declaration of the Parliamentary results for Member of National Assembly for Navakholo Constituency.
3. Whether the 3<sup>rd</sup> respondent was validly elected as Member of National Assembly for Navakholo Constituency in Kakamega County.
4. Who bears the costs of this petition"

From the evidence of all the parties herein, I do find that the court needs to determine two more issues, namely-

5. Whether the petitioner has proved his case against the respondents
6. Whether the petitioner committed an election offence.

1. **Whether the Petitioner has laid a basis for an Order of scrutiny and/or recount of votes or**

**any of the Orders sought in the Petition.**

The record shows that the issues were agreed upon during the pre-trial. The petitioner closed his case as well as the respondents who closed their case on the 21.6.2013. Subsequent to the closing of the respective cases, the petitioner filed an application dated 24.6.2013 seeking among other things an order for scrutiny, recount and re-tally of all the votes cast so as to come up with one reconciled form 36, and an order to be issued to the Deputy Registrar to file the results of that recount. The application was duly heard and a ruling delivered on the 26.7.2013. In that ruling I did order that the votes for Kaunda market polling station number 42 and Emuhuni Primary School polling station number 73 (stream one) to be recounted. I did further order that the Deputy Registrar do re-tally all the votes as per the forms 35 and file a report. The court order was complied with and a report was filed by the Deputy Registrar dated 31.7.2013 giving the results of the two polling stations as well as the final results after the re-tallying.

In my ruling of 26.7.2013 I did find that an application for scrutiny and recount can be filed at any time before the final judgment is delivered. The petitioner in one of his prayers in the petition is seeking **an order for scrutiny of all ballot papers cast, recount of votes cast for all candidates and examination of the tallying.** The court dealt with the application for scrutiny and recount and made its determination. The issue on scrutiny, recount and re-tallying has already been determined by the court and cannot be dealt with at this time. What is remaining is the final determination of the petition.

**2. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondent complied with the Constitution, the Elections Act and Regulations in the declaration of the Parliamentary results for Member of National Assembly for Navakholo Constituency.**

The petitioner contends that the 2<sup>nd</sup> respondent did not collate, count and tally the votes properly. The petitioner maintains that the 2<sup>nd</sup> respondent conceded to his mistakes and testified to the effect that the votes for Kaunda market polling station were not correctly posted on the form 36 and one stream of Emuhuni polling station was left out in the final tally. Further, there are cancellations on the form 35 which were not countersigned. The 2<sup>nd</sup> respondent announced the results from a piece of paper and not from the form 36 as required by the law. The forms 35 are not authentic and some of them were signed by more people than the authorized number of agents. The results are not in compliance with the provisions of Article 86 of the Constitution. The tallying process was done casually and this made the results not to be authentic. Several audits were done after the gazettement of the results and this raises doubt as to the exact results for Navakholo Member of Parliament election. Different results were posted by the 2<sup>nd</sup> respondent. There is variance between the number of valid votes and total votes cast. The rejected votes were given to the 3<sup>rd</sup> respondent. The petitioner further contends that 50% of the forms 35 have cancellations and alterations. Party agents were not given copies of the forms 35 for verification and there are mathematical errors which bridge the gap of 32 votes that was the margin between the petitioner and the 3<sup>rd</sup> respondent who was declared the winner.

On the other hand, counsels for the respondents maintain that the election was properly conducted. The petitioner and his agents did not raise any complaint about the results of any single polling station. The petitioner concedes that the election in all the polling stations went on fairly well and there were no

incidents. The votes were counted at each polling station and none of the petitioner's agents asked for a recount of the votes. The votes were ferried by the presiding officers to the Chebuyusi tallying centre. The results from each polling centre were announced as they came and were posted on a screen for all to see. The 2<sup>nd</sup> respondent was being assisted by some IEBC staff in posting the results on the form 36. There is an error in that two polling centres were not included in the final tally, this being Kaunda market and Emuhuni stream one. This was a human error and it did not benefit anybody. The 3<sup>rd</sup> respondent won the election. After the two polling stations which had been erroneously left out were corrected, the winning margin became bigger. However, the respondents maintain that the gazetted results are supposed to be the proper results and the subsequent audits were mere analysis of the results. The respondents contend that the alleged cancellations and alterations have no bearing on the final results.

Article 86 of the Constitution states as follows:-

**86. At every election, the Independent Electoral and Boundaries 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**
  - a. Appropriate structures and mechanism to eliminate electoral malpractice are put in place, including the safekeeping of election materials.**

Similarly Regulation 76 of the Elections (General) Regulations 2012 states as follows:

**76. (1) The presiding officer shall, in the presence of the candidates or agents-**

- (a) open each ballot box and empty its contents onto the counting table or any other facility provided for the purpose and, shall cause to be counted the votes received by each candidate; and**
- (b) record the total number of votes cast in favour of each candidate.**

**(2) Each ballot paper shall be counted as follows-**

- (a) the presiding officer shall in respect of every ballot paper announce the candidate in whose favour the vote was cast.**
- (b) display to the candidates or – agents the ballot paper sufficiently for them to ascertain the vote; and**
- (c) put the ballot paper at the place on the counting table, or other facility provided for this**

*purpose, set for the candidate in whose favour it was cast.*

**(3) The presiding officer shall record the count of the vote in a tallying sheet in Form 33 set out in the Schedule.**

**(4) A candidate or an agent shall have a right to –**

**(a) dispute the inclusion in the count, of a ballot paper; or**

**(b) object to the rejection of a ballot paper**

Regulation 79 of the Election Rules also states as follows:-

**79. (1) The presiding officer, the candidates or agents shall sign the declaration in respect of the elections.**

**(2) For purposes of sub-regulation (1), the declaration for-**

**(a) presidential election results shall be in Form 34 set out in the Schedule.**

**(b) National Assembly, county women representatives, Senator, county governor and county assembly elections shall be in Form 35 set out in the Schedule.**

**(2) The presiding officer shall-**

**(a) immediately announce the results of the voting at that polling station before communicating the results to the returning officer;**

**(b) request each of the candidates or agent then present to append his or her signature;**

**(c) provide each political party, candidate, or their agent with a copy of the declaration of the results; and**

**(d) affix a copy of the declaration of the results at the public entrance to the polling station or at any other place convenient and accessible to the public at the polling station.**

**(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.**

**(4) Where a candidate or an agent refuses or fails to record the reasons for the refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.**

**(5) Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence.**

**(6) The refusal or failure of a candidate or 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 (2)(a).**

**(7) The absence of a candidate or an agent at the signing of a declaration form or the**

**announcement of results under sub-regulation (2) shall not by itself invalidate the results announced.**

**(8) After complying with the provisions of this regulation, the presiding officer shall, as soon as practicable, deliver the ballot boxes, and the tamper proof envelopes to the returning officer who shall take charge thereof.**

The election procedure is that once the votes are counted from all the polling stations they are taken to the tallying centre where the returning officer is mandated to tally them. Rule 83 requires the returning officer to tally the results without counting the ballots that were not in dispute and if he finds that the valid votes in a polling station exceeds the number of registered voters in that polling station then the returning officer shall disregard the results of that polling station. Upon tallying of the results the returning officer is supposed to announce the final results. This will include the total number of rejected votes, the total number of valid votes as well as the total votes cast. Finally the returning officer shall deliver to the IEBC the forms 35 and 36. The decision of the returning officer on the validity or otherwise of a ballot paper or a vote is final except in an election petition.

The evidence on record shows that the voting went on very well in all polling stations without any incident reported. There is no evidence that any of the candidates or their agents asked for a recount in any of the polling stations. Indeed the petitioner in his petition does confirm that the voting went on very well on the election day. Paragraph 6 of the petitioner's supporting affidavit sworn on the 2.4.2013 states as follows:-

**"THAT I confirm that on the 4.3.2013 voting began and ended generally well at about 6.00 p.m. in all the 82 polling stations within Navakholo constituency."**

Paragraphs 3 and 4 of the affidavit of the petitioner's chief agent, **Nicanor Eric S. Wangwe (PW5)** states as follows:-

- 1. THAT in that capacity (chief agent) I did monitor the voting process in all the 82 polling stations from Navakholo constituency in person as well as based on information from the party agents.**
- 2. THAT I confirm that generally the voting process progressed on well.**

From the petition, the affidavits of the petitioner's witnesses and the evidence adduced in court, it is clear that there was no dispute as to how the election was conducted in all the polling stations. The results were ferried to the tallying centre and the same were announced publicly. According to the petitioner the results from 81 polling stations were announced and he was in the tallying hall with his chief agent. Paragraph 11 of the petitioner's affidavit states as follows:-

**"THAT at that time National Assembly results from 81 out of 82 polling stations had been announced except results from SHIKOMARI PRIMARY SCHOOL polling station.**

The petitioner and his chief agent testified to the effect that the 2<sup>nd</sup> respondent left the tallying centre when only the results from Shikomari polling station were pending announcement. By that time the petitioner was leading with 10,228 votes while the 3<sup>rd</sup> respondent was trailing with 9,776 votes. The

2<sup>nd</sup> respondent returned and announced the results from a piece of paper and not from the form 36. The announced results gave the 3<sup>rd</sup> respondent 10,246 votes and the petitioner 10,214 votes leaving a margin of 32 votes. The petitioner's position is that the election had several irregularities which make the result not to be valid.

In the Nigerian case of **KUNDU SWEM V DZUNGWE [1966] CLR 2(a) (SC)** the complaints were that there were wide scale election malpractices which included corrupt practices on the part of the winning candidate, intimidation, promise of financial reward to voters, physical acts of violence, interruptions of the polling process at the polling stations, prevention of qualified voters from voting among other things. The electoral body responded by stating that even if there was non-compliance with the electoral laws, such non-compliance did not affect the results. The court agreed with the electoral body and stated as follows:-

**“Once a petitioner establishes non-compliance and the court or other tribunal cannot say whether or not the results of the election could have been affected by such non-compliance, the election will be avoided. It follows therefore that at that stage, the onus shifts to the respondent to show that the non-compliance on which the petitioner relies did not affect the results of the election.”**

In **RE KENSINGTON NORTH PARLIAMENTARY ELECTIONS [1960] 2 All ER 150** there were several irregularities cited relating to a parliamentary election. These included:-

- i. *That no proper arrangements were made for the transporting of the ballot boxes from the polling stations to the counting place.*
- ii. *No marks were placed on the voters register against the names of the voters who voted.*
- iii. *The ballot boxes were opened and the returning officer proceeded to count the votes in the absence of parties' counting agents.*
- iv. *Un authorized persons attended the counting of the votes yet they had not taken the requisite declaration of secrecy.*

The petitioner in that case contended that the irregularities made the results to be doubtful and called for the election to be nullified. The court evaluated the entire evidence and justice Streatfeild J. stated as follows:-

**“It seems to me that the election was conducted substantially in accordance with the law, and that the act or omission did not affect the true result. The question of the burden of proof does not, on the strict wording of s 16, really arise. If it did arise, it seems that, under the wording of the corresponding section of the Ballot Act, 1872, the burden rested on the respondent.....it is for the court to make up its mind on the evidence as a whole whether there was a substantial compliance with the law as to elections or whether the act or omission affected the result.”**

From the evidence on record it is established that the voting process cannot be faulted. All the voters who turned up did cast their votes and there was no incident at any polling station. According to the form 36 the voter turnout was 82%. The main dispute is the manner in which the votes were tallied

at the Chebuyusi tallying centre. The petition itself does not raise any issue relating to the voting process and all the complaints are directed at the tallying centre. The evidence also shows that the results that were announced did not include those of Emuhuni polling station stream one and the results for the 3<sup>rd</sup> respondent for Kaunda market polling station were wrongly posted on the form 36. The 3<sup>rd</sup> respondent got 263 votes at Kaunda polling station but the announced results had given him 43 votes. The main issue is whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents complied with the law. It is not disputed that the initial form 36 dated 5.3.2013 did not include some of the results. The evidence also does show that even without those results the 3<sup>rd</sup> respondent had emerged the winner with a margin of 32 votes. After taking the results of the two polling stations the margin widened. The law requires the returning officer to tally the results and compute the votes garnered by each candidate. This was done but an error occurred. Since the error did not affect the fact that the 3<sup>rd</sup> respondent had won, I do find that it was a human error that was not meant to benefit any of the candidates. It would have been expected that the 3<sup>rd</sup> respondent was the one to complain since the two polling stations that were affected had a combined total of 326 votes that had not been captured in his favour. The petitioner contends that the error did affect the results and prejudiced him. There is no evidence that the petitioner was prejudiced by the error. After the addition of the two polling stations, the petitioner's initial results benefited from 9 votes from Emuhuni polling station stream one.

The first holding in the case of **MORGAN V SIMPSON [1974] All ER 722** is that “**an election court was required to declare an election invalid (a) if irregularities in the conduct of the election had been such that it could not be said that the election had been so conducted as to be substantially in accordance with the law as to elections, or (b) if the irregularities had affected the result. Accordingly, where breaches of the election rules, although trivial, had affected the result, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the election law it was vitiated irrespective of whether or not the result of the election had been affected.**”

The current case is more or less similar to that of **FITCH V STEPHENSON & OTHERS [2008] All ER (D) 13 (Apr), or [2008] EWHC 501 (QB)**. In that case 9,099 votes were cast in an election for a Local Government position. Only 4,930 votes were counted and the results were declared without the remaining votes constituting 45.8% being counted. The petitioner challenged the election and contended that the failure to count the remaining votes constituted such an irregularity in the conduct of the election that it could not be said to have been conducted substantially in accordance with the law as to elections. The respondent contended that despite the fact that 45.8% of the votes were not counted the result of the election was unaffected. The court framed the issues for determination as follows:-

- a. *Whether the failure to count a proportion of the votes cast was such that the election was not conducted substantially in accordance with the law as to elections, notwithstanding that the result was not affected;*
- b. *Whether the petition is vitiated as a result of procedural failures.*

The court dismissed the petition and cited the case of **MARSHALL V GIBSON [1995]** where Justice Colman stated the following:-

**“The effect of section 48(1) of the 1983 Act is that an election will not be declared invalid merely**

because there has been a breach of official duty in connection with the election or of the Rules by the returning officer or any other person. There cannot be a declaration of invalidity unless it appears either that the election was so conducted that there was substantial non-compliance with the law as to elections or that there was a breach of official duty or of the Rules which affected the result. It is clear now that the result means the question which person or persons are elected as distinct from the number of votes cast for each person....Thus if the consequence of a breach of the Rules is that one or more of the candidates would have polled more or less votes than were recorded at the count, but the same candidate or candidates would still have been elected, the result will not have been affected and the election can only be declared invalid if it appears to the court that the election was not so conducted as to be substantially in accordance with the law as to elections.”(emphasis added)

In Halsbury’s Laws of England 3<sup>rd</sup> Edition Vol. 14, page 150, it is stated as follows:-

“An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election if the tribunal is satisfied that the election was notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, was not and could not have been affected by those transgressions. If, on the other hand, the transgressions of the law by the officials being admitted, the tribunal sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether those transgressions may not have affected the result, and it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the tribunal is then bound to declare the election void.”

The election was properly conducted and the tabulation was also properly done. There was a normal human error which did not affect the final outcome. It would have been different if the polling stations that had been left out made a different candidate to be the winner. However, since the 3<sup>rd</sup> respondent still emerged the winner by widening the gap, the error cannot be the cause of vitiating the results. The presiding officers complied with Regulation 76 of the Election Regulations by counting all the votes from the ballot boxes and posting the votes for each candidate on the forms 35. The returning officer received the results from the polling stations and posted them on the form 36. In the end, I do find that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did comply with the law relating to the conduct of the elections and declaration of the results.

### 3. Whether the petitioner has proved his case against the respondents

Counsels for the petitioner submitted that the election was marred with several irregularities which make the results not to be authentic. The major complaints are that 50% of the forms 35 contain erasures without having been countersigned, that in 8 polling stations there is a variance between the aggregate recorded votes for each candidate and the recorded valid votes, that in 8 polling stations there is a variance in the vote tally on the forms 35. It is also contended that some forms 35 were signed by more than 8 party agents and that makes the results to be doubtful. Counsels further maintain that the 2<sup>nd</sup> respondent kept the forms 35 instead of taking them to the IEBC and this raises doubt as to the authenticity of the forms 35. The mathematical errors prejudice the petitioner who was leading.

The burden of proof in an election petition is on the petitioner. This is in line with the provisions of Section 107 and 108 of the Evidence Act which states as follows:-

**107. (1)Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

**108.The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.**

The forms 35 were provided by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Although they are photocopies, there is no allegation in the petition to the effect that those forms 35 are not authentic or that the result contained in any one of those forms is not correct. No agent of the petitioner came to court to complain that at the polling station where they were standing in for the petitioner the results have been changed. The petitioner himself did not pinpoint any single polling station where his results were altered or where the results of the 3<sup>rd</sup> respondent or any of the other candidates were changed. It is upon the petitioner to tell the court where he thinks that his results were altered to his disadvantage. Counsel for the petitioner picked on minor cancellations and alterations on the forms 35 which have no effect on the individual results for each of the candidates. In some of the complaints the issue is a cancellation of one figure and replacement of the correct figure without touching the distributed results to the candidates. The petitioner informed the court that this petition is about numbers. It is true that the margin was small and it is the numbers which add up and make the winner to be declared. However, it was incumbent upon the petitioner to show the court by way of numbers how he won the election. Generalized allegations to the effect that he was leading while the 3<sup>rd</sup> respondent was trailing do not prove his claim.

The petitioner's intention was to have all the votes recounted and re-tallied. This could only be done if there was any dispute of the results of a particular polling station. Even the forms which are alleged to have erasures and cancellations were signed by the candidates' party agents. Rule 33 restricts scrutiny of votes to the polling stations in which the results are disputed. The petition does not contain even a single polling station where the results were disputed. No evidence has been adduced to show that those forms were not the ones signed by the agents. The contentions by PW6, Vance Udoto, that the forms 35 are not the correct ones is not true. He could not even give the names of his party agents. The list of results by the petitioner's own chief agent gives the petitioner the same results for **55 polling stations** as posted by the IEBC. The question is, what would be the purpose of opening those ballot boxes if it is confirmed by his own evidence that the petitioner's results were correctly posted and there is no allegations that the results of the other candidates were either inflated or reduced. With regard to the other 27 polling stations, it is clear that PW5 did not get the correct results as most of his figures go beyond the number of votes cast. PW5 indicated some of the results like **Sisokhe** Primary polling station to be 15 votes instead of 5. The same applies to **Namundera** polling station where the petitioner got 5 votes but PW5 indicated 15 votes. Similarly where the petitioner got no vote, PW5, wrongly picked a different figure. This applies to **Sidikho, Kochwa, Simakina, Muiyi** and **Muyuke** polling stations. As explained herein above the totals of PW5 do not add up as his final total was 10,228 yet when I totaled the results as per his tabulation it gave me 10,527 votes giving a variance of 304 votes.

It is therefore correct to conclude that PW5 did not pick the correct results for his candidate in 27 polling stations. Further, if the petitioner was of the view that it is the IEBC that gave him the wrong results, he would have itemized each of the 27 polling stations and state that the IEBC results were wrong. These polling stations are **Ewamakhumbi, Tumaini, Naluchira, Shikomari, Shing'oto, Ebutenje, Eshikhoni,**

**Shibembe, Namundera, Sisokhe, Sidikho, Kochwa, Nang'anda, Mukama, Burangasi, Simakina, Muiyi, Mayuke, St. Mary, Chekata, Buheri, Konyero, Tanga, Emuhuni, Chebuyusi Primary, ADC Church and Mukhweso.** No agent from any of these polling stations was called to testify to the effect that the petitioner's votes were changed. I have gone through the forms 35 for each of the 27 polling stations and noted that apart from Shikomari stream one and St. Mary polling stations, the party agents signed the forms 35 for all the other polling stations and this confirm the authenticity of the results given by the IEBC as opposed to those picked by PW5.

Only two witnesses testified for the petitioner in relation to specific polling stations. PW2 Charles Ong'ayo was the petitioner's agent at Shikomari polling station stream one. He confirmed in his evidence that the petitioner got 633 votes. Although the witness tried to deviate from his averments and contend that the petitioner got 387 votes in stream one, it is proved by his own averments and the evidence on record together with the re-tallying exercise that the petitioner got 633 votes at Shikomari polling station and not 653 votes. As already herein above indicated, if the petitioner is given 653 votes that would make the total valid votes be more than what all the candidates got. **DW4 Ismael Osundwa Barasa** and **DW5 Eubert Amatsima Tatwa** were the 3<sup>rd</sup> respondent's agents at Shikomari. The two witnesses did confirm that the petitioner got 633 votes. The other witness for the petitioner was **Dinah Ayako Were (PW4)** who was the petitioner's agent at Bushili Primary stream two. She did confirm that the petitioner got 305 votes in stream one and his total votes for that polling station was 615 votes. PW5 confirmed that to be correct. The complaint by the two witnesses was that they did not sign the forms 35 although the ones provided to the court are signed. Dinah Ayako confirmed that she signed the aggregate form and the results in that form are the same as the ones on the form 35.

PW5, Nicanor Eric S. Wangwe testified that one of the petitioner's complaints is that his agents were not allowed to board the vehicles which transported the ballot papers to the tallying centre. There is no evidence that the results from the polling stations were changed while being transported to the tallying centre. In any case there is no obligation on the part of the IEBC to ferry party agents to the tallying centre. By the time the votes are announced at the tallying centre, a serious party agent would notify his candidate or the chief agent presumably by a phone call or short message service (SMS) the results in that particular polling station so that what would be announced at the tallying centre would be the same as what was announced at the polling station. In the case of **ALI V GETHINJI [1984] KLR 511** the court dealt with a complaint that the petitioner's agents were not allowed to accompany the ballot boxes when they were transferred to the counting hall. The petitioner's agents in that case were also not allowed to inspect the seals on the ballot boxes before they were opened at the counting hall which made it difficult to verify the authenticity of the votes. The court stated as follows:-

**“There is no obligation on the returning officer or any other election official to provide transport from polling stations to the counting hall. The candidates were warned before election day that they would not be carried in the Government vehicles which transported the ballot boxes. It was the responsibility of the candidates to provide their own transport to accompany the Government vehicles if they wished to keep the ballot boxes under observation.....”**

Given the evidence on record I do find that the allegations of mathematical errors and variances are not proved. Counsels for the petitioner picked on the minor corrections on the forms 35 and ignored the substantial information in those forms which is the results per each candidate. This part of the forms 35 is titled **“the number of valid votes cast in favour of each candidate”**. I have gone through all the forms 35 and the only alterations are the balancing of the upper part of the forms where the presiding officers were giving a summary of the total votes cast, spoilt votes, total valid votes and total rejected votes. Due to normal human errors in some polling stations the presiding officers interchanged the valid votes and total votes cast and they cancelled and corrected the anomaly. In all the forms 35 there is no

single cancellation of any candidate's results. It is the same results that were re-tallied by the Deputy Registrar and after the tabulation there was no submission by the petitioner's counsels to the effect that there was alteration of the results. This is a different situation from the one in the case of **WILLIAM KABOGO GITAU V GEORGE THUO & 2 OTHERS** where the results of individual candidates were cancelled and replaced with other figures.

The totality of the evidence on record shows that the results for each of the candidates from each polling station were correctly posted. This is the most crucial information required in the form 35. It is the distribution of those results which are later announced at the tallying centre and the total for each candidate tallied. The evidence on record does show that the tallying excluded the whole of Emuhuni polling station stream one and 220 votes for the 3<sup>rd</sup> respondent from Kaunda market polling station. The 2<sup>nd</sup> respondent realized that error after he had announced the results. The correction of the error did not alter the final position which was that the 3<sup>rd</sup> respondent had won the election. For purposes of confirming the evidence of the 2<sup>nd</sup> respondent to the effect that there was an error on those two polling stations, the court ordered that the votes from those polling stations be recounted and the final tally be done. The Deputy Registrar's report does confirm that it was true the two polling stations were not properly included in the final tally.

Counsels for the petitioner filed an application on the 2.8.2013 after the re-tallying process had been done by the Deputy Registrar. The court summarily dismissed that application. However, I wish to indicate that the forms 35 are not filled in duplicate but in counter parts. Further, the printing of the forms 35 may not be in the same series whereby each polling station has a particular serial number for its form 35. Forms 35 for a single polling station can be in different series. The contentions by the petitioner that a different serial number for the forms 35 was found in the opened ballot boxes does not help. It was contended further that some of the forms 35 that were found in the boxes that were opened were signed by different agents. Since forms 35 are not filled in duplicate, it is possible to get a different serial number and the presiding officer might call upon the available agents to sign for him the extra copies. Each of the agents of the candidates is expected to ask for a copy of the form 35. Several other copies are thereafter distributed with some put in the ballot boxes before sealing, a copy is plastered on the ballot box while the original is taken to the IEBC offices. Therefore, what is important is the content of the form 35 in relation to the results of each candidate and not the serial number or the cancellations or corrections at the upper part. If an agent of a candidate has evidence to the effect that the results were altered, then that can be a good ground for an order for recount. No such evidence was adduced before the court.

The initial results did give a difference of 34 votes. In other election petitions the courts ordered scrutiny and recount due to the small winning margin. In the case of **HASSAN ALI JOHO V HOTHAM NYANGE & OTHERS [2006] eKLR**, the court noted as follows:-

**“.....where the vote margins are narrow like in ONAMU V MAITSI, Election Petition No. 2 of 1983, where the margin was only 30, KIRWA V MULIRO Election Petition No. 13 of 1988 where the margin was only 7 and HEMED SAID V IBRAHIM MWARUWA Election Petition No. 1 of 1983 where the margin was only 62, scrutiny was ordered without laying any foundation. Scrutiny has also been ordered without laying foundations even where the margins are wide on the ground that a recount may lead to an expeditious disposal of the petition.”**

However, it is not a legal principle that whenever the winning margin is narrow then the court must order scrutiny and recount of the votes. Such a principle would make the court to be partisan. The impartiality role of the court is to evaluate the petition and the evidence on record and form its opinion as to whether a basis for recount has been laid or not. If there are no complaints from any single polling station about

the results, why would the court order a recount of the votes. An election is a competition and the winner is declared because he or she would have obtained the highest number of votes. The quality of the election process also counts in deciding whether or not the election was properly conducted. It is not up to the court to require a wide winning margin yet it is the voters who cast their votes according to their own decisions. The court cannot call upon the voters to ensure that whoever wins gets a bigger margin than his competitors. The votes were counted and the results that were announced gave a margin of 34 votes. There is no evidence that those votes were either fictitious or that some votes were deducted from another candidate and given to the winner. The contentions that the 3<sup>rd</sup> respondent got the rejected votes is not proved.

The re-tallying process did establish that the total number of valid votes was 34,683. The total number of rejected votes was 417 giving a total number of votes cast of 35,100. The figure by the Deputy Registrar is different from that indicated in the form 36 provided by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The difference does not affect the results. The corrected form 36 indicated that the petitioner got 10,223 votes. The report by the Deputy Registrar gives the petitioner 10,223 votes. There has been no difference in the number of votes garnered by the petitioner. The votes for the 3<sup>rd</sup> respondent as per the report of the Deputy Registrar is 10,596 votes. The difference takes into account the votes for Kaunda market and Emuhuni stream one. When the results were announced the petitioner was given 10,214 votes. According to the 2<sup>nd</sup> respondent the results for Emuhuni polling station stream one had not been included. The petitioner got 2 votes in stream two and 9 votes in stream one. After adding the extra 9 votes for Emuhuni stream one the petitioner got 10,223 votes as per the corrected form 36 and this is the same number of votes given to him by the report of the Deputy Registrar.

Section 83 of the Elections Act states as follows:-

**83. 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.**

Section 83 of the Elections Act is meant to assist in retaining election results if it is established to the satisfaction of the court that the non-compliance with the law was not so serious as to make the election not to be in compliance with the Constitution and the election laws or in the alternative where the non-compliance did not affect the result of the election. The only irregularity on this election is the fact that two polling stations were not properly posted on the form 36. The form 36 is a final tally of all the results from each polling station. Since the paper trail in the form of the forms 35 is still available, the error can be detected and rectified. Further, the error did not affect the final result. Section 83 of the Elections Act therefore comes into play in this matter.

In the case of **MBOGORI V KANGETHE & ANOTHER [2008] 1KLR (EP) 168**, the complaint related to preliminary elections for the Meru North constituency. There were discrepancies in the final aggregate tally of the votes cast. The figures showed an excess of over 3,000 votes declared in favour of the 2<sup>nd</sup> respondent. The petitioner stated that the returning officer had failed to give an explanation of the discrepancy and that this showed that there was something so wrong with the elections as to render them invalid. The court analyzed the evidence and stated as follows:-

**“Can it be said, therefore, in this case however the error occurred, and assuming for the moment, in the petitioner’s favour that it occurred by the insertion and subsequent removal of unlawful ballot papers, that the election was conducted so badly that it is not in accordance with the law”** Apart from any statutory provision we are quite satisfied that if an election was so manifestly

unreliable, in any of its aspects, that it really could not be said to be an election at all, we should be obliged to declare it void. But such is not, in our view, the case here. The evidence has not shown one way or the other how this admittedly substantial error occurred. It could have happened either before the ballot boxes reached the counting hall, or in the course of the figures being transmitted from one person to another after counting had commenced. In either case we do not think that the error ipso facto shows that the election was conducted so badly that it cannot be said really to have been an election. Indeed the evidence as to the counting called so far, if we may express our opinion, shows that it was meticulously conducted. We cannot say when the error occurred. It will have to be taken into consideration with all the other evidence at the conclusion of the case.

In the Ugandan case of **PAUL MWIRU V IGEME NATHAN SAMSON NABEETA & 2 OTHERS (Election No. 3 of 2011 at Jinja)**, one of the petitioner's complaints was as follows:-

**“The 2<sup>nd</sup> respondent incompetently computed the results of the election thereby indicating in its final tally that the petitioner had obtained less votes than the votes cast in his favour as indicated in the declaration forms and giving an unfair victory to the 1<sup>st</sup> respondent, which affected the final results in a substantial manner.”**

The court analyzed the evidence and concluded as follows:-

**“After a careful review of all the evidence on record, I do find that the election in Jinja Municipality East was substantially in compliance with prevailing electoral laws. It was only laced with some mistakes by presiding officers which led to the miscomputation of the results. These mistakes however did not affect the numerical results of the election substantially impact on the free choice of the majority of voters....” (emphasis added).**

Counsels for the petitioner concentrated on the minor alterations and cancellations on the upper part of the forms 35 and ignored the substantive part of the forms which contain the individual results for each candidate. This is a court of law and equity and it is a maxim of equity that equity looks at the substance as opposed to the form. According to **Snell's Equity, 29<sup>th</sup> Edition (1990) page 39** it is stated that *“Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that by insisting on the form, the substance will be defeated, it hold it to be inequitable to allow a person to insist on such form and thereby defeat the substance.”* The form 35 that was borrowed from Ematiha contain results for each of the candidates and the party agents signed it. There is no dispute as to the contents of the results and therefore the fact that it was not meant for Bushili polling station cannot invalidate those results. Similarly the court cannot invalidate the results in the forms 35 which have some alterations on the upper part as the evidence shows that the results for each candidate are correct.

From the evidence on record I do find that the alleged errors, cancellations and erasures had no effect on the final results. There is no evidence to the effect that the 3<sup>rd</sup> respondent benefited from those errors. Indeed the evidence shows that he was the one who was prejudiced by the errors as the initial announcement gave him 10,246 votes but the report of the Deputy Registrar gave him 10,596 giving a variance of 350 votes. The petitioner jumped on the fact that the margin was small and wanted to have a second bite at the cherry and expected the court to simply order a recount of the votes without bringing the required evidence. In the end, I do find that the petitioner has failed to discharge the burden of proof expected of him.

#### **4. Whether the 3<sup>rd</sup> respondent was validly elected as Member of National Assembly for**

## **Navakholo Constituency in Kakamega County.**

The petitioner maintains that the 3<sup>rd</sup> respondent benefited from the irregularities committed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Whereas the petitioner was leading with 10,228 votes and the 3<sup>rd</sup> respondent was trailing with a gap of over 1000 votes, the 2<sup>nd</sup> respondent announced the 3<sup>rd</sup> respondent as the winner. It is the petitioner's position that even without the votes for Shikomari polling station he was still winning. According to the agent for the petitioner for Shikomari polling station, Charles Ong'ayo Dias (PW2), the petitioner got 633 votes at Shikomari polling station. That line of evidence would have given the petitioner a total of 10,861 votes as he already had 10,228 votes. The petitioner's chief agent testified that according to him the petitioner got 653 votes at Shikomari and not 633 votes. That would give the petitioner 20 extra votes and make his total to be 10,881 votes. This would lead to about 658 extra votes that cannot be justified taking into account the total number of votes cast.

It was expected of the petitioner to produce evidence and show how he had 10,228 votes from all the other polling stations excluding Shikomari polling station. The court went through the record of the petitioner's chief agent which tabulated the petitioner's results as follows:-

### **I.E.B.C. TALLIES Vs. PETITIONER'S TALLIES**

From the above results, there are 27 polling stations which give results that are different from those posted by the 2<sup>nd</sup> respondent. In my ruling of 26.7.2013, I did go through all the polling stations which have different results and the sum total of the analysis is that PW5 picked the wrong results. If the court were to go by his evidence then in all those 27 polling stations, the number of valid votes would exceed that of the registered voters. To mention only a few is the case of Shikomari polling station where the petitioner's own agent confirmed that the votes for the petitioner were 633 made of 367 votes for stream one and 266 votes for stream two. The total number of registered voters for stream one was 470 and 445 for stream two. The total valid votes were 457 for stream one and 315 for stream two giving a total of 772. The petitioner got 633 votes leaving the other candidates with a combined total of 139 votes. Therefore the petitioner's votes (633) and the votes for the other candidates (139) make a total of 772 valid votes. There is no room for the extra 20 votes and if that were to be added it will make the total valid votes to be 792. There were only 8 rejected votes. Further the results by PW5 gives a total at the bottom as **10,228** yet when I tabulated his results it came up to **10,527**. This shows that PW5 did not get the results from his agents correctly. According to PW5 the petitioner got 283 votes at Tumaini NFE School polling station instead of the 183 votes posted by the IEBC. This gives a variance of 100 votes but that variance is not reflected in PW5's final tally. The Deputy Registrar re-tallied the results for Tumaini polling station and posted 183 votes for the petitioner while the 3<sup>rd</sup> respondent got 21 votes.

From the report of the Deputy Registrar the 3<sup>rd</sup> respondent got **10,223** votes. If we were to subtract the 633 votes from Shikomari, this gives a balance of **9,590** votes. According to paragraph 13 of the affidavit of Nicanor S. Wangwe, without Shikomari the 3<sup>rd</sup> respondent had **9,776** votes. It is therefore not correct to say that the petitioner was leading without the votes of Shikomari. According to the returning officer the votes for Shikomari were received and were announced at 2.00 p.m. The results contained in the form 36 that was issued on the 5.3.2013 did give the petitioner 633 votes and therefore the votes for Shikomari were indeed included in the final tally.

This court directed the Deputy Registrar to recount the votes for Kaunda market polling station and Emuhuni stream one. The Deputy Registrar in her report dated 31.7.2013 gave the results for Kaunda

market polling station as follows:-

1. Emmanuel Wangwe	-	263
2. Emy Nawanjaya Siganga	-	06
3. Joseph Amisi Omukanda	-	41
4. Leonard Mayende	-	03
5. Moni Wekesa	-	161
6. Saleh Mung'ang'a	-	02
7. Stanley Kevin Bushuru	-	05
8. Vance Paul Udoto	-	<u>60</u>

Total valid votes - **541**

Rejected votes were - 23

Total Votes Cast - **564**

The Deputy Registrar's report for Emuhuni Primary School polling station number 73 stream one gave the following results:-

1. Emmanuel Wangwe	-	106
2. Emy Nawanjaya Siganga	-	6
3. Joseph Amisi Omukanda		9
4. Leonard Mayende	-	3
5. Moni Wekesa	-	228
6. Saleh Mung'ang'a	-	3
7. Stanley Kevin Bushuru	-	0
8. Vance Paul Udoto		65
9. Rejected votes	-	2

<i>Total valid votes</i>		<b><u>420</u></b>
Total votes cast	-	<b><u>422</u></b>

The Deputy Registrar proceeded to re-tally all the votes from the 82 polling stations for Navakholo Member of National Assembly and came up with the final tally as follows:-

1. <i>Emmanuel Wangwe</i>	-	<b>10,596</b>
2. <i>Emy Nawanjaya Siganga</i>	-	<b>303</b>
3. <i>Joseph Amisi Omukanda</i>	-	<b>10,223</b>
4. <i>Leonard Mayende</i>	-	<b>203</b>
5. <i>Moni Wekesa</i>	-	<b>6,450</b>
6. <i>Saleh Mung'ang'a</i>	-	<b>260</b>
7. <i>Stanley Kevin Bushuru</i>	-	<b>212</b>
8. <i>Vance Paul Udoto</i>		<b>6,334</b>

The petitioner in his prayer (b) urged the court to recount and retally all the votes and the candidate with the highest number of votes be declared to be the one validly elected Member of National Assembly for Navakholo constituency. The tallying process did give the 3<sup>rd</sup> respondent more votes than the petitioner. The 3<sup>rd</sup> respondent therefore won the election and the correct results are those contained in the report of the Deputy Registrar dated 31.7.2013. The 3<sup>rd</sup> respondent was validly elected as Member of National Assembly for Navakholo constituency.

### 3. **Whether the petitioner committed an election offence**

According to the 2<sup>nd</sup> respondent the petitioner threatened him after he announced the results. The petitioner protested and threatened him. He later reported the incident to the Kakamega police station on the 13.3.2013 as OB number 13/10/3/2013. It is the evidence of DW3 Wilson Kipruto Kosgey who was at the tallying centre that immediately the results were announced the petitioner and his supporters threatened the returning officer. The petitioner requested for the votes to be recounted but the returning officer declined and advised the petitioner to go to court. The petitioner and his supporters wanted to grab the computer which contained the results. According to the 3<sup>rd</sup> respondent, he witnessed the violence after the results were announced. The petitioner started shouting and went for the returning officer. It is the evidence of the 3<sup>rd</sup> respondent that since the petitioner had lost, his action was understandable.

It is the evidence of DW3 that the petitioner was not arrested and he left the tallying centre. The

petitioner had no weapons and after he left the tallying hall the business continued as usual. The matter is still pending under investigations. From the evidence on record, I do find that no election offence was committed by the petitioner. The petitioner was only shocked by the results as he expected to win. The 2<sup>nd</sup> respondent could not have recounted the votes at the tallying centre. All what he could have done was to ask for a re-tally and not a recount of the votes as the law prohibits the returning officer from recounting the votes at the tallying centre. It was expected of the petitioner to have been angry but he should have known that in any competition there is winning and losing. I do find that the petitioner did not commit any election offence.

### **Final Analysis and Determination**

The contentions by the petitioner have not been proved. The election was conducted and all the results were posted on the forms 35 from all the polling stations. There was an error in that the transferring of those results from the forms 35 to form 36 left out the entire stream one of Emuhuni polling station and some results from Kaunda market polling station. That error did not affect the final outcome. The 3<sup>rd</sup> respondent still emerged the winner. In some polling stations some candidates send more than one agent. The fact that more than 8 agents signed some forms 35 does not invalidate those results. The petitioner did not call a witness from those polling stations to deny the results. The paper trail left after the election is clear and does confirm that the election was conducted as per the law and the results are extremely clear. Even the petitioner himself does confirm that the election in all the 82 polling stations was properly done. The contention that the returning officer left the tallying hall for two hours before he returned to announce the results has been disproved by the petitioner's own witness, PW6 Vance Udoto, who was a candidate and according to him the returning officer left the tallying hall for only 20 minutes which should not be an issue. There is no evidence that the presiding officer for Bushili polling station, Hutton Wanyama (DW1) signed the form 35 at Chebuyusi tallying centre. If he had any intentions of assisting the 3<sup>rd</sup> respondent then he would have altered those results. The petitioner's agent at Bushili polling centre Dinah Ayako Were did confirm the results. The petitioner's allegations that there is a difference of 1,282 votes is not true. The petitioner sought to have the votes recounted and the winner declared. This is in line with Rule 32 (2) of the Election Petition Rules. However, a petitioner who relies on that Rule has to prove that there is a dispute on the results in specific polling stations or in all the polling stations and adduce evidence to the satisfaction of the court confirming such allegations. There is no evidence that the returning officer announced different results from those that were announced at all the polling stations. I do wish to comment that thanks to the ingenuity of counsels for the petitioner, this petition has mutated and undergone a complete metamorphosis from the original one filed in court. The initial petition had no single complaint for the results from the polling stations. The petitioner's counsels expanded the petition and alleged that 50% of the forms 35 did not give the valid results as they had alterations and cancellations. The 50% was enlarged and became 95% of the forms 35. Counsels further submitted that the initial 32 votes margin has been shown to have been bridged by the alleged unaccounted votes. However, these are just wide allegations which do not assist the petitioner. Counsels for the petitioner did not even bother to evaluate the results of all the candidates as posted on the forms 35. I do believe that they know that those results are indeed correct.

The petitioner in his prayer **(b)** is that upon recount and re-tallying, a declaration that the candidate with the highest number of votes is the one validly elected as Member of National Assembly for Navakholo constituency. The court ordered a partial recount and a re-tallying of all the votes. The report by the Deputy Registrar show that the 3<sup>rd</sup> respondent is the winner having garnered 10,596 votes and I do hereby declare the 3<sup>rd</sup> respondent as the one who was validly elected as Member of National Assembly for Navakholo constituency. The petition is hereby dismissed.

## **Costs**

**Section 84** of the Elections Act provides that an election court shall award the costs of and incidental to a petition and such costs shall follow the cause. Although that is a statutory provision the courts have discretion to either award costs or not. The petitioner herein sought from the 1<sup>st</sup> and 2<sup>nd</sup> respondent the forms 35 used in the election. He noted some errors on the form 36 and came to court. I do find that justice being fairness, it will be unfair to condemn the petitioner to pay costs. It will also be unfair to condemn the 1<sup>st</sup> and 2<sup>nd</sup> respondents to bear the costs of the petition as the irregularities complained of were normal human errors. The 3<sup>rd</sup> respondent should be satisfied with his new title as Member of National Assembly for Navakholo constituency. I do order that each party shall meet his/its own costs.

***Delivered, dated and signed at Kakamega this 20<sup>th</sup> day of September 2013***

**SAID J. CHITEMBWE**

**J U D G E**



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