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| Case Number: | Election Petition 2 of 2013 |
| Date Delivered: | 24 Sep 2013 |
| Case Class: | Civil |
| Court: | High Court at Garissa |
| Case Action: | Judgment |
| Judge: | Alfred Mabeya |
| Citation: | Abdikam Osman Mohamed & another v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR |
| Advocates: | Ms. Mumo for Petitioner Ms. Keya and Mr. Muganda for 1st and 2nd Respondent Mr. Muchoki and Mr. Mureithi for 3rd Respondent |
| Case Summary: | <p><u>Extension of voting beyond the gazetted day does not necessarily warrant nullification of an election</u></p> <p>Abdikam Osman Mohamed & another v Independent Electoral and Boundaries Commission</p> <p>Garissa Election Petition No 2 of 2013</p> <p>High Court at Garissa</p> <p>A Mabeya J</p> <p>September 24, 2013</p> <p>Reported by Njeri Githang'a Kamau & Victor L Andande</p> <p>Issues</p> <p>i. Whether failure to sign form 35 by agents could lead to invalidation of the election.</p> |

- ii. Who had the burden of proof in an election petition?
- iii. Whether an election could be nullified where voting in one polling station had been extended beyond the gazetted day.

Electoral law – election petition – duration of voting exercise – where the voting had been extended beyond the duly gazetted day – claim by the petitioner that such was an irregularity that affected the result – whether the election could be nullified in the circumstances – Election Regulations Election (General) Regulations 2012, regulations 64 & 66.

Electoral law – election petition – election malpractices and irregularities – where the petitioners alleged that there had been numerous malpractices and irregularities – whether the election could be nullified where such malpractices and irregularities were proved – Elections Act, section 83.

Electoral law – signing of election forms – where Form 35 had not been signed by some of the agents – whether in the circumstances the election could be invalidated

Regulation 79(6) of the Election (General) Regulations 2012 provided that:-

“The refusal or failure of a candidate or an agent to sign a declaration form under sub-regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation 2(a).”

Section 83 of the Elections Act provided that:

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

Held

1. In an Election Petition, the burden was on the Petitioner to prove, not only non-compliance with the electoral law, but also that the non-compliance affected the results of the election. Accordingly, the Petitioners not only had the burden of proof to establish that there were violations, omissions, malpractices and irregularities in the conduct of the Garissa gubernatorial election, but also had to illustrate to the court that the said violations, omissions, malpractices and irregularities, if any, affected the result of the election. It was after the Petitioners had established the foregoing that the burden shifted to the respondents, to establish that the results were not affected.
2. To invalidate the entire gubernatorial election due to the fact that voting took place in one polling station past the duly gazetted voting day would be misdirecting punishment to voters in Garissa County who had properly exercised their right to vote under article 38 of the Constitution. The voters had stayed in long queues to cast their votes, and had their votes counted, entered into a declaration form and publicly declared.
3. Invalidating the election based on one polling station would only serve to disenfranchise the voters based on an act of omission by an electoral officer, over whose conduct the voters had no control. Further, no cogent evidence was adduced to show that the non-compliance or allowing people to vote a day later was premeditated and carried out by the presiding officers, with the intent of causing prejudice to any particular candidate or change the election's outcome or to render it uncertain.
4. There was no evidence or allegation made that persons who were not entitled to vote did vote as a result of the extended opening hours or that such opening of the polling station created an opportunity for electoral malpractice. It was the Petitioners burden to establish this fact which they failed to do.
5. Breaking of ballot boxes was a serious

offence. However, proving the breakage alone was not enough to establish whether the irregularity affected the results. When such an anomaly was noted, the recommended action was to assess the contents of the ballot box to ascertain whether there was tampering with the contents. This could only be done through a scrutiny.

6. The mere failure to sign the form 35 did not go to the root of the validity of the figures on the form. There had to be more or other accompanying irregularities in addition to such failure, for an election of an unsigned Form 35 by agents to be invalidated.
7. In cases of allegations of election malpractices and other irregularities; the Petitioners were not only required to establish that such electoral malpractices and irregularities actually occurred but that they were of such magnitude that they substantially and materially affected the results of the election. The primary consideration in an election Petition was whether the will of the electorate had been affected by the irregularities.
8. Irregularities and errors alluded to had to be weighed against the entire exercise of elections. The bulk of the Petitioners complaints had been unsuccessful. The Petitioners did not provide credible evidence to show that the irregularities complained of and established were so substantial as to have affected the final results of the election.

Petition dismissed with costs to the Respondents. The costs capped at Kshs.2.5Million. The 1st and 2nd Respondent entitled to a maximum of Kshs.1Million whilst the 3rd Respondent entitled to a maximum of Kshs.1.5Million.

Cases

East Africa

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

2. *Hamisi, Kakuta v Peris Tobiko and 2 others* Election Petition No 5 of 2013 –(Mentioned)

3. *Joho v Nyange (No 4)* (2008) 3 KLR (EP) 500 –(Mentioned)

4. *Kabuti, Wilson Mbithi Munguti and others v Patrick Makau King'ola and others* Election Petition 9 of 2013 –(Mentioned)

5. *Kai, Sarah Mwangudza v Mustafa Idd Salim and 2 others* Election Petition No 8 of 2013 –(Explained)

6. *Masaka, Bernard Shinali v Boni Khalwale and 2 others* Election Petition No 2 of 2008 –(Explained)

7. *Ndeti, Wavinya v Independent Electoral and Boundaries Commission & 4 others* Election Petition No 4 of 2013 –(Explained)

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

9. *Sirat v Abdirahman & 2 others* [2010] 1 KLR 741 –(Explained)

Ghana

1. *Nana Addo Dankwa & 2 others v John Dramani Mahama & 2 Others* (2013) –(Explained)

United Kingdom

1. *Morgan & Others v Simpson & Another* [1974] All ER 722 –(Explained)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 86(a) –(Interpreted)

2. Elections (General) Regulations, 2012 (Act No 24 of 2011 Sub Leg) regulations 62(1); 64(1); 66; 79; 79(1),(2)(a)(b)(c),(6); 80; 83(1)(a); 88(4)(e)

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| | <p>–(Interpreted)</p> <p>3.Elections (Parliamentary and County Elections) Petition Rules, 2013 (Act No 24 of 2011 Sub Leg) rule 14(1); 17 –(Interpreted)</p> <p>Advocates</p> <p>1.Ms Mumo for the Petitioner</p> <p>2.Ms Keya and Mr Muganda for the 1st & 2nd Respondents</p> <p>3.Mr Muchoki and Mr Mureithi for the 3rd Respondent</p> |
| Court Division: | Civil |
| History Magistrates: | none |
| County: | Garissa |
| Docket Number: | - |
| History Docket Number: | none |
| Case Outcome: | Petition dismissed |
| History County: | - |
| Representation By Advocates: | Both Parties Represented |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | Kshs.2.5Million |
| <p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p> | |

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

AS HEARD IN THE HIGH COURT OF KENYA AT NAIROBI

GARISSA ELECTION PETITION NO. 2 OF 2013

ABDIKAM OSMAN MOHAMED1ST PETITIONER

**SAHAEL NUNO ABDI2ND
PETITIONER**

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER, GARISSA COUNTY.....2ND RESPONDENT

NATHIF JAMA ADAN3RD RESPONDENT

J U D G M E N T

1. Following the Gubernatorial Election held in the County of Garissa on 4th March, 2013, the 2nd Respondent declared the 3rd Respondent the Governor for Garissa County with 37,910 votes. The Petitioners being dissatisfied with that declaration filed this Petition on 25th March, 2013. The Petition was supported by affidavits sworn by the 1st Petitioner and 7 other persons that the Petitioners intended to call as witnesses.

2. In the Petition the Petitioners contended that the Gubernatorial Election for Garissa County was marred with electoral malpractices in violation of the Constitution and Electoral laws. That the 1st and 2nd Respondent failed to meet their obligations as envisaged in **Article 86 (a)** of the **Constitution** to ensure that the voting was done in an accurate, verifiable, accountable and transparent manner. The Petitioners complained that on 5th March 2013, ballot papers were found littered in the streets of Garissa Township and Balambala constituencies by members of the public, in contravention of the Election regulations that require the sealing of election materials in ballot boxes. That the 1st Respondent ejected agents from the county tallying center on 4th and 5th March, 2013 without proper justification, that the 1st and 2nd Respondent failed to provide polling agents with a copy of Form 35 in their respective polling stations in contravention of the law.

3. Further, the Petitioners averred that most Forms 35 used in the Garissa County gubernatorial elections were not signed by party agents. According to them, the Presiding Officers failed to record reasons for such refusal or failure to sign as required by **Rule 79** of the **Election (General) Regulations 2012** [hereinafter the "Regulations"]. They contended that the results in those forms 35 were therefore unverifiable. It was further claimed that there were two contradicting Form 35 for Ifthin Primary School polling station in Garissa Township Constituency which brought to question the integrity of the results

that were announced by the Presiding Officer for that particular polling station as it was not certain from which Form 35 the results were announced. The Petitioners also took issue with the fact that there were a number of Forms 35 from various polling stations that contained alterations that had not been countersigned, calling into question the veracity of the results announced in the respective polling stations.

4. The Petitioners also levelled several accusations against 1st Respondent's polling officials. It was alleged that the Presiding Officer at Abakaile Centre polling station in Daadab constituency failed to indicate the results of Mr. Ali Bunow Korane, the candidate for the National Alliance Party ("TNA"). In addition, it was contended that the Presiding Officers in a number of polling stations did not announce results in breach of **Regulation 79(2) (a)** of the **Regulations**, that the Returning Officer for Garissa Township Constituency abdicated his duty of declaring the results as he disappeared for 12 hours on 5th March, 2013. That in contravention with **Regulation 83** of the **Regulations**, the Presiding Officer for Saka Primary Polling Station allowed people to vote on the 5th day of March, 2013, a day after the designated and duly gazetted polling day, without justifiable reason.

5. The Petitioners further complained that the results announced by the County Returning Officer were not in compliance with the **Election Regulations**, that the 2nd Respondent omitted results from one stream in Danyere polling station in the final tally therefore announcing results that were inaccurate on the votes cast; that the 2nd Respondent and his deputy closed the county tallying center on 5th March, 2013 from 12.00 a.m to 8.00 a.m on the morning of 6th March, 2013 without reasonable explanation. In their view, these actions affected the transparency and credibility of the tallying process. The Petitioners also claimed that the 2nd Respondent failed to settle disputes at the tallying centre as required by **Article 88 (4) (e)** of the **Constitution**, and instead chose to eject agents from the tallying centre when complaints of irregularities were aired out by various political party agents.

6. Further complaints were that there was breaking and stuffing of ballot boxes at Mathalibah Polling station, Balambala polling station and Daadab Constituency. That though the Presiding Officer for Mathalibah Polling station was arrested, the 1st and 2nd Respondent failed to take into account the results of that polling station in the final tally and this adversely affected all the candidates' final tally. That there was breaking of seals of the ballot box Serial Number 070696 at Alangorbar polling station and that the polling officials failed to properly seal the ballot boxes at Garissa County Council office polling station as well as Saka Town polling Station.

7. Finally the Petitioners complained that the elections held in Garissa County were not free and fair, as the same were affected by several explosions that occurred on 4th March, 2013 in Garissa Township Constituency. In their opinion, this affected the voter turnout in the Constituency and the integrity of the ballot, as some presiding officers left ballot boxes unsealed as they scampered for safety.

8. For the above reasons, the Petitioners prayed for the court to firstly, issue a declaration that the gubernatorial election in Garissa County was not in accordance with the Constitution and did not represent the will of the people of Garissa County, the nullification of the gubernatorial election and for an order that the 3rd Respondent was not duly or validly elected as the Governor for Garissa County. The Petitioners also prayed for costs of the Petition.

9. Pursuant to **Rule 14(1) of The Elections (Parliamentary and County Elections) Petition Rules, 2013 (hereinafter "the Election Petition Rules")**, the Respondents filed their responses in opposition to the Petition. In their response filed on 24th April, 2013, the 1st and 2nd Respondent denied the allegations made in the Petition. It was averred that no reports were received from any Returning Officers within Garissa County that election materials were lost or found littered along the streets of

either Garissa Township or Balambala constituencies. On the claim of ejection of agents from the tallying centre, it was contended that this was necessary during the tallying exercise in order to maintain law and order. It was contended that some agents agitated for a recount of votes in particular polling stations which was not part of the 2nd Respondent's role as a county returning officer and this lack of understanding of his role, culminated in unruliness by some agents occasioning the ejection of the agents from the tallying centre. In addition, it was averred that there were security concerns, owing to the explosions experienced in the area on polling day, which compelled the closure of the tallying centre from midnight to 8.00 a.m in the morning of 6th March, 2013.

10. As regards the complaint by the Petitioners that there were irregularities in the tallying process, the 1st and 2nd Respondent averred that they had substantially complied with the law in collating and declaring the results from the various polling stations. That the allegation that party agents in 202 polling stations were not allowed to sign the forms 35 was a fallacy and that no credible evidence had been advanced to prove this fact.

11. The 1st and 2nd Respondent denied that election officials failed to seal ballot boxes at two polling stations of Garissa County Council Office polling station and Saka Town Polling Station. They also denied that there was the breaking of seals of ballot box number 070696 at Alangorbaa polling station nor the breaking and stuffing of ballot boxes at Mathalibah polling station in Balambala constituency and Dadaab constituency as claimed.

12. The 1st and 2nd Respondent contended that the elections in Mathalibah polling station were cancelled in accordance with the law and the Presiding Officer for the said polling station apprehended for neglect of duty. They denied that the explosions in Garissa Town affected the voting at various polling stations, given the impressive voter turnout in that constituency. They concluded that the gubernatorial election for Garissa County were conducted substantially in compliance with the Constitution, the statutory provisions and the election regulations. They affirmed that the declaration of the 3rd Respondent as the duly elected Governor for Garissa County was valid and credible. They therefore urged the court to dismiss the Petition with costs.

13. In his Response dated 12th April 2013, the 3rd Respondent contended that the Petition was frivolous and lacked tangible evidence to support the allegations therein. He averred that the elections were conducted in a free, fair and transparent manner by the 1st Respondent and its officials. He therefore put the Petitioners to strict proof in respect of all the claims in the Petition. He urged the court to dismiss the Petition with costs.

14. Against these allegations and counter allegations, a total of 23 witnesses testified. I will consider their evidence as and when necessary as it relates to the issues under consideration.

ISSUES FOR DETERMINATION

15. I have considered the evidence and the pleadings. I have also paid regard to the written and oral submission by learned counsel. During the Pre-Trial Conference held on 28th May, 2013, the parties agreed on the following broad issues for determination:

- a. ***Was the Election for Garissa County carried out in breach of the Constitution of Kenya and the Elections Act as claimed by the Petitioners"***
- b. ***Was the Gubernatorial election for Garissa County conducted in a free, fair and transparent manner"***
- c. ***Do the irregularities complained of by the Petitioners affect the result of the election"***
- d. ***Was there a gubernatorial election held on 5th March, 2013 at Saka Ward Balambala Constituency in respect of Garissa County Election" If so, did that render the entire gubernatorial election invalid"***
- e. ***What order as to costs"***

Burden and Standard of Proof

16. In an Election Petition, the burden is on the Petitioner to prove, not only non-compliance with the electoral law, but also that the non-compliance affected the results of the election. In **Raila Odinga –Vs- IEBC & 3 Others, Election Petition No.5 of 2013**, the Supreme Court held that:-

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”

17. Accordingly, the Petitioners not only bear the burden of proof to establish that there were violations, omissions, malpractices and irregularities in the conduct of the Garissa gubernatorial election held on 4th March, 2013, but must also illustrate to the court that the said violations, omissions, malpractices and irregularities, if any, affected the result of the election. It is after the Petitioners have established the foregoing that the burden shifts to the respondents, to establish that the results were not affected.

18. As regards the standard or threshold of proof, it is now settled that electoral disputes involve not only the parties to the Petition but also the electorate in the electoral area concerned. It is therefore obvious that they are matters of great public importance and the public interest in their resolution cannot be overemphasized. See the case of **Joho –vs- Nyange Another (2008) 3KLR (EP) 500**. Owing to the peculiar nature of election petitions, the law requires that the Petitioner proves the allegations of electoral malpractices to the standard that is higher than that of a balance of probability that is applicable in civil cases but lower than that applicable in criminal cases i.e. that of proof beyond any reasonable doubt. This was succinctly captured by **Lenaola J** in **Bernard Shinali Masaka –Vs- Bonny Khalwale & 2**

Others [2011] eKLR where he held that:

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

19. However, where the Petitioner alleges commission of election offences such as corruption, bribery, oath-taking, alteration of results and so forth, the burden of proof is even higher and must be proved beyond reasonable doubt. See **Wilson Mbithi Munguti Kabuti and others Vs Patrick Makau King’ola and others Machakos, High Court election petition 9 of 2013 (unreported)**. The court will therefore not interfere with results of an election unless it is established to the required standard of proof that the irregularities and electoral malpractices complained of render the said election invalid.

20. Those then are the legal beacons and clear strictures within which this Court shall determine the allegations in this Petition. I shall now proceed to consider the issues as framed for determination.

a. Was the Election for Garissa County carried out in breach of the Constitution of Kenya and the Elections Act as claimed by the Petitioners”

21. This issue concerns the conduct of the election by the 1st Respondent and its agents. As stated earlier, it is presumed that the official acts of the electoral body and its agents are lawful and valid unless evidence is tendered to the contrary standard of that presumption.

22. There were several matters alleged against the 1st and 2nd Respondent, which include the exclusion of candidates’ agents from the polling stations/centers, failure to seal ballot boxes, closure of the tallying centre on 5th March, 2013, the disappearance of the Garissa Township Constituency Returning Officer, breaking and stuffing of ballot boxes, the failure of the 2nd Respondent to settle disputes before the announcement of results as required and cancellation of results in Mathalibah polling station. I shall consider each of these claims in light of the evidence tendered and submissions made.

1. Impeding agents from Polling Stations

23. The Petitioners alleged that the 1st Respondent's officials impeded party agents from accessing polling stations to verify the transparency and validity of the process of voting on the Election Day. The Petitioners called two witnesses in support of these allegations. PW2, Abdikhaim Osman Mohamed, who was the 1st Petitioner and PW4, Daud Aden Dabar. PW2 testified that during the election period, he was the Chief Campaigner for the National Alliance Party (TNA), gubernatorial candidate in Garissa, Mr. Ali Bunow Korane. The witness on cross examination maintained that agents from TNA had been ejected and prevented from accessing various polling stations though he did not have the names of the Agents, nor the Polling stations where the ejection took place. He stated that he did not know the reasons for such ejection.

24. PW4, on the other hand testified that he was one of the TNA Agents in Afweyn Centre Polling Station in Lagdera Constituency where there were two streams. On cross examination, he stated that he did not sign Form 35 for his respective stream as he had been ejected from the polling station. He told the court that although he knew who kicked him out of the polling station, he did not indicate the same in his affidavit or report the matter to the police. He said that he was the only agent in the polling station that was kicked out of the polling station. When shown the Form 35 produced in Court, the witness confirmed that the Form 35 in respect of Afweyn Centre polling station had been signed by the other agents. He admitted that the results reflected on the Form 35 for both streams of the Afweyn Centre Polling Station were correctly reflected on the Form 36.

25. Learned counsel for the Petitioners Mr. Mbugua teaming up with Ms Mumo submitted that based on the evidence by PW2 and PW4, it was clear that the Agents from the TNA party were impeded and or ejected from accessing polling stations as pleaded in the Petition.

26. The 2nd Respondent, who was the County Returning Officer of Garissa denied that TNA party agents were kept away or prevented from accessing polling stations. He also denied that the agents were disallowed from carrying out their duties in their respective polling stations. To him these allegations were baseless. It was submitted for the Respondents that none of the Petitioner's witnesses adduced cogent evidence that would support the Petitioners claim that agents for TNA were ejected from their various polling stations.

27. Although PW4 testified that he was ejected from his polling station, he did not name the person who was responsible for his ejection. The question that arises is whether having failed to disclose the person responsible for such ejection in his affidavit, what was expected of the 1st and 2nd Respondent to rebut the allegation. On my part, I find the allegation to be vague and lacking in detail. It is noted that PW4 acknowledged that even though there were several other agents present in Afweyn centre polling station, he was the only agent ejected. He claimed that he did not know the reason for such ejection. That the other TNA agent was for member of National Assembly while he, PW4 was for Presidential, Governor and Senatorial election. It is curious that it was PW4 alone who was ejected and the others left. **Regulation 62 (1)** of the **Regulations** provides that the Presiding Officer shall admit to the polling station not more than one agent for each candidate or political party. Since there was one other agent from the TNA political party that was left in the polling station, I find that no prejudice was suffered by the alleged ejection of PW4. Probably PW4 may have been ejected because the TNA party had two Agents in the polling station. As regards PW2's evidence, the same lacked probative value as he did not identify the agents who were allegedly denied access or even the specific polling stations involved. An allegation must be pleaded with sufficient detail to enable a Respondent to sufficiently respond. In this case, the allegation was too generalized. The foregoing coupled with the evidence of the County

Returning Officer that there were no complaints raised regarding alleged ejection of agents, which was not challenged, I find that the allegation of ejection of agents or their denial of enter to polling stations not proved.

II. *Failure to seal ballot boxes*

28. It was the Petitioners case that the 1st Respondent and its officials failed to properly seal the ballot boxes at Garissa County Council office polling station in Garissa Township Constituency and Saka Town polling Station in Balambala Constituency. As a consequence, ballot papers were found littered in the streets of the aforementioned constituencies by members of the public. Two witnesses testified in this regard. They were PW2 and PW6, Bassane Mohamed Osman.

29. On cross examination, PW2, admitted that he did not personally see any ballot paper littered on the streets but rather that several ballot papers were brought to him by PW6 and a Mr. Yakhoub whose serial numbers he noted. He admitted that he had neither indicated this fact in his affidavit nor made a report to the police or the 1st Respondent. PW6 on his part testified that he was an accredited Observer during the election and was also a Campaign Agent for the TNA gubernatorial candidate. He recalled that he had collected ballot papers that were strewn near the Garissa Chief's office on 5th March, 2013. That he had the serial numbers of those ballot papers although he did not know whether the same was reflected in his Affidavit as he was unable to read and write. He told the Court that he did not report the matter to the Police for fear of arrest. He however confirmed that he had delivered the said ballot papers to Mr. Ali Bunow Korane's Lawyers in preparation for the present Petition. In their submissions, the Petitioners did not submit on this issue.

30. The 1st and 2nd Respondent denied the Petitioners allegations. According to the 2nd Respondent, there were no complaints received regarding littered ballot papers in Garissa Town. He told the Court that there was proper sealing of electoral materials in ballot boxes.

31. Learned Counsel for the 3rd Respondent, Mr. Muchoki teaming up with Mr. Mureithi submitted that the allegations of littered ballot papers in Garissa and Balambala constituencies were unsupported by facts. That since no serial numbers of the ballot papers were disclosed in the Petitioners' Affidavit nor copies of the alleged ballot papers produced, the allegation remained unsubstantiated.

32. The court has considered the evidence tendered on this issue. I agree with Mr. Muchoki's submission that all ballot papers have serial numbers. PW2 indicated to this court that he had noted the serial numbers of the ballot papers allegedly brought to him by PW6 and a Mr. Yakhoub. These vital details were however omitted from his affidavit. It was not enough to simply allege that Ballot papers were littered in the streets of Garissa. Since the Petitioners and their witnesses confirmed that they had collected such littered ballot papers they should have produced copies of the same either in PW6 or PW2's affidavits. Nothing would have been easier than to attach them for the consideration of the court.

33. Further, it is curious that both PW2 and PW6 did not lodge any complaint with the police or the 1st

Respondent. A report from the police for example would have gone a long way in ascertaining the veracity of the testimony of PW2 and PW6. The court is in the circumstances not persuaded that there were ballot papers littered in Garissa and Balambala as claimed.

III. The Disappearance of the Returning Officer

34. The Petitioners complained that the 1st Respondent's electoral officials did not meet their obligations envisaged under Article 86(c) of the Constitution in that the Returning Officer for Garissa Township Constituency disappeared for 12 hours on 5th March, 2013 and could not be traced on phone. According to them, the aforesaid Returning Officer failed to declare the results of his respective Constituency in breach of **Regulation 83** of the **Regulations**. PW2 testified that he tried to call the Returning Officer but could not trace him and that he made a report to the police. When challenged to produce evidence of calls made or the police Occurrence Book number, he admitted that he had none.

35. The 1st and 2nd Respondent denied the allegation. They insisted that the said Returning Officer never abdicated his duties as claimed by the Petitioners. It was submitted on their behalf, that the allegation was baseless.

36. Having considered the issue, I am of the view that the testimony of PW2 was not convincing. This was an election which was a public exercise. If it be true that there was a report of the disappearance of the Returning Officer for 12 hours made to the police, the easiest thing to have proved that fact was a production of the occurrence Book number of that report. This is lacking. I find the allegation not substantiated.

IV. Breaking and Stuffing of Ballot Boxes

37. It was pleaded that there was breaking and stuffing of ballot boxes at Mathalibah, Balambala and Daadab Constituencies. The Petitioners further alleged that there was breaking of the seals of the Gubernatorial election ballot box serial No. 070696 at Alangorbaa polling station. PW2 indicated that he had not personally witnessed the breaking and stuffing of ballot boxes in either Mathalibah, Balambala or Daadab constituencies. The witness however confirmed that there was the breaking of the Governor Ballot Box serial number 070696 at Alangorbaa polling station. He identified the said Ballot Box in court and confirmed that the same was broken and its contents could easily be accessed. On cross examination however, he noted that the ballot box was not in relation to Alangorbaa polling station as

indicated in his affidavit and Petition, but was for Dertu Polling station.

38. The 1st and 2nd Respondent denied the allegations of the Petitioners. The 2nd Respondent told the court that as the County Returning Officer, he did not receive any complaints with regard to breaking and stuffing of ballot boxes. With regard to Alangorbaa Polling station, the witness testified that exhibit R1Exh1 – Ballot Number 070696 produced in court was not a ballot box for Alangorbaa Polling station, but was a ballot box from Dertu Polling Station. He noted that though the same was broken and its contents easily accessible, there was no challenge by the Petitioners with respect to the returns from Dertu Polling station.

39. It was submitted for the respondents that there was no evidence to show that there was breaking and stuffing of ballot boxes at Mathalibah, Balambala and Dadaab constituencies. That there was no evidence that there was any broken box in Alangorbaa and that the only ballot box produced, was that of Dertu Primary School.

40. The Petitioner relied only on the testimony of PW2 on this issue. There was no evidence that he witnessed the breaking and stuffing of ballot boxes in Mathalibah, Balambala and Daadab. The number of Ballot boxes allegedly broken was not provided. Neither were their serial numbers given. This was but a generalized claim. However, as regards Ballot Box No.070696 from Dertu Polling station, I am satisfied that the same was broken and damaged on top of the lid. The contents therein were easily accessible although the seals were however intact.

41. Breaking of ballot boxes is a serious offence. However, proving the breakage alone is not enough to establish whether the irregularity affected the results. When such an anomaly is noted, the recommended action is to assess the contents of the ballot box to ascertain whether there was tampering with the contents. This can only be done through a scrutiny. In this case, the Petitioners did not pray for scrutiny in their petition and their application for scrutiny was declined.

V. Closure of the tallying Centre, the ejection of agents from tallying centre and the 2nd Respondent's failure to settle disputes before declaring results

42. In the Petition, it was alleged that the 2nd Respondent as the County Returning Officer closed the county tallying center on 5th March 2013 to 6th March 2013 without any justifiable cause. As such, the Petitioners pleaded that the 2nd Respondent's actions precluded transparency during the tallying process. In their assessment, the announced results in the tallying centre lacked credibility. The 2nd Respondent was further accused of failing to settle disputes that arose before the declaration of results of the gubernatorial election, while at the tallying centre.

43. PW2 testified in support of his allegation. He stated that he witnessed the closure of the tallying centre on 5th March 2013 at around midnight to the following morning at 8 a.m. According to him, the closure was ill intended and the 2nd Respondent and his deputy closed the polling station to manipulate the election results. On cross examination he stated that the work of the 2nd Respondent was to count

votes, although there were no ballot boxes in the tallying centre. The Petitioners did not however submit on this issue.

44. The 2nd Respondent testified in response to the claim. He conceded that the County tallying centre was closed at 12 a.m to 8 a.m of 6th March, 2013. He told the court that the closure was occasioned by security concerns as there had been several bomb explosions experienced in Garissa Town on the 4th of March, 2013. He admitted that several agents were ejected from the tallying centre but for reasons of being unruly. He told the court that some Agents majority of whom, were from the TNA party, were demanding for a recount of votes which was not within his mandate. He explained that his role as the County Returning Officer for Garissa was to receive and collate the Forms 35 and 36 received from the Constituency Returning Officers. To him the security personnel ejected the agents from the tallying centre in order to restore calm as the process of tallying could not go on in the mayhem.

45. Mr. Muganda teaming up with Mr. Sagana submitted that from the testimony of the 2nd Respondent the agents were ejected from the tallying centre for disrupting and interfering with the tallying process which is permissible in the law.

46. The 3rd Respondent told the court that he was present during the tallying of votes at the tallying centre on 5th March, 2013. He testified that the tallying process went on smoothly until some people become rowdy, prompting the security personnel to eject persons from the tallying centre until calm was restored. According to him, this was a required step as the process of tallying could not take place under the circumstances. R3W2, Idris Omar Abdi also testified in this respect. He told the court that he was the Chief Agent for Wiper Party and that he had recorded a video of the proceedings in the tallying centre on 6th March, 2013. He played the video in court and all parties agreed that it could be admitted by consent.

47. It was submitted for the 3rd Respondent that it was clear from the video evidence that there were chaos in the tallying centre on 6th March, 2013. That the video showed that the 1st Petitioner was engaged in violent behavior as he was among those threatening the 2nd Respondent. As such, the 3rd Respondent submitted that an adverse inference should be drawn against the 1st Petitioner given his conduct and behavior in the tallying centre.

48. It is clear from the evidence that agents were removed from the tallying centre at some point on 6th March, 2013. In the **Raila Odinga & others –v- IEBC and others(supra)** the court observed that:-

“243. elections will operate optimally in conditions of order, peace and security; and it is the first place, the responsibility of the machinery of IEBC to ensure such conditions prevail...”

49. The evidence on record including the video evidence clearly show that people were ejected from the tallying centre when the situation became unbearable. Tallying had stopped because the crowd had become unruly. The video shooting showed the 1st Petitioner engaged in disorderly conduct. There were threats of bodily harm that were made against the 2nd Respondent. In the circumstances, I am satisfied that the ejection of the agents was not without a basis.

50. On the closure of the centre on the 6th March, 2013 from 12.00 a.m to 8.00 a.m, I find the explanation of the 2nd Respondent credible. The Centre was not closed for any ill intent as contended by the Petitioners but the same was necessitated by security concerns due to the bomb explosions that had

rocked the area. The Petitioners themselves were agreeable that there were such bomb explosive.

51. With regard to the settling of the disputes before declaration of the results, I have assessed the evidence before the court. The nature of the complaints raised by the agents in the tallying centre was with regard to a recount of votes. As a County Returning Officer, the 2nd Respondent is only required to collate the results in the Forms 35 and Form 36. Once the Forms 35 and 36 are delivered by the various Constituency Returning Officers, the results garnered by the candidates on the Forms 35 and 36 cannot thereafter be altered through a recount of votes by the County Returning Officer. The reason is clear; the votes will have been counted and returned to the sealed ballot boxes, those boxes are delivered to the tallying center and can only be opened by an order of Court. See **Kakuta Hamisi Vs Peris Tobiko and Others Nairobi EP No. 5 of 2013 [2013]eKLR**. The 2nd Respondent did not have the mandate to open them and conduct a recount.

52. **Regulation 80 (1)** of the **Regulations** provides for rechecking and recounting of votes on request by a candidate or agent or by the Presiding Officer at the Polling Station. There is no evidence that the Petitioner's agents sought a recount of the votes at the polling stations and were denied. To seek for a recount at the tallying centre was wholly misplaced. For these reasons, I find no merit in the Petitioners claim and therefore accordingly dismiss the same.

VI. Results not announced in the polling stations.

53. The Petitioners alleged that the Presiding Officers in a number of polling stations did not announce results as provided for in **Regulation 79(2) (a)** of the **Regulations**. I have looked at the record. The Petitioners did not specify which polling stations were affected by this alleged irregularity. They also did not lead any evidence to establish this fact. The 1st and 2nd Respondent specifically denied this allegation and stated that all the results were tallied and duly announced in all the polling stations in Garissa County. For this reason, the allegation remains unsubstantiated.

54. In conclusion, on the first issue, my evaluation of all the evidence show that the alleged breaches of the Constitution and election law were never proved satisfactorily. The disputed election was conducted and supervised by the 1st Respondent in a manner that substantially complied with the constitution and the law.

b. ***Was the Gubernatorial election for Garissa County conducted in a free, fair and transparent manner"***

55. This also concerns the issue of whether the elections were conducted in an accurate, verifiable, secure, accountable and transparent manner. For purposes of good order, I propose to deal with each cited irregularity on its own in a sequential manner.

i. ***The signing and failure to supply copies of Form 35 to candidates agents***

56. The Petitioners complained that the Presiding Officers in many polling stations failed to provide party agents with Form 35. It was further pleaded that many party agents were barred from signing the said Form 35 in contravention of **Regulation 79(2) (b)** of the **Regulations**. The 1st Petitioner, PW2 in his testimony testified that he received reports that most TNA agents for the gubernatorial race in Garissa had not signed the Form 35s as required by Law. He stated that the TNA party had agents in all the Polling stations in the entire Garissa County. He however, told the court that he did not have a list of all the Agents that had not signed the Forms 35. In his opinion, the Electoral officials were supposed to seek out the Party Agents to sign the Forms 35 which they failed to do.

57. PW1, Osman Hussein Issak and PW3 Hodan Ali Aden also testified on this issue. Both witnesses told the court that they were stationed as Agents of the TNA gubernatorial candidate in Danyere Primary school and Chief Township Office Centre polling stations, respectively. PW1 confirmed that he signed the Form 35 in his polling station but was not given a copy. He stated that the result of one stream from that polling station was omitted in the Form 36. PW3 on the other hand, testified that she did not sign the Form 35 for Chief Township polling station. She was firm on cross examination that she was not supplied with a copy of the Form 35. She however admitted that she stayed outside the polling station expecting the Presiding officer to give her the Form 35 for her signature.

58. I have carefully considered the evidence on the allegation of failure to provide Forms 35 to Party Agents by the presiding officers. **Regulation 79(2)(c)** of the **Regulations** provides that the Presiding Officer shall, provide each political party, candidate, or their agent with a copy of the declaration of results. It is to be noted that Form 35 is prepared at the polling station and the Presiding Officer can only comply with this provision if the candidate or party agent is present at the time the results are declared. It was for the Petitioners to show that agents of their political party were present when results were declared but the Presiding Officer refused to give such agent the Form 35 when requested. Whilst it would seem PW1 met this criterion, PW3 did not. She was outside the polling station. She expected the Presiding officer to look for her and give her the Form 35. Apart from these two, there was no evidence to show which other agents of TNA and for which polling stations were not supplied with Forms 35. At least PW2 admitted as much.

59. I now turn to the issue of the failure by the Agents to sign the Forms 35. It was the submission of the Petitioners that no credible explanation was offered by the 1st and 2nd Respondent as to why 55 form 35s presented in court did not bear the signatures of the Party Agents. As such, it was contended that the results in the Forms 35 that did not bear the party agents signatures were unverifiable. The Petitioners relied on the case of **William Kabogo Gitau –v- George Thuo & 2 Others (2010) eKLR** in support of their contention.

60. In rebuttal, the 2nd Respondent stated that though there were some Forms 35 that did not contain the Agents' signatures, over 81 % of the Form 35's were signed by the Party Agents. Accordingly, it was submitted on behalf of the 2nd and 3rd Respondent that failure by agents to sign Form 35 or failure to record reasons for such refusal or failure, does not by itself invalidate the results of a given polling station. It was further submitted that the Case of **William Kabogo Gitau (Supra)** was not applicable as the same was decided before the advent of the Election (General) Regulations, 2012.

61. Having carefully considered the evidence on record, it is clear from the election regulations that Party Agents form an integral part of the conduct of the polls on Election Day. They are not passive attendants at an election. **Regulation 79 (b)** of the **Regulations** require the Agents to certify the results of their respective polling stations by appending their signatures on the Form 35. This is meant to give credibility to the results of an election.

62. From the record, it is clear that there were several Forms 35 that did not bear any signatures from Party Agents as required by law. No reasons were given for these omissions. It can only be left to speculation of the likelihood of some Agents, like PW3, having been absent from the polling station when the forms were being signed. That is only a speculation which I believe has no place in a case such as this one.

63. Notwithstanding the absence of the agents' signatures, I note that there was an admission by both PW2 and PW3 that the figures on the unsigned Forms 35 were correct with a few exceptions. It is also clear from the record that over three quarters (3/4) of the Form 35 were signed by Agents. In this regard, **Regulation 79(6)** of the Regulations provides that:-

"The refusal or failure of a candidate or an agent to sign a declaration form under sub-regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation 2(a)." (Emphasis supplied)

64. The mere failure to sign the Form 35 therefore does not go to the root of the validity of the figures on the form. In this regard the case of **William Kabogo (supra)** on the failure of the Party Agents to sign the statutory Form 16 in the 2007 election which is the equivalent of the Form 35 in this election, has been negated by **Regulation 79(6)**. To my mind, there has to be more or other accompanying irregularities in addition to such failure, for an election of an unsigned Form 35 by Agents to be invalidated. In this case, there is no such additional irregularity to warrant the invalidation of the results in those polling stations.

ii. **Failure to indicate the results in the Form 35**

65. In the Petition, the Petitioners indicated in Part D, Paragraph 1 (e) that:-

“The Presiding officer, at Abakaile Centre polling station, Dadaab Constituency failed to indicate the results of Mr. Ali Burow Korane.”

PW2 conceded in his testimony that the entries made in the Form 36 for Dadaab Constituency indicated that Mr. Korane garnered no votes in that particular polling station. He acknowledged that all the entries made in the Form 36 and Form 35 did not vary with respect to that polling station. No submission was made by the Petitioners with regard to this allegation.

66. The 1st and 2nd respondent however denied this allegation in their Response. It was submitted by the Respondents' Counsel, that the allegation of the missing result for Mr. Korane in Abakaile Centre Polling station was unmeritorious as the Form 35 of the polling station tallied with the Form 36 for Daadab Constituency.

67. Having examined the Form 35 with respect to Abakaile Centre polling station, it is clear that there is no entry made in respect of Mr. Korane's votes. It was incumbent upon the Presiding Officer to indicate the figure garnered by each candidate. Even if it was Zero "0" that is what the law expected the Presiding officer to enter as the result of the election. However, I note that the 1st Petitioner conceded that the actual result for Burow Korane in that station was Zero "0". In this regard, I find that the omission by the Presiding Officer to indicate that result was not intended to deny the said candidate any votes or that it affected the results.

iii. Bomb Explosion in Garissa County

68. The Petitioners complained that the elections held in Garissa County were not free and fair, as the same were affected by several explosions that occurred on 4th March, 2013 in Garissa Township Constituency. In their opinion, this affected the voter turnout in the Constituency and the integrity of the ballot, as some presiding officers left the ballot boxes unsealed when they scuttled for safety. PW2 told the court that he did not know who was responsible for the incident. He however insisted that the explosion had affected the voter turnout in the Garissa town.

69. In rejoinder, the 2nd Respondent conceded that there were security concerns in the County. He told the court that the security situation was however not to an extent that could have affected the election in Garissa County. It was the submitted on behalf of the 3rd Respondent that the bomb explosions did not affect the elections as alleged by the Petitioners, as Garissa Township experienced a voter turnout of 73%. It was further submitted that the blast could not be blamed on the 1st and 2nd Respondent.

70. Having assessed the evidence on record, I agree with the Petitioners that threat of violence can affect the voters' willingness to attend and vote in an election. Apart from the testimony of PW2, there was no other evidence that was tendered to show that the explosion in Garissa Township affected the

polling. No evidence was led to show that several or a number of voters in Garissa Township constituency were intimidated from attending the poll. Form 36 produced in court shows that 72.86 % of the registered voters in Garissa Township exercised their constitutional right to vote. This is an impressive number by all standards. We cannot expect 100% voter turnout for any poll in a constituency. I associate myself with **Githua J** when she stated in ***Sarah Mwandgudza Kai v Mustafa Idd and Others Malindi EP No. 8 of 2013 (Unreported)*** that:-

“Though in ideal circumstances all registered voters should be able to cast their vote for their preferred candidates without any impediments the truth of the matter is that in reality, it is impossible to attain a 100% voter turnout in any election and that is why democracy is predicated upon the will of the majority.”

In totality, I find that though there were security concerns in Garissa Township Constituency, the same did not substantially affect a free, fair and transparent election in the area. The explosion was not attributable to either of the Respondents. Further, the Petitioners did not lead any evidence at the trial to prove that poll officials left the ballot boxes unsealed or unattended when they scampered for safety. The allegation is threadbare and remains unsubstantiated.

iv. Cancellation of the results in Mathalibah

71. In regard to this issue, it was the contention of the Petitioners that the 1st and 2nd Respondent's officials were responsible for numerous irregularities experienced in Mathalibah polling station. According to them, there was breaking and stuffing of ballot boxes in the aforesaid polling station, which occasioned the arrest of the Presiding Officer and the cancellation of results. The Petitioners argued that this cancellation adversely affected their preferred candidate, as Mathalibah polling station was located in an area that was considered his stronghold.

72. PW2 testified in support of the above claim. He told the court on cross examination that he could not remember the name of the Presiding Officer at Mathalibah Polling Station. He acknowledged that the said presiding officer was charged in a criminal case. He was firm that he knew that the votes of the respective polling station were not factored in the final tally and this affected all the candidates.

73. It was submitted for the Petitioners that the cancellation of the results in Mathalibah Polling station had a bearing on the gubernatorial election. That the said polling station had 216 registered voters and was a stronghold of Mr. Ali Korane. That as such, the cancellation of the results for that polling station directly affected Mr. Korane as compared to other gubernatorial candidates. Finally, that had the results not been cancelled, the number of votes in that polling station would have had the effect of narrowing the margin between the 3rd Respondent and Mr. Korane.

74. In response, the 2nd Respondent told the court that though the results were announced in Mathalibah Polling station, the same were cancelled owing to gross misconduct on the part of the Presiding Officer. He said that the decision to cancel the results was made after consultation with the Constituency Returning Officer and the 1st Respondent's officials at Nairobi. He told the court, that the

matter was now a criminal case and the aforesaid Presiding Officer was being prosecuted. He reiterated that no party or candidate benefited from the cancellation of the results in Mathalibah polling station.

75. It was submitted on behalf of the 1st and 2nd Respondents that the cancellation of results in Mathalibah was not done with any malicious intent on the part of the 1st Respondent. That the cancellation was done to uphold the integrity of the election process and that no candidate was prejudiced by the said cancellation. On his part, the 3rd Respondent submitted that it is erroneous for the Petitioners to presuppose that all the 216 registered voters in Mathalibah would have voted for Mr. Korane if the results were upheld.

76. I have considered the rival positions of the parties and the evidence adduced. It is common ground that the results in Mathalibah polling station were cancelled on account of malpractices. A criminal case against the Presiding Officer for the said polling station is still pending. The Returning Officer is empowered to cancel the results of a polling station where the votes cast exceed the registered voters. This is under **Regulation 83 (1) (a)** of the **Regulations**. The circumstances under which the results for Mathalibah were cancelled are not clear. What is clear is that the cancellation of the results disenfranchised 216 registered voters in Mathalibah polling station. That cancellation was as a result of an irregularity committed by officials of the 1st Respondent. This is a clear incident of an irregularity which the Petitioners have proved.

77. The Petitioners contended that the cancellation affected the result of the gubernatorial election and prejudiced Mr. Ali Korane the most, as compared to the other candidates. According to them, if the 216 votes are added to Mr. Korane's overall vote, the same would reduce the margin between him and the 3rd Respondent. That may be so, but there is nothing on record to show that all the 216 voters would have voted for Mr. Ali Korane.

78. What is the impact of the cancellation of the results in Mathalibah polling station in the context of the overall election result in the gubernatorial election" The 216 registered voters at Mathalibah consisted 0.1872% of the overall registered voters of 115,386 in Garissa County. One of the overall objectives of the Election Court is to do justice to all parties. In this regard, would it be proper for the court to nullify the entire gubernatorial election due to the cancellation of results in a polling station with only 216 registered voters" The will of these 216 voters as well as the rest of the voters whose results were declared in the County must be respected. In this regard, I will take into consideration that fact when analyzing the overall effect of the irregularities proved in the overall results of the election.

79. In conclusion, on the issue of whether the Elections were conducted in a free, fair and transparent manner, I find that the Petitioners have proved that there were some irregularities and minor deviations in the conduct of the elections for the Garissa County. The question will be what effect such irregularities and deviations had on the overall results of the election.

c. Do the irregularities complained of by the Petitioners affect the result of the election"

80. I propose to deal with this issue in the context of how the election results of the gubernatorial contest in Garissa County were collated in the Forms 35 and Forms 36. The issue of alleged irregularities and discrepancies in these particular statutory forms formed the bulk of the Petitioners' submissions. However, the issues contained in the Petitioners submissions in respect of this issue were not pleaded in the Petition. It is trite law that the Petitioner has to specifically plead the allegations he intends to prove at the trial. My view is, for a Petitioner to fail to plead a matter and clutch on it after trial on the basis that it arose during trial is untenable. Issues crystallize through pleadings to enable each party to know the case he has to meet. In this regard, I shall limit my observations and findings to the consideration of pertinent issues that were specifically pleaded in the Petition and which the Respondents would have had an opportunity to respond to in their respective responses.

l) Errors, alterations, mistakes in Forms 35 and 36

81. The Petitioners' case was that the Forms 35 contained so many errors, alterations and mistakes so as to render the election of the 3rd Respondent invalid. Mr. Mbugua, counsel for the Petitioners took the County Returning Officer (the 2nd Respondent) through the details of the errors, mistakes and alterations on the Forms 35. The witness admitted that there were errors, alterations and mistakes in the statutory forms but stated that these were regrettable mistakes and that the same were not intentional or done with any malicious intent.

82. It was the submission of Mr. Mbugua that there were a total of seventy six (76) Forms 35 that had been altered without any countersignatures against those alterations. In his assessment, the failure to countersign tainted the returns contained in those Forms 35. He relied on the case of **William Kabogo Gitau (supra)** in support of this submission. He further submitted that 12 Forms 35 did not bear the 2nd Respondent's seal or the signatures of the Presiding Officers therefore raising the question as to the validity and origin of the said forms. Mr. Mbugua further took issue with the fact that there were a total of Thirty One (31) Forms 35 missing, sixteen (16) of which were for Balambala Constituency, ten (10) from Fafi Constituency and five (5) from Ijara Constituency. Accordingly, it was submitted that without these forms, which are the primary document in the election, the results returned by the 2nd Respondent could not be verified. Mr. Mbugua was firm that the missing documents cannot be taken lightly. In his opinion, the 2nd Respondent had been given ample time and numerous opportunities to produce the same, but he failed to do so. He asked the court to draw an adverse inference against the 1st and 2nd Respondent for not producing the said documents.

83. In rejoinder, counsel for the 1st and 2nd Respondent submitted that the Petitioners had failed to demonstrate how the alterations complained of in the Forms 35 had affected the results of the gubernatorial election. It was further submitted that the case of **William Kabogo Gitau (supra)** relied on by the Petitioners was distinguishable as the same was in reference to the alterations made in respect to the candidates' results. That the alterations in this Petition did not affect the result of any single candidate and that therefore the alterations alluded to by the Petitioners did not affect the will of the people.

84. On the issue of the lack of the 2nd Respondent's seal or the Presiding Officers signatures on some Forms 35, Mr. Muganda submitted that the same had not been specifically pleaded by the Petitioners. He however told the court that the lack of such seals or signatures did not affect the outcome of the electoral results. It was further submitted that in any case the results contained in such Forms 35 had not been contested by the Petitioners. With regard to the missing Forms 35, Mr. Muganda submitted that the

position by the Petitioners' learned counsel was erroneous. He contended that two bundles containing the Forms 35, had been supplied. The 1st bundle had some Forms 35 missing which was however rectified by an order of the court in which the 1st and 2nd Respondent supplied the 2nd bundle which contained all the Forms 35. It was argued that in any case, the 2nd Respondent had indicated during his cross examination that he had all the original documents in court but the Petitioners had specifically objected to their production. In conclusion, he submitted that all Forms 35 for Garissa County were accounted for by the 1st and 2nd Respondent.

85. I have considered the arguments by the opposing parties and the evidence provided. I am in agreement with Mr. Mbugua's submission that the statutory forms, that is Form 35 and 36, are designed to ensure that the object of a free and fair election is met by providing a simple, accurate and transparent and verifiable process consistent with Articles 81 and 86 of the Constitution. Some pertinent issues have been raised by the Petitioners with regard to these statutory forms.

86. With regard to lack of the 2nd Respondent's seal or the Presiding Officers signatures in some Forms 35, I agree with Mr. Muganda that the issue was not specifically pleaded in the Petition. In this regard I will disregard the same as being an afterthought.

87. In the event I am wrong and since this decision is subject to appeal, I will make a finding on the same but will not take it into consideration in the final decision. **Regulation 79 (1)** of the Regulations mandates the Presiding Officer, agents or candidates to sign the declaration of the elections. I have examined the forms 35 produced by the 1st and 2nd Respondent. Indeed, there are several forms that are signed by the Presiding Officers but the same do not bear the stamp of the 1st Respondent as is customary. These Forms 35 are eight in number as follows:-

| | Polling Station | Constituency | Code |
|----|-----------------------------------|---------------------|-------------|
| 1. | Garissa County Council Hall | Garissa Township | 025 |
| 2. | Jaribu Primary | Garissa Township | 019 |
| 3. | Lander Wells | Daadab | 032 |
| 4. | Malaylay Centre (stream 1&2) | Daadab | 009 |
| 5. | Kone ECD | Balambala | 018 |
| 6. | Marakader Dam | Fafi | 023 |
| 7. | Laago Primary School | Fafi | 042 |
| 8. | Nanighi Primary School (stream 1) | Fafi | 046 |

88. One Form 35 from Abdisamet Dam Mobile polling station, Balambala Constituency does not bear the signature of the presiding officer, but there is a stamp imprinted on the face of it. The state of these forms according to the Petitioners, posed a question on their validity given that they were used in the tallying process by the Returning Officers. Mr. Mbugua cited the case of **William Kabogo Gitau (Supra)** in support of this assertion. I am however, of a different persuasion. **Regulation 79 (1)** of the **Regulations** imposes a duty on the presiding officer to sign the Form 35. Where there is failure to do so, the Election Court should resolve the issue in favour of preserving the voter's inalienable right to vote particularly when there is no proof that failure by the Presiding Officer to sign or stamp the form 35 was willful or affected the election results in any manner.

89. In this regard, the Petitioners did not lead any evidence that the lack of signatures or stamp of the presiding officers in Forms 35 for the above mentioned polling stations affected the outcome of the

election. Further, the Petitioners did not even challenge the results that were tallied and declared at those polling stations. It is not enough for the Petitioners to merely allege and indicate a failure on the part of the 1st and 2nd Respondent, but it was also essential for them to demonstrate that such failure affected the result of the election. The concerned Presiding Officers who failed to sign or stamp the Forms 35 should however be sanctioned but this does not mean that the voter who toiled for hours to exercise his or her right to vote should be disenfranchised for the omissions of the electoral officials. In this regard, I am persuaded by with views of **Adinyira JSC** in the Ghanaian Supreme Court Presidential Election Petition of **Nana Addo Dankwa & 2 others –vs- John Dramani Mahama & 2 Others (2013)(unreported)** where she stated that:

“.....I would in the absence of explicit statutory language that specifies the election is voided because of the failure of the signature of a presiding officer; conclude that the votes on the unsigned sheets are valid. Failure by Presiding Officers to sign declaration forms did not affect the results of the elections at the respective polling stations. The presiding officers who did not sign the declaration forms are liable to be sanctioned.” (Underlining is mine)

90. Accordingly, the claim by the Petitioners that the results contained in Forms 35 that are not stamped or signed by the Presiding officer are void, has no basis.

91. I now turn to the issue of the missing Forms 35. It was the assertion of the Petitioners that the court should draw an adverse inference on the fact that the 1st and 2nd Respondents failed to supply all Forms 35 for the subject election. Whilst I agree with Mr. Mbugua’s submission that the 1st and 2nd Respondent had ample time to produce all the Forms 35, I find it disturbing that the Petitioners would choose to raise the issue of the missing Forms 35 at the submission stage. During the hearing when Mr. Mbugua, raised an issue with regard to the bundles of documents served upon the Petitioners by the 1st and 2nd Respondent, an order was made on 17th June 2013 for the 1st and 2nd Respondent to prepare and serve upon the Petitioners a proper bundle of documents similar to the one filed in court. On 19th June, 2013, Mr. Mbugua again raised the issue of some 16 Forms 35 missing from the bundle. They were in regard to Balambala constituency. Counsel to the 1st and 2nd Respondents thereafter informed the court that they had supplied the bundle to the Petitioners and that they had the original versions of all the Forms 35 in court. Mr. Mbugua is recorded to have stated that ***“I now confirm that the bundle served on us on Monday 17th June, 2013 is akin to the one in the court file and with the 3rd Respondent. We can proceed”***. With this statement, I find that the Petitioners accepted the 1st and 2nd Respondents bundle as presented. The trial proceeded on that basis, i.e that the documents in court were complete. The Petitioner cannot now be allowed to turn back and claim that there were missing documents.

92. Further, it is my view, that the Petitioners conduct is tantamount to trial by ambush contrary to **Rule 17 of the Elections Petition Rules**. The Petitioners had every opportunity at the pre-trial hearing to request for further particulars in terms of the missing Forms 35. They were also not precluded from raising the issue at any time thereafter. During the trial the 2nd Respondent indicated that he had all the original documents (Forms 35) in court. The Petitioners objected to their production. The production of the originals would not have been prejudicial to any party and would have served to verify the results contained in the polling stations in question. To my mind therefore, the issue of the missing Forms 35 is an afterthought. There would be no fairness in determining the issue as framed. I will therefore dismiss the allegation and make no adverse inference as urged.

93. The court will now tackle the issue of the alterations made on the Forms 35 without the

countersignatures of the Presiding officers. According to the Petitioners, a total of seventy six (76) Forms 35 produced by the 1st and 2nd Respondent had been altered without any countersignatures. In their opinion, Form 35, as a primary reflection of the will of the voters, should be a flawless document. Nothing could be further from the truth. I find the holding of Majanja J. in **Wavinya Ndeti –vs- IEBC & 4 others Machakos EP No. 4 of 2013** to be instructive where he stated thus:

“An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error. Indeed the evidence is clear that the counting and tallying was being done..... in less than ideal conditions hence errors, which were admitted, were bound to occur particularly in the tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs.”

94. Mistakes are bound to happen when the Presiding officers fill in the Form 35 or any other document. It is important to demystify the Forms 35. In the same case of **Wavinya Ndeti (supra) Majanja J** delivered himself thus: -

(147.) In order to deal substantially with the petitioner’s case, I think it is important to understand the place of statutory Forms 35 and 36 within the electoral process. Essentially these forms are for recording the votes tallied. In the words of Kimondo J., in Kakuta Hamisi v Peris Tobiko and Others Nairobi EP No. 5 of 2013 [2013]eKLR, “Form 35 is a snapshot of the votes cast. Its contents are then transposed into form 36 that captures the constituency total tallies for all the candidates.”

(148.) The form and contents of the forms is provided for in Part XIII of the General Regulations, 2012. The manner in which they are prepared and filled is clearly set out in the regulations. In most cases the Presiding Officers were furnished with computer printed Form 35 which was pre-filled with the details of the polling station and candidates. A lucid elaborations and demystification of these statutory forms was set out by Kimondo J., in Kakuta Hamisi v Peris Tobiko and Others (supra) and which I adopt fully in my analysis.

(149.) Form 35 contains three distinct parts. The first part, which I shall refer to as Part A, requires the Presiding Officer to insert the following details; Total number of registered voters for the polling station, Number of spoilt ballot papers, Total number of votes cast, Number of rejected votes, Number of disputed votes, Number of rejected objected votes and Total number of valid votes cast.

(150.) The second part, which I shall refer to as Part B, is to my mind, the crucial part which captures the actual vote tally. The part contains the name of the candidate and against it a space to fill in the number of valid votes cast in favour of each candidate.

(151.) The last part, Part C, contains the declaration where the Presiding Officer, Assistant Presiding Officer are required to sign and date the form and declare that they were present when the results were announced and that the results shown on the form are true and accurate count

of the ballots. There is also a space for the candidate or his or her agent to sign. If the agent refuses to sign, there is space for the Presiding Officer to record the reasons. Finally, there is a space for the Presiding Officer to record any necessary comments that are pertinent to the process of counting votes. These comments are referred to as statutory comments.

(152.) Mistakes may be made in the first part because the Presiding Officer may insert the wrong number of registered voters. It should be recalled that the number of registered votes is already fixed at the close of the registration process and therefore an error in the number is not fatal to Form 35 as this number can readily be ascertained by reference to the voter register. (Emphasis mine)

95. From the above case, it is clear that the alterations have to be contextualized as either material or immaterial. The figures in the Part A of Form 35 require mathematical reconciliation for registered voters, total votes cast, spoilt votes and so forth. The valid votes cast have to match the total votes in Part B of the Form 35, which contains the votes for each individual candidate. Alterations in Part A are therefore immaterial whilst those in part B will be material.

96. In a nutshell, the Presiding Officer is allowed to amend Part A to agree with Part B where necessary. Alterations made in Part A of the Form 35 are therefore permissible as long as they are not done with fraudulent intent. That being said, there are however sacrosanct parts of that form that are not open to amendments or alterations. Such is Part B of the form 35 which captures the individual votes obtained by the candidates. After counting and signatures by the Presiding Officers and Agents, the said electoral officials cannot thereafter alter the results of the candidate. Any such alteration will obviously affect the results of the election.

97. I have seen and examined the seventy six 76 Forms 35 highlighted by the Petitioners as having alterations without the countersignatures of the presiding officers. Majority of these forms contain alterations on Part A of the Form 35, which in my view are immaterial, as it was not proved that the same are a resultant of fraud or malicious intent on the part of the presiding officers. In my assessment, the presiding officers were only endeavoring to correct mathematical errors. However, I find that some of the said seventy six (76) to have had material alterations.

98. It is noteworthy, that once discrepancies in Part B of Form 35 are noted, the only sure way of ascertaining what the respective candidates garnered in an election would be through a recount and scrutiny. In this case, the Petitioners did not pray for any scrutiny or recount in their Petition or in their affidavits. Secondly, at the pre-trial stage, there was no indication that was given by the Petitioners that they were to make such or any other application with regard to the scrutiny or recount in those polling stations where the Forms 35 had alterations. In this regard, the court cannot result to speculation but has to deal with facts as presented. In establishing their case, I agree with the submissions of the 3rd Respondent that the Petitioners are bound by the matters which they have set out in the petition. As **Kimaru J., in Mahamud Muhumed Sirat v Ali Hassan Abdirahman and 2 Others Nairobi EP No. 15 of 2008 [2010]eKLR** dealt with the importance of pleadings in election petitions. He stated that;

“From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the petitioner’s case which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular, the Petition.”

99. I am of the same persuasion. A party to an Election Petition is bound by his pleading. In sum, I find that though the Petitioners were able to establish that there were material alterations in some Forms 35, their assertions that the said alterations impacted on the gubernatorial elections result would only have crystallized through a scrutiny and recount of the results in the affected polling stations. What the Petitioners had done is to endeavour to lay a basis for a recount and scrutiny in the submission stage which in my opinion is but an exercise in futility. A party should at the submissions stage draw the court’s attention to the relevant evidence and law. Rather than doing this, the Petitioners have instead raised questions that could only have been resolved through a recount and scrutiny. As the basis of this was not laid during the trial, the court cannot anchor its findings on possibilities and conjectures as proposed by the Petitioners. The law requires proof. There is no room for speculation. I find the issue of the alterations without countersignatures on the Forms 35 unmeritorious and consequently dismiss the same.

II. Discrepancies between the Forms 35 and Forms 36

100. It was the Petitioners case that from a simple evaluation of the results outlined in the Forms 35 and Forms 36 provided, it was clear that a number of them have discrepancies in Garissa Township, Fafi, Dadaab and Ijara Constituencies. Some of these discrepancies were admitted by the 2nd Respondent during his testimony, while others were reasonably explained. The Petitioners submitted that, when the discrepancies are taken into account, the same would drastically reduce the margin between the 3rd Respondent and the TNA candidate by 3%. According to them, this cannot be explained away by human error, as the said irregularities massively affected the outcome of the result.

101. On his part, the 3rd Respondent’s counsel submitted that the figures offered by the Petitioners were merely speculative. That there should have been a recount and scrutiny done to have clarity and certainty as to the true returns in the areas where the Petitioners highlighted the alleged discrepancies.

102. I have considered the rival arguments. On this broad complaint of discrepancies, the petitioners complained of various aspects touching on the same. I propose to deal with them sequentially herein below.

i. Two Forms 35 in respect of Iftin Primary School

103. It is apparent that there were two Forms 35 presented by the 1st and 2nd Respondent for this particular polling station although it was common ground that the polling station only had one stream. During his testimony, the 2nd Respondent explained this anomaly. He clarified that the Form 35 that had "Stream One" indicated on the particulars of Form 35 of that polling station, was in fact the Form 35 in respect to Tetu Primary polling station Stream I.

104. He explained that , Tetu Primary polling Station Code Number 12, received a pre-printed Form 35 for Iftin Primary School and not Tetu Primary as expected. That though the Presiding Officer used the Form 35 from Iftin primary school, the entries in this Form 35 were correctly captured in the Form 36 for Garissa Township Constituency, to reflect the correct results for Tetu Primary school stream I. To my mind, the results of the two polling stations were properly posted to Form 36 for Garissa Township Constituency.

105. The Petitioners complained that there were two Forms 36 presented for Garissa Township Constituency. These are in pages 427 and 428 of the 1st and 2nd Respondents response. The two forms are fundamentally different on the face of it. The first form 36 at Page 427 does not contain a column for the number of registered voters in the constituency; it does not bear the signature or stamp of the Returning Officer of that constituency. It also does not capture the correct details for some polling stations. Tetu Primary School polling station stream 1 and 2 for example are captured as code number 18, while in the true sense, the polling station is Code Number 12. The 2nd Respondent explained that this was an erroneous form and refused to testify on it and indicating that the correct Form 36 was the one at page 428 of that Bundle.

106. The court has looked at both forms. The second Form 36 contains what seems to be the correct information and is authenticated by both the signature and the stamp of the Returning Officer at page 428. The entries made in respect of Tetu Primary Stream 1 in the said Form 36 are compared well with the Form 35 of Iftin Primary School stream one at page 514 bundle. The 2nd Respondent explained the reasons why the Presiding officer used the form. I find the reasons advanced by him to be plausible. As I stated earlier, the purpose of Form 35 is to record the tally of votes cast which the Presiding Officer is obliged to record and unless there is fraud, which has not been alleged or proved in this case, the form ought to be accepted.

107. It is common knowledge that the Forms 35 are pre-printed by the 1st Respondent before dispatching them to the respective polling stations. Errors are bound to occur and the 2nd Respondent explained that this was one of such errors. Such an error, in my view should not be visited upon the Presiding Officer or the voters of Tetu Primary School polling station stream 1. In any case, the said Form 35 bears the signatures of three agents. No complaints were made in respect of the results of that polling station. The claims by the Petitioners on the two (2) Forms 35 of Iftin primary school are therefore without basis and hereby dismissed.

ii. **Discrepancy in Valid votes cast and votes in the Forms 35 and Form 36**

108. After a thorough analysis, I find that there were indeed discrepancies in some polling stations when the Forms 35 and Forms 36 are compared in terms of votes cast. There are also polling stations that have discrepancies in terms of the valid votes cast. The same are summarized below:-

| Polling Station | Constituency | Votes Cast | | Un-accounted votes | | Valid Votes | | Un-accounted votes | Total unaccounted votes |
|--------------------------|------------------|------------|-------|--------------------|------|-------------|-------|--------------------|-------------------------|
| | | F. 35 | F. 36 | F. 35 | F.36 | | | | |
| Garissa Medical training | Garissa Township | 454 | 424 | 30 | | 448 | 418 | 30 | 60 |
| Garissa Primary | Garissa Township | 517 | 508 | 9 | | 508 | 508 | 0 | 9 |
| Ashadin Centre | Balambala | 112 | 111 | 1 | | - | - | - | 1 |
| Borehole 5 | Fafi | - | - | - | | 459 | 509 | 50 | 50 |
| Dadaab Primary | Daadab | - | - | - | | 2,390 | 2,378 | 12 | 12 |
| Kulan Primary | Daadab | - | - | - | | 714 | 699 | 15 | 15 |
| Alikune | Daadab | - | - | - | | 773 | 771 | 2 | 2 |
| Total | | | | | | | | | 149 |

The total unaccounted votes amount to 149

109. As regards Bulla Mzuri Market Centre polling station, I find that the Form 36 captured the proper details as encapsulated by the Form 35 for both stream I and stream II. The Total Number of votes cast in stream II shown as 464 is obviously erroneous, as a mathematical calculation of what all the candidates garnered totals to 362, which is the correct figure indicated as the total number of valid votes and captured in the Form 36. As already held earlier, errors in Part A of the Form 35 are likely to happen as the same involves a mathematical exercise. In the circumstances, I find that the error in this particular form did not lead to a different or incorrect result of what each candidate garnered in the aforementioned polling station and could not therefore affect the results.

iii. Rejected Votes

110. After an examination of the Forms 35 and Forms 36 I find that there are discrepancies in terms of rejected votes. The affected polling stations are summarized as follows:-

| | Polling Station | Constituency | Rejected Votes | | Unaccounted Votes |
|--------------|----------------------------|------------------|----------------|---------|-------------------|
| | | | Form 35 | Form 36 | |
| 1. | Elkambere primary school | Ijara | 1 | 0 | 1 |
| 2. | Muftu Primary School | Ijara | 1 | 0 | 1 |
| 3. | Haitagan Village Dam | Ijara | 2 | 0 | 2 |
| 4. | Sinai Primary | Ijara | 5 | 0 | 5 |
| 5. | Matata Arba Early Child | Ijara | 1 | 0 | 1 |
| 6. | Mareh Early child centre | Ijara | 1 | 0 | 1 |
| 7. | Gerille Primary school | Ijara | 3 | 0 | 3 |
| 8. | Rugha Primary School | Ijara | 1 | 0 | 1 |
| 9. | Ijara Primary school | Ijara | 1 | 0 | 1 |
| 10. | Masalani Baraza Park St. 1 | Ijara | 2 | 5 | 3 |
| 11. | Masalani Baraza Park St. 2 | Ijara | 4 | 0 | 4 |
| 12. | Hagadera | Fafi | 5 | 0 | 5 |
| 13. | Walmerer Primary school | Fafi | 1 | 0 | 1 |
| 14. | Dagahley Center | Daadab | 17 | 0 | 17 |
| 15. | Kuno Primary school | Balambala | 9 | 0 | 9 |
| 16. | Garissa Primary School | Garissa Township | 9 | 1 | 8 |
| Total | | | | | 63 |

The unaccounted votes on the rejected votes are therefore 63

iv. Votes Cast exceeding the total result of the candidates.

111. This error was self-evident from the Forms 35 provided in respect of Disso Primary school polling station Code 41 which had three streams. From a simple arithmetical exercise, the total votes cast in favour of each of the candidates in part B of the Form 35 far exceeded the valid votes cast as captured in Part A by 23 votes. The Valid votes cast in Part A of the Form 35 were 1260. However, when each of

the candidate's votes are added up the figure arrived at is 1283. Such an error heightens the need for scrutiny and recount. This is an issue that could have been resolved by scrutiny which the Petitioners failed to raise in the Petition. They also failed to lead evidence on this discrepancy either in their evidence or when cross examining the 2nd Respondent.

112. However, the impact of this affected result was in terms of 23 extra unaccounted votes.

v. Errors in the postings of the candidates figures in Form 36 from the Form 35

113. There are several errors noted in the Forms 36 in respect of the votes the candidates garnered. In Garissa Medical Training College stream 3, Mohamed Moulid Shurie managed 33 votes. However, in the Form 36 of the Garissa Township Constituency, 3 votes are reflected which are 30 votes fewer than what was recorded in the Form 35. In Borehole 5 polling station in Fafi Constituency, the 3rd Respondent is recorded to have 19, while in the Form 36, the figure is indicated as 878 which translates to an increase of 859 votes. Mohamed Shurie also garners 384 votes in the Form 35, but the same is reflected as 413 in the form 36. Harun Mohamed Yussuf garners 88 votes as reflected in the Form 35, this figure is however increased by 20 votes in the Form 36 which indicated he that he received 108 votes.

114. In Dadaab primary School, in comparing the total for the five streams against the corresponding Form 36's, Mr. Korane received 183 votes which is two (2) votes less than the 185 reflected in the Forms 35. The entry of the candidate Mohamed Shurie also does not tally. According to the Forms 35's he should have garnered 26 votes while in the Form 36, his vote is reflected as 16 votes , 10 votes less than what is in the Form 35. In Alikune Primary School polling station, the candidate Harun Mohamed Yussuf had garnered 4 votes in both stream 1 and 2, but Form 36 only reflects 2 votes, which is less two votes from the Form 35.

115. It is common ground that the results of Danyere polling station, the results of one polling station were left out in the form 36. The Petitioners assertions were not challenged in this respect and the 2nd Respondent conceded to this. The total number of valid votes in this case was 399. The omission of this stream affected all candidates, but Mr. Ali Bunow Korane seemed to be affected the most as he garnered the most votes in this polling station totaling to 362 votes.

116. After a careful consideration of all the evidence, it is my finding that the Petitioners did prove that there were errors and irregularities in both the Forms 35 and 36 as highlighted in this Judgment. Some of these errors were admitted by the Respondents and some were termed as honest human omissions.

117. I find that from the issues highlighted by the Petitioners with regard to the anomalies on the valid votes cast, rejected votes, discrepancies in the returns in the Form 35 and Form 36, close to 900 votes were either misapplied or seem to be unaccounted.

118. In my analysis of the submissions put forth by Mr. Mbugua, for the Petitioners, it was clear that the overall intent of the discrepancies as highlighted was to lay a basis for scrutiny and recount at the

final stretch of the case. As I have already said, it was incumbent upon the Petitioners to have pleaded in sufficient detail why they required the Court's intervention to order scrutiny and recount. The Petitioners should have specifically stated which polling stations had alleged irregularities and needed scrutiny. In my view, highlighting these issues at the submission stage was tantamount to a fishing expedition where the Petitioners discovered new or fresh evidence as the trial progressed. It would be expected that a party when filing an Election Petition is from the outset seized with the grounds, facts and evidence for questioning the validity of an election. The Petitioners have in essence tried to introduce new grounds to their Petition and amending it through the backdoor. The so called discrepancies having not been raised, the 1st and 2nd Respondents did not have the opportunity to respond. In any event, the 2nd Respondent was not questioned on them.

119. I therefore find that, by proceeding on an analysis of the impact of the anomalies raised in each and every Form 35 and 36 in which the Petitioners have raised issues, would amount to a scrutiny and recount of the results. I decline to embark on such an analysis in this judgment. To do so would be to engage in judicial guesses.

120. The only assessment I can make and which emanated from the allegations in the Petition are the effect of the missing result of Danyere polling station stream 1 and the inflated votes in respect to Borehole 5 polling station. In the final tallies, Ali Korane received 35,098 votes. Add the 362 votes garnered in Danyere Polling Station Stream 1 he would have a total of 35,460. In terms of the 3rd Respondent, he garnered 37,910 votes in the final tally. If we were to add the 3 votes he received in Danyere polling station stream 1, the same would amount to 37,913 votes. After the subtraction of the 859 votes irregularly added to his tally in Borehole 5, the same would amount to 37,054 votes.

121. The margin of victory between the 3rd Respondent and Mr. Ali Bunow Korane would be 1, 594 votes. In my view, this adjustment did not affect the result. In whatever edition of results that one picks the 3rd Respondent, Nathif Jama Adan remains ahead. The margin may have narrowed, but the intent of voters is established by the number of votes cast in favour of the winning candidate in an election that is substantially conducted in compliance with the principles set out in Article 81 of the Constitution. It matters not that he or she won by one or two votes as long as the result reflects the will of the electorate. The duty of the court is to strive to preserve the election held in accordance with the Constitution and the law.

122. As a whole, I find that the lapses pointed out by the Petitioners were not supported by cogent evidence that would make the court conclude that there was deliberate intent in the conduct of the 1st Respondent's officials to manipulate the numbers in favour of any candidate. My answer to issue number (c) in this Petition is therefore in the negative: from the totality of the evidence the irregularities complained of by the Petitioners, the same did not affect the results of the gubernatorial election for Garissa County.

d. *Was there a gubernatorial election held on 5th March, 2013 at Saka Ward Balambala Constituency in respect of Garissa County Election" If so, did that render the entire gubernatorial election invalid"*

123. In regard to this issue, the Petitioners complained that the Presiding officer of Saka Primary School Polling Station in Saka Ward, allowed people to vote on the 5th day of March, 2013, a day after the designated and duly gazetted polling day, without justifiable cause. In their opinion, the same was a grave irregularity that affected the gubernatorial election. In support of their claims, the Petitioners called two witnesses, PW7 Abdi Isaak Ibrahim and PW8 Abdi Ibrahim Mohammed.

124. PW7 testified that he voted at Mathalibah polling station but proceeded to Saka Primary School Polling station thereafter. He told the Court on cross examination that he was neither an Agent nor an accredited observer in Saka Primary Polling station but that he was in the polling station as a mere witness. In his testimony, PW7 stated that voting at the Polling Station started at 12.00 p.m on 4th March, 2013 until 10.40 p.m when the same was closed. He recalled that the polling station was closed due to violence and was done at the behest of the police officers present in the station. He later changed and stated that a fight broke out in the polling station between two candidates for the county ward representative, namely one Kassim Dagane and Adan Yussuf, protesting the closure of the polling station before everyone on the queue had voted. He further testified that he remained outside the polling rooms after the closure of the polling station and that the polling officials remained inside the classroom until morning. That in the morning he witnessed the opening of the polling station at 7.30 am to 1.30 pm.

125. In his testimony, PW8 recalled that he went to vote at Saka Primary School on 4th March 2013, where he was a registered voter. He stated that he did not vote on that day as the Polling Station was closed while he was still queuing around 10.00 pm. The witness informed the Court that he voted the following day, that is 5th March, 2013. On cross examination he confirmed that he did not know why the Polling station was closed on 4th March 2013 but that violence broke out after closure.

126. It was submitted for the Petitioners that the Presiding Officer's actions in allowing voting to continue on 5th March 2013 in Saka Primary School, was an illegality. That no valid explanation had been given as to why the elections in that particular polling station were adjourned to the next day. The Petitioners' submitted that under Regulation 64 (1) of the Regulations a Presiding Officer may after consultation with the Returning officer adjourn the proceedings at his or her polling station where they are interrupted by inter alia riots, violence, natural disaster or other occurrence. In the circumstances, it was submitted that the act of allowing people to vote on a date that is not gazetted for elections was illegal and on this ground alone the entire Garissa gubernatorial election should be declared invalid.

127. In response, the 2nd Respondent testified that voting in Saka Primary School started late on 4th March, 2013 due to logistical problems. He stated that due to the high voter turnout and an incidence of violence that occurred in the polling station, it was necessary for the Presiding Officer to adjourn the voting process. Given that voting was underway until 10. 40 p.m which was late in the night, the earliest the process could restart was the following morning. It was the submission of the 1st and 2nd Respondent that the Presiding Officer was within his powers to adjourn polling as per Regulation 64, as he had consulted with the Returning Officer on the adjournment. Further, it was submitted that no malpractice, save for the late closure and the voting on 5th March, 2013, was cited in this particular polling station.

128. I have considered the various arguments by the parties. It is common ground that there was extended voting in Saka Polling station to 5th March 2013. The issue is of what effect was the postponement of the voting in Saka Polling station to the 5th of March 2013. Counsel for the Petitioners pointed out that opening of Saka Primary School polling station beyond regulation time was irregular. My view is that such opening, does not prove that the polling station was irregularly opened or closed. In the Petition, the Petitioners did not allege that the late closure or that postponement of polling to the next day was ill motivated. They only alleged that the late closure and the postponement of the elections in the aforesaid polling station was contrary to law. In his testimony, the 2nd Respondent explained that the

polling station was opened late due to logistical problems. This position was corroborated by PW7.

129. **Regulation 66 of the Regulations** stipulate that voting is to commence at 6 o'clock in the morning and end at 5 o'clock in the afternoon on the polling day save that a person who is on a queue for the purposes of voting before 5 o'clock in the afternoon shall be allowed to vote despite the fact that the voting time may extend to after 5 o'clock. **Regulation 64** conversely gives leeway for extension of time beyond 5 o'clock by the presiding officer. Given that the polling station had opened at around 12.40 p.m or thereabouts, the extension of hours beyond 5 O'clock was, in my view, reasonably explained by the 2nd Respondent.

130. With regard to the postponement of the election, it was also common ground that Saka Polling Station had a high voter turnout. In my opinion, this is clear from the fact that there were still many people on the queues as at 10.40 pm. This fact, coupled with the fact that the polling station had opened rather late due to logistical problems and the violence alluded to by the 2nd Respondent may have necessitated the postponement of the said election. PW7 and PW8 however stated that the violence broke out because of the closure of the elections.

131. I note that PW7 and PW8 gave conflicting accounts as to what transpired in the polling station. While, PW7 stated that the polling station opened at 12. 40 p.m, PW8 states that the same was opened at 10.00 a.m. Further on cross examination PW7 had stated that the polling station was closed due to violence but changed this testimony and stated that violence broke out due to the closure of the polling station. The issue of credibility arises with regard to these two witnesses as they give contradictory facts concerning the same event. This in my view raises doubts as to whether they were present in the Centre as they claimed. Further, PW7 admitted that he did not vote in that particular polling station. He was neither an agent nor an accredited observer. So what was he doing in that particular polling station" Why would he stay overnight in the polling station whilst he was neither an agent nor observer and where he did not vote" His presence in the Saka Polling station, if at all true, was an illegality in itself. In my view, I find his evidence not credible.

132. In light of credibility issues of PW7 and PW8, I am inclined to believe the 2nd Respondent with regard to the reasons for postponement. **Regulation 64 (1) of the Regulations** permits the adjournment of polling is permitted where the same is interrupted by a riot, violence, natural disaster or other occurrences such as shortage of equipment or other materials or other administrative difficulty as long as the same is done in consultation with the Returning Officer. The 2nd Respondent testified that the Presiding Officer did consult on the adjournment. I therefore agree with the submission of the 1st and 2nd Respondent that the earliest practicable moment to restart the polling was on the following day which was 5th of March 2013. That exercise was carried out for half day as the station closed at 1 p.m. of 5th March, 2013.

133. The court also notes that, there was no evidence or allegation made that persons who were not entitled to vote did vote as a result of the extended opening hours or that such opening of the polling station created an opportunity for electoral malpractice. It was the Petitioners burden to establish this fact which they failed to do. The allegation is consequently dismissed.

134. In view of the foregoing, I hold that the holding of elections I Saka primary School on 5th March, 2013 did not render the gubernatorial election invalid. To invalidate the entire gubernatorial election due to the fact that voting took place in one polling station past the duly gazetted voting day as propagated by Mr. Mbugua, would be misdirecting punishment to voters in Garissa County who had properly exercised their right to vote under Article 38 of the Constitution. These voters stayed in long queues to cast their votes, and had their votes counted, entered into a declaration form and publicly declared. To

invalidate the entire gubernatorial election based on one polling station would only serve to disenfranchise them based on an act of omission by an electoral officer, over whose conduct the voters have no control. Indeed no cogent evidence was adduced to show that the non-compliance or allowing people to vote on 5th March, 2013 was premeditated and carried out by the presiding officers, with the intent of causing prejudice to any particular candidate or change the election's outcome or to render it uncertain.

135. From the foregoing, I have found that the Petitioners have proved certain irregularities in the conduct of the Gubernatorial election for Garissa County. These are as follows:- that one ballot box serial No. 070696 for Dertu polling station was broken, that the TNA agent for Danyere polling station was not given Form 35, that there were several Form 35 that were not signed by the party agents, that the results for Abakaile polling station were not indicated in the final results, that the results for Mathalibah polling station were cancelled thereby disenfranchising 216 registered voters. The Petitioners were also able to show that a couple of Form 35 had not been stamped by the Presiding Officer and finally that due to some discrepancies and errors in Forms 35 and 36, close to 1000 votes were unaccounted for.

136. What is the effect of these irregularities and errors on the results of the elections" **Section 83** of the Act provides that:

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

137. From the above, it is clear that in cases of allegations of election malpractices and other irregularities; the Petitioners are not only required to establish that such electoral malpractices and irregularities actually occurred but that they were of such magnitude that they substantially and materially affected the results of the election. The primary consideration in an election Petition is whether the will of the electorate has been affected by the irregularities. The principle in **Section 83** of the Act was resounded in the case of **In Morgan and others v. Simpson and another [1974] 3 All ER** the court held that:

“If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not.... (2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. ... (3) But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated.”

138. From the foregoing, have the Petitioners clearly and decisively shown that the conduct of the election was devoid of any merit and was so distorted so as to affect the intent of the voters of Garissa County"

139. My view is that the irregularities and errors alluded to have to be weighed against the entire exercise of elections. The bulk of the Petitioners complaints were unsuccessful. The Petitioners did not provide credible evidence to show that the irregularities complained of and established were so substantial as to have affected the final results of the election. I have already shown how those irregularities could not have affected the results of the election. Even if the close to 1000 unaccounted for voters were to be deducted from the 3rd Respondents total votes, he will still remain head. The people of Garissa County have spoken. I am therefore satisfied that the elections for Garissa County were conducted substantially in accordance with the constitution and electoral law. They were free and fair and that the 3rd Respondent was properly declared as elected Governor for Garissa County. I therefore dismiss the Petition with costs to the Respondents. The costs are capped at Kshs.2.5Million. The 1st and 2nd Respondent will be entitled to a maximum of Kshs.1Million whilst the 3rd Respondent will be entitled to a maximum of Kshs.1.5Million.

140. It is so decreed.

DATED and DELIVERED at Nairobi this 24th day of **September, 2013.**

.....

A. MABEYA

JUDGE

In the presence of:-

Hassan Court Clerk

Ms. Mumo for Petitioner

Ms. Keya and Mr. Muganda for 1st and 2nd Respondent

Mr. Muchoki and Mr. Mureithi for 3rd Respondent



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