



Case Number:	Petition 9 of 2013
Date Delivered:	25 Sep 2013
Case Class:	Civil
Court:	High Court at Garissa
Case Action:	Judgment
Judge:	Alfred Mabeya
Citation:	Abdinasir Yasin Ahmed & 2 others v Ahmed Ibrahim Abass & 2 others [2013] eKLR
Advocates:	Kigera holding brief for Anzalla & Issa for Petitioner Mr. Kanjama for 1st Respondent Mr. Garane & Ms Keya holding brief for Mr. Moibi for 2nd and 3rd Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Garissa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	Kshs. 4 million
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HEARD IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO.9 OF 2013

ABDINASIR YASIN AHMED 1ST PETITIONER

UBAH ABDULLAHI SANEI.....2ND PETITIONER

YUSUF SULEIMAN AHMED3RD PETITIONER

VERSUS

AHMED IBRAHIM ABASS.....1ST RESPONDENT

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION2ND RESPONDENT

GEORGE CHEGE 3RD RESPONDENT

J U D G M E N T

1. Like all other Kenyans, the voters of Ijara Constituency (hereinafter “the Constituency”) dutifully participated in the 4th March, 2013 National Assembly election for that Constituency in the County of Garissa. After the election, the 3rd Respondent who was the Returning officer returned the following results:-

a. Abdi Aden Korio	2,463
b. Ahmed Duale Ahmed	1,034
c. Ahmed Ibrahim Abass	4,666
d. Muktar Bullale Muhumed	960
e. Sophia Abdi noor	4,319

a. From the said results, the 1st Respondent, Ahmed Ibrahim Abass was returned as the duly elected Member of the National Assembly for the Constituency. Aggrieved by this, the Petitioners who are registered voters of Constituency challenged the 1st Respondent's election. In the Petition lodged on 5th April, 2013, the Petitioners contended that the elections were not conducted in a free, fair and transparent manner by the 2nd and 3rd Respondent as required by the Constitution and Election Laws.

b. The Petitioners contended that the total voter turnout and the total votes cast for the presidential, parliamentary and gubernatorial election differed as a result of gross and criminal manipulation on the part of the 3rd Respondent and his presiding officers. That the 3rd Respondent and the presiding officers issued excess ballot papers for the parliamentary elections to certain voters with a view of unduly influence the outcome of the elections, that the 2nd Respondent failed to provide adequate staff and sufficient voting materials to facilitate a free, fair and transparent election. The Petitioners in particular cited the lack of adequate polling clerks in various polling stations and inadequate lighting materials. According to them, lack of proper lighting materials forced the Presiding Officers to use light from various gadgets that belonged to the agents and supporters of the 1st Respondent during voting in Masalani Polling Station which proceeded past 5.00 pm. The Petitioners argued that this state of affairs affected the transparency of the voting process.

c. The 3rd Respondent was also accused of failing to recruit electoral officials in the Constituency in a fair and transparent manner. It was alleged that the 3rd Respondent hired 35 Presiding Officers from the 1st Respondent's immediate sub-clan, a move meant to give the 1st Respondent undue advantage over the other contestants.

d. The Petitioners further complained that the process of assisting illiterate voters at various polling stations was marred with malpractices and was in contravention of the law. They faulted the Presiding Officers for failing to ensure secret balloting during such voter assistance. They complained that the 3rd Respondent irregularly transferred ballot papers from Masalani Primary School polling station to Shurie Secondary Polling Station and Maah Village Dam, respectively. That the Presiding officer in charge of Ijara Primary Polling station interchanged lids for the ballot boxes, causing confusion among the voters, that the agents of United Republic Party (URP) were not allowed into the polling stations on the election day and that many were kicked out of their respective polling stations for no apparent reason.

e. It was claimed that almost all polling stations in the Constituency were opened and closed outside the prescribed time. It was pointed out that that Sinai, Ege and Wardijab Polling Stations were closed before 5 p.m, that in the case of Maah Polling Station voting stopped between 11.00 a.m to 3.00 p.m as the station run out of ballot papers for the gubernatorial election yet the Presiding Officer failed to extend the voting hours to make up for the lost time. That the voters in these polling stations complained of being denied their right to vote. In the case of Masalani Primary, Masalani Baraza Park, Shurie Secondary and Handaro Polling Stations, the Petitioners accused the Presiding Officers of closing the polling stations after midnight without proper justification.

f. The Petitioners faulted the 2nd Respondent for failing to use the Biometric Voter Registration and other electronic mechanisms to eliminate alleged uncertainties and difficulties in the manual system. Owing to this failure, the Petitioners alleged that several voters were denied a chance to vote as their names did not appear in the manual register, which according to them was not up to date.

g. On the declaration of results, the Petitioners contended that the results declared at polling stations were fundamentally different from those announced at the tallying centre in Hulugho, Matata Arba, Daber Wayne, Gababa Primary, Ire Garwan and Ali Tarire polling stations. They claimed that the results for the URP candidate in the tallying centre had been drastically reduced as compared to the results announced at the polling station.

h. Further, the Petitioners complained that a number of Forms 35 supplied to the Petitioners by the 2nd and 3rd Respondent were not signed by agents and contained no reasons for such failure as required by law. They complained that there were multiple cancellations and alterations in the Forms 35 in several polling stations and that some of the agent's signatures were purportedly forged calling into question the

veracity of the results contained therein.

i. In conclusion, the Petitioners accused the 1st Respondent of electoral malpractices including voter bribery, communicating with voters during the election exercise, undue influence, violence and intimidation of the URP candidate and her supporters.

j. As a result of the matters outlined in their Petition, the Petitioners requested the court to declare that the 1st Respondent was not validly elected. They also prayed for an examination of the electors register used in all the polling stations of the Constituency during the 4th March, 2013 general election and for scrutiny of votes cast in the Constituency and also to be awarded costs of the Petition.

k. Pursuant to **Rule 14(1) of The Elections (Parliamentary and County Elections) Petition Rules, 2013 (“the Election Petition Rules”)**, the Respondents filed responses to the Petition. The 1st Respondent in his response filed on 30th April, 2013, maintained that he had been validly elected as the Member of National Assembly for Ijara Constituency, that the elections were free, fair and credible and had been conducted in accordance with the law. He denied that he was involved either directly or through his supporters in the commission of election offences involving violence, bribery, threats, communication with voters during polling and intimidation or undue influence of voters. He therefore urged the court to dismiss the Petition with costs.

l. The 2nd and 3rd Respondent through their response to the Petition contended that, the Petition was frivolous and lacked tangible evidence to support the allegations therein. That the election of the 1st Respondent was conducted in a free, fair and transparent manner. They denied the allegations of violence, intimidation, improper influence or corruption and contended that the elections were administered in an impartial and neutral manner.

m. As Regards the electoral malpractices contended by the Petitioner, the 2nd and 3rd Respondent averred that no proper evidence had been adduced by the Petitioners to support the claims that the 3rd Respondent condoned any impropriety in the electoral processes. The 2nd Respondent also denied that it was ill prepared for the elections and stated that all necessary resources were provided in various polling stations, including adequate polling clerks and lighting materials. The 2nd and 3rd Respondents denied that the appointment of election officials was done in a partisan and biased manner and contended that such appointments were above board.

n. On the issue of transfer of ballot papers from Masalani Primary polling station to Shurie Secondary and Maah polling stations, the 3rd Respondent asserted that this was done in the course of his duties as a Returning Officer and that the same was carried out in an open and transparent manner with the concurrence of the various candidates.

o. In conclusion, it was averred that the declaration of the 1st Respondent as the duly elected Member of the National Assembly for the constituency was valid and credible. The 2nd and 3rd Respondent therefore urged the court to find that the election of the 1st Respondent reflected the will of the people of Ijara Constituency and that the Petition should be dismissed with costs.

p. On these allegations and counter allegations a total of 33 witnesses testified for and against the Petition. I will refer and analyze the evidence of these witnesses as and when necessary whilst considering the issues for determination hereunder.

ISSUES FOR DETERMINATION

18. I have carefully considered the evidence and the pleadings in this Petition. I have also considered the written and oral submissions by learned counsel together with the authorities relied on. The parties settled on the following broad issues for determination during the pre-trial conference held on 3rd June 2013;

- a. ***Whether the elections for the National Assembly for Ijara Constituency were conducted in contravention of the Constitution of Kenya and the Elections Act"***
- b. ***Whether the 1st Respondent was validly elected as member of National Assembly for Ijara"***
- c. ***Who is to bear the costs of the petition"***

19. Before delving into the evidence and the issues, this court considers it necessary to address the question of the burden and standard of proof as it was alluded to by the parties both in their written and oral submissions.

20. It is trite that in election petitions, the burden of proving the allegations made in the Petition lies with the Petitioner. Hand in hand with this concept, is the cardinal principle of the law of evidence that he who alleges must prove. Whilst the burden of prove continuously lies with the Petitioner, the evidentially burden keeps on shifting. In this regard, it is not enough for a Petitioner to merely point out that irregularities took place during the elections. Such electoral malpractices and irregularities must be proved in a quantitative and qualitative manner to such a magnitude that they would substantially and materially affect the result of an election. They must be shown to have altered the will of the electorate in choosing a candidate of their choice. This is informed by the statutory underpinning at **Section 83** of the **Elections Act 2011** which provides thus:-

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

If there is some appearance of compliance with the principles laid down in the Constitution and the law in the conduct of an election, an election Court will be slow in upsetting the will of the people as expressed in the results unless the non compliance with the law affects such results. This provision implies that elections are not perfect, they are conducted by humans who may be allowed a reasonable margin of error which error however, must be that which is reasonable in the circumstances. In this regard, not all irregularities will lead to nullification of an election. Put in another way, the primary consideration in an

election contest therefore is whether the will of the electorate has been affected by the irregularities complained of or whether the results returned reasonably reflect the will of the voters. This was the holding of the Supreme Court of Kenya in the Case of **Raila Odinga –Vs- IEBC & 3 Others, Election Petition No.5 of 2013**. Also see the case of **Morgan and others Vs. Simpson and another [1974] 3 ALL ER 722**.

21. As regards the standard of proof, the Petitioner is required to prove the allegations of electoral malpractices to the standard that is higher than that of a balance of probabilities that is applicable in civil cases but lower than that applicable in criminal cases i.e. that of beyond reasonable doubt. Nevertheless, if the irregularities or malpractice complained of amount to election offences or hinge on criminality the same must be proved to the satisfaction of the court i.e. beyond reasonable doubt. See the cases of **Joho Vs Nyange & Another (2008)3 KLR(EP)**, **Richard Kalembe Ndile and another Vs Patrick Musimba Musau et al Machakos, High Court election petition 1 (consolidated with petition number 7 of 2013) (unreported)**. In a nutshell therefore, the court will 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 or affect the will of the voters.

22. With these principles in mind, I shall now deal with the specific issues for determination in this petition.

a. **Whether the elections for the National Assembly for Ijara constituency were conducted in contravention of the Constitution of Kenya and the Elections Act"**

w. This issue focuses on the responsibility of the 2nd Respondent to carry out a free and fair election. Its responsibility under the Constitution is absolute and it is one that cannot be abdicated. It cannot be compromised for whatever reason. Free and fair elections being a component of democracy and therefore good governance, an election court cannot countenance a flawed election. The requirements of the constitution and the law must be seen to have been complied with. The issue also focuses on whether the 2nd and 3rd Respondent condoned electoral malpractices complained of by the Petitioners on the part of officials of the 2nd Respondent. It also extends to the conduct of the 1st Respondent during the elections.

x. Under **Article 86** of the Constitution, the 2nd Respondent has the mandate to ensure that the voting method used is simple, accurate, verifiable, secure, accountable and transparent. The Election Act on the other hand provides for the conduct of election to the office of the President, the National Assembly, the Senate, County Governor and County Assembly. The Regulations made under the Act provide for an exhaustive procedure for the management of the entire election process, from nomination, voting, counting and declaration of the results. In the entirety, the Constitution and the Election laws vest the 2nd Respondent with the primary responsibility of carrying out and administering the general elections. The decisions and conduct of the 2nd Respondent and election officials are therefore subject to review in a judicial process that is the Election Petition.

y. From the Petition, several complaints were raised about the way the 2nd and 3rd Respondents carried out the election in the Constituency with regard to the National Assembly election. The Petitioners also complained of electoral malpractices by the 1st Respondent and his supporters. I propose to deal with each of the complaints individually in an attempt to answer the first issue.

I. **Conduct of the Elections by the 2nd and 3rd Respondent**

a. **Recruitment of Presiding Officers and Deputy Presiding Officers**

26. It was the Petitioners' case that the 3rd Respondent failed to transparently recruit electoral officials in the Constituency. It was also claimed that such officers were recruited from the immediate sub- clan of the 1st Respondent. The Petitioners contended that the list containing the names of both the Presiding Officers and Deputy Presiding officers was changed 24 hours to the election date, a move that the petitioners believed was orchestrated to affect the outcome of the election.

27. In support of this contention, the Petitioners called two witnesses. PW1, Sophia Noor and PW9, Daudi Hamdi Isse. PW1, testified that she was a URP candidate in the elections of Member of the National Assembly for the Constituency. During cross examination she told the court that she did not know the thirty five (35) presiding officers who she had pointed out in her affidavit dated 5th April, 2013 as being from the sub- clan of the 1st Respondent. She admitted that one of her cousins, a Mr. Hassan Barre Sanei, had been recruited as a Presiding Officer by the 2nd Respondent. She conceded that she was aware that the jobs for the electoral officials were advertised and that a political party could query the list of the appointed officials after recruitment. She acknowledged that she was not aware if the 1st Respondent was involved in the recruitment of electoral officials in Ijara. In her testimony, she complained that she did not receive the list of the electoral officials in the constituency although she had made numerous attempts to obtain the same. She told the court that she wrote a letter complaining about the recruitment by the 2nd Respondent, which letter however she had not attached to her affidavit.

28. PW9 in his Affidavit dated 5th April, 2013, averred that he had been appointed as Clerk with the 2nd Respondent, before becoming a URP agent. He contended that 36 electoral officers appointed by both the 2nd and the 3rd Respondent, were close family members of the 1st Respondent. According to him, the said polling officials had been heavily involved with the 1st Respondent's campaign before being employed as electoral officials by the 2nd Respondent. On cross examination, PW9 denied that he was ever appointed by the 2nd Respondent as a Clerk. He nevertheless admitted that he attended a training organized by the 2nd Respondent for its electoral officials on a date that he could not recall. He also conceded that he could not draw the family chain or lineage that led him to believe that the 35 Presiding Officers and Deputy Presiding Officers he complained about had close family ties with the 1st Respondent. He only pointed out one Mohamed Khalif Anshur and Katra Ahmed Ali as having a common great grandfather with the 1st Respondent.

29. The 1st Respondent on his part disputed the Petitioners allegations and maintained that he was neither involved in the recruitment of Polling Officials nor did he have any of the 2nd Respondent's officials in his campaign team.

30. As for the 3rd Respondent, he denied the Petitioners allegations. He testified that as the Returning Officer for Ijara Constituency, he was personally responsible for the recruitment of the Presiding Officers, Deputy Presiding Officers as well as polling clerks. He confirmed that he strictly followed the Human Resources Guidelines given by the 2nd Respondent in the recruitment exercise. He denied that the recruitment of the electoral officials was skewed in favour of the 1st Respondent and maintained that, apart from being a resident of Subukia in Nakuru, he was not even aware of the various sub-clans in the Constituency as he was only posted to Ijara in September, 2012. He confirmed to the court that all the positions for the polling officials had been competitively sourced and filled.

31. Learned Counsel for the 2nd and 3rd Respondent Mr. Moibi leading Ms Keya, submitted that, given the 3rd Respondent's testimony, the Petitioner's allegations that the 2nd and 3rd Respondent were biased in terms of the recruitment and appointment of electoral officials in the constituency, had no merit. That the said officials had been competitively selected and there was no credible evidence that had been adduced to show that the recruitment and deployment of election officials was done in a manner favourable to any particular candidate. Counsel submitted that PW1 was under a misapprehension that she was entitled to the list of the Electoral officials in the constituency as such a list is only provided to political parties and independent candidates as set out in the Elections Regulations. According to him, given that Sophia Noor was a URP candidate, she ought to have received the list from her party and not from the 2nd Respondent as contended.

32. In rejoinder, learned Counsel for the Petitioners, Mr. Issa teaming up with Mr. Anzalla and Ms Kigera (hereinafter "The Petitioner's counsel") submitted that the 3rd Respondent did not controvert the Petitioner's evidence that the polling officials were relatives of the 1st Respondent. He submitted that the 3rd Respondent confirmed that while interviewing the polling officials, he had failed to inquire whether the said candidates were related to any of the aspiring candidates to ensure a level playing field.

33. Under **Regulation 5 (1) of the Elections (General) Regulations 2012 (hereinafter "the Regulations")**, any appointment of Presiding Officer and Deputy Presiding officer must be done in an open, transparent and competitive manner. In the circumstances, the Petitioners' allegations that there was subjectivity in the recruitment of electoral officials in the Constituency are grave and must be examined to establish the fairness of the elections in that constituency. An election presided over by relatives of a candidate, prima facie projects an unfair political terrain.

34. According to the 3rd Respondent, the recruitment of poll officials was done in compliance with the 2nd Respondent's Human Resource Policy which provided for competitive recruitment. This fact was not denied by any of the parties. It was also not denied that the 3rd Respondent hails from Subukia, Nakuru and was only posted to Ijara in September, 2012. The issue for determination is whether the 35 election officials complained of were from the immediate sub-clan of the 1st Respondent and had been actively involved in his campaigns before the elections.

35. When cross examined, PW1 failed to give the names of the 35 polling officials complained of. She failed to give the basis for her allegation. She conceded that her cousin was one of the people who had been recruited as a polling official in the constituency. She also acknowledged that some polling officials were from her own sub-clan.

36. As regards PW9, I find his allegations in his affidavit to be strange. During cross examination, he denied that he was in the employ of the 2nd Respondent as a clerk. This was a direct contradiction to paragraph 5 of his affidavit. Further, it is difficult to understand how PW9 could have attended a training of poll officials, if he was not in the employ of the 2nd Respondent. Such training, according to the 3rd Respondent, was only for the officials who had been recruited by the 2nd Respondent to administer the

elections. It was strange that PW9 was taking two contradictory positions on a simple issue of his earlier employment before he became a URP agent. Indeed the Court stopped Mr. Kanjama from producing a letter that would have seriously incriminated the witness for reasons of timing. The court found PW9 to be not only untruthful, but his evidence was completely unreliable. He was also not able to identify the alleged 35 polling officials who were allegedly relatives of the 1st Respondent. The two officials he named, Mohamed Khalif Anshur and Katra Ahmed Ali had a great grandfather in common with the 1st Respondent. In my view, that is too distant a relationship for an election court to consider. To my mind, no credible evidence was produced to establish this complaint.

37. In any event, even if the court were to believe PW1 and PW9, the clansmen of the 1st Respondent like any other Kenyan, are entitled to employment with the 2nd Respondent. Indeed PW1 had her own relative and clansmen recruited as polling officials. To my mind, although having polling officials from a candidate's family or immediate clan can on the face of it, infer bias, actual bias is a matter of proof. The Petitioners having failed to prove with cogent evidence that the 3rd Respondent was actually biased and partial in the way he recruited the polling officials, I will dismiss the claim as unsubstantiated.

38. On the issue that PW1 was denied the list of the polling officials in the Constituency and that the same was changed 24 hours to the election date, I find that such a claim was not backed by any cogent evidence. I agree with the 2nd and 3rd Respondent's submission that under **Regulation 5 (2) of the Regulations**, such a list is supplied to the political parties and any independent candidate(s) 14 days prior to such appointments to enable them make presentations. In the instant case, there is no allegation that the URP, PW1's party, was not provided with such a list nor was there evidence to show that the party raised an objection as to the appointment of any of the proposed polling officials. Further, although PW1 contended that she wrote to the 2nd Respondent objecting to the proposed appointment of some individuals as polling officials, she did not provide proof of such communication to substantiate her claim. The 2nd and 3rd Respondent in my view therefore cannot be faulted for not having given a candidate the list of polling officials when there is no legal requirement to do so. The claim is therefore dismissed.

b. **Provision of Necessary Staff and Polling Materials**

39. The Petitioners contended that the 2nd and 3rd Respondent failed to provide adequate queuing clerks and sufficient voting materials to facilitate a free and fair election. In her evidence, PW1 averred that the 2nd Respondent failed to deploy polling clerks to ensure that there was a systematic way of voting in polling stations that had more than one stream such as Hulugho, Masalani Primary, Masalani Baraza Park and Shurie Secondary.

40. It was submitted for the Petitioners that their evidence remained unchallenged for the reason that the 3rd Respondent had admitted that not all polling stations in Ijara had queuing clerks. That queuing clerks were essential to maintain order outside the polling stations, to guide voters, and to ensure that no communication with voters by unauthorized persons took place.

41. In response, the 3rd Respondent testified that there was a streaming or mapping done on how

electoral officials or personnel would be distributed in the Constituency. He told the Court that, in his assessment, only the stations that had more than one stream required queuing clerks and that there was only four (4) such stations. The 2nd Respondent also called two witnesses to corroborate the 3rd Respondent's evidence.

42. R2W4, Ngugi Loice who was the Presiding Officer for Masalani Primary School Stream 3 and R2W8, Mohamed Khalif the Presiding Officer for Ijara Primary School testified in this respect. They admitted that they did not have queuing clerks at their respective polling stations. R2W8, testified that the designated polling clerk for his station failed to report, but nevertheless, given that his polling station had only one stream, such a resource was not necessary. R2W4 on the other hand testified that there was one queuing clerk in all the three (3) streams in Masalani Primary Polling Station given that the polling clerk designated to her stream failed to report for duty on the Election Day. She was however quick to add that she utilized a security officer to perform the duties of a queuing clerk when the need arose.

43. Counsel for the 2nd and 3rd Respondent submitted that under the circumstances, the Petitioners were mistaken to expect a queuing clerk for every polling station, given that majority of polling stations in the Constituency had only one stream.

44. I am in agreement with the Petitioners' submissions that it was important for the 3rd Respondent to deploy queuing clerks given their vital role. This included guiding the voters to the proper streams and ensuring order during the polling exercise. They also play the critical function of ensuring that it is only the people on the queue by the official closing time of the polling station that are allowed to vote as provided for in **Regulation 66** of the **Regulations**.

45. I note that it was admitted that in Masalani Polling Station there was only one polling clerk for three streams. As explained by R2W4, the queuing clerk assigned to Stream 3, did not turn up for duty on the material day. This in essence prompted R2W4 to enlist the help of a one Officer "Shinde", who was the assigned Security officer in her stream to undertake the duties of manning the queue. It is clear that under the circumstances, both the 2nd and 3rd Respondent did not have control over an employee who chose to abdicate duty. It is doubtful if on the morning of the election, they could make arrangements for a replacement given that there would be need for full instructions to be given to such a person. Their only recourse was to make due with the situation by engaging personnel authorized to work within the polling station, security personnel.

46. It is noted that the 3rd Respondent conceded that he did not assign queuing clerks to all polling stations in the constituency. While the Petitioners have established that indeed not all stations had queuing clerks, the explanation given by the 3rd Respondent and the Presiding Officers who testified, in my view, are reasonable. I agree with the 3rd Respondent that every situation has to be contextualized. Given that Ijara Constituency is sparsely populated, it would seem that there may not have been any need for queuing clerks in the polling stations that had only one stream. I have seen the Forms 35 provided by the 2nd Respondent. Most of the polling stations had as little as 100 voters. In any event, there was no evidence to show that the lack of queuing clerks in majority of the polling stations affected the conduct of the election and the overall election result. In short, one cannot draw the inference from the evidence adduced that the lack of queuing clerks in a number of polling stations would by its very nature invalidate the whole election.

47. I now turn to the issue of lack of proper lighting materials in the polling station. It was the Petitioners case that the 2nd Respondent failed to provide adequate lighting materials to be used in the various polling stations at night and that this prompted the Presiding Officers to use lights from gadgets

that belonged to the agents and supporters of the 1st Respondent during nightfall. The Petitioners claimed that these affected the transparency of the election as a whole in Masalani Polling Station and Masalani Baraza Park polling station. The 2nd Petitioner testified that in Masalani Polling station Stream 2 where she was a URP agent, there was no electricity from 6 p.m to 8 p.m. She however conceded that there was the use of pressure lamps during the blackout.

48. The Petitioners submitted that in Exhibit R2EXH 7 at page 25, the Presiding Officer had remarked that there were lighting problems in Masalani Stream 2 therefore corroborating the Petitioners' claims. It was also submitted that the Polling Day Diaries presented in court as Exhibits did not have a record of what was supplied to the respective polling stations, including pressure lamps or other lighting materials. That it was therefore not verifiable whether lighting materials were provided by the 2nd and the 3rd Respondent.

49. In response to these allegation, the 1st Respondent, R1W4 Abdi Sheikh and R1W12 - Abdi Mohammed Adan, who were both the 1st Respondent's agents at Masalani Polling Station and R1W13 - Ahmed Abdi Noor who was the 1st Respondent's Chief Agent, all testified that there were no lighting problems in Masalani Primary Polling Station as the same had electricity supply. They also stated that the 2nd Respondent had provided two pressure lamps per stream in case of any blackouts. R2W5, Dido A. Elema who was the Presiding Officer at Masalani Baraza Park stream 2 also testified that though the polling station had no electricity supply, he switched on all the pressure lamps at 6.00pm. This evidence corroborates the 3rd Respondent's testimony and that of the various Presiding Officers called to testify on behalf of the 2nd Respondent. These witnesses evidence remained consistent, firm and unshaken under cross examination. They all verified that there was provision of adequate lighting materials. For their consistence and firmness, the court believes their evidence.

50. As regards lighting problems in Masalani Stream 2, there was no evidence to show the nature of the lighting problems indicated in the stream's polling day diary. In her testimony, the 2nd Petitioner admitted that although there was a blackout in this stream, there was use of pressure lamps to provide lighting. Further, there was no claim that the results in the Masalani Primary School Stream 2 in the Form 35 were inaccurate due to the lighting problems. In sum, I find that there is no merit to the Petitioners' allegations that the 2nd Respondents failed to provide adequate lighting materials during the Election Day to facilitate a transparent voting process.

c. **Opening and Closing Polling Stations Past Regulation Time.**

51. The Petitioners complained that some polling stations were opened late and closed early thereby denying voters an opportunity to vote. It was contended that Masalani Primary, Masalani Baraza Park, Shurie and Handaro Polling Stations were all opened beyond regulation time. The Petitioners also claimed that Sinai, Maah, Ege and Wardejib Polling Stations were all closed before the stipulated time of 5.00 pm

52. **Regulation 66** of the **Regulations** is clear that polling 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 after 5 o'clock. **Regulation 64** conversely, gives leeway for extension of time beyond 5 o'clock by the presiding officer. **Regulation 64(3)** also permits a presiding officer in consultation with the returning officer to extend the hours of polling at the polling station where polling has been interrupted or for other valid cause, and where polling in that polling station has started late by the amount of time which was lost in so starting late.

53. On this issue, the 3rd Respondent produced R3Exh 3, 4, 5, 11 and 12 which were the Polling Day Diaries for Sinai, Ege, Wardejib, Shurie Secondary School stream 2 and Maah Village Dam Polling Stations. These polling day diaries showed that those stations were opened and closed on time. At the trial, the entries to those exhibits as to time were not seriously challenged. While counsel for the Petitioners pointed to polling diaries which showed that some polling stations opened beyond regulation time, this fact by itself, did not prove that the polling stations were irregularly opened or closed. In Shurie Secondary stream 1, Masalani primary streams 1, 2 and 3 and Masalani Baraza Park streams 1 and 2 polling stations for example, the Petitioners' allegations were that the polling stations were opened and closed late. In the Petition, the Petitioners did not allege that the late closure was ill motivated on the part of the 2nd and 3rd Respondent. Neither was it suggested so during trial. They only alleged that the early or late closure of the alleged stations was contrary to law. In their testimony, R2W5, Dido Elema the Presiding Officer for Masalani Baraza Park and R2W4, Loice Ngugi, the Presiding Officer for Masalani Primary Stream 3, both told the court that gates to the polling stations were closed at exactly 5 p.m. as required by law but they allowed those voters who were on the queue to continue voting until the last of them voted. That evidence was not challenged and I find their expositions perfectly credible. In any case, there is no evidence 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.

d. Transfer of counting of votes

54. Before proceeding on the next issue, I find it prudent to address the issue of Sinai Polling Station. All parties referred to this matter in their respective submissions. The Petitioners in their pleadings had complained that Sinai Polling Station was closed before the stipulated time of 5 o'clock. In response, the 2nd and 3rd Respondent produced the polling day diary which indicated that the polling station was closed within the stipulated time.

55. However, during the hearing, it emerged that the counting of the votes did not take place in the aforesaid polling station but at Hulugho Police station. According to the Petitioners, this was in contravention of **Regulations 73 and 76** of the **Regulations**. To the Petitioners, moving of ballot boxes from one polling station to the other can only be authorized by the Returning Officer. The Presiding Officer told the court that he did not consult with the 3rd Respondent which, according to the Petitioners, was a grave irregularity as the counting of the votes was not witnessed by any of the Agents.

56. In response, the 2nd and 3rd Respondent called R2W6 – Abdullahi Abdi Ahmed, who was the Presiding officer for Sinai Polling Station. He testified that he opened and closed the polling station within the stipulated time. He admitted that the only votes counted in the polling station were those for the Presidential and Gubernatorial contest. That the rest of the count was conducted at Hulugho Police Station, as his team was evacuated from Sinai due to security reasons. He told the court that he could not communicate with the 3rd Respondent as the area lacked any mobile network infrastructure to facilitate communication. The 3rd Respondent also supported R2W6's claim that Sinai was a high risk area being a town bordering Somalia and that it was necessary for the Presiding Officer to secure the election material by moving the same to a safer location as advised by the security personnel.

57. It was the submission of the 2nd and 3rd Respondent's counsel that a presiding officer has the power to transfer election proceedings if need be, under Regulation 64, provided that such an area is a public facility. Counsel therefore submitted that the transfer of counting of votes from Sinai Polling station to Hulugho Police station was necessitated by security reasons and not motivated by any ill intent on the part of the 2nd and 3rd Respondent.

58. I agree that any transfer of ballot boxes should be done with the approval of the Returning Officer as per the law. This is so because, it is the Returning officer who is in charge of elections in a Constituency and upon whom the law gives discretion as to various aspects in the conduct of elections. Be that as it may, the explanation given by R2W6 seems to be persuasive. The transfer of the counting was necessitated by security concerns given the proximity of the polling station from the Kenya Somali Boarder. In my view, it was prudent for the Presiding Officer to take precautionary measures to ensure the safety of both the election officials and the election material to safeguard the integrity and credibility of the results. In view of the foregoing, I am satisfied that the transfer of votes for counting from Sinai polling station to Hulugho Police station in this case was done in the exercise of the Presiding Officer's discretion donated by Regulation 64 of the Elections Regulations.

59. My finding is informed by the fact that no evidence was adduced to show that the election officials manipulated or tampered with the votes in the course the transportation of the election material to Hulugho Police Station. It was neither alleged nor shown that vote loss or stuffing of ballot boxes occurred during the transfer. In any case, the entries in Form 35 for that station with respect to the votes counted were not disputed by either the Petitioners or any candidate. Furthermore, I find that five (5) out of seven (7) agents signed the said Form 35 and there was no dispute as to entries therein.

e. **Assisted voting**

60. The Petitioners complained that the process of assisting illiterate voters at various polling stations was marred with malpractices and was not carried out in accordance with the law. According to them, 90% of the voters in the Constituency were illiterate and the Presiding Officers failed to ensure secret balloting. The 2nd Petitioner, PW3, testified in respect to this allegation. She told the court that she witnessed the Presiding Officer in her polling station asking voters to shout the person they intended to vote for. She further testified that the Presiding officer would always start with the name of the 1st

Respondent and leave out the names of other candidates. She admitted on cross examination, that she did not raise any complaint with the Returning officer or any polling official with regard to the manner in which voter assistance was carried out.

61. PW7, Halima Lugey also testified on behalf of the Petitioners. She told the court that she was an assisted voter in Masalani Primary polling station. Through her testimony, she verified that all the steps required in voter assistance took place. She indicated that agents were present when she indicated to the Presiding Officer the name of the candidate she wanted to vote for. She told the court that she did not see the 2nd Petitioner, PW3 in the polling room, though she voted at Masalani Primary School Stream 2. She also testified that while voting, she saw people standing outside the window of the polling area. According to her, such people were able to hear the name of the person she wanted to vote for once the question was posed to her by the electoral official.

62. The Respondents on their part denied the allegation in their respective responses. All the witnesses by the Respondents confirmed that the process of voter assistance was done in accordance with the law. R1W5, Osman Sirat who was an agent of the 1st Respondent in Masalani Polling station testified that there were no people on the windows in the polling area as there was a buffer zone created in the area leaving a distance between the rope demarcating the polling station and the polling room (classroom) windows.

63. It is clear that there was no dispute that over 90% of the Ijara voters were voter assisted. The presiding officers who testified also indicated that this was one of the reasons why voting in Ijara was prolonged. They also told the court that they had indicated in the register (V.A) to signify "voter assisted" against the names of assisted voters. The 3rd Respondent further told the court that he never received any complaints as to the process of voter assistance. I agree that a free and fair election directly impacts on the electorate's freedom to choose a candidate of their choice, be they literate or illiterate. I am guided by the pronouncement in **Rameshwar Prasad and Ors –vs- Union of India and Anor (2006) 2 SCC 1, AIR 2006 980** wherein it was held that:-

"..... "Democracy" and "Free and Fair election" are inseparable twins. There is almost an inseverable umbilical cord joining them. In a democracy, the little man- voter, has overwhelming importance and cannot be hijacked from the course of free and fair elections. His freedom to elect a candidate of his choice is the foundation of a free and fair election."

64. In view of the foregoing, it is important to evaluate the evidence provided by the Petitioners, especially PW7. PW7 controverted the 2nd Petitioner's, PW3 evidence as to the processes that were followed in voter assistance. According to PW7, all the required steps were adhered to. This was in line with what the Respondents' witnesses told the court. The point of divergence was however whether PW7's right to secret ballot was violated. The witness contended that she could see people outside the window of Masalani Polling Station that could hear the questions put to her by the polling official. PW3 told the court that the people outside the polling room window were women, who were, in her words "calling her names that are unprintable". Both the evidence of PW3 and PW7 were seriously challenged. On his part, R1W5 stated that there was a buffer zone created leaving a distance between a rope and the classroom windows. This portion of his evidence was not challenged on cross examination.

65. From the foregoing, the court concludes that the process of voter assistance was in accordance

with the law. There was no cogent evidence that was presented to illustrate that there was violation of an assisted voter's right to secret ballot at Masalani or that such an irregularity was so prevalent in the Constituency. It was also not indicated that what was alleged to have happened at Masalani Stream 2 Polling Station was replicated elsewhere in the constituency. As such, I find that the irregularity complained of has not been sufficiently proved to the required standard and it is therefore dismissed.

f. **Denial of the Right to Vote**

66. The Petitioners alleged that several supporters of PW1 were denied their right to vote even though they were registered voters. The Petitioners called one witness PW8, Eshia Idle Dahir. It was her testimony that she was a registered voter at Masalani Polling station and had been denied her right to vote. She claimed that she arrived at the polling room around 6.00 p.m. She told that Court that after verifying her identification details, she was informed by the polling clerk in that stream that she had already voted given that her name had been crossed out. The witness claimed that this was false as she did not even have indelible ink on her index finger as is required when one has voted. She claimed that while forwarding her complaint to the Presiding Officer, a Mr. Opiyo, she was physically assaulted and thrown out of the polling room by the said officer.

67. The Respondents on their part denied the Petitioners' allegations. The 1st Respondent called two witnesses to rebut PW8's testimony. R1W3, Addinafaa Ahmed, testified that he was a registered voter at Masalani Primary polling station. He told the Court that he knew PW8 very well and that he had seen her enter and leave Masalani Primary polling station as PW8 had entered the polling room before him. He testified that he was through with the process of voting at around 10.00am. He however could not verify whether after entering the polling room PW8 had voted or not. R1W3 disputed the claim that PW8 was physically thrown out by the Presiding Officer. He testified that PW8 had left Masalani Polling station without any scuffle contrary to what she had claimed. On his part R1W4, Abdi Shiekh Hassan testified that he was an agent at Masalani Primary school Stream 1 polling station. He testified that he personally knew PW8 and that she voted at around 10 a.m. in Masalani Primary Polling Station Stream 1. He denied having seen her at around 4.30 pm attempting to vote again or being roughed up by any Presiding Officer.

68. I have considered the testimonies of the witnesses. The right to vote is a Constitutional right provided under **Article 38** of the Constitution. Having considered the evidence on record, I find it difficult to believe PW8. She testified that she was in the queue from 6.00 a.m. to 6.00 p.m., a whole day. When informed that R1W4, Abdi Sheikh Hassan had seen her vote at 10.00 a.m., she only said that she could not comment on that. She did not deny that fact. Declining to comment is not the same as denying a fact. She admitted that R1W4 knows her and she knows him as well. Is it possible that a voter could be in the queue for 12 hours in a polling station in which only 486 voters casted their vote" Masalani primary polling station stream 1 had only 486 cast votes. Would it be that PW8 voted at 10.00 a.m. and returned at 6.00 p.m. and that is why the polling clerk told her that her name had been canceled" From the evidence on record, this is most likely.

69. In the event that I am wrong on this, I find that the Petitioners have failed to lead any evidence, probably by way of testimony by the Chief Agent, that other voters, aside from PW8, were deprived of their right to vote. Though PW8 testified that she knew of two other women who suffered the same fate, the said women have not sworn affidavits with respect to such incidences and they never appeared in court to testify. To my mind, PW8's evidence is threadbare and does not meet the standard of proof required. I therefore find that the claim that some voters were denied the right to vote not to have been proved.

g. **Failure to use the Biometric Voter Register**

70. On this issue, it is clear that the 2nd and 3rd Respondent failed to use the Biometric Voter Register as required by law but chose to use a manual register. The Petitioners claimed that this register was not updated. There was no evidence to show that the register was not updated. From the record, I am satisfied that the 2nd and 3rd Respondent failed to use the BVR kit as dictated by law. However, to what extent this affected the election it is not clear. I will revert to this fact later on in this judgment.

h. **Variance as to the votes cast**

71. The Petitioners alleged that the votes cast for the various elections differ greatly with those of the Parliamentary Election. There was, however no evidence presented to court on the alleged difference of the six (6) elections held on 4th March, 2013. I am also of the opinion that this Court is not seized of the jurisdiction or all materials used in those other elections. It is entirely possible that the voters may have spoiled their ballots for certain elections or cast them into the wrong ballot boxes. Some may also have not been familiar with new elective posts and only voted for the favourite candidates in certain posts such as gubernatorial and the Presidential seats and not necessarily for National Assembly. The claim presented by the Petitioners as it were, has not been backed by any proper evidence. In my view, therefore, the same remains unsubstantiated.

i. **Interchanging of Lids of some ballot boxes**

72. On this allegation, it was claimed that the Presiding Officer for Ijara Primary School interchanged the lids of two ballot boxes thus causing confusion among the voters who placed their ballot papers in the wrong ballot boxes. At the hearing, all parties were agreed to the fact that the ballot boxes in question were those of the County representative and Women Representative. R2W8, Mohamed Khalif, the presiding officer for Ijara Primary School testified to this fact and he indicated that the same was noted in “**R1Exh 10**” the polling day diary for the said polling station. This error in my view did not have a bearing in the elections for the member of the National Assembly. I reject the Petitioners submission that this confusion reflected the entire conduct of the elections at Ijara including those of National Assembly. This claim, in my view, has no basis and is, therefore, dismissed.

j. **Prohibition of the Candidate’s Agents**

73. The Petitioner’s pleaded that agents of the URP candidate were not allowed into the polling stations on the Election Day and that many of them were kicked out of the polling room. PW3, Ubah Sanei testified in respect of this allegation. She claimed that despite having all the requisite documentation, the presiding officer for Masalani Primary Stream 2, declined to allow her in the polling station until 10.30 a.m. She however, conceded on cross examination that another URP agent by the name of Yusuf was already in the polling station by the time she reported for duty. It was submitted on behalf of the Petitioners that the prevention of PW3 from accessing the polling station was in contravention of the electoral law.

74. **Regulation 62 (1)** of the **Regulations** stipulates that the Presiding Officer shall admit to the polling station not more than one agent for each candidate or political party. That requirement is not discretionary, it is mandatory. The Presiding Officer has no discretion whatsoever. For any election to be said to be fair to all and transparent, such regulations must be complied with. From the testimony of PW3, it is evident that in her polling station, there was another agent who was representing the same party or candidate by the name “*Yusu*” It was only after that Agent left, that PW3 was allowed into the polling room. Apart from PW3 it was not alleged or proved that any other agent in any other station was prevented from carrying out his/her legal duty. This allegation therefore, remains unsubstantiated.

k. **Polling Day Diaries, Field Notebooks and Ballot Papers**

75. This is a complaint that was raised in the submissions. The Petitioners complained that upon inspection of the polling day diaries produced as evidence by the 3rd Respondent, it was evident that the statements and details required to be recorded therein under Regulation 73(2) of the Regulations were missing. The Petitioners' counsel submitted that the 3rd Respondent had testified that the said polling day diaries were an administrative tool with statutory underpinning. That it was therefore necessary for all Presiding Officers to record all the information required in the said documents to aid in the transparency and credibility of the election.

76. According to Counsel, recording all the required details was mandatory under the law and was not discretionary on the part of the Presiding Officers. The Petitioners further submitted that during the course of the hearing, it emerged that the Presiding Officers who testified on behalf of the 2nd Respondent were unable to explain the returns in the polling day diaries. To the Petitioners therefore, it was apparent that the elections in the Constituency were carried out in complete disregard to the law thus rendering the results unverifiable.

77. On his part, the 3rd Respondent testified that the Polling day diary is an administrative tool and that the Elections Regulations only contemplated the use of a statement, which according to him was the Field Notebook that was sealed in the Gubernatorial Ballot box. The Presiding officers who testified on behalf of the 2nd Respondent admitted that they had not properly or comprehensively filled the polling day diaries as required. They told the court that most of the details required in the polling day diary had been recorded in the Field Notebook. According to them, they had sealed the field notebooks in the gubernatorial ballot boxes as that was the last election to be counted. Counsel for the 2nd and 3rd Respondent submitted that although the Presiding Officers may have failed to fill in the necessary details in the polling day diaries, that had not been shown to have affected the results of the election.

78. From the record, there was no specific allegation in the Petition of malpractices with regard to the Polling Day Diaries and the Field Notebooks. I am of the firm view that parties are bound by their pleadings. I am in agreement with the submissions of Counsel for the 1st Respondent, Mr. Kanjama that in the context of a Petition, the same must succeed or fail on the grounds pleaded and the evidence adduced in support thereof. Pleadings are the body and soul of any case and election petitions are no exception. Crystallizing issues in a Petition allows the Respondents to know the case they are facing. Ambush is not at all to be encouraged. Be that as it may, since the issues as to the entries in these two documents emerged during the cross examination of the various Presiding Officers called in support of the 2nd and 3rd Respondent's case, my view is that the 2nd and 3rd Respondent had the chance to respond to the allegations through the 3rd Respondent's testimony. This court would therefore in a restrictive manner address the same but having in mind the circumstances under which the same arose.

79. The evidence reveals that there were indeed admissions by some of the Presiding officers that they had omitted some entries in the polling day diary. R2W7- Abdi Hassan Ahmed, the Presiding Officer for Dabel Weyne Village Dam admitted in court that he failed to make majority of the entries in the polling day diary. He however told the court that he made such entries in the Field Notebook that was sealed in the gubernatorial ballot box. **Regulation 73 (2)**, of the Regulations provides that:-

“ 73(2) Immediately after the close of the polling at his or her polling station, the presiding officer shall make in the polling station diary a written statement of-

a. The number of ballot papers issued to him or her under regulation 61;

- b. ***The number of ballot papers, other than spoilt ballot papers issued to voters;***
- c. ***The number of spoilt ballot papers; and***
- d. ***The number of ballot papers remained unused.”***

From the reading of the above provision, I am in agreement with the Petitioners submissions that it is mandatory to make the above entries in the Polling Day Diaries. The said provision says nothing about the Field Notebook. Though the 3rd Respondent testified that the Field Note Book is the written statement which the Regulation refers to, I am in agreement with Mr. Issa that the law is very specific as to what entries are supposed to be recorded in the Polling Day Diary. The Polling Day Diary may have been an administrative tool as contended by the 2nd and 3rd Respondent, but the same was meant to safeguard the credibility of the elections in a polling station. From the Regulation, it is compulsory that all the necessary information should appear in the polling day diary. I have not seen anywhere in the Regulations any mention of or reference to the Field Notebook.

80. Be that as it may, although it is clear that there were omissions by some Presiding Officers in filling in the polling day diaries, no evidence was led nor was it alleged that the said irregularities were calculated to or did actually affect the outcome of the final results. It was only submitted that this omission rendered the elections for the Constituency unverifiable. I should here note that recount ordered by this court included Dabel Weyne Polling Station. It revealed that the result as reflected in the Forms 35 and 36 and that of the recount exercise were in agreement. I shall have the opportunity to address the report of that recount later in this judgment.

81. Before leaving this issue, I am of the view that the omissions by the Presiding Officers to properly fill the polling day diaries may have been caused by lack of proper training. They seem not to have understood the importance of these so called administrative tools, that is the polling day diary. It would probably be prudent for the 2nd Respondent in future to ensure that all electoral officials have been adequately trained on their various duties during the election period to bolster the accountability and transparency in the conduct of elections. While I appreciate the demands that the 4th March 2013 elections may have placed on the Electoral officials, the sanctity of the ballot must be safeguarded at all costs.

1)Ballot Papers

82. In their submissions, the Petitioners submitted that the 2nd and the 3rd Respondent could not account for or verify the ballot papers issued in various polling stations. Mr. Kanjama for the 1st Respondent objected to these submissions and urged the court to confine its findings to the matters pleaded in the Petition. I think that objection was well founded. As stated earlier, parties are bound by their pleadings. Any other issue on ballot papers, save for the transfer of ballot papers from some polling station to others, would be but an ambush to the Respondents, who did not have proper and/or adequate notice to effectively answer the allegation.

83. The Petitioners had pleaded that there was issuance of excess ballot papers by the 2nd

Respondent to the voters in the Parliamentary elections. The Petitioners accused the 3rd Respondent of transferring ballot papers from Masalani Streams 1 and 2 Polling stations to Shurie and Maah Village Dam polling stations, respectively in the absence of the candidates' agents and in contravention of the law. PW1, Sophia Noor, testified that on polling day, her Agents in Shurie and Maah Village Dam informed her, that shortage of ballot papers was being experienced in some particular polling stations. In her testimony, she told the court that she was of the opinion that when a shortage of ballot papers occurs, a Returning Officer should consult the respective candidates before the transfer of any ballot papers can take place. She opined that the transfer of ballot papers from one station to another was not an option and that the 3rd Respondent's action of such transfer was irregular. It was submitted on behalf of the Petitioners that though the ballot papers complained of were in respect of the Gubernatorial Seat, the 2nd and 3rd Respondent failed to confirm how many ballot papers were collected and the serial numbers verified thereof in order to enable the court to verify the veracity of the 3rd Respondent's contentions.

84. In response, the 3rd Respondent testified that all electoral materials were packed from the 2nd Respondents Headquarters in Nairobi. That there were bound to be errors to the effect that some stations would get fewer ballots than others. He admitted that the concerned transfer of ballot papers was in respect of the gubernatorial seat for Garissa County and had no impact on the National Assembly election. He also told the court that he consulted with some of the Candidates, including PW1, before such transfer. The 1st Respondent corroborated the 3rd Respondent's evidence and confirmed that he was aware about the shortage and that he witnessed the transfer of the ballot papers to the aforementioned polling stations. He further told the court that PW1 and the other candidates for various electoral positions were also consulted by the 3rd Respondent and they accompanied the ballots during such transfer. Mr. Kanjama submitted that given the testimony by the 3rd Respondent, it was clear that the Returning Officer was within his power to transfer the ballot papers for the Gubernatorial Seat. It was finally submitted for the 2nd and 3rd Respondent that all the procedures for a transfer of the ballot papers were adhered to and there was no evidence to show that there was any shortage of ballot papers with respect to the National Assembly.

85. All the witnesses who testified on this issue agreed that the ballot papers transferred from Masalani Stream I and II to Shurie and Maah Village Dam polling stations were for the Gubernatorial seat and not the National Assembly. To my mind, it was not clearly established how the transfer of such Gubernatorial ballot papers could have affected the results of the elections for the National Assembly. The mere failure to record such a fact in the polling day diary does not go to the root of the complaint. If there was an allegation by the Petitioners that the ballots that were transferred were those of the National Assembly, then it would have been the burden of the 2nd and 3rd Respondent to prove the number of transferred ballots and whether or not the fact was recorded as such in the relevant polling day diaries. This is, however, not the case.

86. The Petitioners' submitted that the Returning Officer for Masalani Primary Stream 1 had admitted in court that he had issued 100 ballot papers for each position. That given the outcome of the recount ordered by the court in the said polling station, the Petitioner's submitted that there were no counterfoils found in the respective ballot boxes. To them, this was a clear indication that the 100 ballot papers could not be accounted for in that particular polling station. The Petitioner's further contended that the Presiding Officers for Sinai, Dabel Weyn Village Dam and Ijara Primary school polling stations could not verify and account for ballot papers issued in their polling stations as compared to their respective polling day diaries. The Petitioners therefore submitted that, that omission, cast doubt on the results returned in the said polling stations.

87. The 2nd and 3rd Respondent submitted that the Petitioners allegation that there was lack of

accountability in handling of the ballot papers was untrue and that no evidence was adduced to support the allegation. It was submitted on their behalf that the outcome of the recount of the Masalani Primary Stream 1 showed that the results for the aforesaid Polling Station was as returned in Forms 35 and 36.

88. Though, I shall deal with the issue of the outcome of the scrutiny and recount later on, I consider it necessary to deal with the issue of ballot papers as presented by the Petitioners. This is an issue that is better dealt with in an application for scrutiny to confirm whether the irregularities mentioned by the Petitioners are meritorious. Such an application was lodged on 24th July, 2013. The Petitioner's failed to lay a proper basis for the scrutiny and recount in the Ijara Polling Station and Sinai Polling Stations which they now address. However, in Dabel Weyne Village Dam polling station wherein a recount was ordered the results of the recount marched those in the Forms 35 and 36 that was provided to court. There is therefore no merit in the Petitioner's allegations on the ballot papers issued in that polling station.

89. In Masalani Primary Stream 1, the recount revealed that there were no counterfoils issued in the ballot box. It is a requirement for a Presiding Officer to seal counterfoils of the used ballot papers in a tamper proof envelope for purposes of being delivered to the Returning Officer in terms of **Regulation 73(3) (4) of the Regulations**. A counterfoil may be defined as the part of a document retained by the issuer as a record of a transaction. It is an important document. Lack of the counterfoils is therefore grave as the ballot papers in the ballot boxes cannot be ascertained and verified if indeed they were duly cast as votes or not. See the case of **THOMAS MALINDA MUSAU & 2 others v IEBC & 2 others [2013] e KLR** and **Manson Onyongo Nyamweya versus James Omingo Magara and 2 Others [2009] eKLR** relied on by the Petitioners. I agree with the Petitioners that the votes for Masalani Primary Polling Station Stream I being unverifiable, they should be excluded from the final tally.

90. That being the case, it is important for this court to evaluate the real impact of this irregularity on the final outcome of the result. According to the Form 36 produced by the 3rd Respondent, the valid votes cast in Masalani Primary Stream 1 were 483. The Total valid votes cast in the constituency were 14,048. If the valid votes cast in Masalani Primary Stream 1 were subtracted from the total valid votes, the total valid votes would be 13,565. In my view, this would minimally impact the voting outcome of the entire election in Ijara Constituency. Would it be prudent for this court to disenfranchise 13,565 voters by invalidating the entire election based on this anomaly found in a polling station that only had 483 valid votes" Even if the results for that polling station were disregarded, the results of the eventual winner of the election would be reduced by about 34 votes. The Victor would still be ahead by more than 300 votes. In this regard, I find that the irregularity as claimed by the Petitioners in terms of the missing counterfoils in Masalani Primary Stream 1 could not and indeed did not substantially affect the result of the elections.

m. **Form 35s issued were incomplete and had massive alterations and cancellations and that the results announced were not accurate or verifiable**

91. The Petitioners accused the 2nd and 3rd Respondent of providing Forms 35 that contained numerous cancellations and alterations. According to them, the alterations of such forms without any

Presiding Officer countersigning the same rendered the results unverifiable. The Petitioners further contended that not all Forms 35 in the constituency were signed by the Agents as required by law. The Petitioners also alleged that some Forms 35 contained forged signatures of Agents.

92. On the accuracy of results, it was the Petitioners' contention that the results declared at the polling station were different from those announced at the tallying center in 6 polling stations which they highlighted as follows:-

Polling Station	Results Declared at the Polling Station	Results Declared at the Tallying Centre
Hulugho	85	35
Matata Arba	130	341
Daber Weyne	40	0
Gababa Primary	113	138
Ire Garwan	94	24
Ali Tarire	60	6

93. On the Forms 35, it was submitted that where some agents failed to sign the Forms 35, the Presiding Officers did not give reasons why such Agents refused to sign the same as mandated by Regulation 79 of the Regulations. That the failure of the Agents to sign the form 35 and the failure by the Presiding Officer to record the reasons for such a refusal renders the election results unverifiable and violates both the Constitution and the Election Laws. In support of their propositions, the Petitioners relied on the cases of **James Omingo Magara –vs- Manson Onyongo Nyamweya & 2 others Kisumu Civil Appeal No. 8 of 2010, Simon Nyaundi and Another –vs- Hon. Joel Omwagwa Onyancha & 2 Others (2008) eKLR, William Maina Kamanda –vs- Margaret Wanjiru Kariuki (2008) eKLR and William Kabogo –vs- George Thuo & 2 Others.**

94. The Petitioners further submitted that there was failure by the Presiding officers to sign the declaration provided in the Form 35. They singled out Sarirah Polling Station as an example. It was pointed out that R2W5 – Dido A. Elema, who was the Presiding Officer for Masalani Baraza Park Stream 2 had admitted not to have signed Form 35 but had left it to his deputy to do so. This, according to the Petitioners' Counsel was erroneous as the Form 35 of the concerned polling station clearly showed that the signatures on the part of the Presiding Officer and Deputy Presiding Officer were distinctly different. According to the Petitioners, there was a possibility that the same could have been signed by a stranger. Such an omission by a Presiding Officer, in their opinion invalidated the results in the concerned polling station.

95. In response, the 3rd Respondent testified that there were no objections raised as to the contents of Forms 35 during the tallying of the results. He told the court, that the 2013 elections was a tedious exercise as there were six elections in one and mistakes were bound to occur while filling in the Forms 35. It was his testimony that where there were alterations on the Forms 35, there was no requirement for

a presiding officer to countersign the same, though it was a matter of good practice to do so. He was of the opinion that the alterations did not necessarily alter the final result. Further, he told the court that he did not receive any complaints on the alterations in the Form 35 in any of the 65 polling stations to the effect that a candidate obtained more than what was appearing in the Form 35.

96. It was submitted for the 2nd and 3rd Respondent that correction of errors in documents is allowed as a matter of general practice and that such alterations do not in any way invalidate or cast doubt on the accuracy of such documents unless it is established by credible evidence that such an alteration is fraudulent and meant to give unfair advantage to a particular candidate. It was further submitted that no claim or evidence was produced to show that any alteration in Forms 35 was done with fraudulent intent. It was further contended that the cancellations were merely aimed at correcting arithmetical errors or wrong postings. The 2nd and 3rd respondent cited the case of **Alhaji Waziri Ibrahim-v- Alhaji Sehu Shagari & Others Supreme Court of Nigeria Suit No. SC. 94/1983** in support of their position.

97. On the issue that some Forms 35 had not been signed by some party agents, I find that a substantial number of these forms were signed by several agents. The various agents who testified on behalf of the 1st Respondent confirmed that they had signed the Forms 35 for their respective polling stations. Furthermore, failure to sign the declaration forms does not by itself invalidate the election results. 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).”

In this regard the submissions on behalf of the Petitioners that the results of a polling station are invalidated by the mere fact that agents have failed to sign Form 35 is not correct. This is also the case with the contention that failure by Presiding Officers to indicate the reasons for the agents' failure to sign the Forms 35 was fatal. The cases cited by the Petitioners in my view were not applicable. They were decided in completely different circumstances from those pertaining to this case. Further, the Electoral legal regime at the time was substantially different to the present one. To my mind, the unverifiability of an election on the basis of non-signing of Form 35 by agents will arise where, results of a particular polling station are disputed, there is evidence that complaints in respect of such a result are lodged at the earliest time and the Forms 35 have the irregularities of the nature now complained of. That is not the case here.

98. With regard to forgery of the signatures, I find that no particulars were given in the Petition. I have, however, also seen the affidavit of Anisa Mahboub Mohamud dated 5th April 2013 which was an exhibit annexed in PW1's affidavit. That Affidavit contained allegations that her signature, as a URP agent, was forged in the Form 35 for Maah Village Dam Polling Station. However, the said Anisa did not testify or present herself for cross examination on her allegation. The allegation of forgery therefore remains unproved as the same had been specifically denied by the 2nd and 3rd Respondent. In conclusion, I find that the Petitioners have not tendered any sufficient evidence to show that there was any forgery in the Forms 35 produced by the 2nd Respondent.

Scrutiny and Recount

99. I shall address the report of scrutiny and recount, the alterations and corrections in the Forms 35 and the issue of results announced in favour of Sophia Noor at the tallying center being different from those announced at the polling station.

100. In the ruling delivered on 7th August, 2013, this court on the application of the Petitioners ordered for a recount in seven (7) polling stations. The following observations were made in respect of the alterations and cancellations complained of:-

“30. As regards cancellation and alterations to Forms 35, the presiding officers who testified for the 2nd Respondent were able to explain some of the alterations. However, in my view where there are unexplained alterations to Forms 35 especially the portion touching on the candidates’ votes, that calls for scrutiny to verify the authenticity of the results. In this regard, I have examined the Forms 35 for the polling stations concerned and I find that there are those that are material and those that are immaterial. Those that are material are those that are likely to affect the results. After careful examination of the said Forms 35, I find that the alterations in Hulugho Stream 1, Hamora, Gababa primary school, Elkambere, Koranhindi, Sagar, and Kotile polling stations are immaterial. Not only that some are countersigned and stamped, they do not affect the results entered for the respective candidates. However, as regards the alterations for Ire Garwan, Tumtish, Muftu, Masalani Primary Stream 1, Hara and Rahma, I find them to be material. They touch on the results entered for the candidates and therefore likely to affect the results.

31. For the foregoing reasons, I am satisfied that the Petitioners have laid a foundation for scrutiny of votes cast in the following polling stations:-

- (a) Tumtish***
- (b) Muftu***
- (c) Masalani Primary School Stream 1***
- (d) Hara***
- (e) Ire Garwan; and***
- (f) Rahma”***

101. From the said ruling, it is clear that some Forms 35 had cancellations and alterations. Some of these were explained by the polling officials sufficiently while others were not. In an ideal setting, the documentation of results should be clean and devoid of alterations or cancellations, but given the magnitude of the 2013 general election, it would be impractical to demand or expect mathematical precision. What is critical is to safeguard the will of the electorate. Scrutiny and Recount was therefore ordered for the Polling Stations whose Forms 35 had material alterations.

102. Apart from the issue on alterations, the court also tackled the issue of the difference in the votes garnered by Sophia Abdi Noor in the tallying and polling centre, as follows;

“24. I have looked at the Petition, in Paragraph 36, the Petitioners listed six (6) polling stations where they disputed the results. These were, Hulugho, Mata Arba, Daber Weyne, Gababa primary, Ire Garwan and Ali Tarire polling stations. They gave what they considered to be the results declared at the polling stations and a different figure declared at the tallying centre. However, when the 2nd Respondent filed its response, it supplied Form 36 which clearly showed that in five of the said polling stations, the results declared in the Tallying Centre were as declared in the polling station and as per the figures supplied by the Petitioners in their Petition. Only Daber Weyne polling station whose results for Sophia Abdi Noor were still returned as “Nil” (0).....

32. As regards Dabel Weyne Village Dam Polling Station, the Petitioners had alleged that Sophia Noor got 40 votes but only zero (0) was returned. It also came out during trial, that the Polling Day Diary for that polling station, R3Exh13, was not properly filled. To this end, I am satisfied that a basis has been laid for the inclusion of that station among those where scrutiny is to be carried out.”

In sum, Dabel Weyne Village Dam was therefore a subject of scrutiny together with Tumtish, Muftu, Masalani Primary School Stream 1, Hara, Ire Garwan and Rahma Polling Stations.

103. The scrutiny and recount was restricted to the ascertainment of the votes which each candidate obtained in those specific polling stations as compared with the respective forms 35 as collated in Form 36 by the 3rd Respondent. This was to enable the court ascertain the integrity of the results announced by the 3rd Respondent in view of the material alterations and cancellations of Forms 35... After the close of scrutiny, the Deputy Registrar of this court presented to the court the findings of the scrutiny and recount. The findings are contained in a report dated 14th August, 2013 which forms part of this court's record. The Petitioner and the Respondents participated in the scrutiny. The parties were supplied with copies of the report after the close of scrutiny.

104. The results of the scrutiny revealed as follows;

a. **Ire Garwan Village Dam Code Number 008** – There was no variance of the votes that each candidate received in that polling station. The Only variance noted was on the form 35 which indicated that the total number of valid votes was 128 while the valid votes in Forms 36 indicated 133. Upon Recount and scrutiny there were no rejected votes noted and the same confirmed the valid votes to be 133 as per the Form 36.

b. **Tumtish Village Dam (Code Number 016)** – the Deputy registrar noted that there were no Forms 35 affixed on top of the ballot box, nor was there any Form 35 inside the ballot box. Upon Recount, the Total votes cast for each candidate tallied with the Forms 35 and 36 presented to court except those of Mohadulamin Mohamud Ali. Upon recount the said candidate's votes were 20 in contrast to the 30 that

were indicated in the Form 35. There was therefore a variance of 10 votes. The Total number of valid votes was therefore 93 and not 103 as indicated in the Form 36.

c. **Muftu Primary School Code Number 006** – it was noted that no Form 35 was affixed on the ballot box as is required, but nevertheless there was one inside the ballot box. On recount the figures indicated for all the candidates in both the Form 35 and Form 36 tallied with the exception of two candidates, Abdi Aden Korio and Mohadulamin Mohamud Ali. On recount Abdi Aden Korio received 52 instead of the 51 indicated in the Form 35 and 36. Conversely, Mohadulamin Mohamud Ali upon recount received 4 votes in contrast to the 5 indicated in the Form 35 and 36. The valid votes upon recount were 101 and agreed with those in the Form 36 but contrary to 103 appearing in Form 35.

d. **Dabel Weyne Village Dam Code 030** and **Rahma Primary School Code 050** – the scrutiny and recount show full accuracy in the reported results.

e. **Masalani Primary School stream 1 Code 046** - it was observed that the Form 35 did not bear the 2nd Respondents stamp. Further, the Deputy Presiding Officer whose name was indicated as Martin Njiru signed the same and also purported to sign on the space reserved for Agents signatures. There were no booklets used or unused neither was there any counterfoils of used ballot papers which the court has already tackled. Upon recount however, the valid votes for each candidate were the same as those in the Forms 35 and 36 save for Sophia Abdi Noor. The said candidate on recount received 162 votes which was at variance with the Form 35 and 36 which had indicated her result as 167. There was therefore a difference of 5 votes less for Sophia Noor. As already noted, the results of this polling station are to be excluded from the final results of the election.

f. **Hara Primary Polling Station**- According to the report, there were four broken seals with serial numbers 3124416, 3124417, 3124418 and 3124420 inside the ballot box. All votes for each of the candidates upon recount tallied with those indicated in the Forms 35 and 36, save for Mukhtar Bulale Muhumed. The said candidate received 5 votes as per the Form 35. The same tallied with the recount. The Form 36 however, had indicated that he got 4 votes. The partial scrutiny and recount of the votes cast showed that the results announced and captured in the final form 36 were largely accurate.

105. I directed the parties to submit on the findings of the Report for scrutiny as part of their final submissions. According to the Petitioners, the scrutiny report affirmed that there were indeed non-compliance with the election laws by the 2nd and 3rd Respondent. The Respondents however submitted that the results of the scrutiny and recount by and large confirmed that the vote results of the Constituency was fair and was in accordance with the law, although minor deviations were noted.

106. Having considered the report on scrutiny and recount, it is evident that there were no material discrepancies between the results declared by the 2nd and 3rd Respondent in the respective Forms 35 of the polling stations that were under scrutiny. The recount put to rest the Petitioners' assertions that Sophia Noor garnered 40 votes in Dabel Weyne Village Dam. The Recount and scrutiny confirmed that she did not garner any votes in that polling station as had accurately been reflected in the Forms 35 and 36.

107. On the issue of the four (4) broken seals in Hara Polling Station, the Petitioners' Counsel submitted that given that state of affairs, it was not possible to verify the authenticity of the seals and

consequently the credibility of the votes, ballot papers and records kept in the ballot boxes. The Respondents did not address this issue. Since the scrutiny was ordered after the close of the trial, there was no evidence to show when and how the seals were broken. This may be left to speculation having in mind that these Ballot Boxes had been transported from Ijara in Garissa to Nairobi. The scrutiny of all the votes for the respective candidates tallied with those declared in both the Forms 35 and 36 that are before court, save for one candidate who received one vote more than was indicated in the form 36. From the report, the results did not reveal that there was any voter stuffing or votes missing. In my view, the irregularity as presented was not sufficient to impeach the franchise in that polling station.

108. With regard to the 5 blank Forms 35 found in the ballot box and none were affixed as required on the sides of the ballot box, I find that the Petitioners have proved that there were irregularities in this polling station as regards the affixing and sealing of the forms 35 in the ballot boxes. There was however, a Form 35 produced in court at Page 44 of the 2nd and 3rd Respondents bundle of documents. This could mean that the document was delivered to the 3rd Respondent as required by law. According to that Form 35, all the results for the candidates therein tallied with those of the recount save for Mohadulamin Mohamud Ali who received 10 votes less than what was indicated in the Form 36. This in my view, is a minor deviation that cannot affect the outcome of the result

109. In summation, after considering the Scrutiny and Recount Report, I find that the results of the scrutiny did not support the contention by the Petitioners that there were massive irregularities in the particular polling stations that would lead this court to impeach the results that were returned from the said polling stations by the respective presiding officers.

ii) Whether the 1st Respondent was guilty of electoral offences.

110. The basis of this contention was that the 1st Respondent was guilty of several electoral dereliction, including bribery, undue influence, communicating with voters while polling, violence and voter intimidation. I shall deal with each particular malpractice individually.

a. Bribery

111. The Petitioners contended that some Party Agents of the 1st Respondent were found collecting voter identity cards in various polling stations and offering money to voters perceived to be supporters of the URP candidate so as to boycott the polling exercise or vote in favour of the 1st Respondent. They singled out Masalani Polling station where they claimed that voter bribery was rampant as voting continued unsupervised until 3 a.m. of 5th March, 2013. They also claimed that voting in the aforesaid polling station was marred with violence and that several of the 1st Respondent's supporters had carried crude weapons to the polling station with a view of intimidating voters supporting the URP candidate, Sophia Noor.

112. In support of their case, the Petitioners called several witnesses. On bribery, PW4 Yusuf Suleiman Ahmed, the Campaign Manager of PW1 testified that he witnessed some people in groups within the precincts of Masalani Primary polling station, giving bribes to voters at around 5.10 p.m. On her part, PW3, Ubah Abdullah Sanei stated in her Affidavit that a campaigner of the 1st Respondent was seen bribing voters in Masalani Primary Stream II. In answer to this allegation, the 1st Respondent testified that he did not bribe voters on the 4th March, 2013. It was submitted on his behalf that the bribery claims were a mere fabrication and that the same was not corroborated by any tangible evidence. It was also pointed out that PW4 who voted in Wardeijab polling station, was not even legally allowed to enter Masalani Primary Polling Station to have witnessed the incident of bribery he alleges of.

113. This court has carefully considered the opposing evidence put forward by the parties. Voter bribery is a grave electoral offence recognized under **Section 64** of the **Act**. The standard of proof required in such an instance is slightly higher than that of ordinary allegation in an Election Petition. An act of bribery should be proved beyond reasonable doubt. This is so because proof of a single act of bribery is sufficient to nullify an election. One should be elected freely by the electorate for elections to be said to be free and fair. Bribery is one major single evil that can influence an electoral process thereby destroy a democracy. In **Kiiza Besigye –vs- Yoweri K. Museveni SC. Election Petition Appeal No. 1 of 2001** the Supreme Court of Uganda held that in order to prove bribery there must be proof that a gift was given to a voter by a candidate or his agent. Further, that the gift has to induce the receiver to vote for the candidate or to influence a voter from voting.

114. Bribery is a serious charge made against an individual. To prove it, one must be precise, particular and clear in the manner the same is committed. A generalized allegation is not enough. It has been suggested in the **Richard Kalembe Ndile case (Supra)**, that the act of bribery should be quantifiable in view of Section 82 (2) (b) of the Act. This is so because on scrutiny and recount, it would seem that votes procured through bribery are to be excluded.

In Halsburys Laws of England Vol. 15 (3) paragraph 344 ff it is posited:-

“723. Proof of bribery

Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the elections. The judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be, such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason, clear and unequivocal proof is required before a case of bribery will be held to have been established and suspicion is not sufficient. The confession of the person alleged to have been bribed is not conclusive.

A corrupt motive must in all cases, be strictly proved. For this purpose a corrupt motive in the mind of the person bribed alone is not enough; the question is as to the intention of the person who bribes him.

Where the evidence as to bribery consists merely of offers or proposals to bribe, stronger evidence will be required than in the case of a successful bribe because of the greater likelihood of there having been some misunderstanding. A general evidence may, however, be given to show what the character of particular acts has presumably been.”

115. Applying the above principles to the present case, the Petitioners through PW4 told the court that he witnessed some people walking along the queues bribing voters in Masalani primary polling station. That there were people in small groups within the precincts of the polling station talking to voters and giving bribes of between Kshs.1,000/- and 2,000/-. That anyone accepting the bribe was accompanied by someone to the polling room to ensure that he voted for the 1st Respondent. This witness however, did not identify the people who were bribing the voters. He only said that he saw some people undertaking the vice. He was the Chief Campaigner of PW1. He stated that he left Wardeijab at 1.30 p.m. to head to Masalani Primary polling station when he received a call from his campaign team members including one Abdullahi Muhumed that there were serious election malpractices taking place at Masalani. This is what he told the court when being cross examined by Mr. Moibi:-

***“One Abdullahi Muhamed from Masalani called me telling me that there was tension there and as the campaign chairman I was required there urgently. I reached Masalani at 5.00 p.m. We stopped at 2 places. The motor vehicle got a puncture and we lost time mending it. We stopped at Sangailu and Ijara for tea. The puncture was near Masalani. I decided to eat first on the way to Masalani.*”**

I stood outside Stream I. There were no queues. I never went in. There was full of confusion. I spoke to security personnel who told me they only receive orders from the Presiding Officer only. I spoke to the Presiding Officer about the confusion, people were coming and entering in droves. He never did anything. The presiding officer I spoke to was called Opiyo. Generally there was no control.”

When cross examined by Mr. Kanjama PW4 told the court:-

“I travelled back to Masalani and reached 5 p.m. I saw people being given money. They were about five (5) metres away from me. We were approximately 10 metres from the polling room. It was Stream I. I did not know that I was no legally allowed to enter Masalani polling station.”

116. Earlier in his evidence in chief in paragraph 8 of the Affidavit, he had told the court:-

“8. THAT I arrived at Masalani primary school polling station at around 5.10 p.m. and I observed the following THAT:-

a. The polling station was not closed and people were still coming into the polling station freely;

b. People in the queues to vote were holding ballot papers;

c.

d. People were communicating, mingling and discussing freely their preferred candidate in the queues;

e. **Some people were walking along the queues bribing voters.....”**

From his Affidavit PW4 seems to suggest that there were queues wherein electoral malpractices including bribery were taking place. However, in his testimony in court, there were no queues but total confusion. The place was in chaos a situation which prompted him to talk to the security personnel and the Presiding Officer who did nothing to contain the situation. If then that was the confusion and chaos, in which queues were people walking along bribing voters" Can PW4 be believed" He was categorical that he was the chairman of the campaign team for PW1. That he had been called from Wardeijab to urgently come to Masalani and try to contain the tension there. This was around 1.30 p.m. As urgent as the situation sounded, he conveniently decided to break the journey twice to have tea and eat at Sangailu and Ijara on the way to Masalani. The vehicle only had a puncture near Masalani. Can a Chief Campaigner who had been summoned urgently to go to Masalani to contain tension have the luxury of detouring twice for tea" I do not think so. The court did not believe PW4. His evidence was not credible.

117. As regards PW3, whereas she had stated in her Affidavit that she saw a campaigner of the 1st Respondent bribing voters in the voting hall at Masalani primary polling station Stream 2, in her testimony in court she denied ever seeing any bribery taking place. In this regard, I do not find the allegation of bribery proved at all.

b. **Violence and Intimidation**

118. The Petitioners alleged that there was widespread violence and intimidation of PW1's supporters in Masalani Primary Polling station. PW1, Sophia Noor, PW2, Abdinasir Yasin, PW3, Ubah Sanei, PW7 Halima Lugey and PW8 Eshia Dahir all testified on behalf of the Petitioners on this aspect. PW1 claimed that her female supporters were attacked while voting in Masalani Primary polling station. She told the court that she witnessed PW7 being assaulted in the afternoon of 4th March, 2013 at around 4 pm at Masalani Primary Polling station, that after the assault PW7 was taken to hospital for treatment. She however conceded that she did not report the matter to the police until 6th March, 2013, two days after the incidence. PW2 testified that he was in Masalani Polling station and that although he saw some people carrying Somali swords, he never witnessed any violence. On the other hand, PW3 testified that as a URP Agent at Masalani Polling Station Stream 2, she could attest to the fact that voting in that polling station was extremely chaotic. She claimed that she saw several people carrying rungu and Somali swords within the voting area. That she was coerced to sign a blank Form 35 by R1W4 who was carrying rungu. That R1W4 was an agent of the 1st Respondent.

119. On her part, PW7, Halima Lugey told the court that after casting her vote at Masalani Primary Polling Station she was assaulted by some people. She claimed that as she walked out of the polling room, she was attacked at the door by unknown assailants using sticks and stones. That she fell

unconscious and only regained consciousness at 6 pm on the same day. On cross examination, she stated that she did not go to hospital after the incident. That she was taken home where she regained consciousness at 6 p.m. That she went for treatment in a pharmacy the following day. That though she had treatment notes, she had not presented the same to court. She also confirmed that she did not report the assault to the police. PW8 testified that she witnessed people in the polling station carrying concealed knives and sticks. She stated that she witnessed PW7 being beaten with sticks by a group of people in Masalani polling station. On cross examination, she said that she saw PW7 being carried to her house after being assaulted while bleeding and crying. She also told the court that she knew of another woman who had been assaulted in the polling station by the name Maryam Yahya.

120. It was submitted on behalf of the Petitioners that based on this evidence, there was evidence of violence and intimidation against the supporters and agents of PW1. That according to the police, acts of violence had been reported though the investigations had not been completed. According to the Petitioners' Counsel, the report by police corroborates the Petitioners' evidence of violence and intimidation and the fact that the police chose not to conduct proper investigations should not negate the evidence tendered.

121. In response, the 1st Respondent testified that he did not hear of any incidence of violence against any woman in Masalani primary polling station. On his part, R1W4 denied carrying a rungu to the polling station as alleged by the 2nd Petitioner. He denied the claim that he forced the 2nd Petitioner to sign the Form 35. He was firm that he was an agent in Masalani Primary Stream I and not Stream II with PW3 as had been suggested. R1W5, Osman Sirat, was an agent of the 1st Respondent in Masalani Primary Stream II. He also testified that there was no violence in Masalani Primary Polling Station and that PW3, was not coerced into signing any Form 35 as she alleged. Finally, R1W15, an Elog observer testified that in the polling stations where his observer group had observers, there were no incidents of harassment, ballot stuffing, disruption of vote counting, intimidation and late opening of polling station.

122. Mr. Kanjama submitted that there were glaring inconsistencies in their testimony of the Petitioner witnesses. He challenged their credibility on the basis that they were all related. He urged the court to view the evidence tendered on violence and intimidation suspiciously as the 1st Respondent and his witnesses effectively disproved the allegations of the Petitioners.

123. On behalf of the 2nd and 3rd Respondent, R2W2 PC Isaac Ogotu testified that he was attached to the Criminal Investigation Department (CID) at Ijara Constituency. He confirmed that PW1 made a complaint vide Occurrence Book Number 8 of 6th March, 2013. That in the complaint, PW1 made eight allegations but none of them included the assault of PW7 or violence and intimidation at Masalani Primary Polling Station. On cross examination, he was firm that PW3 recorded a statement in support of PW1's complaint. He told the court that PW3's statement was in relation to the issuance of excess ballot papers by the Presiding Officer at Masalani Primary Polling Station Stream 2 and not about intimidation or violence. According to the witness, after investigations, the file was closed for lack of adequate evidence. He asserted that given that the elections were hotly contested in the area, the security agents had taken enough measures to ensure that the elections were peaceful. He was firm that there was no reported incidence of violence during the polling exercise in Ijara Constituency.

124. It was then submitted for the 2nd and 3rd Respondent that given the testimony of R2W2, it was clear that no such violence was reported to the police. That if there was any violence as alleged, the police would have intervened as Masalani Primary Polling Station was directly opposite the Masalani Police station as had been confirmed by the various witnesses.

125. **Section 63(1)** of the **Act**, makes it an offence for a person either directly or indirectly in person or

through another person to use or threaten to use any force or violence in order to induce or compel a person to vote or not to vote for a particular candidate or political party at an election or for the purpose of impeding or preventing the free exercise of the franchise by a voter.

126. On supposed assault of PW7, it was apparent that the testimony of PW1, PW7 and PW8 was varied and inconsistent. While PW7 claims she was beaten unconscious, PW8 told the court that after the assault, good Samaritans carried PW7 to her home while she was bleeding and crying, indicating that the victim was fully conscious.

127. PW1 had told the court that she witnessed PW7's assault and that the latter was taken to hospital. However, in her testimony PW7 stated that she was taken to her house and not to the hospital. She also told the court that she did not go to hospital after the attack but chose to go to a pharmacy a day after the incident. PW1 further claimed that she made a report of the assault to the Police, but R2W2 indicated in his testimony that the complaints made by PW1 and PW3 did not relate to violence and intimidation.

128. With its many inconsistencies, the common thread in the testimonies of PW1, PW7 and PW8 is that PW7 was assaulted in Masalani Primary Polling station. None of the said witnesses was able to identify the alleged perpetrators and whether they were linked to any candidate, including the 1st Respondent. The court finds it odd that such an incident could have happened in the full glare of polling officials and security personnel without any intervention. All the witnesses in the case stated that there was heavy police presence in that polling station. Was it possible for such an incident to happen without the intervention of the security personnel? There was no evidence tendered nor was it suggested that the security personnel were partisan. If such violence occurred, it is expected that there could have been arrests. That is not the case here. The court also notes that no report was made to the Masalani Police Station although that station was just across the road opposite the polling station. One will wonder why PW7 as the victim of such a heinous act could not report the matter to the police or even seek medical treatment from a hospital on the same day. How then can the veracity of her assertions be ascertained without treatment notes or a police report? To say the least, the court found it difficult to believe the testimonies of PW7 and PW8.

129. The other limb of the Petitioners' claim is that people in Masalani Polling Station were allowed to roam freely with crude weapons. PW3 made fantastic claims that she was intimidated and coerced by R1W4 to sign a Form 35 for Masalani Primary School stream II using a rungu! PW2 and PW8 also claimed to have seen people carrying crude weapons. PW2 however conceded that no violence erupted in any of the streams at Masalani polling station. Although all the three witnesses, PW2, PW3 and PW8 claimed to have seen people carrying concealed weapons in the polling station, none of them reported the matter to either the police or the polling officials on 4th March, 2013.

130. I note however, that PW3 claimed that she reported the matter to the police on 6th March, 2013, after the election results had been declared. R2W2, a police officer who testified for the 2nd and 3rd Respondent told the court that the police did not find enough evidence to prosecute anybody as the suspects were unnamed which impeded the investigations. I have seen the statement of PW3 dated 6th March, 2013 that is attached to PW1's affidavit and marked "**SAN 4**". The said statement contains allegations that PW3 saw an unnamed person carrying a crude weapon and communicating with voters. She did not state that it was R1W4 who was the person with the rungu at the time of making the statement. Furthermore, she did not state that she was intimidated by this unnamed person, but that rather he was communicating with voters. It is questionable why PW3 chose not to mention R1W4 in her police statement. Neither did she record in that statement that R1W4 had intimidated or coerced her into signing Form 35. That statement was made barely 2 days after the alleged events. In my view, her

testimony in court on R1W4 carrying a rungu and threatening her, was but an afterthought. In the circumstances, I am inclined to believe R1W4 when he stated that he was not in the same stream PW3. PW3's testimony was inconsistent and not credible. In the court's assessment, she came out as an untruthful witness.

131. In sum, having evaluated the evidence on the issue of violence, I find that the Petitioners have failed to establish to the required standard that there was violence on the day of the elections in Masalani Primary polling station or any other polling station which would have affected the conduct of a free and fair election.

c. **Communicating with Voters**

132. The Petitioners' inclusion of this allegation was difficult to understand. Save for the testimony of PW4, the Petitioners neither called any other evidence regarding the allegation, nor did they make any submissions on it. I have already referred to the testimony of PW4, Yusuf Suleiman Ahmed and indicated why the court did not believe his testimony. I find that this allegation was not proved.

d. **Undue Influence**

133. On this malpractice, the Petitioners pleaded that during the campaign period, the 1st Respondent and his campaign team in conjunction with religious leaders ran smear campaigns against PW1 on the basis of her gender and prior work engagement in the Non-Governmental sector. This claim was supported by several witnesses including PW1 Sophia Noor, PW2, Abdinasir Yasin Ahmed, PW5 Ali Mirat Dahir, PW6, Osman Muhamud Muhumed and PW8, Eshia Idle Dahir. It was PW1's testimony that religious leaders in Ijara constituency opposed her candidature and advised the constituents not to vote for her as this would amount to a curse. She further told the court that after she handed in her nomination papers in the month of February, 2013, she heard the 1st Respondent at a rally at Masalani campaign against her on the basis of her gender, that she heard Muslim Sheikhs in a Baraza preaching against her candidature. She told the court she was in her car together with her bodyguards and Halima Lugey Aden, PW7 when she heard the 1st Respondent invoke religion as the basis for her unfitness. She also accused the 1st Respondent of spreading hate speech during campaigns. She contended that this was on two occasions, namely at Masalani Market and Hulugho during his campaign rallies. The witness however admitted that she did not report the matter to the police. She admitted that she had religious leaders in her campaign team. She further told the court that her candidacy was not unique as

there were other women contesting for other electoral positions in the constituency and the County of Garissa at large.

134. PW2 on his part testified that he witnessed religious leaders and the 1st Respondent addressing a crowd in Masalani Town Centre in February 2013. He accused the religious leaders of preaching against PW1's candidature on the basis of her gender. He told the court that he could identify two religious leaders by the name of Sheikh Ismael Osman and Muhamed Dahir as the culprits. He however conceded that he never heard any Imam or Sheikh preaching against the candidature of PW1 in Jamia mosque where he attended his prayers throughout the campaign period. PW5 Ali Mirat Dahir testified that in February, 2013 at Masalani Town Centre, he witnessed many sheikhs led by Sheikh Ismail Ali and Sheikh Muhamud Dahir in the presence of the 3rd Respondent preaching against the election of women into leadership positions. That the preachers endorsed the 1st Respondent whilst they asked voters to reject PW1. PW6 Muhamud Muhumud testified that he personally heard Sheikhs preach against the voting of a woman in Jamia Mosque in Masalani town on two occasions. He told the court that the Sheikhs preached that voting for a woman would lead one to hell.

135. It was submitted for the Petitioners that in totality, the Petitioners were able to demonstrate that the sheikhs in Masalani were against the candidature of female candidates. That Ijara being a Muslim dominated community, such proclamations by religious leaders had the effect of affecting the free will of voters. According to the Petitioners, this undue influence affected the outcome of the election. The Petitioners' relied on the case of **Ntwiga –vs- Musyoka & 3 Others (2008) 2 KLR 276** in support of their contention.

136. The 1st Respondent disputed this allegation. During cross examination, he told the court that he did not have any Sheikhs or Imams in his campaign team, though he had religious leaders who were his supporters. With regard to hate speech during his campaign rally at Masalani Market on the day of his nomination, the witness told the court that by the time his rally started, PW1 had already finished her rally and left. He denied that he used any hate speech as alleged by PW1 and PW2. R1W11, Abdullahi Ahmed, also testified in support of the 1st Respondent's assertions. He told the court that he is a Sheikh based in Ijara Constituency. He denied that campaigns were carried out in Mosques by the Sheikhs as alleged by the Petitioners. In conclusion, R1W11 told the court that he was initially a campaigner for PW1 but joined the 1st Respondent's team twenty (20) days before the elections.

137. It was submitted for the 1st Respondent that no evidence was tendered by the Petitioners to substantiate the claims of the Petitioners that there was any undue influence on the voters of Ijara by the 1st Respondent and the religious leaders of the area. For the 2nd and 3rd Respondent it was submitted that the evidence adduced only showed that majority of the religious leaders only supported candidates from their respective clans. The court was urged to dismiss the claim for lacking merit.

138. **Section 67 (1) (g) (i)** of the Elections Act, makes it an offence for a person to influence voters on the grounds of ethnicity, race, religion, gender or any other ground or discrimination during the campaign period. **Section 64** of the **Election Act** also makes it an offence to unduly influence a voter either by impeding or preventing the free exercise of the franchise of that voter through threats either directly or indirectly or spiritual injury.

139. The Petitioners in their pleadings claim that PW1 was targeted by religious leaders on the basis of her gender and prior work experience with the NGO sector. PW1 herself admitted that she had Sheikhs and other religious leaders in her campaign team. The 1st Respondent denied having any religious leaders in his campaign team. They were only part of his supporters. Indeed R1W11 acknowledged that he decided to support the 1st Respondent after defecting from PW1's campaign team twenty days prior

to the election. This in my view shows a divided house. There was no evidence to show that the religious leaders did present a united front in terms of which candidate they would support in the elections. I also note that PW1's evidence contradicted that of other witnesses of the Petitioners as to what transpired in February, 2013.

140. When one pleads undue influence, it is important to provide proof to the acceptable standard that there was inducement or compulsion of the elector to vote in a certain way. The Petitioners did not call any independent witness to show that due to the agitation of the religious leaders against PW1's candidature, he or she failed to exercise his or her political right to vote in a free manner. According to R1W11, Ijara Constituency is Muslim dominated and religious leaders hold a prominent and position of influence. That the electorate has a tendency to rely on the advice and counsel of these religious leaders. He told the court that had the religious leaders campaigned or stood against PW1's candidature, she would have performed dismally and would not have come in second in the elections, in his words, she would have been last. This may be an indication that the voters in the constituency were not unduly influenced not to vote for her. With religious leaders being on both sides of the divide, this court is not convinced that there was a policy in place by the religious leaders in Ijara which influenced the electorate against PW1. From the evidence on record, I am not convinced that the 1st Respondent committed the irregularities and malpractices complained of. Most of those malpractices bordered on criminality, yet the evidence tendered was far much less than even that of a balance of probability.

141. In conclusion and based on the evaluation of all the evidence presented by the Petitioners in this petition, it is clear that there may have been certain irregularities in respect of the disputed election as conducted and supervised by the 2nd and 3rd Respondent. It is clear that statutory documents were not properly filled, in one polling station, Masalani Primary Polling Station the scrutiny showed that the seals were broken and the results therein could not be verified, that there was deployment of inadequate staff in some areas in the Constituency. These are the only irregularities, in my view that were established. In the case of **Re KENSINGTON NORTH PARLIAMENTARY ELECTION case [1960] 2 All ER 150** Justice Streetfield stated that:-

"It is for the court to make up its mind on the evidence as a whole whether there was a substantial compliance with the law as to elections or whether the act or omission affected the results". (Emphasis added).

142. Further, in the case of **Rishad Amana Vs IEBC and others Malindi, High Court election petition 6 of 2013 [2013]** eklr Kimaru J held thus:-

"A petitioner is not only required to establish that there were irregularities which were committed during the elections, he must also establish that such irregularities (non-compliance with the law) were of such magnitude that it affected the outcome of the results. This is what is referred as the materiality test. Apart from that, the Petitioner is required to establish that the errors and irregularities were either occasioned by outright negligence or deliberate action on the part of the guilty party. Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. What Section 83 of the Elections Act simply provides is that in any election, because it is conducted by human

beings, there bound to be errors which can be explained. There is no election which can be perfectly conducted. However, it is only when such errors, which constitutes non-compliance with the law, materially affects the outcome of the results that the court will have no option other than to nullify the said results.” (Emphasis mine)

143. I am of the same persuasion. It is not enough to merely catalogue instances of malpractice, irregularities and breaches of the law. A Petitioner bears the burden of establishing by cogent, consistent and credible evidence that the number of votes affected by the irregularities was sufficient to change the result of the election. That evidence must be credible, consistent and convincing. Generalized allegations are not enough. The will of the electorate has to be safeguarded at all costs. However, if that will is affected for any reason whatsoever, the election must be overturned and the electorate given another chance to exercise its will. From the analysis of the issues raised and evidence tendered with regard to how the 2nd and 3rd Respondent conducted the elections, I find that the Petitioners have failed to prove that the irregularities complained of adversely affected the sanctity of the ballot. In my view, elections were conducted in accordance with the Constitution and Electoral laws. They were free and fair and I am satisfied that the results reflected the free choice and will of the people of Ijara Constituency. Flowing from this I also find that the 1st Respondent was duly and validly elected as the Member of National Assembly for Ijara Constituency.

144. Accordingly, I dismiss the Petition with costs to the Respondents. Considering the nature of this Petition, the number of witnesses who testified, the time taken (including trial taking place on a Saturday), I am satisfied that it will be reasonable to cap costs at Kshs.4Million. The 1st Respondent will be entitled to a maximum of Kshs.2.5million in costs while the 2nd and 3rd Respondent will be entitled to a maximum of Kshs.1.5million.

145. It is so decreed.

DATED and DELIVERED at Nairobi this 25th day of September, 2013

.....

A. MABEYA

JUDGE

In the Presence of

Hassan court clerk

Ms Kigera holding brief for Anzalla & Issa for Petitioner

Mr. Kanjama for 1st Respondent

Mr. Garane & Ms Keya holding brief for Mr. Moibi for 2nd and 3^d Respondent



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