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Court:	High Court at Malindi
Case Action:	Judgment
Judge:	Luka Kiprotich Kimaru
Citation:	Benson Karisa Ngirani Maneno v Jacob Machekele & 2 others [2013] eKLR
Advocates:	Mwakisha for the Petitioner, Mwadilo for the 1st & 2nd Respondents, Kinyanjui/Mayaka for the 3rd Respondent.
Case Summary:	-
Court Division:	Constitutional and Human Rights
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County:	Kilifi
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Case Outcome:	Petition dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

ELECTION PETITION NO. 14 OF 2013

BENSON KARISA NGIRANI MANENO.....PETITIONER

VERSUS

JACOB

MACHEKELE.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

**PETER SAFARI SHEHE.....3RD
RESPONDENT**

JUDGMENT

Benson Karisa Ngirani Maneno, the Petitioner herein, is a registered voter in Ganze Constituency. During the 2013 General Elections, he was the chief agent of the Republican Congress Party (RCP). The Petitioner was dissatisfied with the manner in which the elections of Ganze Constituency (hereinafter referred to as the constituency) were conducted. He filed this petition challenging the declaration of Peter Safari Shehe, the 3rd Respondent as the duly elected member of National Assembly for Ganze Constituency. In the said elections, seven (7) candidates contested for the seat. On 6th March 2013, Jacob Machekele, the 1st Respondent, the returning officer of the constituency, declared the results of the elections. The votes garnered by the said candidates were as follows:

I. Eliezer Mulei James	- 399
II. Joseph Kingi A. Kahindi	- 5,708
III. Kahindi Kingi Edward	- 5,335
IV. Patrick Kazungu Ngumbao	- 681
V. Peter Safari Shehe	- 6,145
VI. Richard Kazungu Konde	- 2,019
VII. William Chengo Kenga	- 4,634

The 3rd Respondent was declared to have been duly elected as the Member of the National Assembly seat of the Constituency.

According to the Petitioner, the said election was marred by irregularities which ultimately vitiated the validity of the results. The Petitioner averred that the 2nd Respondent's officials turned away illiterate voters and prevented them from voting in Dzikunze, Palakumi and Bandari polling stations contrary to the provisions of **Section 58(n)** and **59(1)(d)** of the **Elections Act**. The Petitioner stated that the validity of elections was severely compromised by the overriding fear or apprehension of violence by the voters in the constituency. He averred that the fear and apprehension of violence became real when on the eve of the election persons believed to be members of the outlawed Mombasa Republican Council (MRC) attacked security personnel, and in the case of Ganze Constituency, attacked an administration police officer at Palakumi. The Petitioner was of the view that this fear of violence rendered the prevailing environment in the constituency to be unsuitable for the conduct of free and fair elections.

The Petitioner further averred that several polling stations were opened late and later closed early due to the then prevailing security situation. He stated that in several polling stations, due to the early closure of the polling stations, voters were denied the opportunity to vote. This was due to the fact that they were turned away from the polling stations by security officers despite the fact that they still on the queue. The Petitioner doubted the integrity of the results of Palakumi polling station because the counting of ballots were not carried out in the polling station but were transported to Ganze tallying centre without being accompanied by any of the agents of the candidates. The Petitioner complained that the conduct of elections at Palakumi polling station was therefore not in accordance with the **Elections Regulations**. He stated that the presiding officer of Mwapula polling station irregularly allowed agents to sign blank Form 35s before the results were entered. The Petitioner complained that in Palakumi, Dzikunze and Bandari polling stations, election officials had picked strangers to assist illiterate voters to mark the ballots in the absence of the agents and therefore compromised the integrity of the electoral process in contravention of the **Regulation 72** of the **Elections (General) Regulations** (hereinafter referred to as the **Election Regulations**).

The Petitioner averred that in Palakumi, Dzikunze, Sosodemu, Bandari and Kidemu, the election officials, in breach of **Regulation 66(2)** of the **Election Regulations**, prematurely closed the polling stations while voters were still on the queue. The Petitioner stated that this action by the election officials resulted in voters being disenfranchised. He complained that party agents were denied access into Sosodemu polling station because the presiding officer had determined that certain agents would represent the coalitions and not the specific parties that had offered their candidates for the various seats. He averred that there was rampant interference of voters by agents and persons around polling stations. The Petitioner was aggrieved that the election officials had deliberately failed in their duties to address or mitigate the failures and irregularities that were apparent during the elections. The Petitioner was of the view that because of the slim margins separating the leading candidates, the final outcome of the election was materially affected by the irregularities and breach of law cited in his petition.

The Petitioner averred that the principles espoused by **Articles 82** and **138(2)** of the **Constitution** in relation to the conduct of an election in a process that is simple, transparent and takes into account the needs of all groups of persons was breached by the said election officials. In the premises therefore, the Petitioner urged the court to find that the elections in respect of the National Assembly Member for Ganze Constituency was not free and fair and therefore the court should declare the election of the 3rd Respondent invalid, null and void. The Petitioner further urged the court to order fresh elections and to condemn the 1st and 2nd Respondents to meet the costs of the proceedings.

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. They both opposed the petition. The 1st and 2nd Respondents in their response filed on 6th May 2013 denied the allegations made by the Petitioner that the election in respect of Ganze Constituency was not conducted in a

transparent, free and fair manner. They stated that the results of the election reflected the will of the electorate of Ganze Constituency who had validly and duly elected the 3rd Respondent as their member of the National Assembly. The 1st and 2nd respondents specifically denied the allegation made by the Petitioner that voters were turned away from the polling stations by the election officials or polling clerks. As regard illiterate voters, the 1st and 2nd Respondents averred that such voters were assisted by their preferred aides or by the presiding officer in the presence of all agents. They denied the allegation that any such voters were turned away either at Dzikunze, Palakumi or Bandari polling stations or in any of the other polling stations.

The 1st and 2nd Respondents conceded that police officers were indeed attacked by the suspected members of MRC on the eve of the election. They however stated that the security situation was contained and did not therefore affect or interfere with the voting exercise within the constituency. They further stated that although there was an attack of an administration police officer at Palakumi, that fact did not affect the voter turnout. The 1st and 2nd Respondents reiterated that the security situation did not adversely affect or favour any one particular candidate. They conceded that some of the polling stations were opened late while others were closed early on the advice of the police on the security situation in respect of the particular polling station. They explained that in the event of such eventuality, a mutual agreement on the premature closure of the polling station was arrived at in consultation with the police, the agents and the election officials. The 1st and 2nd Respondents asserted that the late opening or the early closure of the particular polling stations did not disenfranchise any voter because there were no people waiting to vote at the time the particular polling stations were closed before the official time.

As regards Palakumi polling station, the 1st and 2nd Respondents averred that the ballot boxes were transported to the tallying centre for counting due to security threat. In any event, they explained that the transfer of the ballot boxes to the tallying centre for counting and tallying was endorsed by the agents. The 1st and 2nd Respondents stated that the ballot boxes of the particular polling station were not opened until the agents arrived to enable the counting and tallying process to commence. They denied the allegation by the Petitioner that strangers were handpicked by election officials to assist voters in need of assistance. They further denied the assertion by the Petitioner that Palakumi, Dzikunze, Sosodemu, Bandari and Kidemu polling stations were prematurely closed or that there was any intention to disenfranchise voters.

In conclusion, the 1st and 2nd Respondents pleaded that they had conducted the election in an impartial manner as required by the law. They excused any minor non-compliance with the law and explained that it was occasioned by factors beyond their control or by the security situation which in any event did not affect the outcome of the elections. They urged the court to dismiss the petition with costs.

The 3rd Respondent also filed a response to the petition. He denied the allegations made by the Petitioner to the effect that his election as the member of National Assembly for Ganze Constituency was invalidated or tainted by irregularities and breach of the law by the election officials. The 3rd Respondent reiterated that he was validly elected as the member of National Assembly of Ganze Constituency having received the highest vote than any other candidate. As regard the allegation that illiterate voters were prevented from voting by election officials, the 3rd Respondent stated that no such voters were turned away. He explained that all persons who wanted to vote on the material day voted and none was turned away either in Dzikunze, Palakumi or Bandari polling stations.

The 3rd Respondent conceded that MRC threat was a national security concern and was competently and effectively handled by security agents. He asserted that the voters of Ganze Constituency defied the blackmail and threats by MRC to record a turnout that was higher than the average turnout in the entire Coast Region. He denied the claim by the Petitioner that voter turnout was affected by the threat of

violence by MRC at the constituency. The 3rd Respondent stated that the security situation did not adversely affect or favour any candidate. He admitted that some of the polling stations were indeed opened late due to logistical reasons but denied that such late opening affected voter turnout. The 3rd Respondent conceded that Palakumi polling stations was indeed closed early due to security concerns. In any event, such closure was arrived at after consultations between the police, the polling officials and party agents.

The 3rd Respondent averred that the decision to transfer the counting and tallying of ballots from Palakumi polling station to the tallying centre at Ganze was made with the consent of all concerned parties due to the exigencies of security. The 3rd Respondent reiterated what the 1st and 2nd Respondent stated which was to the effect that the counting and tallying of ballots was undertaken at the tallying centre in the presence of agents of the political parties. The 3rd Respondent denied the allegations that the election officials committed any irregularities as alleged by the Petitioner in regard to the manner in which the illiterate voters were assisted. In particular, he denied the allegation that strangers were handpicked by election officials to assist illiterate voters.

In summary, the 3rd Respondent was of the view that his election as the member of the National Assembly seat of the constituency was free, fair and transparent. In particular, he reiterated that the elections were conducted in compliance with **Articles 82 and 132** of the **Constitution**

. In the premises therefore, the 3rd Respondent urged the court to dismiss the petition with costs and declare that he, the 3rd Respondent was validly elected in the said elections.

At the pre-trial conference, the Petitioner's Advocate Mr. Mwakisha informed the court that the Petitioner had filed thirty-three (33) witnesses' affidavits in support of the petition. The 1st and 2nd Respondents' counsel Mr. Mwadilo informed the court that he would require ten (10) of the Petitioner's witnesses to attend court so that he cross-examines them. On his part, Mr. Odiwuor for the 3rd Respondent told the court that he would require fifteen (15) of the Petitioner's witnesses for the purposes of cross-examination. The 1st and 2nd Respondents filed nine (9) witnesses' affidavits. The Petitioner told the court that he would require to cross-examine seven (7) of the Petitioner's witnesses. The 3rd Respondent required three (3) of the said witnesses for the purposes of cross-examination. The 3rd Respondent filed fifteen (15) witnesses' affidavits. The Petitioner told the court that he would cross-examination all of the 3rd Respondent's witnesses. The 1st and 2nd Respondents informed the court that they would cross-examine the said witnesses for a day. Prior to the hearing of the petition, counsel for the parties herein filed the following agreed issues for determination:

I. Did the security situation in Ganze Constituency lead to an election that was not free, fair and credible"

II. Were the elections conducted in accordance with the principles laid down in the Constitution and the Law"

III. Did the instances of non-compliance with the law affect the results of the elections"

IV. Was the 3rd Respondent validly elected as the member of the National Assembly seat of Ganze Constituency"

Before addressing the issues for determination in this petition, it is important for this court to remind itself of the burden and standard of proof that is required in Election Petitions. In **Joho –Vs- Nyange (2008) 3 KLR (EP) 500** Maraga J (as he then was) held thus in regard to the burden of proof in Election Petitions:

“...election petitions should be proved by cogent, credible and consistent evidence. For instance where allegation of bribery are made, instances of the bribery should be given. The burden of proof in election petitions lies with the petitioner as he is the person who seeks to nullify an election. While the proof has to be done to the satisfaction of the court, it cannot be said that the standard of proof in election petitions is proof beyond any reasonable doubt. Like in fraud cases, the standard of proof is higher than a balance of probabilities and where there are allegations of election offences a very high degree of proof is required.”

In **Bernard Shinali Masaka –Vs- Bonny Khalwale & 2 Others [2011] eKLR**, Lenaola J held as follows in regard to the standard of proof that should be applied in Election Petitions:

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

In **Raila Odinga –Vs- IEBC & 3 Others, Election Petition No.5 of 2013**, the Supreme Court held thus:

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

In this petition, the burden of establishing the allegations of electoral malpractices is on the Petitioner. It is only when the Petitioner has established the particular electoral malpractice that the Respondents, especially the Electoral Commission, will be required to adduce evidence to rebut or disprove the allegations. The Respondents may also choose to give an explanation for their non-compliance with the law. The Petitioner is required to establish the allegations of electoral malpractices to a standard of proof that is higher than the ordinary standard of proof in civil cases i.e. that of proof on a balance of probabilities. Mr. Mwakisha, learned counsel for the Petitioner submitted that the standard of proof that is required of the Petitioner in an election petition is beyond a balance of convenience but certainly not beyond reasonable doubt. He suggests that it would be more aligned to being on a preponderance of probabilities. Clearly, the Petitioner appreciates that he must adduce evidence that will convince the court that indeed electoral malpractices and irregularities occurred in the election being questioned in the petition and that such electoral malpractice and irregularities materially affected the outcome of the

results.

This court will now address the issues that emerged for determination during the hearing of this petition. The first issue is whether the security situation in Ganze Constituency negatively impacted on the conduct of the election in the constituency to an extent that it was not free, fair or credible. During pre-trial, this court appreciated that the issue of security situation in the constituency would be a material factor during the hearing of the petition. This court on its own motion summoned the Officer Commanding Police Division (OCPD) of Ganze Division, Mr. Jacob Kanake (Kanake) and the Officer Commanding Station (OCS) Bamba Police Station, David Wafula (Wafula). Both officers attended court and gave evidence regarding the security situation in Ganze Constituency. Kanake testified that prior to the conduct of the elections, he prepared a security operation order of the constituency. This entailed him identifying the hot spots in the constituency and the number of security officers that he would require during the elections. He told the court that he deployed at least two (2) police officers to each of the one hundred and eleven (111) polling stations. For this purpose, he had received 98 National Youth Service (NYS) officers, and 42 police officers from the Kenya Airport Authority Police Wing. This was in addition to the police officers that were based in the constituency. Both officers testified that prior to the election they had received intelligence report that outlawed MRC organization would attempt to disrupt the elections. This intelligence report was what influenced the officers in determining the areas that were considered as hot spots and where Kanake determined he would post more police officers who in any event would be armed.

They testified that on the eve of the election (i.e. on 3rd March 2013) at about midnight, they were informed by the Deputy Commandant of the Administration Police in the Division Mr. Allan Abungu (Abungu) that one of their officers had been attacked and seriously injured at Palakumi Administration Police Camp. The officer's name was AP Cpl. Hassan Koi. The officer had sustained serious cut injuries. It was apparent from their testimony that the attack of the police officer at Palakumi was one of the several coordinated attacks targeting police officers and election officials in the larger Coast Province. Reference was made to attacks made at Changamwe in Mombasa County and at Chumani in Kilifi County in which several police officers and election officials were killed. Kanake and Wafula immediately organized a troop of police officers to go to Palakumi, firstly, to rescue the injured police officer, and secondly, to track down the perpetrators of the crime. While on their way to Palakumi, they met with Abungu. He was returning to Ganze in a Land Rover. The injured officer was being ferried in the motor vehicle. Kanake and Wafula saw the officer. He told them that while at the AP Camp, several people attacked him. They first used a petrol bomb to scare him before attacking him. He attempted to shoot them but his gun misfired. It was then that he was assaulted with crude weapons including a machete (panga). Kanake instructed Abungu to rush the officer first to Ganze District Hospital where first aid was administered, and later to Kilifi Hospital where the officer was admitted.

Kanake and Wafula proceeded to Palakumi. They visited the scene. They assessed the scene. They found an improvised petrol bomb. They also found crude weapons including a bloodstained panga. Kanake informed the Provincial Police Officer who directed him to return to Ganze.

From the testimony of the two police officers, it was evident that the attack interfered with the itinerary of the elections. According to 1st Respondent, when he received the information of the attack, he was advised by the police not to deploy the presiding officers and other election officials to the various polling stations in the constituency on the material night due to security concerns. The 1st Respondent instructed all presiding officers and other election officials to spend the night at the tallying centre at Ganze. This was because the tallying centre had been properly secured by the police. The said election officials were deployed early on the following morning to the various polling stations. Kanake and Wafula testified that they gave this advice based on the information that they had received that MRC was bent on disrupting

the elections. The fact that the election officials were dispatched to the various polling stations in the early morning of the Election Day meant that polling stations which were some distance from the tallying centre commenced polling late. These polling stations included Palakumi, Migumo Miri, Bandari and Jira.

Kanake and Wafula, while conceding that there was fear and apprehension of violence on the Election Day, testified that there was no incident that was reported to them that was security related during the voting, counting and tallying of the results. No single incident of violence was reported to them. Kanake testified that because of the attack, he sought and was granted reinforcement by the Provincial Police Officer. The reinforcement was in form of 54 police officers from the General Service Unit (GSU) and Anti Stock Theft Unit (ASTU). He testified that the police ensured that there was security to enable the voting exercise to take place peacefully. Kanake and Wafula denied the claim by the Petitioner that the fear of insecurity caused despondency among the voters and therefore suppressed the voter turnout. They denied the claim by the Petitioner that the security situation adversely affected the conduct of the election thereby rendering it not free, fair or credible. Wafula testified that the only incident that he was called upon by the 1st Respondent to deal with was in respect of two ladies who were alleged to have masqueraded as agents of the 3rd Respondent. He arrested the two ladies but later released them after it was established that indeed one of them was an agent of the 3rd Respondent. Other than that, he did not receive any complaint that was security related. The Petitioner and the 1st and 2nd Respondents did cross-examine Kanake and Wafula.

It was the Petitioner's case that the insecurity in the constituency was such that it was inimical to the conduct of free and fair elections. He testified that the fear of violence at the polling station made many voters not to turn up to vote. The Petitioner testified that he was compelled to visit the homes of voters to persuade them to go to the polling station to vote. Despite his effort, many voters chose not to vote because of fear that they would be attacked at the polling stations by members of the outlawed MRC. In response to this assertion, the Respondents testified that although there was an attempt to disrupt the elections by criminal elements, the voter turnout was not affected by insecurity. The 1st and 3rd Respondents in particular testified that the voter turnout was impressive compared with other constituencies in the Coast Region. The 3rd Respondent testified that the voters defied the attempt by MRC to disrupt the elections by turning out in large numbers to vote.

The 1st Respondent and DW2 Christine Luguse Osimbi, the presiding officer of Palakumi polling station conceded that the fear of being attacked disrupted the plans that the 2nd Respondent had put in place in regard to the deployment of the election officials and the election materials to the polling stations on the eve of the Election Day. They admitted that some of the polling stations including Palakumi polling station were opened late because the election officials travelled to the polling stations on the actual morning of the Election Day. The Respondents testified that no candidate was either favoured or disadvantaged because of the threat of violence. It was their case that whatever the effect of the threat of violence, it equally affected all the candidates. The Respondents stated that there was no violence on the actual day of elections because the 2nd Respondent had put in place measures which ensured that there was security in all the polling stations.

From the evidence of the Petitioner and the Respondents, it was common ground that none of the candidates was involved in the violence or threat of violence. There was consensus that the violence that was perpetrated on the eve of the election was at the instigation of criminal elements associated with the outlawed MRC organization. The violence witnessed on the eve of the election was not limited to Ganze Constituency. From the evidence adduced by OCPD, it was clear that there was a coordinated attack aimed at security officers in various parts of the Coast Province. Several police officers were killed in Changamwe in Mombasa County and at Chumani in Kilifi County. No evidence was adduced to suggest that any of the candidates was involved or was connected with the violence on the eve of the election or

threat of violence on the Election Day.

Mr. Mwakisha counsel for the Petitioner relied on the case of **Kajembe –Vs- Nyange & 3 Others (2008) 2 KLR (EP) 1** where the court held that the election was not free and fair due to excessive violence in which one person was killed at a polling station and a few others injured. At page 17 of the Judgment, the election court made the following observations:

“Finally we come to the issue of violence. The petitioner described graphically how he was attacked by the supporters of the 2nd, 3rd and 4th Respondents when he went to vote at Mikindani polling station. The petitioner identified 3rd and 4th Respondents as the two who addressed the crowd and then instigated the crowd to attack the petitioner. The youthwingers and supporters abused the petitioner while some climbed on top of the petitioner’s car and danced on it as they continued to abuse and intimidate him. In the process they smashed the petitioner’s windscreen. As this happened the 2nd Respondent arrived and his supporters also joined in the fracas.”

The court noted that among the witnesses who testified in the case were police officers who stated that the violence made it impossible for voting to take place in some polling stations. One of the presiding officers also testified that the fact that tyres were burnt on the road leading to the polling station that he was presiding, and the fact that there were people who were running from place to place outside the polling station, dissuaded voters from voting at the particular polling station. In fact one of the candidates was compelled to seek police escort in order to enable him visit one of the polling stations. The court observed that due to widespread violence, some polling stations were not opened. Some were relocated at short notice. The violence intimidated voters from presenting themselves to the polling stations to vote for candidates of their choice.

Unlike in the **Kajembe case** (supra), in the present petition, no candidate was involved in the violence or the threat of violence. No polling station was closed or relocated as a result of the violence on the eve of the election in one particular polling station (Palakumi) or the threat of violence on the Election Day. Further, unlike in the **Kajembe case**, there was no violence on the Election Day. The security officials were alert and were prepared to confront any threat to peace. For the Petitioner to sustain the claim that violence disrupted the election, he was required to establish that the Respondents were either responsible for the violence or condoned or connived in the perpetration of violence. This was not the case in the present petition.

On evaluation of the evidence adduced in this petition on the issue of violence, it was clear that the persons who perpetrated violence on the eve of the election and intimidation on the Election Day were advancing a political agenda. According to the OCPD, the outlawed MRC’s mantra was ***“Pwani si Kenya”*** meaning that the Coast Region was not part of Kenya. Clearly, MRC’s intention was to disrupt the election because the outlawed organization was advocating secession of the Coast Region from the rest of the Republic of Kenya. Whereas this court notes that the violence on the eve of the election at Palakumi and the threat of violence on the Election Day may have dissuaded some voters from voting, this court agrees with the 3rd Respondent’s testimony that the majority of the voters refused to be intimidated and in fact went to vote on the Election Day in defiance of the threat of violence by MRC. This court does not therefore agree with the Petitioner that the violence on the eve of the election at Palakumi and in some areas of the Coast Region was inimical to free, fair and credible elections. The voters of Ganze Constituency turned out in fairly large numbers to exercise their constitutional right to vote on the Election Day despite intimidation and threat of violence. This court cannot uphold the thrust of the Petitioner’s case on the issue of violence or threat of violence which was perpetrated by an outlawed organization, because to do so would give legitimacy to the political agenda of MRC which in effect would have succeeded in interfering with the electoral process.

In the premises therefore, this court holds that the attack of the administration police officer at Palakumi on the eve of the election and the threat of violence on the Election Day did not affect the exercise by the voters of Ganze Constituency of their will to elect representatives of their choice. The OCPD and the OCS were independent witnesses who gave a fair assessment of the security situation at the constituency during the entire election period. This court was persuaded by their testimony that the security organs in the constituency put in place an elaborate security machinery to ensure that the voters were able to exercise their constitutional right to elect representatives of their choice. The security agents were aware of the threat posed by MRC and took appropriate action to deal with the situation. This court finds that the Petitioner failed to establish that the violence in the Coast Region on the eve of the election and the threat of violence on the Election Day affected the exercise by the voters of Ganze Constituency of their constitutional right to elect representatives of their choice.

The second issue for determination was whether the elections were conducted in accordance with the Constitution and the Law. According to the Petitioner, there were irregularities in the manner in which the elections were conducted in Palakumi, Dzikunze, Sosodemu, Kidemu, Bandari and Migumo Miri. In respect of Palakumi, Bandari and Migumo Miri, it was the Petitioner's case that due to insecurity, the said polling stations were opened late and closed early. The Petitioner, PW3 Samson Kahaso Chengo, PW4 Dama Kazungu Masha and PW6 Albert Mwalimu Menza testified that due to the attack on the AP Camp at Palakumi on the eve of the election, the election officials did not turn up at the polling station in time. They testified that instead of the polling station being opened at 6.00 a.m. as required by the law, the said polling station was opened at 10.00 a.m. The 1st Respondent in his testimony admitted that indeed some of the polling stations in the constituency were opened late due to insecurity.

The 1st Respondent explained that the election officials who were slated to preside over the election at Palakumi, instead of travelling to Palakumi on the eve of the election, spent the night at the tallying centre at Ganze. They travelled to Palakumi on the morning of the Election Day. DW2 Christine Luguse Osimbi, the Presiding Officer of Palakumi Polling Station told the court that she arrived at Palakumi Polling Station from the tallying centre at Ganze at about 8.30 a.m. Voting commenced at about 9.30 a.m. DW2 testified that at about 3.00 p.m., the last person who was on the queue voted. No other voter came to the polling station until the time she closed the polling station at 5.00 p.m. DW2's testimony was contradicted by PW3 who testified that the polling station was prematurely closed before all the people who were on the queue had exercised their constitutional right to vote. The Petitioner's witnesses gave the estimate of the people who were prevented from voting at Palakumi Polling Station at between ten (10) and two hundred (200). The 1st Respondent denied this assertion by the Petitioner that people were prevented from voting.

It was the 1st Respondent's explanation that the turnout at Palakumi Polling Station compared favourably with the other polling stations within the constituency. What was not in dispute, from the evidence of the Petitioner and the Respondents, is that Palakumi Polling Station was closed early at the instigation of the OCPD who had advised DW2 that he had received intelligence report that the polling station would be attacked that night and therefore it was prudent that the counting of the ballots cast be transferred to the tallying centre where there was adequate security.

Regulation 66 of the **Elections Regulations** provides as follows:

“(1) Subject to regulation 64, voting shall commence at 6 o'clock in the morning and end at 5 o'clock in the afternoon on the polling day.

(2) Notwithstanding sub-regulation (1), a person who is on the queue for the purposes of voting before 5 o'clock in the afternoon shall be allowed to vote despite the fact that the voting

time may extend to 5 o'clock.

(3) The voting by Kenyan citizens residing outside Kenya shall be carried out during the Kenyan time specified in sub-regulation (1)."

Regulation 64(3) states that:

"A presiding officer shall, in consultation with the returning officer –

extend the hours of polling at the polling station where polling has been interrupted under this regulation or for other varied cause, and where polling in that polling station has started late, extend the hours of polling by the amount of the time which was lost in so starting late."

It was the Petitioner's case that the presiding officer of Palakumi Polling Station breached this regulation, firstly, by opening the polling station late, and secondly, by failing to extend the time by the time equivalent to the time lost by the late opening of the polling station. In response to this claim, the 1st and 2nd Respondents explained that due to the security situation at Palakumi at the time, and further on advice of the security agents, they could not extend the polling time despite the fact that the polling station was opened late. It was their case that no voter was denied the opportunity to vote because at the time the polling station was closed, there was no voter waiting in the queue to vote.

This court has evaluated the facts in regard to polling times at Palakumi Polling Station. It was common ground that the polling station was opened more than three and half (3½) hours after the time the polling station was scheduled to be opened. It was closed at 5.00 p.m. according to DW2. The Petitioner's witnesses testified that the polling station was closed much earlier than 5.00 p.m. If the regulations were to be followed, the time in which the polling station was supposed to be closed ought to have been extended by three and half (3½) hours. This was not done. The 1st and 2nd Respondents explained their failure to abide by this regulation to insecurity. Having assessed the facts on this issue, it was clear to this court that the issue of insecurity in the constituency on the Election Day influenced the decision of the 1st and 2nd Respondents as to the time of opening and closing of the polling at Palakumi. In this court's considered view, the fear expressed by the police and by the electoral officials that the electoral process was likely to be disrupted at Palakumi by elements of MRC was real. This is taking into consideration the fact that the AP Camp near the polling station at Palakumi had been attacked on the eve of the election and a police officer was seriously injured.

Did this fear of disruption of the elections override any other consideration regarding the fair conduct of the election" This court is of the view that since the election officials and the police were aware of the threat posed to the electoral process at Palakumi, adequate arrangements should have been made to ensure that there was sufficient security to ward off any threat that would be posed by criminal elements bent on disrupting the elections. This court holds that the presiding officer of Palakumi Polling Station was not justified in prematurely closing the polling station on account of the advice that she was given by the OCPD. This court formed the view that indeed some voters were prevented from exercising their constitutional right to vote at Palakumi Polling Station because of presiding officer's unquestioning acceptance of the OCPD's advise on security. The presiding officer testified that she did not consult the

returning officer in regard to her decision to prematurely close the polling station. This was contrary to **Regulation 64(3)** of the **Elections Regulations**. This court therefore holds that the Petitioner established that indeed the presiding officer of Palakumi Polling Station acted in contravention of the law when she prematurely closed the polling station. She was supposed to compensate the hours that were lost as a result of the late opening of the polling station.

A second aspect of the conduct of the presiding officer of Palakumi Polling Station that was challenged by the Petitioner was her decision to transfer the counting and the tallying of votes from Palakumi to tallying centre at Ganze. According to the Petitioner, the said presiding officer, without justification, transferred the counting and tallying of ballots from Palakumi to Ganze tallying centre. The presiding officer testified that she took this action because of the threat of insecurity. **Regulation 64(1)** provides that:

“Notwithstanding the terms of any notice issued under the Act or these Regulations, a presiding officer may, after consultation with the returning officer, adjourn the proceedings at his or her polling station where there are interruptions by a riot, violence, natural disaster or other occurrence, shortage of equipment or other material or other administrative difficulty, but where the presiding officer does so, the presiding officer shall restart the proceedings at the earliest practicable moment.”

Sub-regulation (2) provides that:

“The discretionary powers of a presiding officer under sub-regulation (1) shall include a power in the circumstance therein mentioned to transfer the proceedings to another polling station or public facility in the same constituency, and where the presiding officer does so –

a. the presiding officer shall advertise the fact in such manner as is sufficient to bring it to the notice of voters; and

b. the electoral area for the polling station from which the proceedings are transferred shall, for all the purposes of these Regulations, be deemed to be part of the electoral area of the polling station to which the proceedings are transferred.”

It is clear from the above Regulation that a presiding officer has the discretion to transfer proceedings from the gazetted polling station to another location within the constituency if the circumstances warrant it.

In the present case, the presiding officer of Palakumi duly consulted the agents before she made the

decision to adjourn the counting and tallying of votes to the tallying centre at Ganze. It was apparent that the presiding officer was unduly influenced to make this decision by the OCPD who appeared impatient and was determined to have the ballot boxes transported to the tallying centre before it became dark. Instead of waiting for transport which had been hired specifically by the Electoral Commission to transport her and her staff to the tallying centre, the presiding officer instead hiked a lift on the OCPD's motor vehicle. This decision posed a problem. As a condition for adjourning the counting and tallying of votes to the tallying centre at Ganze, the presiding officer had promised the agents that they would be provided with transport from Palakumi to the tallying centre at Ganze to enable them perform their duties as agents.

Due to this fateful decision, there was no sufficient space in the OCPD's motor vehicle to ferry all the agents to the tallying centre. Therefore none of the agents were present at the tallying centre when the ballot box seals were opened. No effort was made either by the presiding officer or by the 1st Respondent to secure the attendance of the agents during the counting and tallying of the votes at the tallying centre. The 1st Respondent explained away this serious anomaly by stating that he had requested the agents of Migumo Miri Polling Station to perform the duty after they had completed their task. This explanation was however disputed by PW10 Hamalin Kasichana Mwesi who was the agent of Republican Congress Party at Migumo Miri. She testified that Migumo Miri was one of the polling stations whose counting and tallying of votes was transferred from the polling station to the tallying centre due to insecurity. She recalled that after she had finished her duties in witnessing the counting and tallying of the votes in respect of her polling station, she was requested to be present during the counting of the votes of Palakumi Polling Station. However, when she reached the venue, the votes had already been counted and tallied. She did not therefore witness the actual counting and tallying of votes of Palakumi. Notwithstanding this fact, she signed the Form 35 in respect of Palakumi Polling Station.

This court holds that once the presiding officer made the decision to transfer the counting and the tallying of votes from her polling station to the tallying centre, she was required to provide transport for the agents. Her failure to do so, casts doubt on integrity of the results of the particular polling station. This is because the agents who witnessed the voting were not given the opportunity to witness the counting and tallying of votes. This court therefore holds that the Petitioner proved that there was irregularity in the manner in which the presiding officer of Palakumi Polling Station transferred the counting and the tallying of the votes to the tallying centre.

The failure by the presiding officer of Palakumi Polling Station to make arrangements for the transportation of the agents of the various political parties to the tallying centre can be contrasted with the action taken by the presiding officer of Migumo Miri Polling Station took. Just like Palakumi, the counting and tallying of votes of Migumo Miri Polling Station was transferred to the tallying centre at Ganze due to fear that the electoral process would be disrupted. The presiding officer of Migumo Miri Polling Station ensured that the agents were transported to the tallying centre at Ganze. This ensured the integrity of the counting and the tallying process because it was witnessed by the same agents who were present when the ballot boxes were sealed before voting commenced on the Election Day.

Another complaint that was raised by the Petitioner was in regard to how illiterate voters were treated at various polling stations and in particular at Dzikunze and Bandari. It was not disputed that majority of voters in Ganze constituency are illiterate. According to the 1st Respondent, prior to being employed by the 2nd Respondent, he had worked as a community development officer in Ganze constituency. He testified that in his estimation the illiteracy rate in Ganze constituency among the voters was about 90%. Being aware of this fact, it was incumbent upon the 1st Respondent to ensure that adequate arrangement were made to enable illiterate voters exercise their constitutional right to vote. According to the Petitioner, the voter assistance forms which were distributed to the various polling stations were

insufficient. The 1st Respondent admitted this fact in his evidence. The Petitioner alleged that illiterate voters were discriminated upon and were frustrated from exercising their right to vote at Dzikunze and Bandari Polling Stations.

In this regard, the Petitioner called several witnesses who testified to the fact that illiterate voters were denied the opportunity to vote. One of the witnesses, PW2 Byron Changawa Charo, a polling agent testified that election officials at Dzikunze Polling Station refused to assist illiterate voters and in fact asked them to get people who would assist them. When PW2 sought to intervene by procuring people to assist the illiterate voters, he was informed that the vote assistance forms were finished. This resulted in illiterate voters being turned away. Another complaint was that illiterate voters were not given the opportunity to express their preferred candidates before the ballot papers were marked. In this regard, PW8 Kadzo Masha Baya testified that her ballot papers were filled by an election official who did not ask her who she preferred to vote for.

PW13 Saumu Juma Karisa testified that illiterate voters were told to queue in a separate queue to that of literate voters. Because the majority of the voters were illiterate, many were frustrated due to the fact that they were forced to stay for a very long time in the queue. She recalled that one election official, Rebecca Mkambe Ngua told her that she could not be allowed to vote because she was illiterate. PW13 was therefore denied the opportunity to vote. PW13's testimony was corroborated in that regard by the testimony of PW14 Safari Masha Baya who was an agent at Dzikunze Polling Station. PW15 Joyce Masha Gona, a voter at Dzikunze also testified that illiterate voters were discriminated upon at the polling station. Literate voters were being given preferential treatment.

In response to these allegations, the 1st and 2nd Respondents denied the allegation that illiterate voters were discriminated. The 1st Respondent testified that if the claim by the Petitioner was to be believed, then the turnout of 69.5% at the constituency would not have been achieved. The 1st Respondent called Rebecca Mkambe Ngua (Rebecca) as a witness. She testified that she was employed as a polling clerk at Dzikunze Polling Station. She was polling clerk No.6. Her work did not include assisting illiterate voters. She recalled that on the Election Day, she was instructed by the presiding officer, who was not a Giriama, to translate certain directions to the voters. This included the direction on how the voting was to take place. She denied the suggestion made by the Petitioner that she discriminated against illiterate voters. She admitted that illiterate voters were indeed told to queue in a separate line. This was however to facilitate their assistance to vote. She told the court that during the entire Election Day she was called upon, from time to time, to translate the instructions of the presiding officer to the voters. She speculated that her firmness may have been interpreted by some of the voters to mean that she was unwilling to assist the illiterate voters. She testified that all voters who presented themselves at the polling station, both literate and illiterate, were allowed to vote. She denied the allegation by the Petitioner to the effect that any of the illiterate voters were frustrated from casting their votes.

This court has evaluated the evidence adduced by the Petitioner and the 1st and the 2nd Respondent in regard to the treatment of illiterate voters. **Regulation 72**

of the **Elections Regulations** provides as follows:

“(1) On application of a voter who is, by reason of a disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter’s own free choice, who shall not be a candidate or an agent.

(2) Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, in the presence of the agents.

.....

(5) The following shall apply with respect to a person who assists a voter under this regulation –

(a) the person shall, before assisting or supporting the voter, make a declaration of secrecy before the presiding officer in Form 32 set out in the schedule;

(b) a person who breaches his or her declaration commits an offence under the act;

(c) the person shall assist or support only one voter at the election and shall have a mark as proof of assisting or supporting a voter.”

The above regulation sets out the procedure on how illiterate voters are to be assisted. It is clear that without a declaration of secrecy, a person wishing to assist or support an illiterate voter cannot do so. That is why it was imperative that the 1st and 2nd Respondents prepared sufficient voter assistance forms to enable person wishing to assist illiterate voters do so in accordance with **Regulation 72(5)(b)** of the **Elections Regulations**. With the knowledge that the majority of the voters in the constituency were illiterate, the 1st Respondent failed in his duty to avail sufficient voter assistance forms to the various polling stations.

This court holds that the Petitioner established that indeed illiterate voters were discriminated upon at Dzikunze Polling Station. There is no law that requires illiterate voters who have presented themselves to the polling station to queue in a separate queue to that of literate voters. It was apparent to this court that the election officials at Dzikunze Polling Station favoured literate voters. Some illiterate voters were frustrated from voting after waiting too long in the queue. This court is of the view that the principle of first come first serve ought to have been applied in attending to the voters at Dzikunze Polling Station subject only to preference being given to the sick, old voters or other categories recognized by the law. The election officials at Dzikunze Polling Station therefore acted contrary to the law when they discriminated against illiterate voters by giving preference to literate voters in casting their votes.

There were other irregularities which were established during the hearing of this petition. One irregularity related to how the votes cast in favour of the 3rd Respondent were entered in Form 35 by the presiding officer of Mwapula Polling Station. According to the said presiding officer, DW4 Joseph Mbaruk Tune, he mistakenly failed to make an entry in respect of 195 votes that had been garnered by the 3rd Respondent at Mwapula Polling Station and instead made an entry of zero (0) votes. The presiding officer attributed this mistake to fatigue. He also told the court that the agents of the candidates signed the Form 35 in blank before the entries were made. He explained this anomaly to be due to the insistence of agents who wanted to go home after the counting exercise had been completed. This was an irregularity which cannot be condoned. He informed the 1st Respondent this error. After consultations, it was agreed that the entry would remain at zero (0) because the final results would not be affected one way or the other. Another irregularity which was admitted by the 1st Respondent was the premature closure of the polling station at Bandari. This polling station was closed at 3.50 p.m. The 1st Respondent attributed this closure to insecurity and the fact that by that time there were no voters in the polling station. There was also evidence which was adduced by the Petitioner's witness PW7 Nelly Gona Kirao in respect of Bandari Polling Station which was to the effect that illiterate voters were frustrated from voting. In her case, PW7

did not vote because she received information that illiterate were not being allowed to vote.

The third issue for determination is whether the irregularities and non-compliance with the law established by the Petitioner is of such nature that it would lead this court to invalidate the election of the 3rd Respondent as the Member of National Assembly of Ganze Constituency. **Section 83** of the **Elections Act** provides thus:

“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.”

In the present petition, the petitioner was not only required to establish that there were irregularities which were committed during the elections, he was also required to 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 innocent mistake or obvious human error cannot constitute a reason for impeaching an election result.

This court is further required to put in mind the fact that it is being called upon to determine whether the voters of Ganze constituency exercised their will to elect a representative of their choice to the National Assembly in an election that substantially complied with the law and which was free, transparent, fair and democratic. The Supreme Court of India in **Azhar Hussein v Rajiv Gandhi 24 AIR 1986 SC 1253** made the following observation:

“In a democratic polity ‘election’ is the mechanism devised to mirror the true wishes and the will of the people in the matter of choosing their political managers and their representatives who are supposed to echo their views and represent their interest in the legislature. The results of the election are subject to judicial scrutiny and control only with an eye on two ends. First, to ascertain that the ‘true’ will of the people is reflected in the results and second, to secure that only the persons who are eligible and qualified under the Constitution obtain the representation. In order that the ‘true will’ is ascertained the Courts will step in to protect and safeguard the purity of elections, for, if corrupt practices have influenced the result, or the electorate has been a victim of fraud or deception or compulsion on any essential matter, the will of the people as recorded in their votes is not the ‘free’ and ‘true’ will exercised intelligently by deliberate choice. It is not the will of the people in the true sense at all. And the Courts would, therefore, it stands to reason, be justified in setting aside the election in accordance with the law if the corrupt practices are established. So also when the essential qualifications for eligibility demanded by the constitutional requirements are not fulfilled, the fact that the successful candidate is the true choice of the people is a consideration which is totally irrelevant notwithstanding the fact that it would be virtually impossible to re-enact the elections and re-ascertain the wishes of the people at the fresh elections the time scenario having changed.”

In the present petition, the Petitioner was able to establish that there were irregularities in the conduct of the elections at Palakumi, Dzikunze, Mwapula, Bandari and Migumo Miri. These are five (5) out of the one hundred and eleven (111) polling stations in Ganze constituency. This court noted that the fact that the times which the elections were conducted at Palakumi, Bandari and Migumo Miri were reduced by several hours on account of insecurity, may have caused persons who wished to vote not to exercise their right to vote.

Upon evaluating the evidence adduced by the Petitioner and the Respondents, this court was unable to reach a conclusive finding as to the number of people who were denied the right to vote in these polling stations taking into account the fact that the said voters may have been discouraged from voting due to the security situation that prevailed at the time. The 1st Respondent testified that the number of registered voters in four of the five polling stations that were the subject of the petition to be as follows:

I. Bandari	-	503
II. Dzikunze	-	727
III. Migumo Miri	-	378
IV. Palakumi	-	567

Out of these registered voters, the following voted:

I. Bandari	-	311
II. Dzikunze	-	391
III. Migumo Miri	-	255
IV. Palakumi	-	267

This court analyzed the turnout of voters in the other polling stations within the constituency. It was clear to the court that the turnout in the questioned polling stations was not significantly lower to the other polling stations within the constituency. Therefore, although there were irregularities which was established by the Petitioner, this court formed the opinion that these irregularities did not affect the outcome of the election.

The fact that some of the illiterate voters were frustrated from exercising their right to vote at Dzikunze did not prevent other illiterate voters in the same polling station and other polling stations from exercising their right to elect a leader of their choice. This court has taken into consideration the fact that although the Petitioner established that there were irregularities in the aforementioned polling stations, the irregularities did not adversely affect or favour any of the candidates who participated in the elections. The court is of the view that the Petitioner failed to establish the threshold that is required by the law *i.e.* that the irregularities established are of such a magnitude that it affected the outcome of the election. The court noted that the irregularities committed by the presiding officer in Palakumi were substantially influenced by the fear that then prevailed within the constituency that members of the outlawed MRC would interfere with the electoral process. These irregularities are not excused but cannot in the circumstance be said to have been made deliberately or by design.

This court has further taken into consideration that elections in one hundred and six (106) out of the one hundred and eleven (111) polling stations were conducted substantially in accordance with the law. The

irregularities committed in the five polling stations cannot therefore vitiate the results of the entire constituency. The Petitioner argued that the margin of victory between the 3rd Respondent and the runner-up was less than four hundred (400) votes and therefore the irregularities committed at the questioned polling stations may have affected the outcome of the election. This court is unable to agree with this argument. This is because the irregularity noted at Mwapula Polling Station meant that if the one hundred and ninety-five (195) votes that were not included in the tally of the 3rd Respondent were to be added to his total votes, then the margin of the 3rd Respondent's victory would be more than six hundred (600) votes. Taking into consideration the totality of the evidence adduced, this court holds that the Petitioner failed to establish to the required standard of proof that the irregularities complained of were of such magnitude as to affect the outcome of the results of the elections for member of the National Assembly for Ganze Constituency.

The issue that remains for determination is the fourth issue: whether the 3rd Respondent was validly elected as the member of National Assembly for Ganze constituency. From the foregoing, it is evident that the 3rd Respondent was duly and validly elected as member of National Assembly for Ganze constituency. The elections in the constituency were conducted in substantially free, fair and transparent manner that meets the constitutional threshold.

In the premises therefore, the petition lodged by the Petitioner herein lacks merit and hereby dismissed. On the issue of costs, costs usually follow the event. This court will award the cost of the petition to the Respondents. Pursuant to **Rule 34(1)(a)** of The **Elections (Parliamentary and County Elections) Petition Rules 2013**, this court is granted power to specify the total amount of costs that shall be paid in a petition. This court has noted the type of input, in terms of time, research, preparation of pleadings and the time spent in court during the actual hearing of the case. This court is not oblivious of the fact that counsel for the parties travelled from their usual places of business to attend the hearing in this case at Malindi. This court therefore holds that the maximum amount of costs that shall be paid to the Respondents is Kshs.4.5 Million. The 1st and 2nd Respondents shall be paid a maximum of Kshs. 2.5 Million while the 3rd Respondent shall be paid a maximum of Kshs.2 Million. In that regard, the sum that was deposited in court, shall remain so deposited pending the taxation of their costs by the Respondents.

In conclusion, this court would like to thank Counsel who participated in the trial of this petition. The said Counsel are Mr. Mwakisha for the Petitioner, Mr. Mwadilo for the 1st and 2nd Respondents, and Mr. Odiwuor Kenyatta and Mr. Kinyanjui for the 3rd Respondent. This judgment is a reflection of their input during the hearing of the petition. Of course, if there is any error in the judgment it is entirely the fault of the court. This court appreciated their conduct during the entire hearing of the petition. The hearing was conducted in an atmosphere that enabled the court conclude the hearing and determination of the petition in record time.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF AUGUST 2013

L. KIMARU

JUDGE

In the presence of:

1. Mr. Mwakisha for the Petitioner
2. Mr. Mwadilo for the 1st & 2nd Respondents

3. Mr. Kinyanjui/Mr. Mayaka for the 3rd Respondent



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