



Case Number:	Election Petition 5 of 2013
Date Delivered:	16 Jul 2013
Case Class:	Civil
Court:	High Court at Kitale
Case Action:	Judgment
Judge:	Joseph Raphael Karanja
Citation:	John Lokitare Lodinyo v Mark Lomunokol & 2 others [2013] eKLR
Advocates:	-
Case Summary:	<p><i>Election Law</i> – election petition – conduct of the election – where the election for the position of Member of National Assembly of Kacheliba Constituency was contested for having been conducted contrary to the provisions of the Constitution of Kenya 2010 and the Election Laws – where there were allegations of widespread irregularities in the conduct of the election which affected the outcome of the election – where there were allegations of voter bribery – whether the irregularities complained of seriously affected the results of the elections as to invalidate it – where it was alleged that the results as declared and recorded by the Independent Electoral and Boundaries Commission contained widespread instances of over-voting in – whether the elections held on 4th March, 2013 for Member of National Assembly for Kachileba Constituency including the voting, counting and tallying were free, fair and credible – whether the elections for the Member of National Assembly for Kachileba Constituency were done in accordance with the Constitution of Kenya, 2010 and the Elections Laws – Elections (General) Regulations 2012, regulation 79 and 82– Elections (Parliamentary and County Elections) Petition Rules 2013, rule4(1) and 32 – Elections Act 2011 section 58 – Constitution of</p>

	<i>Kenya 2010 articles 83</i>
Court Division:	Civil
History Magistrates:	-
County:	Trans Nzoia
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition Dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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It was agreed at the pre-trial conference that the issues for determination would be threefold viz:-

[i] Whether the Kacheliba National Assembly Elections conducted on 4th March, 2013 were conducted in accordance with the Constitution and the Elections Act and Rules made thereunder.

[ii] Whether the first respondent was validly elected and declared as the winner of the seat of the National Assembly for Kacheliba Constituency

[iii] Whether the petitioner is entitled to the reliefs sought in the petition.

The reliefs sought by the petitioner are as follows:-

1. **There be a scrutiny of the votes recorded as having been cast in the parliamentary election in Kacheliba Constituency.**

2. **There be a scrutiny of the rejected, void and spoilt ballot papers.**

3. **There be a scrutiny of the register of electors.**

4. **There be a scrutiny of the counterfoils of the votes cast.**

5. **There be a recount of the ballot papers cast at the said election and the re-tallying of the total votes cast in all the polling stations in the said election.**

6. **The said parliamentary election held on 4th March, 2013 in Kacheliba Constituency be determined and declared null and void.**

7. ***It be determined that the first respondent was not and has not been validly elected as the member of the National Assembly for Kacheliba Constituency.***

8. ***The said election of the first respondent as the member of the National Assembly for Kacheliba Constituency be determined and declared null and void.***

9. ***Such election offences and corrupt practices on the part of the first respondent as are disclosed and found before this honourable court be reported to the speaker of the National Assembly.***

10. ***The respondents be condemned to pay the petitioner's costs of and incidental to the petition.***

11. ***Such further other and consequential orders as this honourable court may lawfully make.***

On the outset and with regard to the first five (5) prayers above (i.e. prayers 1-5), issues pertaining to scrutiny and/or recount of votes cast ought to have been dealt with as interlocutory matters which was not the case herein. Nonetheless, such issues could also have been raised at the hearing of the petition and before its conclusion at the instance of the petitioner. The court however, retained the general power to order scrutiny and/or recount of votes and/or ballot papers. Such power could only be exercised if good or satisfactory reason was shown.

Section 82 (1) of the **Elections Act** provides that:-

“An election court may, on its own motion or on application by any party to the petition, during the hearing of an elections petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.”

Under Rule 32 of the **Elections (Parliamentary and County Elections Petition) Rules 2013**, the petitioner may request for recount or examination of tallying only. The Rule provides that:-

“Where the only issue in the petition is the count or the tallying of the votes received by the candidates and the petitioner requests the court to order a recount of the votes or the examination of the tallying, the petitioner shall indicate the fact in the petition and may indicate that he or she does not require any other determinations except a recount of the votes or the examination of the tallies, as the case may be”.

And, Rule 33 provides that:-

“(1) The parties to the proceedings may at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

2. Upon an application under sub-rule (1) the court may if it is satisfied that there is sufficient reason order for a scrutiny and recount of the votes.”

Herein, the scrutiny and/or tallying or count of the votes is not the only issue. It was not even identified as one of the basic issues for determination during the pre-trial conference. As noted hereinabove, the issue was not even raised as an interlocutory matter. It was therefore left open to the court to decide whether there should be a scrutiny, recount or re-tallying of the votes and after fully hearing the petition, this court takes the view that satisfactory reasons and/or grounds have not been shown to warrant scrutiny, recount or re-tallying. In other words, the petitioner did not lay proper basis for scrutiny and/or recount of votes. Consequently, orders to that effect as contained in prayers 1-5 of the Petition cannot be granted by this court.

Be that as it may, the petitioner's case is set out in the petition as supported by the petitioner's supporting affidavit dated 4th April, 2013 together with the annexures thereon which include further supporting affidavits deposed by his witnesses some of whom appeared in court for cross-examination.

The petitioner averred in his affidavit that the second respondent was bestowed with a Constitutional and Statutory obligation to establish and conduct an electoral system and process to comply with the principle of free and fair election administered in an impartial, neutral, efficient, accurate and accountable manner under Article 81 of the Constitution and in that regard, the second respondent conducted

elections for the Kacheliba National Assembly seat on 4th March, 2013, after which the first respondent was declared as the winner and returned as the duly elected member of the National Assembly for Kacheliba Constituency on the 7th March, 2013. The declaration was subsequently published in a special issue of the Kenya Gazette.

The petitioner averred that prior to the elections, the second respondent made assurances of transparency and integrity of the process by use of an electronic system for registration and identity of the voters at polling stations and thereafter transmission of the results electronically. However, on the election date, the second respondent changed and/or altered the election process and reverted to the manual system thereby effectively introducing a completely different electoral environment which required personnel to oversee the process which the petitioner was unable to do at short notice. It was the petitioner's contention that the people of Kacheliba entered the election day expecting a new electoral dispensation only to be faced in the midst of the process with a reversion to the discredited system of the past. Therefore, the people of Kacheliba were deprived of their legitimate expectation to a new electoral dispensation, devoid of opportunities for manipulation thereby irreparably undermining the entire process and the results as declared on 7th March, 2013. The petitioner averred that the results as declared and recorded by the second and third respondents contained widespread instances of manipulation of the returns through Form 35 such that in some instances the votes cast exceeded the number of registered voters thereby constituting fundamental contravention of the letter, spirit and objectives of the constitution and in the circumstances, there was no free or fair elections in Kacheliba Constituency.

The petitioner contended that the results as announced at the end of the tallying and totalling as contained in the certificate of the result (Form 35) and/or in any other document were false, fictitious, unlawful, fraudulent, inaccurate and incorrect. Further, the second and third respondents by themselves and/or through their officers and agents committed an election offence by willfully preventing people from voting at certain polling stations, by failing to extend the hours of polling where the polling started late by the amount of time which was lost. Further, by failing to provide election material and by marking the names of voters indicating that the voters had voted yet they had not and by failing to open some polling stations mostly in areas considered to be the strongholds of the petitioner such as Kasei and Kasitot wards.

The petitioner averred that the second and third respondents by themselves or through their officers and agents committed an election offence by marking in the election records, returns and other documents entries regarding the results of the said election which they knew or had reasonable cause to believe to be false or they did not believe to be true more particularly the final declaration of the results that contains the total number of votes cast in excess of the number of registered voters.

The petitioners produced the relevant copies of the declaration of the results by the third respondent returning officer (i.e. exhibit marked JLL 1(a) and (b)) showing the entries and indicating that the total number of votes cast was in excess of the number of registered voters. It was the petitioner's contention that the second and third respondents committed an election offence by breaching their official duties by omitting to prepare accurate, complete and signed election returns including the certificate of the results of parliamentary election and by permitting or allowing removal of election materials from a polling station during the election and announcing and declaring results that were unlawful, fraudulent, fictitious and false.

The petitioner averred that the first respondent and his agents, one **Calisto Lomonyang** and one **Michael Kimbur**, committed election offences by corruptly giving or causing to be given to voters money for purposes of corruptly influencing the said voters to vote for the first respondent and by transporting or

conveying voters to and from the polling stations. Further, the first respondent and/or his agents with the connivance and/or collusion of the third respondent and/or officials working under him, ferried in lorries to various polling stations persons from Uganda who were not registered as voters in Kacheliba Constituency and who were unlawfully allowed to vote even more than once in different polling stations and also campaign within the polling station thereby committing elections offences.

The petitioner contended that the results as declared and recorded by the second and third respondents contained widespread instances of over-voting in flagrant breach of the fundamental Constitutional principle of universal adult suffrage, to wit, one man one vote. Further, the first respondent's alleged win was invalid, illegal, null and void as **Regulation 59** of the **Election (General) Regulations 2012**, was violated such that the numerous instances of huge discrepancies in the total number of votes declared by the second and third respondents in the election was inexplicable upon any reasonable hypothesis other than the existence of actual ballot stuffing, multiple voting or gerrymandering or inflating of the number of votes in the tallying thereof by the second and third respondents or their officers or their condoning of or connivance in the same to the advantage of the first respondent.

The petitioner averred that contrary to Regulation 83 (1) of the Elections Regulations, the number of votes cast in several polling stations was more than the total number of registered voters in the individual polling stations, yet the same were counted and tallied as valid votes to the detriment of the petitioner. Further, in the process of the manual tallying from which the petitioner's agents were excluded, the results were declared on the basis of unsigned Form 35 and in many of the polling stations such as Akoret (Naruoro), Mobile, Tuwiit Primary School and Kosamuk Manyatta, the valid votes cast exceeded the number of registered voters.

The petitioner averred that during the elections most of the residents migrated to Uganda in search of pasture such that the voter turnout was not as represented by the second and third respondents so that what was represented was manipulated to justify the excess number of voters in favour of the first respondent.

The petitioner contended that the election was rigged and unfair and should therefore be nullified as there was no proper tallying, counting or totalling of votes cast. No true and complete election took place in Kacheliba Constituency. Also, no true return of the Kacheliba vote took place. Therefore, the petitioner was deprived a fair chance and opportunity of being elected to the material seat by law.

It was the petitioner's contention that his right under Article 38 (2) of the Constitution was violated by the recklessness and negligence of the second and third respondent and in breach of Article 86 of the Constitution, the second and third respondents failed to establish accurate, secure, verifiable, accountable and/or transparent systems thereby declaring results which in many instances had no relation to votes cast at the polling stations and instead developed methods which were opaque and intended to manipulate the result. Further, section 58 (f) of the Elections Act was flouted in that ballot papers were taken out of polling stations before, during or after the election. Further, contrary to Regulation 79 of the Election Regulations, the second respondent's presiding officers did not ensure that the candidates or their agents signed Form 35, did not immediately announce the results of the voting at the polling stations before communicating them to the returning officer, did not provide each political party, candidate or their agent, with a copy of the declaration of the results and did not affix a copy of the declaration of the results at the public entrance to the polling station or at any other place convenient and accessible to the public at the polling station.

The petitioner averred that the presiding officer at Orolwo Primary School polling station did not

display to the agents the ballot paper for them to ascertain the vote and that the appointment of the presiding officers and the third respondent returning officer was not done transparently and competitively by the second respondent since no list of the same was ever provided to the petitioner.

The petitioner contended that the appointed presiding officers were sympathisers or supporters of his main challenger and that given that the majority of the voters in Kacheliba Constituency were assisted voters, it followed that the presiding officers who assisted them were compromised and colluded with the agents of the first respondent in misleading the voters by telling them that all the candidates were in the United Republican Party (URP) and by using the petitioner's surname, Lokitare, which was unfamiliar to the voters. Further, the petitioner fared well where the number of assisted voters was low compared to the way he performed in areas where the level of illiteracy was high meaning that the voters were assisted. Further, at Akiryamet polling station, Amakuriat centre, Kituti Primary School and Kameris Primary School where a majority of the voters were not assisted, the petitioner did well despite the said stations being the hometuff of the first respondent. But, in stations such as Kola Water Point, Kodii Water Point, Prompur Water Point and Kapyyemut, the petitioner performed dismally despite his development track record. Also included were areas such as Kasitot, Kaptich Primary and Kosamuk.

The petitioner further contended that in areas such as Angacha Water Point, Lodwar Water Point, Anachar Water Point and Kabikaleong village where voters were assisted, the petitioner performed poorly because the presiding officers colluded with and acted in favour of the first respondent.

The petitioner averred that he contested for the Kacheliba parliamentary seat in general elections held in the years 2002 and 2007 and lost by a small margin but did not contest the results as they reflected the wish of the people. However, in the material election and owing to his development track record, the results as declared did not reflect the wish of the Kacheliba Constituents.

The petitioner contended that the second respondent's presiding officers breached Regulation 82 by failing to submit the results to the returning officer in electronic form as previously directed before ferrying them to the returning officer at the tallying center which was at the Kacheliba Secondary School. Further, the second and third respondents neglected, refused and/or failed to act on complaints raised by the petitioner and his agents on incidences of electoral frauds, malpractices and irregularities.

The petitioner averred that the failure of the BVR/BVI transmission prevented voters of the ability to have their votes counted accurately and led to the inability of the second and third respondents to comply with the requirements of the law and that the petitioner and his agents were excluded from the verification of the election forms as transmitted to the Constituency tallying centre by the presiding officers after they discovered several anomalies in the election exercise.

The petitioner contended that the tallying process was shrouded in secrecy with no means for stakeholders to transparently monitor, account or verify the veracity of the results announced. Further, in view of the constitutional and statutory violations by the respondents and the gross and widespread irregularities and malpractices that occurred in the material elections, the first respondent did not win fairly the Kachelibna Parliamentary seat and accordingly ought not have been declared as such by the second and third respondents. The petitioner's foregoing averments and contentions were partly fortified by the annexed affidavits of his witnesses which were marked as exhibits JLL 2-18. Those who appeared in court included Lomugetilo Angiroy Lotapasia (PW2), Kilas Rionolee (PW3), Siya Lotarmat (PW4), Lomil Aleu Dopale (PW5), Lobua Rochale (PW6), Nguramuk Longole (PW7), Lonomogina Lopkale Mugee (PW8), Julius Kaliamoi Yaraita (PW9), Rashid Michael Ekai (PW10) and Amina Nyongesa Rajab (PW11).

The case for the respondents was based on their respective responses to the petition as supported by their respective affidavits in reply. The first respondent appeared in court and was cross-examined on the contents of his affidavit and so did the third respondent who appeared on his own behalf and on behalf of the second respondent.

In the response dated 29th April, 2013, the first respondent stated that although the EVID (Electronic Video Identification) and the BVR electronic transmissions failed, the election was conducted and concluded freely and fairly as there was the physical principal register and hence the manual voter registration system that was put in place to counter the failure was effective. Further, the election was conducted in a transparent manner, the declaration of the results was done in a free and fair manner by the second and third respondents and all contestants had their agents and representatives at the polling stations who duly signed and approved the results that were announced. The first respondent stated that although polling centres were opened late, the time for voting was extended by the second and third respondents contrary to what the petitioner stated. The first respondent denied that elections offences were committed and contended that there was no fraudulent and fictitious tallying of the results which was done in the presence of the agents representing each candidate and if there were irregularities, the same were not reported to law enforcement officers or the second respondent by the petitioner.

The first respondent also denied the allegation of fraud, rigging and voter bribery made by the petitioner and termed them spurious, imagined and an afterthought as no report of having committed any of the offences was made against him.

It was contended by the first respondent that the present petition is full of hearsay and is unsubstantiated by any evidence and if there were any anomalies in the process then both the petitioner and the first respondent were affected equally such that no unfair advantage was rendered to the first respondent.

Further, there was no rigging or unfairness in the election as demonstrated by the vote margin which was emphatic in favour of the first respondent against the petitioner.

The first respondent therefore prayed for a determination that the election was valid and that he was duly elected as the member of the National Assembly for Kacheliba Constituency.

In the replying and/or supporting affidavit dated 29th April, 2013 which was essentially the first respondent's evidence in chief, the first respondent averred that the election was conducted transparently and without favour to him. That, the failure of the electronic system did not fail the people of Kacheliba or give an undue advantage to him. That, the election process was a hybrid of both the manual and electronic system as the principle register acted as a back up in the event of the failure of the electronic system. That, due to the failure of the electronic system, the second respondent adopted the manual process with the help of the principal register which was accepted by all the participants in the election. That, the electronic system did not only fail in Kacheliba Constituency but in the entire county and therefore, the failure of the system did not deny the petitioner a victory in the election nor can it be said that he lost the elections due to the failure of the electronic system.

It was the first respondent's contention that the signing and filling of form 35 was done in the presence of agents of the candidates and at no time did the petitioner's agents write or register a complaint of any electoral malpractice during the voting and tallying of the votes. The first respondent denied that the second and third respondents prevented people from voting in designated polling station and contended that if it were so, then his (first respondent's) votes were also affected as the petitioner could not claim that all voters in Kacheliba Constituency were his supporters. The first respondent averred that the petitioner had vied for the Kacheliba parliamentary seat on three occasions in the years 2002, 2007 and

2013 and lost in all the occasions thereby indicating that he was unpopular among the people of Kacheliba. Therefore, his failure to file petitions in the past elections did not mean that the elections were fair as it was clear that the elections held in the year 2007 and its aftermath are the basis of the new constitutional and electoral dispensation.

The first respondent averred that he did not collude with the second and third respondents or his agents to rig the elections. He contended that he did not commit election offences as alleged by the petitioner nor were unregistered persons allowed to vote in the election.

The first respondent denied that he shifted votes into ballot boxes with the aid of the second and third respondents as alleged by the petitioner. He termed the allegations a figment of the petitioner's imagination and contended that the petitioner spoke lies by alleging that the voter turnout was higher than anticipated as a result of migration of people to Uganda. The first respondent denied that his agents colluded with the second and third respondents to mark election records to his advantage.

The first respondent maintained and contended that the elections were conducted freely and fairly by the second and third respondents and therefore, losing an election did not mean that it was not free and fair as alleged by the petitioner.

The allegation by the petitioner that election materials were moved out of a polling station during or after the election was denied by the first respondent and so was the allegation that the presiding officers and the returning officer were not competitively appointed. It was the first respondent's contention that the petitioner had an opportunity to challenge the alleged impropriety in the appointment of the said officers but he did not do so and in any event, the first respondent was not the recruitment agent for the second respondent.

The first respondent vehemently denied that voters were misled by his agents together with the second and third respondents to the effect that all candidates were URP candidates. Further, the first respondent denied the allegations by the petitioner that his (petitioner's) surname was unfamiliar and that he (petitioner) fared well in the first respondent's strongholds. It was also denied by the first respondent that the petitioner's agents were compromised and that he (first respondent) gave directions that the results be ferried to the tallying centre other than by electronic form.

It was stated by the first respondent that he was not aware that the petitioner's agents were prevented from participating in the tallying of the votes and that the allegations made in the affidavits deposed by petitioner's witnesses were false in as much as the said witnesses were misled to depone them.

It was the first respondent's contention that this petition is an afterthought and a fishing expedition by the petitioner in an attempt to discredit the election process and the respondents. The first respondent therefore prayed for the dismissal of the petition with costs and contended that the election was conducted in accordance with the law.

As for the second and third respondents, their case is based on the response dated 30th April, 2013 whereupon it was stated that the general election conducted by the second respondent on 4th March, 2013, was the most complex and unprecedented in the history of Kenya such that it required the hiring, training, deployment and supervision of over 300,000 temporary personnel in addition to the regular permanent staff. That, large quantities of equipment some highly sophisticated were acquired and six (6) elective positions had to be filled up i.e. President (and deputy President), Governor (and deputy Governor), Senator, Member of the National Assembly, Woman member to the National Assembly and

County Assembly member.

As regards the petition, the second and third respondents stated that by virtue of the Constitution, the third respondent was mandated to declare the result of a parliamentary election and deliver to the second respondent the original form 35 together with Form 36 as the case may be. That, the parliamentary election at Kacheliba Constituency saw the first respondent of URP garner 10,913 total votes (51.41%) and being the person who scored the higher votes became the person to be declared as the winner.

Accordingly, the first respondent was declared a member of parliament elect on the 7th March, 2013 as mandated by law.

It was contended by the second and third respondents that there is no lawful basis advanced by the petitioner to warrant either the setting aside of the results as announced together with the subsequent declaration of the first respondent as member of parliament elect or the setting aside of the electoral process as a whole.

The second and third respondents stated that in the exercise of their mandate under Article 86 and 88 (4) of the Constitution and section 49 (m) of the I.E.B.C. Act, the second respondent deployed the use of various information technology based systems for the registration of voters, facilitation of voting and the transmission of election results during polling day, all aimed at improving the efficiency of the electoral process and in no way meant to substitute but rather to complement the statutory provided manual electoral process.

Further, the process of electronic voter identification at the polling stations and the result transmission system (RTS) were not abandoned, changed or altered but rather, the presiding officers experienced challenges in the use of the electronic voter identification device (EVID) in some polling stations which subsequently continued with the use of the manual registers largely due to the fact that Kacheliba was a remote area with no power and network coverage. Therefore, the integrity of the electoral process was neither violated, vitiated, breached, compromised or rendered ineffective as to deprive the people of Kacheliba of their legitimate expectation.

It was stated by the second and third respondents that with the challenges faced in the deployment of the EVID and RTS on the election day, the primary manual electoral process were maintained without any challenge from political parties. Further, Regulation 82 of the Election Regulations was not breached since an attempt to electronically transmit provisional results was made but due to technological challenges did not succeed.

It was the second and third respondent's contention that they discharged their mandate in accordance with the Constitution and the electoral laws and declared a valid outcome of the Kacheliba Constituency parliamentary election.

In their replying and/or supporting affidavit dated 30th April, 2013 deponed by the third respondent, the second and third respondents averred that the material election saw a total of **24,317** votes cast out of which the first respondent garnered 10,913 being 51.41% of the total votes cast and eventually being declared the winner on 7th March, 2013 as depicted in the summary of the parliamentary results otherwise known as Form 36 (exhibit marked "NKK 2"). That, the use of the technology was never at all intended by the second and third respondents or the people of Kacheliba to be the sole means of registering voters, identifying them on voting day and transmitting and tallying results. That, the adoption of various technological systems or technology was not meant to replace the legally provided manual

system of voter registration, but was meant to provide an additional layer of efficiency and integrity in the electoral process to Kenya in general inclusive of Kacheliba. Thus, the residents of Kacheliba were not deprived of any legitimate expectation which was anchored in the electoral framework which anticipated a manual electoral process and which legitimate expectation was discharged by the second respondent in accordance with the law.

It was contended by the second and third respondents that elections were conducted in a free and fair manner and all relevant forms indicating that the election was to standard were signed by the petitioner's agents posted all over the Constituency. Further, the results announced were indeed true, accurate, lawful and inapt of any inaccuracies. The second and third respondents averred that Kacheliba was known by the petitioner to be in an area where both road and network connection is very poor and that issues of security and terrain are not friendly. Consequently, some polling stations were far and unaccessible by motor vehicles thus requiring the second respondent to use other expensive alternative means to ensure at most all the registered voters exercised their Constitutional right of voting in the general elections. To that extent, all polling stations were open save some stations where though the election officers were present, voting in the area could not proceed due to the war between the Pokot and the Turkana which led to voters in the area migrating to Uganda making voting impossible.

It was further averred by the second and third respondents that centres such as Chepkondot Primary School and Taker where it was alleged that ballot papers and registers were not received, the same was depicted in form 36 and all candidates were affected in equal measure and so were the other five elective posts.

The second and third respondents reiterated and averred that they as a whole discharged their mandate in establishing accurate, secure, verifiable, accountable and transparent system for conducting the election as exhibited by the electorate systems and safeguards contained in various election laws and regulations formulated by the second respondent and approved by parliament. That, the election process in various polling stations was to the standards required and above board and if there was any discrepancy in the exhibits (see exhibits marked JLL 1 a-b) produced by the petitioner, then it was mere typographical error and did not in any way affect any candidate. That, there was no movement of election material from a polling station to another and if any, the same was by officials of the second respondent who acted in accordance with section 58 (g) of the Elections Act. The second and third respondents denied that voters were ferried to polling stations and averred that the second respondent did not own lorries for such acts, neither did it collude with the first respondent to do so as alleged.

The second and third respondents contended that the election was free and fair to the extent that the petitioner's agents signed all the forms 35 and polling day diaries and as such, there was no rigging in Kacheliba Constituency.

As regards the alleged non registered voters, the second and third respondents contended that the laws governing elections were strictly adhered to and at no time did someone who was not in the register vote. Further, the presiding officer, after counting the results in their polling stations, prepared, signed, dated forms 35 and gave the copies of the same to the candidates or their available agents in accordance with Regulation 79 of the Election Regulations (see, forms marked "NKK 4")

The second and third respondents contended that by dint of Regulations 72 of the Elections Regulations, it was the presiding officer who was mandated to assist a voter (not an agent or candidate) or a person elected/nominated by the voter who was required to undergo an oath of secrecy in accordance with the Elections Act.

The second and third respondents averred that the petitioner's agents made no formal complaint all through the electoral process and they infact signed forms 35 and knew that they would refuse to sign if there were any anomalies or irregularities. That, there was no breach of any law, neither was there any disenfranchisement resulting from the failure of the BVR/BV1 transmission.

With regard to the affidavits deponed by the petitioner's witnesses, the second and third respondents produced affidavits in reply (exhibits marked NKK 6 a-e) deponed by respective presiding officers and/or officials at respective polling stations. Some of the said officials appeared in court and were cross-examined on the contents of their respective affidavits. These included **Longal Donato (RW3)**, **Mark Lotee Akange (RW 4)** and **Moru Aleper James (RW5)**

From all the foregoing facts contained in the averments and contentions by the Petitioner and the respondents in their respective affidavits together with those of their respective witnesses, it is apparent that the bone of contention is the manner in which the parliamentary elections at Kacheliba Constituency was conducted on the material 4th March, 2013. Whereas, the petitioner believes that the said elections were a sham in as much as they were conducted in a flawed manner, the respondents contend that the elections were conducted in a free and fair manner and in accordance with the Constitution and laws governing the electoral process.

It is also the petitioner's belief that the Constitution and the electoral laws were deliberately disregarded by the second and third respondents for the sole purpose of rendering an advantage to the first respondent such that the outcome of the election as declared by the second and third respondents did not reflect the true will of the people of Kacheliba Constituency.

The petitioner alleges that the first respondent colluded with the second and third respondents to not only "rob" him victory but also to engage in fraudulent and unlawful activities which ensured that the will of the people of Kacheliba was diverted to his (first respondent) advantage and to his (petitioner) disadvantage.

Indeed, any credible and proven allegation of impropriety against the respondents during the material electoral process would invariably render the entire process a sham and a nullity.

It would therefore be within the court's power to invalidate the entire process and order for fresh elections.

The right to vote is accepted as a fundamental human right and its enforcement and protection must be the duty of every election court. Every election petition presents the court with an opportunity to give effect to such voting right. **The Universal Declaration of Human Rights 1948** and **The United Nations Conversant on Civil and Political Rights**, are the main human rights instruments which emphasize the right of citizens to participate in genuine periodic elections which guarantee free expression of the Will of the electors for purposes of conferring specific authority on the duly elected leaders. These two instruments are part of our Kenya Laws by dint of Article 2 (6) of the Constitution which provides that:-

“Any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this Constitution.”

The right to free, fair and regular elections based on universal suffrage and the free expression of the Will of the elections is entrenched by Article 38 (2) and (3) of the Constitution.

The right of every eligible citizen to determine who will represent them in any given position is a basic cornerstone of any democracy and a pre-requisite to social cohesion and solidarity.

Elections give voice to the political will of the people and must ordinarily be conducted in an environment which is respectful to human rights if they are to be truly free and fair. They are the means through which citizens directly exercise their sovereign powers and must be conducted in accordance with the value falling under Article 10 of the Constitution.

Article 48 and 50 of the Constitution guarantee access to justice for all persons and entrench the right of every person to have any dispute that can be resolved by the application of law decided in a fair and public hearing. Indeed, this current dispute is an exercise of the petitioner's aforesaid Constitutional rights.

An election dispute is regarded as a special category of a civil disputes and for a petitioner to successfully prosecute such a dispute, he must adduce credible and sufficient evidence to support the allegations in his petition on a standard higher than is applicable in ordinary civil suits but lower than the standard of proof required in ordinary criminal cases. However, with regard to statistical facts or facts intended to establish election offences thereby imputing criminal offences, the standard of proof must be beyond reasonable doubt because such offences attract serious sanctions (see, **Onalo Vs. Ludeki & Others (2008) 3KLR 614**)

Since the petitioner contends and maintains that the material elections were not free and fair in as much as the relevant provisions of the Constitution and the electoral laws were disregarded or breached, it would be vital to consider some of those provisions. This would bring us first and foremost to chapter seven (7) of the Constitution which provides for the electoral system and process.

Thus, Article 81 of the Constitution requires that the electoral system complies with principles "inter-alia" freedom of citizen to exercise their political rights under Article 38, universal suffrage based on the aspiration for fair representation and equality of vote and free and fair elections, which are by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

The I.E.B.C., is the body entrusted with the legal mandate to conduct elections. It is established under Article 88 of the Constitution and under Article 86, it is required to ensure that firstly, whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent. Secondly, the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station. Thirdly, the results from the polling stations are openly and accurately collated and promptly announced by the returning officer and fourthly, appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

Article 87 (1) of the Constitution provides for electoral disputes and donates to parliament, the power to enact legislation to establish mechanisms for timely settling of electoral disputes. In that regard, The Elections Act No. 24 of 2011 was enacted as ***"an Act of Parliament to provide for the conduct of elections to the Office of the President, the National Assembly, the Senate, County governor and County assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes"***.

The Elections (Parliamentary and County Elections) Petition Rules 2013 (herein, the Rules) were created pursuant to the powers conferred by section 96 of the Elections Act 2011 (herein, the Act).

Under section 109 (1) of the Act, the I.E.B.C. is empowered to make regulations generally for the better carrying out of the purposes and provisions of the Act. In that regard, the I.E.B.C. came up with the Election (General) Regulations 2012 (herein, the Regulations).

Part two of the Elections Act provides for registration of voters and determination of questions concerning registration. Towards that end, section 3 (1) and (2) provides for the right to vote, in that, an adult citizen shall exercise the right to vote specified in Article 38 (3) of the Constitution in accordance with this Act and that, the right to vote shall be exercised if the citizen is registered in the Principal Register of voters which shall be compiled and maintained by the I.E.B.C. (The Commission) and which according to section 4 (1) of the Act comprise of a poll register in respect of every polling station, a ward register in respect of every ward, a Constituency register in respect of every Constituency, a County register in respect of every county and a register of voters residing outside Kenya.

According to section 4 (3) of the Act, the principal register of voters shall contain such information as shall be prescribed by the commission.

Election Offences are provided for under Part Six (VI) of the Act. These include offences relating to the register of voters and voters card (section 56), offences relating to multiple registrations as a voter (Section 57), offences relating to voting (Section 58) and offences of members and staff of the Commission (Section 59). Other offences include those relating to treating (Section 62), undue influence (Section 63), bribery (Section 64), use of force or violence (Section 65) use of national security organs (Section 66) and generally offences relating to elections (Section 67).

Part Seven (VII) of the Act provides for Election disputes Resolution. Section 82 of the Act provides for scrutiny of votes and the mode of scrutinizing the votes. Thus, an election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for scrutiny of votes to be carried out in such manner as the elections court may determine.

In this case, the question relating to scrutiny/recount of votes/ballot papers was herein above dealt with and determined. This was with regard to prayers one (1) to five (5) of the Petition.

Be that as it may, Section 83 of the Act provides for non-compliance with the law in the following terms:-

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

Section 86 (1) of the Act provides that:-

“An election court shall at the conclusion of the hearing of an election petition, determine the validity of any

question raised in the petition , and shall certify its

determination to the commission which shall then notify

the relevant speaker”.

And, section 87 of the Act provides for the report of the election court on election offences. Such report is to be send in writing to the Director of Public Prosecutions (DPP), the Commission and the relevant speaker.

Basically, the Election Petitions Rules 2013 and the Election Regulations 2012, provides for the procedural aspect of the conduct of the entire electoral process and matters incidental thereto. Indeed, most of the complaints made herein by the petitioner relate to the manner in which the parliamentary election at Kacheliba Constituency was conducted by the second and third respondents. Among the complaints was one related to the usage of the Biometric voter Registration(BVR), the electronic voter Identification Device (EVID) and the Results Transmission System (RTS).

Generally, the complaint had to do with the failure of the information technology systems applied by the I.E.B.C. to ensure transparency and integrity in the election exercise. Paragraphs 10 to 12 of the Petition inclusive of Paragraphs 6 to 9 as well as paragraph 46 of the supporting affidavit captures this complaint. The petitioner contended that the people of Kacheliba were deprived of their legitimate expectation when the usage of the aforementioned electronic system was suddenly abandoned by the I.E.B.C. in favour of the old and unsecure manual system thereby providing opportunity for manipulation and rendering the whole process devoid of transparency and integrity.

The petitioner believed that whether by design, negligence or mere incompetence, the failure of the electronic transmission system prevented voters of the ability to have their votes counted accurately thereby leading to the inability of the second and third respondents to comply with the requirements of the law in the conduct of the elections.

To this question of the electronic system, the second and third respondents stated that the system experienced technical challenges such that it could no longer operate effectively thereby resulting in the usage of the manual systems.

It was their contention (i.e. the second and third respondents) that the electronic system was not a substitute but was rather intended to compliment the statutorily provided manual system. Further, the use of the primary manual system of voting, counting, transmission, tallying and announcement of results was never challenged after being communicated to all those participating in the elections.

Notwithstanding the foregoing facts regarding the electronic system, it was apparent that neither the petitioner nor the respondents considered it a substantial factor in this matter and this explains why it was not identified as one of the issues for determination. However, it was a known fact that the electronic system broke down and was abandoned in the midst of the electoral process such that the second respondent had to revert to the manual process. Herein, despite the negative attitude displayed by the petitioner with regard to the failure or breakdown of the electronic system and in particular during the process of transmitting the results electronically, there was nothing in the form of credible evidence to prove that the breakdown was a deliberate act or a sabotage with a view to manipulating the results of the election in favour of any of the candidates.

Judicial notice may be taken of the fact that the breakdown was a national catastrophe as it affected

each and every segment of the elections held on the 4th March, 2013, right from the presidential election to the County Representatives elections. The breakdown was not therefore a factor intended to favour the first respondent at the expense of the petitioner as implied by the petitioner.

In the now famous presidential Election Petition No. 5 of 2013 **Raila Amolo Odinga Vs. I.E.B.C. & Others**, the Supreme court of Kenya noted that in Kenya, electronic technology has not yet achieved a level of reliability and cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. So much for the unreliable electronic system.

Other complaints advanced by the petitioner in showing that the elections at Kacheliba were a sham related mostly in the manner in which the electoral documents were processed and the manner in which the voting process was conducted in some specific polling stations. Thus, the petitioner alleged that there was manipulation of returns mostly through the electoral form 35 such that in some instances, the votes cast exceeded the number of registered voters.

The petitioner also alleged that the counting and tallying of votes was inaccurate, in that different results were strangely recorded in the declaration forms 34, 35 and 36 thereby rendering the results false, fictitious, unlawful and fraudulent.

That, at several polling stations and the tallying centre incomplete, unsigned and unverified forms 35 were used in the counting and tallying of votes. That, in several polling stations the number of votes cast exceeded the total number of registered voters.

The petitioner further alleged that there were instances of electoral offences committed by electoral officials either by themselves or in cahoot with the first respondent.

There was on the periphery a complaint relating to the recruitment of the election officials particularly the Returning Officer (RO) and the Presiding Officers (PO).

The petitioner alleged that the Returning officer and the presiding officers at Kacheliba were not recruited in a transparent and competitive manner. However, this complaint was not supported by any cogent and credible evidence. There was nothing to establish, as alleged by the petitioner, that the Returning Officer and his presiding officers were appointed on the basis that they were sympathizers and supporters of his main challenger i.e. the first respondent. Further, there was nothing to show that the second respondent violated Regulation 3 (2) and (4) of the election Regulations 2012 in recruiting its temporary and permanent staff.

There was a futile attempt by the petitioner to create the impression that the Returning Officer and all the presiding officers in all the 174 polling stations within Kacheliba Constituency were sourced by the first respondent for and on behalf of the second respondent.

Invariably, all the complaints raised by the petitioner were intended to discredit the entire electoral process and as such they would form the basis upon which the issues for determination are to be resolved regard being given to the fact that the burden of proof rests with the petitioner.

In a Uganda case, **Mugeria Peter Vs. Mudiabole Abedi Nassir Election Petition Appeal No. 30 of 2011**, the Court of Appeal of Uganda stated with regard to burden of proof in election petitions, that the burden of proof lies on the petitioner to prove the assertions in the election petition and the standard of proof required is proof on a balance of probabilities according to section 61 (1) and (3) of the Parliamentary elections Act and though the standard of proof is set by the statute to be on a balance of

probabilities, because of the public importance of an election petition, the facts in the petition must be proved to the satisfaction of the court. A petitioner has a duty to adduce credible and/or cogent evidence to pave the allegations to the stated standard of proof.

In this country, as already noted hereinabove, the standard of proof is higher than balance of probabilities and lower than beyond reasonable doubt (see **Muliro Vs. Musonye & Another (2008) 2 KLL 52, Khaoya Vs. Sifuna Election Petition No. 12 of 1993**).

It is however, incumbent upon the petitioner to adduce credible and satisfactory evidence to prove allegations made against the respondents. The evidence adduced is generally intended to show that certain irregularities affected the outcome of the elections (see, **Mututho Vs. Jayne Kihara & Others Civil Appeal No. 102 of 2008**).

The success of a petition would depend mostly on the evidence adduced in support thereof. Such evidence must not only be cogent and credibly but must also satisfy the election court.

In defining the meaning of the word "satisfied", the Court of Appeal in Uganda in Election Petition Appeal No. 30 of 2011 (supra), applied the observation by Lord Denning in **Blyth Vs. Blyth (1966) AC 643**, thus:-

"The courts must not strengthen it, nor must they weaken it. Nor would I think it desirable that any kind of gloss should be put upon it. When Parliament has ordained that a court must be satisfied only parliament can prescribe a lesser requirement. No one whether he be a judge or juror would in fact be "satisfied" if he was in a state of reasonable doubt"

Bearing in mind the Principles of Law and the burden and standard of proof required in this election petition whose objective is to inquire as to whether the results of the Kacheliba parliamentary elections as announced and/or declared by the second and third respondents reflected the expression of the Will of the voters and with regard to the first issue for determination i.e. whether the Kacheliba National Assembly elections conducted on 4th March, 2013 were conducted in accordance with the Constitution and the Elections Act and the rules made thereunder, the petitioner's case was anchored on four pillars viz; appointment of presiding officers, disenfranchisement of voters, counting of votes and declaration of election results and malpractices or election offences by the first respondent and his agents.

On appointment of electoral officials such as the Returning Officer and the Presiding Officer, this court noted hereinabove that the appointment of the said officer was done in accordance with Constitutional principles and that Regulations 3 and 5 of the elections (General) Regulations 2012 were not flouted as alleged by the petitioner. There was no tangible evidence proving that the second and third respondents flouted the law in the appointment of the election officials. It is without doubt that the petitioner having concluded that all the presiding officers were biased against him assumed that the first respondent played a major role in their recruitment. Unfortunately, courts do not act on mere assumption

unsupported by hard evidence. In any event, the petitioner never raised any formal complaint as he was required to do in regard to the alleged irregular appointment of the election officials.

On the alleged disenfranchisement; the petitioner alleged that in some polling stations, the voting hours were not extended yet the same were opened late and in other polling stations, voting materials inclusive of ballot papers were not provided (e.g. Chepkondot Primary School and Takar all in Kasei ward).

The petitioner alleged that some polling stations at Kasei and Kasitot did not open and that at Kasitot the names of voters were marked and crossed by polling clerks yet the voters had not voted at all.

Article 38 of the Constitution provides for the right to free and fair elections based on universal suffrage and the free expression of the Will of the electors. The evidence availed herein by the second and third respondents has shown without any substantial dispute that this important constitutional right afforded by Article 38 of the Constitution was not withheld from any person who presented himself to participate in the elections at Kacheliba. There was nothing substantial coming from the petitioner to show that the voting exercise at Kacheliba was conducted without adherence to relevant Constitutional and Statutory provisions.

The large turnout of the voters at 86.94% attested to the strict adherence of the law by the second and third respondents during the voting exercise and the manner in which it was conducted. The petitioner relied mostly on hearsay to allege that voters were barred from voting or that voting materials such as ballot papers were marked or crossed by polling station officials or that voting materials were not availed in some polling stations.

The only witness who alleged that his right to vote was violated by election officials was **Lomugetilo Angiroy Lotapasia (PW2)**. He said that he arrived at Kasitot polling station either at 1.00 p.m. or 3.00 p.m. and was told that his name had been crossed thereby implying that he had already voted. Consequently, he was not allowed to vote. He said that some other voters were refused to vote for the same reason that their names had been crossed. Lotapasia (PW2) denied that he had gone to polling station earlier and voted. He said that other than being refused the chance to vote, the whole voting exercise progressed well. He did not see any reason to complain about his being denied the right to vote.

The petitioner's agent at the said Kasitot polling station, **Kilas Rionolee (PW3)** said that he only saw Lotapasia (PW2) arguing with election officials over the crossing of his name but he did not see the name being crossed. He (PW3) did not report Lotapasia's complaint to anybody. He said that there were other people who raised similar complaints.

The presiding officer at Kasitot polling station No. 158 was **Mark Lotee Akange (RW4)**. He confirmed that the polling station was opened at 7.10 a.m. and was closed at 6.00 p.m. instead of 5.00 p.m. due to having been opened late. He said that by 6.00 p.m. all the voters had cast their votes. He also said that during the voting exercise a voter whom he could not remember by name had complained that he had been refused to vote by a polling clerk. He (RW4) perused the register and confirmed that the voter had already voted and could not be allowed to vote twice.

Most probably, the presiding officer (RW 4) was referring to Lotapasia (PW2) as the voter who could not be allowed to vote twice. Indeed, if Lotapasia had already voted and his name crossed, he could not be allowed to vote twice or as it were, "take a second bite at the cherry". Such is not an uncommon occurrence in any election. His allegation that his name was crossed without having voted was unsupported by any other credible evidence. The other alleged voters with a similar problem were not

called to testify and render credit to the allegation.

There was great doubt in the credibility of the evidence by Lotapasia (PW2). He and other petitioner's witnesses agreed that the election exercise was conducted smoothly despite a few insignificant hitches here and there. None of them came up with significant evidence attributing the hitches to deliberate and illegal activities on the part of the election officials at the various polling stations.

Most likely than not, Lotapasia (PW2) and others were voters whose intention was to commit the election offence of voting more than once.

Basically, the allegation of disenfranchisement was clearly unsupported by credible evidence from the petitioner.

As regards voting materials, the third respondent/Returning officer, **Norbert Kimutai Kimei (RW2)** explained that voting materials were dispatched to the various polling stations from 8.00 p.m. on 3rd March, 2013 and that due to the delays in obtaining the materials from their headquarters extra materials supplied to some polling stations were moved to stations which had not received any. He confirmed that some polling stations were opened late but this was compensated by late closure. He said that polling stations such as Chepkondol primary school, Takar and Tokogh were reflected in the electoral form 36 as having recorded nil votes for all candidates meaning that no candidate obtained advantage over the others due to the alleged lack of voting materials.

The Returning Officer (RW 2) further stated that in some polling stations the voters did not turn up although the stations were opened and manned by election officials. He attributed the position to insecurity fanned by the frequent border conflicts between the Pokot and Turkana Communities. He indicated that the most affected polling stations were those situated in Kasei and Alale since the areas are at or near the Pokot/Turkana border.

From the foregoing undisputed evidence by the Returning officer it cannot be said that voters from Kacheliba Constituency were denied the right to vote by non-availability of voting materials or by the non-opening of some polling stations or by the late opening of some polling stations as alleged by the petitioner.

As to the counting of votes and declaration of results what springs into mind or focus is the manner in which the electoral forms 35 and 36 were compiled and prepared by the second respondent through its officials at various polling stations and the central tallying centre.

Forms 35 and 36 are vital documents in the election process as they give a summary of the results of an election and it is on the basis of their accuracy that the credibility of the election is rated.

If the irregularities noted on such forms are so grave, it may lead to a conclusion that the election was not transparent, free and fair. However, if the irregularities have no effect or substantial effect on the result, then there would be no proper basis for nullifying the election. (see, **Clement Kungu Waibara Vs. Bernard Chege Mburu Civil Appeal No. 205 of 2011 (C/A)**).

Herein, the allegations made by the petitioner regarding the process of counting votes and declaration of results was effectively a tacit indictment of the second respondent and its officers performance in the parliamentary election at Kacheliba Constituency. So that, on an illustrative scale of fifty (50), the petitioner gave the second respondent a performance rate of between ten (10) to fifteen (15). Indeed, if the second respondent's performance was so much below par, then it would not be far-fetched for

anyone to opine that the election was a complete fiasco and a sham as to be free and fair.

Basically, the contention by the petitioner was that relevant election Regulations related to the counting of votes and declaration of results were flouted by the election officials. Such Regulations included Regulations 73 (2), 75(2), 79(3)(4) and 5 and Regulation 83. These are found in Part 13 (XIII) of the Election Regulations 2012.

the petitioner alleges that entries made in the polling station diary were not consistent and did not tally in respect of the number of ballot papers in all the elections conducted on 4th March, 2013.

In that regard, the petitioner felt vindicated by the evidence of the election officials at Orolwo Primary School polling station No. 31 and at Kosamuk Manyatta polling station No. 167 (i.e. RW3 and RW5) indicating that there was great disparity in the number of ballot papers used in the Presidential election compared to the number used in the parliamentary election and further indicating that about fifty (50) ballot papers out of at least 699 could not be accounted for.

However, **Longal Donato (RW3)**, stated that some of the voting materials were taken to other stations which did not have adequate materials and that the transaction was recorded in the polling diary. He averred that the registered voters at Orolwa polling station were 695 and those who turned up to vote were 585 thereby indicating that the election at the polling station was free and fair.

Donato (RW3) further stated that about 750 ballot papers were received for the parliamentary election and that about 700 were used while the balance was collected for use in other stations. He said that 62 ballot papers were unused.

From the foregoing, it is clear that Donato was mixed up when it came to numbers. His calculation of the used and unused ballot papers was not exactly correct. The mix up did not however, translate to significant none accounting of ballot papers nor did it in any significant way affect the credibility of the voting exercise at Orolwo polling station.

Moru Aleper James (RW5), was the presiding officer at the Kosamuk Manyatta polling station. He indicated that there could have been a difference in the tally of the ballot papers respecting the parliamentary election and the senate election but for the parliamentary election he received a total of 350 ballot papers of which 287 were used and reflected in the polling diary. He said that there were 63 unused ballots and two (2) spoilt ballots.

The evidence by Moru (RW5) with regard to parliamentary elections did not show anything untoward. The fact that the registered voters were 313 and those who turned up to vote were 287 was a clear indication that the overall credibility of the election at the material polling station engulfed any minor disparity that may have been encountered in the ballot papers.

This court must therefore find that there was (if any) insignificant breach of Regulation 73 (2) by election officials in specified polling stations.

As to Regulation 75 (2), the petitioner held the view that the presiding officers failed to indicate the sequence in which they counted the votes meaning that the counting was conducted in violation of the law.

Regulation 75 (2) provides that the presiding officer shall carry out the counting of votes for the respective elective posts in a particular order. However, the allegation by the petitioner with regard to

the provision is generalized as to appear vague. There is no mention of any specific polling station and in any event, the allegation was unsupported by evidence.

The petitioner contended that Regulation 79 (3) (4) and (5) was flouted in that in polling stations No. 84, 118, 121, 141 and 162, the petitioner's agents did not sign Forms 35 and the reasons for the omission were not given. Further, in polling station No. 69, there was indication that Form 35 was not completed at the polling station but at the tallying centre since the reason given for the failure of the petitioner's agents to sign the form was that the form had been left at the polling centre.

It was the petitioner's contention that in polling stations such as No. 26, 77, 118, 133, 137 and 141, the forms 35 were neither signed by the presiding officer nor the deputy presiding officer and did not even bear the stamps of the second respondent yet the results contained therein were used in compilation of the final tally of results.

Regulation 79 (3) provides that where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.

This provision imposes an obligation on a candidate or his agents but not election officials. The obligation is imposed upon election officials by Regulation 79 (4) and Regulation 79 (5).

However, the refusal or failure of a candidate or his agent to sign a declaration form or to record the reasons for their refusal to sign would not by itself invalidate the results announced by dint of Regulation 79 (6). The absence of a candidate or his agent at the signing of a declaration form or the announcement of the results would also not invalidate the results announced (see, Regulation 79 (7)).

As regards the Forms 35, the petitioner's witnesses (PW 3, 7, 8, 10 and 11) who were his agents at the elections indicated that the elections were generally conducted in a proper manner and that they signified as much by affixing their signatures on Forms 35. None of them made allegations of irregularity or impropriety in the completion of the forms by the electoral officials. Indeed, most of the Forms 35 exhibited herein as "NKK 4" by the second and third respondents contain the signatures of the candidates agents, a fact that was undisputed by the petitioner although he alleged, without evidence, that some of his agents were compromised. He also alleged, again without proof, that the presiding officers altered the results on their way to the tallying centre from the polling stations because according to his own count of votes, he had garnered 11,400 votes yet it was declared at the tallying centre that he had garnered 8,559 votes. He had nothing to show and confirm that he indeed garnered 11,400 votes. He did not even bother to find out what his main opponent had garnered. He was only interested in his own votes. He was the only person complaining about the conduct of the elections by the second and third respondents. His agents and witnesses who deponed affidavits and appeared in court for cross-examination highly rated the conduct of the elections by the election officials despite few hiccups and irregularities which may have occurred in the compilation of Forms 35 which formed the basis of the announcement of the results from all the 174 polling stations.

The third respondent confirmed that the results from all the polling stations were announced in the presence of all candidates and none of them raised any complaints pertaining to Forms 35.

In any event, the polling stations alleged to have had irregularities were too few to have had any significant effect on the result.

Further, even in these polling stations alleged to have heard irregularities, those irregularities had not

been shown to have been ill motivated or that taken as a whole they would have tilted the balance against the first respondent.

In sum, the petitioner's contention that the Forms 35 were either irregularly completed or lacked the essential signatures or official stamp of the second respondent could not be upheld on the basis of the available evidence.

The same position would apply with respect to form 36 which the petitioner claimed that it was not dated and that it was prepared in his absence and that of his agent. He exhibited two copies of Form 36 (JLL 1 -b) to give credit to his claim. He alleged that the form was based on erroneous results from polling stations and that Regulation 83 of the Election Regulations was flouted by the third respondent by his failure to tally the results from the polling stations in respect of each candidate, failing to complete Form 36 in the presence of the candidates and/or their agents and failing to sign and date the form.

The petitioner believed that the result as declared and recorded by the third respondent was a product of manipulation of Forms 35 thereby rendering the entire parliamentary election exercise at Kacheliba Constituency null and void.

However, the third respondent confirmed that the results were declared on 6th March, 2013 and that the form marked JLL 1 (a) produced by the petitioner was unverified at the time of its issuance while the form marked JLL 1(b), also produced by the petitioner was the later copy which gave a true reflection of the results.

The third respondent admitted that he did not date form 36 but he confirmed that his signature was affixed thereon. He exhibited his copy of Form 36 (Exhibit marked "NKK 2") which shows that it was signed and stamped. He indicated without substantial dispute from the petitioner that his exhibit "NKK 2" was more or less in consonance with the petitioner's exhibit marked JLL 1 (b).

Clearly, there was no credible evidence forthcoming from the petitioner showing that the third respondent Returning officer flouted Regulation 83 of the Election Regulations. In any event, the petitioner was at the tallying centre during the announcement of the results. He did not raise any complaint at the time thereby implying that his allegations with regard to the completion of forms 35 and 36 by the electoral officials including the third respondent were an afterthought prompted by the fact that he lost the election.

The words "if present" in Regulation 83 denotes that the presence of a candidate and/or agent during the tallying and announcement of the election results is not a necessity and the mere failure to date Form 36 is not by itself a ground for nullification of an election which was largely conducted in accordance with the law.

Coming to the allegations of malpractices and/or election offences on the part of the first respondent and/or his agents, it was incumbent upon the petitioner to prove beyond reasonable doubt that indeed the first respondent either on his own or through his agents bribed, treated or unduly influenced voters at Kosamuk polling station to vote for him. Such election offences attract serious and heavy penalties/sanctions and are capable of impacting negatively on the integrity of an election process.

Generalized complaints in regard to allegations of electoral malpractices are insufficient to invalidate an election.

In **Onalo Vs. Ludeki & Others [2008] 3 KLR 614**, it was held that:-

“The burden of proof of election offences like bribery etc as per the Election Offences Act in the election petition are higher because they are in the nature of quasi criminal and if the offence is not proved to the satisfaction of the court and if the court is not satisfied and when it is in doubt and where a reasonable doubt exists, the same cannot be held to be proved again the respondent”.

Herein, it was evident that the petitioner relied on hearsay and/or unreliable witnesses to not only discredit the first respondent but also the entire electoral process by alleging that unregistered voters from Uganda were transported in the first respondent's lorry to vote at specified polling stations and that the first respondent or his agents bribed voters and election officials.

Two names featured prominently in the bribery allegations i.e. Calisto Lomonyang (Calisto) and Michael Kimbur (Kimbur).

The first respondent denied that he engaged in acts of bribery and termed the allegations by the petitioner in that regard as spurious, imagined and an afterthought as much as they were never reported to law enforcers.

Witnesses who deponed affidavits in support of the allegations included Kilas Ronolee (PW3), Siya Loitarmat (PW4), Lomil Aleu Dapale (PW5), Lobua Rochale (PW6), Ngiranuk Longole (PW7), Lononogwa Lopkale Mugee (PW8) and Julius Kalimoi Yaraita (PW9). Even as he denied the allegation that his lorry was used to transport or ferry voters from Uganda or elsewhere, the first respondent admitted that he operates a business company which owns a lorry Reg. No. KBK 511E. But, he went further to state that the lorry was at the material time in Kapenguria with his driver one Jeff Kalanga.

The first respondent also admitted that he knew the two individuals called Calisto and Kimbur. He however, indicated that they were not his agents as alleged and that whereas Calisto was an agent for a certain political party in the presidential election, Kimbur was a candidate vying for the post of deputy governor under a political party associated with him (first respondent).

Although the petitioner's witnesses implicated both Calisto and Kimbur, none of them adduced sufficient and credible evidence to prove to the satisfaction of the court and beyond reasonable doubt that indeed the two people acted as agents for the first respondent and together they committed acts of bribery intended to influence voters to vote for the first respondent.

None of the witnesses could establish a linkage between the first respondent and the two people with regard to bribing and influencing voters.

Kilas (PW3) talked about Kimbur giving people money. Neither did he receive any money nor

report the incident to anybody. Siya (PW4) referred to Kimbur but said that he gave money to children yet it is a known fact that children are not eligible to vote. He also did not report the incident to the police.

Lobwa (PW6) did not also report to the police yet he alleged that he saw the first respondent dishing out money to people whom he (PW6) knew but did not mention.

Nguramuk (PW7) talked of seeing Calisto giving money to women so that they could vote for a certain political party yet he did not hear him tell the women to vote for the said party. He also made no report to the police or anybody else regarding the incident.

Lonomogwa (PW8) just heard people saying that the first respondent had given money to people at Kosamuk polling station yet he did not see him at the said station.

Yaraita (PW9), a local chief, involved himself in partisan politics oblivious of the civil service code of regulations yet he alleged that he was maintaining security at Amakuriat polling station. He said that he heard people saying that they were being influenced to vote for a particular political party and that agents of a political party associated with the petitioner were bribed by a particular political party to absent themselves from respective polling stations and that he knew the said agents yet he did not report the matter to his superior officer (The area D.C.) or even the police. He also failed to take necessary action as a law enforcer if indeed there were illegal activities which had taken place or were taking place.

Depale (PW5) alleged that he saw a lorry ferrying voters from Uganda to Kosamuk polling station. He claimed that the voters were registered and unregistered and that he knew them. Yet, he did not mention them. He said that the lorry belonged to the first respondent yet he did not know its registration number until he was given the same by an unnamed person. He did not have anything to prove the alleged ownership of the lorry by the first respondent.

In sum, all the aforementioned witnesses did not provide cogent and credible evidence to prove the allegations of malpractices and criminal conduct on the part of the first respondent or any other person. Their respective affidavit and oral evidence in that regard was not only unreliable but was also sufficiently discredited during cross-examination.

The ultimate considered opinion of this court is that the allegations by the petitioner intended to cast doubt on the credibility and integrity of the parliamentary elections at Kacheliba took at most three (3) dimensions viz:-

I. ***Non-adherence of the Supreme Law and the electoral laws by the respondents.***

II. ***Involvement of the respondents jointly and/or separately in unlawful criminal conduct with the intention of directing the “winner’s trophy” to the first respondent.***

III. *Widespread irregularities particularly during the process of voting, counting and tallying votes through misleading voters and manipulation of electoral forms by the election officials.*

However, all the allegations were either discredited and disproved by the respondents' responses and/or evidence or were totally unproven by cogent, credible and satisfactory evidence as noted hereinabove and were there was slight or part proof of the allegations particularly those related to irregularities in the compilation of the electoral forms 35 and 36 or in the counting and tallying of the votes or in the verification process, the irregularities were clearly attributable to human error and/or poor performance of duty by some election officials and agents representing the candidates or their political parties in some polling station. At worst, the election officials and the agents were less than diligent if not outright incompetent, reckless and/or negligent. It is no wonder that any suspicion relating to the integrity of the entire electoral process was germinated by the careless manner in which some electoral officials and agents performed their duties.

Most importantly, the irregularities which were partly proved by the petitioner were not so grave or substantial as to affect the ultimate result of the election in any significant way particularly with regard to the number of votes garnered by each of the candidates.

The vote margin between the petitioner and the first respondent was reasonably wide such that any irregularity, mistake or error in the calculation of the figures or otherwise could not have translated into a numerical "tsunami" to the advantage of the petitioner and the disadvantage of the first respondent.

Even if the petitioner were to gain additional votes and the first respondent to lose some votes in the rectification of any errors, mistakes or irregularities, the first respondent's "winning poise" would have been maintained regard being given to the fact that the irregularities cut across the board and did not benefit any of the candidates.

The transgression which may have occurred during the election was not proved to have been deliberate and even if there was transposition of the results, this would not have significantly affected the credibility of the election and the ultimate result.

The determination of the issues herein was based on a qualitative rather than a quantitative approach. The number of valid votes achieved by each of the candidates and in particular, the petitioner and the first respondent was not really a disputable point and more so, when there was no cogent and credible evidence to show that the number of votes cast exceeded the number of the registered voters as alleged by the petitioner. As to the quality of the election, this court is satisfied that despite minor and insignificant errors, mistakes and irregularities, the parliamentary election for Kacheliba Constituency held on 4th March, 2013 measured to acceptable Constitutional and Statutory standards for any reasonable observer to say without doubt that the election was free and fair such that it reflected the Will of the Kacheliba electorate.

Consequently, with regard to the first issue for determination this court holds that the Kacheliba National Assembly elections conducted on 4th March, 2013 were conducted in accordance with the Constitution and the Elections Act and the Rules made thereunder. It would therefore follow with regard to the second issue for determination that the first respondent was validly elected and declared as the winner of the seat of the National Assembly Kacheliba Constituency.

This petition was therefore devoid of merit. It must and is hereby dismissed with costs to the three respondents as the petitioner cannot in the circumstances possibly be entitled to the reliefs sought in the petition or any one of them.

Ordered accordingly.

[Delivered and signed this 16th day of July, 2013.]

J.R. KARANJA.

JUDGE.



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