Case Number:	Civil Appeal 49 of 2013
Date Delivered:	14 Mar 2014
Case Class:	Civil
Court:	Court of Appeal at Kisii
Case Action:	Judgment
Judge:	John walter Onyango Otieno, Daniel Kiio Musinga, Sankale ole Kantai
Citation:	Paul Gitenyi Mochorwa v Timothy Moseti E. Bosire & 2 others [2014] eKLR
Advocates:	Mr. Otachi, assisted by Mr. Ogeto Mr. Omwenga, counsel for the appellant. Mr. Ligunya, counsel for the 1st respondent Mr. Ojiambo, counsel for the 2nd and 3rd respondents.
Case Summary:	-
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Kisii
Docket Number:	-
History Docket Number:	Petition 8 of 2013 2013
Case Outcome:	Appeal dismissed.
History County:	Kisii
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISII

(CORAM: ONYANGO OTIENO, MUSINGA & KANTAI JJ.A)

CIVIL APPEAL NO. 49 OF 2013

BETWEEN

PAUL GITENYI MOCHORWA..... APPELLANT

AND

TIMOTHY MOSETI E. BOSIRE …..... 1ST RESPONDENT

FREDRICK HEZEKIAH OWINO ODENGE

RETURNING OFFICER …..... 2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION..... 3RD RESPONDENT

(Appeal from the Judgment of the election court (High Court of Kenya at Kisii)

Hon. Muriithi J. dated 30th September, 2013

in

KISII ELECTION PETITION NUMBER 8 OF 2013)

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JUDGMENT OF THE COURT

The genesis of this appeal is the General Elections held all over the Republic of Kenya on 4th March, 2013. The first respondent, ***Timothy Moseti E. Bosire,*** was a candidate for the Parliamentary Elections in respect of ***Kitutu Masaba Parliamentary Constituency***. The third respondent, ***Independent Electoral and Boundaries Commission*** was charged with the overall conduct of the entire elections including the Parliamentary Elections on that date. The second respondent, ***Fredrick Hezekiah Owino Odenge,*** was appointed by the third respondent as the Returning Officer for the said Kitutu Masaba Constituency. The Petitioner, ***Paul Gitenyi Mochorwa***, though a candidate for the seat of ward representative in one of the wards in Kitutu Masaba constituency, was however one of the voters in respect of the Parliamentary Elections. He petitioned the High Court in respect of this matter as a voter in the constituency. At the close of the elections, and after counting the votes, and tallying the same votes, the second respondent declared the first respondent as the duly elected member of the National Assembly representing Kitutu Masaba constituency. There were fourteen candidates for that constituency's parliamentary seat. The first respondent was declared the winner with 23,303 votes. His nearest rival was one ***Shadrack John Mose*** who garnered 14,663 votes. Each of the other candidates

got less than 13,200 votes, with one ***Reuben Motari Okibo*** getting 127 votes only.

The appellant felt aggrieved by these results. He petitioned the High Court vide an Election Petition dated 9th April, 2013 and filed on 10th April, 2013. We add here that the record shows that the appellant, together with Reuben Motari Okibo, had been arrested by the police on the election day, – 4th March, 2013, on matters related to the elections and arraigned in court that same day. Reuben Motari Okibo was released, according to the record, on 5th March, 2013 and the appellant was released on 6th March, 2013. In short, they were both released after the elections. The record shows that they were both seeking elections in respect of two different seats on one party namely the Party of National Vision. We will discuss the possible effect of the arrests later.

In the appellant's petition to the High Court, the major complaints he raised were that, the said parliamentary election was not conducted in accordance with the provisions of the Elections Act and Regulations made thereunder and thus the first respondent should not have been declared as duly elected because the second respondent and its officers denied agents of Reuben Motari Okibo and of ***Walter E. Nyambati Osebe*** access to the polling stations and/or tallying hall; that the second respondent caused the arrest and detention of Reuben Motari Okibo; that the agents of Okibo and of Osebe were not allowed to access and/or to sign form 35 contrary to the Act and Regulations; that the results were intentionally manipulated in favour of the first respondent by inflating and/or reducing the votes cast; that copies of form 35 were not given to the agents of Okibo and Osebe; that the names of the agents appointed by each candidate at each polling station were not indicated and the second respondent refused to give reasons for refusal to sign form 35 as well as to give statutory comments; that the second respondent neglected to properly file and sign form 35 and validate the results with IEBC stamp; that the results entered in the tally sheet were different from those indicated in form 35 and announced at the polling stations; that more agents were allowed at the polling stations than the number of candidates; that relatives of one of the candidates were employed and thus compromised the outcome of the results; that results were doctored without countersigning the same and without giving the agents reasons for the same; that unsigned results were announced from some polling stations and these were invalid; that Rigoma DEB school votes cast were more than the registered votes, ie registered voters were 993, whereas votes cast were 1,808 as declared by the presiding officer; that wrong entries were made on the tally sheet (form 36) which were not indicative of the actual votes cast in a particular polling station as happened at six polling stations namely: ***Riabore, Rigoma, Nyagechenche, Riamoro, Amaiga Tea Buying Centre*** and ***Bogwendo.*** Further, the appellant stated in that petition that diverse breaches of the statutory rules governing conduct of election were committed by the second respondent and presiding officers at each polling station, which breaches prejudiced the election results against the appellant. Some of these breaches were that wrong entries were made in the tally sheet which led to flawed results; that in arresting and detaining Reuben Motari Okibo, the second respondent denied him the right to participate in the elections; that inspite of oral application made, the second respondent denied the candidates the right to have the votes cast recounted; that the figures entered in the forms 35 and 36 were not correct and as a result the correct totals were not ascertained. As a result of the above, the appellant contended in that petition that the elections for Kitutu Masaba constituency were rigged, unfairly conducted, interfered with, unduly influenced and so became invalid elections. He prayed:-

“(a) That it be ordered that there be a scrutiny of the votes recorded as having been cast in the parliamentary elections in the constituency.

(b) That it be ordered that there be a recount of the ballot papers cast at the elections in the constituency.

(c) That the said parliamentary elections in Kitutu Masaba constituency be determined and

declared null and void.

(d) That the said elections of the 1st respondents to the National Assembly be declared null and void.

(e) That the respondents be condemned to pay your petitioner's costs of this petition."

The petition was supported by a lengthy affidavit sworn by the appellant which on the whole mainly elaborated on the complaints in the petition and supplied several documents mainly forms 35, and Gazette Notice No. 3160 of 13th March, 2013. Reuben Motari Okibo also swore an affidavit and a further affidavit in support of the petition. He also attached to his affidavit his certificate of nomination as a candidate and nine form 35s together with few other documents mainly copy of charge sheet and statements to police. The other people who swore affidavits supporting the petition were ***Samuel Ochieng Orori*** who claimed to have been beaten by the first respondent's agents who he alleged were released from police custody by the same respondent and so were not charged with any offence; ***James Bundi Nyakeri*** who deponed that he knew that first respondent's agents gave bribes to voters at Nyatieno; ***Reuben Mokaya Kebaso*** who also swore that he saw a group being bribed by the first respondent; ***Douglas Nyacheno Omwenga*** and ***David Okero Obonyo***, both swore that the first respondent bribed voters.

The three respondents filed answers to the petition. The first respondent's answer to the petition was in brief that the elections were conducted in a fair and transparent manner to the extent that six of the candidates who were present at the time the results were announced immediately conceded defeat and made glowing tributes to the first respondent and to the second and third respondents. He stated further that the allegations in the petition were imaginary, fake and false as the parliamentary elections in the subject constituency were conducted in strict compliance with the Constitution, Elections Act and Rules made thereunder and was a true reflection of the will of the people of the constituency.

In response to the various complaints at paragraph 6 of the petition, the first respondent stated that no candidate's agents who complied with the legal requirements were denied access to the polling station and/or tallying centres by the second respondent; that Reuben and the appellant were arrested and charged in court for committing election offences; that the agents of Walter Nyambati and Motari Okibo were not denied the right to sign form 35; that in any event, the appellant had not named the alleged agents who were denied such rights; and further, Nyambati had not sworn any affidavit in respect of the alleged agents; that the petitioner 's allegation at paragraph 6 (XIV) are hearsay as the appellant could not have witnessed what happened at various places at the same time; that no agent was denied copies of form 35; that the results captured in form 35 were clearly transferred to form 36; that at Rigoma polling station the voters were 993 of whom 808 voted and not 1808 as alleged by the appellant; that the first respondent did not either personally or through any of his agents/supporters bribe voters nor did he go to Rigoma Market on the voting day; that the first respondent did not go to Mosobeti nor to Riakworo on the polling day and denied allegations of bribery alleged against him nor did he have any agent by names ***Charles Ondari Bernado***; that he did not know how to recruit nor did he take part in the recruitment of the election officials and so he did not know his alleged relatives allegedly deployed at the polling centre as alleged; that the petitioner never made any request for a recount and/or retallying as alleged; that it was not mandatory that all agents be at the tallying centre before the exercise could proceed; that all the appellant alleged in his petition were hearsay allegations without the names of the makers being revealed and hence had no probative value; that in any event as on the voting day, the appellant was in police custody, having been arrested, he could not have had first hand information as to what transpired in the elections on that day; that the first respondent did not know any relatives known as ***Moses Ongera, Nancy Ongera, Eunia Okinyi and Maurice Okinyi***. The first respondent ended his

answer to the petition by seeking dismissal of the petition and confirmation that he was the validly elected Member of Parliament for Kitutu Masaba constituency. He also swore a lengthy affidavit in support of his answer to the petition which contained several annextures some of which were repetition of the documents annexed by the appellant and his witnesses.

The second and third respondents filed a joint response to the petition in which they stated that they conducted the elections impartially as per the laid down rules and procedure, that the allegations of improper conduct were denied; that the first respondent obtained the highest number of votes and so was declared the winner after the counting of the votes; that the result was the popular will of the voters in the said constituency and that the elections were conducted by the third respondent in compliance with the standards set out in ***Article 81(e)*** of the Constitution, the Elections Act, and its attendant regulations under part XIII of the Elections (General) Regulations 2012, and that the electoral management system also complied with ***Article 86*** of the Constitution as it was simple, accurate, secure, accountable and transparent and in accordance with the Elections (General) Regulations, 2012, Elections (Rules of Procedure and settlement of Disputes Regulations and Elections (Regulation of votes) Regulations 2012; that through various robust verification and audit process, the 3rd respondent ensured that all rules and regulations were meticulously complied with to ensure fairness of the counting and tallying of votes cast. They set out the procedure that was adopted to ensure fairness in details and stated that the errors complained of were immaterial and did not affect the outcome of the election. They further set out variance analysis for various polling stations to demonstrate that the variance, if any, were minor and did not affect the outcome of the election. They denied the allegations made in the petition in respect of alterations of form 35s. They also denied obstruction of authorised party agents and contended that all presiding officers duly signed, and stamped form 35s for their respective polling stations and in any case they maintained that failure of agents to sign the forms could not be a valid ground for challenging the results of the elections. They denied allegations of bias by the electoral officials, and maintained that the allegations were unfounded and made in bad faith, as the third respondent undertook its statutory obligations and duties without any favouritism and thus ensured free and fair electoral process on 4th March, 2013. They denied allegations of rigging made in the appellant's affidavit, and on the general conduct of the elections in the constituency on the election date and stated that the grounds in support of the petition were fanciful and insufficient to justify the nullification of the results in that the respondents complied with every law in ensuring a fair and just election. They also relied on several affidavits to buttress their response to the petition. These were affidavits sworn by ***Dominic Onchwari***, the presiding officer who was at tallying centre for the constituency, ***Jones Nyabio***, the returning officer at the Reception Desk at the constituency tallying centre, ***Albert Momanyi Onkumbi***, the presiding officer in charge of Rigoma DEB Primary School, polling station, ***Fredrick Hezekiah Owino Odenge***, the second respondent who was the constituency returning officer and was sued in that capacity. He annexed to his affidavit several forms in respect of the particulars of agents *(four parties/independent candidates)*. As he is a party, we add here that in his affidavit he explained which agents would be admitted at the polling stations and at the tallying centre and the entitlement of agents to access form 35. He also maintained that the number of agents in the relevant election did not exceed the number of candidates contesting position of Member of National Assembly and that entries in form 35s were correctly rendered in form 36. His affidavit was, as would be expected, he being the eye of the 3rd respondent in the elections that took place in the constituency, lengthy. On the whole, he denied allegations by the appellant as regards the integrity of the elections in Kitutu Masaba constituency. He denied employing any relative of a candidate at the tallying centre and further denied several allegations made against him and against the third respondent.

At the close of what we may call pleadings, the petition was placed before Muriithi, J. for hearing. An application for recounting and scrutiny was made vide Notice of Motion dated 20th May, 2013. That was opposed and was extensively canvassed vide written submissions filed by each party. The learned

Judge, thereafter, in a lengthy ruling delivered on 30th August, 2013, declined to order scrutiny stating in doing so as follows:-

"23. I do not consider that the petitioner has demonstrated a foundation in evidence to warrant the order for scrutiny sought. In view of wide margin of over 8000 vote difference between the candidates (sic) declared winner and the runner-up. In these circumstances, I find that to order scrutiny would not be efficient use of judicial time as required by the principle of expeditious determination of election disputes under Article 87(1) of the Constitution and rule 4 of the Election Petition Rules.

- **Having reached this decision with regard to the issue whether scrutiny and recount of votes will be ordered, the second issue of whether to order full or partial scrutiny and recount on all or part only of the polling station does not arise."**

Thereafter the agreed issues were filed and at the hearing of the petition, the witnesses who included the parties and their witnesses relied on their various affidavits filed together with their supporting affidavits or affidavits in support of each respondent's case. Each witness was availed only for cross-examination by the other side and re-examination by the side calling him or her. We will delve into the evidence that was adduced herein later, but let it suffice to say that the appellant together with himself availed seven witnesses for cross-examination and re-examination by the respondents, their affidavits being treated in each case as evidence in chief. The first respondent was cross-examined and re-examined on his affidavit in support of his written response to the petition but did not call any witness whereas the second and third respondents together availed three witnesses who included the second respondent who gave evidence as DW4. We will revisit the oral evidence as well as the affidavits later in this judgment but only whenever the same will be necessary.

After a full hearing, the learned Judge, in a judgment that covered sixty pages, declined to allow the petition and issued certificate pursuant to ***Section 86*** of the Elections Act in the following terms:-

"1. That Petitioner's petition dated 8th April 2013 is declined with costs to the Respondents.

2. That this Court confirms and determines that TIMOTHY MOSETI BOSIRE was validly elected as the Member of the National Assembly for Kitutu Masaba constituency."

We find it necessary and fair to reproduce the brief reasons that the learned Judge set out in the concluding remarks of his judgment which in our view summed up his entire view of the matter. He stated:

"<u>Conclusion</u>

110. In answer to the questions before the court, I find that:

a. There were a few cases of irregularities relating to election documents by way of -

i. Misspelling of a candidate's (PW2) irst name Reuben on the ballot paper;

ii Failure of the Presiding Officer to indicate statutory comments in some stations and to give reasons in the forms for candidates/agents default in signing

Form 35;

iii Corrections or alterations of figures and names of polling stations affecting 42 of the 127 polling stations in the Constituency, 14 of which were counter-signed by the Presiding Officers but in all of which the valid votes of the respective candidates were not affected;

iv Errors of Transposition of figures from Form 35s to the Form 36 for constituency for three (3) polling stations; and computation error on the votes cast at one (1) polling station Rikenye DEB (001) with an error of 1 vote in the computation of the total votes cast.

b. The irregularities proved in sub-paragraph (a) above did not affect the result of the election. All the figures for the valid votes in the affected stations agreed with the totals of the votes cast for the candidates and there was not evidence that votes garnered by the individual candidates wereaffected in any way.

c. There was no proof of the election offences of bribery and intimidation as alleged in the petition.These allegations were largely based on inadmissible hearsay by PW1 and PW2 who were in police custody at the time when the events allegedly took place and on evidence of PW5, PW6 and PW7 whose consistency could not be established as their oral testimony before the court was not reflected in the affidavit sworn in support of the petition when their memory of the events would be expected to be fresh. On the whole, as discussed earlier in the judgment, the evidence of PW3, PW4, PW5, PW6 and PW7 was for the aforesaid reasons not credible.

d. The proved irregularities were not of such nature and magnitude to amount to non-compliance with the Constitution and the Elections Act, Rules and Regulations. The irregularities proved involved in the recording of the votes garnered by the candidates into the form 35 and subsequent transposition onto Form 36 for the constituency as opposed to the process of voting and counting of the votes which was done in accordance with the Constitution and the Elections Act and witnessed by agents for the candidates. The errors in the mathematical processes leading to a few corrections and alterations mis-transpositions did not affect the constitutional requirement for accuracy because the figures were ascertainable and verifiable by the computation formulae on the relationship between the values in the statutory forms the total votes cast,the rejected votes, the valid votes cast and the total votes cast for each candidate in the election. I consider that the election complied with the principles of the Constitution and the Elections Act with regard to free and fair election and expressed the will of the electors in the Constituency."

The appellant felt aggrieved by that judgment, hence this appeal before us premised on twenty nine (29) grounds of appeal set out in the Memorandum of Appeal dated 28th October, 2013. In brief these grounds are that, the learned Judge erred in law in misinterpreting the law relating to statutory documents issued by the 2nd and 3rd respondents to the appellant; that he failed to consider evidence adduced by the appellant; that he erred in concluding that few polling stations had irregularities and malpractices; that he failed to consider the submissions of the appellant and in relying on the submissions of the respondents only; that he erred in failing to order scrutiny and recount; that he erred in treating the petition casually; that he failed to make specific findings on matters raised by the appellant; that he erred in holding that the appellant failed to disclose the source of information of his testimony; that he disregarded the specific provisions of the Elections Act, the Constitution of Kenya and other laws; that he erred in concluding that the first respondent was validly elected; that he erred in finding that the petitioner did not adduce evidence to show that unauthorised persons signed form 35s contrary to the evidence; that he erred in dismissing all specific claims raised by the appellant; that he erred in dismissing evidence on the arrest and intimidation of the appellant and his witness; that the learned Judge erred in failing to find that the first respondent committed an election offence of bribery;

that he arrived at contradictory findings and decisions contrary to the evidence before the court; that he erred in failing to find that only appointed agents were allowed to access the designated stations by the respective presiding officers; that he showed total bias in favour of the respondents; that he erred in failing to find that the declared results were altered, interfered with, cancelled and/or did not reflect the will of the people; that he erred in finding that the agents had a duty to sign form 35 or to give reasons for failure to do so; that he erred in finding that the form 35s annexed to the petition were not genuine and/or were not official documents; that he erred in failing to conclude that the alterations of the results were so massive that the same affected the net result of the elections; that he erred in failing to find that failure to file the statutory forms as required would affect the results; that he erred in believing the 2nd respondent that the improvised form 35s were not used to rig the elections; that he erred in law in forming a wrong opinion that since the first respondent had won by over 8,000 votes, he won fairly; that the learned trial Judge erred in law in not finding that rigging took place during the elections; that the learned Judge erred in not finding that the announcement made at the tallying centre was inaccurate and went against the law, and that the learned Judge erred in law in not finding that the results declared at the polling stations were not in the final announcements.

Mr. Otachi, the learned counsel for the appellant was assisted by Mr. Ogeto and Mr. Omwenga, who conducted the appellant's petition in the High Court. He addressed us at length on the petition and in his doing so referred us to some reported cases. In brief, his submissions were that in law, pursuant to this Court's decision in the case of ***James Omingo Magara vs Manson O. Nyamweya & Others*** **–** *Kisumu CA Civil Appeal No. 8 of 2010*, form 35, which is the equivalent of the former form 16A, must be signed by agents at the polling station and if not so signed then reasons must be availed for that refusal. The sanctity of form 35 cannot be over emphasized, he contended, and that it must be properly filled and signed, are mandatory necessities. However, in this case, Mr. Otachi submitted there were several form 35s which were not signed by the presiding officer and some were not countersigned by agents. There were alterations in some of form 35s which were not witnessed by the agents. He stated further that one of the witnesses for the third respondent who was a presiding officer, namely Jones Nyabio (DW3) conceded that as the returning officers were submitting their form 35s if the entries did not tally, he would tell them to tally them before accepting them and contended that that resulted into serious errors caused by alterations which would not be countersigned by agents. He further submitted that the form 35s annexed by the appellant demonstrated several irregularities. However, at this juncture, Mr. Otachi could not give comparison of the form 35s - those unsigned and those not countersigned as the same could not be easily accessed. He blamed the mix-up and confusion on the faulty preparation of the record. He applied for full adjournment to be able to apply to file supplementary record but for reasons we stated in our ruling on that application, the application was rejected. Mr. Otachi proceeded on with his submissions and addressed us on other grounds of appeal. He maintained that the finding of the learned Judge that no strangers signed form 35s was not correct because the appellant gave evidence in proof of that allegation and the second respondent (DW4) confirmed in his evidence that there were people who signed form 35 but who were not agents and that affected sixty six (66) polling stations. He thus felt the learned Judge misdirected himself when he said the additional signatures of the strangers amounted to a mere over confirmation of the relevant results. The regulation, according to Mr. Otachi, is clear that there should be one agent to a candidate. He ended that line of argument by saying this was a serious irregularity. On the fifth ground, Mr. Otachi's take was that scrutiny should have been done to determine the genuine form 35s and the non genuine ones. He felt the learned Judge was wrong in dismissing the application for recount and scrutiny as in doing so, the learned Judge relied on only one ground which was the margin of the number of votes cast between the first respondent and his runner up and in so relying, the learned Judge applied the quantitative test instead of the qualitative test which he should have applied. In his view, the issue of election went beyond margins of votes cast. Matters like transparency and sanctity of the elections needed to be ensured. At the very minimum, the learned Judge should have allowed scrutiny. Lastly, Mr. Otachi submitted that the burden that the learned Judge

placed on the appellant was too huge as the learned Judge was influenced by the vote margin to the extent that he did not consider, as he should have done, the integrity of the election. According to Mr. Otachi, had the integrity of the election been considered, the petition would have been successful and he thus asked us to salvage the integrity of that election by allowing this appeal.

In response, Mr. Ligunya, the learned counsel for the first respondent, started off by producing to the Court several authorities relied on at the hearing in the High Court which were omitted from the record. Thereafter he made a summary of the twenty nine (29) grounds of appeal into five main grounds which, according to him were:

(i) Refusal of scrutiny and recount which were covered in grounds 5 and 6.

(ii) Disregard of relevant law which were covered by grounds 7,10 and 25.

(iii) Electoral forms relied on by the petitioner summed up by grounds 1, 12, 17, 20, 21, 23, 24, 28 and 29 of the appeal.

- *Failure to consider the petitioner's evidence which appeared in grounds 2, 4, 8, 9, 13, 16, and 18; and lastly*

(v) the issues of ongoings at tallying stations which were reflected in grounds 3, 14, 15, 19, 22 and 27.

Relying on the summarised grounds, Mr. Ligunya addressed us on each head, stating on the issue of scrutiny and recount that that matter was the subject of an interlocutory application by the applicant and was canvassed by parties at length and a ruling made on it. The appellant has not in his grounds of appeal challenged that ruling. In his view, the issue of margin of votes cast was not the main reason for dismissing that application, as the Judge also considered whether any matters raised in support of that application for scrutiny could have affected the final result and the learned Judge found in the negative and hence ordering scrutiny and recount would have been actions in futility. On the second cluster of complaints as stated above, Mr. Ligunya submitted that the appellant himself had admitted in his affidavits that he had no agents. The record shows that the appellant said in his affidavit that he got form 35s from agents but whose names he did not give. That, according to Mr. Ligunya, was evidence that form 35s were given to agents as he agreed in that affidavit that he did not get them from the second and/or third respondents. Further, Mr. Ligunya submitted that the record shows that the diary was signed at the beginning of voting before 7.00 am whereas the appellant was arrested few hours after that and thus some agents could have signed the forms after that and the learned Judge was entitled to find that a reasonable answer to that complaint. Further, he agreed with the learned Judge that no irregularity or prejudice was occasioned by the use of improvised forms. It was his case that not all errors would result into invalidation of an election, he referred us to the decision of this Court in the case of **Joho vs Nyange (2008) 3KLR (EP) 500** for that proposition. He further disputed the appellant's allegation that the results as announced were not correct and stated that as the appellant was not at the Tallying Centre at the time of tallying, he could not but rely on hearsay evidence for his allegations. Mr. Ligunya referred to several pages of the judgment and refuted the appellant's contention in the grounds of appeal that the learned Judge failed to consider the evidence of the petitioner who is now the appellant. Lastly, Mr. Ligunya submitted that there were no intentional irregularities in the entire election, the subject of this appeal, and as to bribery, he felt the learned Judge rightly found that that allegation was not proved to the standard required in law.

On his part, Mr. Ojiambo, the learned counsel for the second and third respondents, submitted on the

complaint that the learned Judge erred in rejecting the forms annexed by the appellant and accepted the respondents forms by stating that the learned Judge was perfectly entitled to do so as it was not disclosed as to who actually filled the forms that were relied on by the appellant as the appellant in his evidence said agents were blocked from accessing the form 35s on the one hand and on the other hand said the agents were the ones who gave him the same forms. Mr. ojiambo was of the view that as the appellant's wife was an election official, perhaps that was the source of confusion as regards the authenticity of the forms he had. Further, Mr. Ojiambo contended that the appellant never wrote to the third respondent seeking the results and thus went to court with documents the authenticity of which were in doubt. He also referred us to several court decisions on the issues such as the case of **D. Venkata Reddy v R. Sultan and Others AIR 1976 SC 1599** and urged us to give due respect to the verdict of the voters in the case. In his view, to refuse to accept forms allegedly signed by those who were non agents together with those signed by the agents would mean throwing out such forms, ignoring that authentic agents had also signed them. He maintained that qualified agents had access to and did sign the form 35s. He conceded that there were some alterations in the forms but stated that these alterations were in the tallying and not in the figures and further submitted that after considering all these alterations, the final results were not affected in any way. In conclusion, Mr. Ojiambo submitted that when all is considered, the learned Judge could not be faulted in his final verdict on the petition.

We have anxiously considered the Election Petition that was before the learned Judge, the affidavits in support which as we have stated were treated as evidence in chief, the responses by the respondents and the affidavits in support which were also treated rightly as the defence evidence in chief. We have also considered the entire record before us, the submissions that were before the High Court, the judgment of the trial court, the grounds of appeal in this appeal, the able submissions by the learned counsel including the decided cases they referred us to and all those filed in their lists of authorities and the law. In normal circumstances, this would have been treated as a first appeal and our jurisdiction would have entailed revisiting the evidence afresh, analysing it, evaluating it and coming to our own independent conclusion always being aware that the trial court had the advantage of having seen and heard the witnesses and seen their demeanor and thus giving room for that. However, this is not that type of appeal although it is indeed coming to us as a first appeal. Unlike other appeals, it is not coming to us pursuant to the Civil Procedure Rules. It is coming to us pursuant to the Elections Act, 2011, Chapter 7 Laws of Kenya, the which Act was put in place pursuant to the provisions of ***Article 105(3)*** of the Constitution of Kenya, 2010. ***Section 85A*** of the Elections Act states as follows:

“85A. Appeals to the Court of Appeal.

An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate, or the office of County Governor shall lie to the Court of Appeal on matters of law only and shall be

(a) filed within thirty days of the decision of the High Court and

(b) heard and determined within six months of the filing of the appeal.”

Thus an appeal to this Court in respect of election such as the one now before us can only be on matters of law. We have no jurisdiction to delve into matters of facts, but we think nonetheless that like normal second appeals, if we are persuaded that the trial court failed to consider matters of fact it should have considered or if it considered matters of facts that should not have been considered the commission or the omission would result into an error or errors in law in which case we may intervene. But ideally ours is to consider only matters of law. The intention of the legislature is clear that it was apparently intended that election petitions would be finalised at the High Court level. That is what we

read in the making of the section that allowed appeals to this Court. It was to our mind reluctantly introduced later and hence 85A. What we are saying is that we need to accept that intention and thus confine ourselves to matters of law only.

Before we consider whether or not this appeal raises matters of law that need full discussions and which matters of law are raised, if any, we need to emphasize the sanctity of the election and its importance to the voters and to the country. Participation of a citizen in an election is a right enshrined in ***Article 38 (2)*** and **(3)** of the Constitution of Kenya, 2010. These two parts of ***Article 38*** state:-

"(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for-

(a) any elective public body or office established under this constitution; or

(b) any office of any political party of which the citizen is a member.

(3) Every adult citizen has the right, without unreasonable restrictions:-

(a) to be registered as a voter

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected to hold office."

In order to facilitate the above, that is to ensure that every adult citizen exercises the right spelt out in this Article, and particularly in respect of election to fill the seats in the Kenya National Assembly which is the subject matter of this judgment, a direction is made as to what should be ensured, whatever electoral system is applied. ***Article 81*** of the same Constitution provides as follows:-

"81. The electoral system shall comply with the following principles-

(a) freedom of citizens to exercise their political rights under Article 38;

(b) not more than two thirds of the members of elective public bodies shall be of the same gender;

(c) fair representation of persons with disabilities,

(d) universal suffrage based on the aspiration for fair representation and equality of vote; and

(e) free and fair elections, which are -

(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner"

The way to ensure that the election meets the above requirements are set out in ***Article 86*** of the Constitution where the third respondent is directed to ensure that certain standards or characteristics are met. These are set out in ***Article 86 (a-d)*** which are stated that:-

"(a) whatever voting method is used, the system is simple,accurate, verifiable, secure, accountable and transparent;

(b) the votes cast are counted, tabulated and results announced promptly by the presiding officer at each polling station;

- **the results from the polling stations are openly and accurately collated and promptly announced by thereturning officer; and**

(d) appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including the safekeeping of election materials."

Compliance with the above is, in our view, what ensures the sanctity of the election and intentional breach of them removes the required integrity from the elections and would, render the election non valid. We say so mindful of the fact that there may very well be instances where there could be minor irregularities as we take judicial notice of the fact that in elections like the one we are dealing with where on the same day, at the same polling station, voters had to vote for six seats, namely the office of the President, the office of County Governor, Senate seats, National Assembly, County Women Representative to the National Assembly and County Ward Representatives, mistakes were bound to occur as it is human to err. In such a situation, the courts would have to look at the irregularity and see if it or accumulation of them would have affected the election result or not for as is clear, the rights of voters and their voice reflected in their votes cast must be honoured. In the case of ***D. Venkata Reddy v R. Sultan and Others*** *(supra),* the Supreme Court of India, dealing with an Election Appeal held as follows:-

"1(a) While it is necessary to protect the purity of elections by ensuring that the candidate do not secure the valuable votes of the people by undue influence, fraud, communal propaganda, bribery or other corrupt practices, the valuable verdict of the people at "the polls" must be given due respect and should not be disregarded or set at naught on vague, frivolous or fanciful allegations, or on evidence which is of a shaky or pre-varicating character."

Thus a court of law, considering an election petition is bound to ensure that the integrity of the challenged election was not in anyway compromised, so that it ensures that the voting was free, and fair; and that it complied with the requirements of ***Articles 38*** and ***81*** and its conduct met the requirements in ***Article 86*** of the Constitution.

The effect of all the above is that whoever challenges the election of a candidate, must on whatever grounds he/she relies demonstrate that the election was so riddled with breaches of the set down legal principles that its integrity no longer existed in which case the election would be vitiated, or that the breaches, though excusable, were such that the results were affected. The petitioner, in this case the appellant has the burden to demonstrate the same for he is the one alleging breaches. In the ***Venkata Reddy v R. Sultan & Others*** *(supra)* the court held in respect of who has the burden of proof as

follows:-

"(b) The onus lies heavily on the election-petitioner to make out a strong case for setting aside the election. He must, in order to succeed, plead all material particulars and prove them by clear cogent evidence. The allegations of corrupt practice being in the nature of a quasicriminal charge, must be proved beyond reasonable doubt. When the election petitioner seeks to prove the charge by purely partisan evidence of his workers, agents, supporters and friends, the court would have to approach the evidence with great care and caution, and would, as a matter of prudence, though not as a matter of law, require corroboration of each evidence from independent quarters, unless the court is fully satisfied that the evidence is so creditworthy and true, that no corroboration to lend further assurance is necessary. The attempt of the agents or supporters of the defeated candidate is always to get the election set aside by fair means or foul and the evidence of such witnesses, must, therefore, be regarded as highly interested and tainted evidence."

In the case of ***Raila and Others vs IEBC & Others***, *Presidential Petition Nos. 3, 4, and 5 of 2013*, the Supreme Court of Kenya was of the view that the Petitioner has in an Election Petition, the legal burden of proving his case but that as the case proceeds and the respondent gives his evidence, it has the burden of proving that evidence. But after all is said and done, the petitioner must show that the election he is challenging was so badly messed up that it was in contravention of the constitution or that if there were defects here and there in the way it was conducted, such defects affected the result of the election. And as to standard of proof required, the Supreme Court stated, *inter alia,* in the Raila's case (supra) as follows:-

"The threshold of proof should in principle, be above the balance of probability, though not as high as beyond reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question."

Having discussed above what was required of the appellant to persuade the court that the National Assembly Elections for Kitutu Masaba constituency was so flawed that it should be invalidated, we now go back to the issue as what matters of law arose from the conduct of the election petition case and whether such points went into the integrity of the election and of what effect were the same defaults or breaches. As we have shown above, the learned Judge of the High Court after full hearing of the petition concluded that though there were a few cases of irregularities relating to election documents *(he set out four)*, nonetheless, these irregularities in his view, did not affect the result of the election; that there was no proof of the election offences of bribery and intimidation as alleged in the petition and that the election result was not affected by the proved irregularities and so he dismissed the petition. We note that the learned Judge in his detailed judgment considered each complaint raised by the appellant in his petition and in his affidavit as well as in the affidavits filed by his supporters as well as the oral evidence in court. As we have stated, ours is to look into allegations based on law or alleged errors in law. In describing the complaints, we will therefore only confine ourselves to the matters of law raised.

The allegation about bribery is an allegation that if proved may lead to the first respondent's election not only being invalidated but the first respondent would also be found guilty of an election offence which has the consequences of not only being disqualified from standing as a candidate in the by-elections but also facing possible prosecution. The standard of its proof is therefore much higher than that of the other breaches of election regulations and rules. The record shows that the appellant did not himself witness any bribery of voters. His witness PW 2 who was a candidate stated at the end of his affidavit at paragraph 26 in support of the Petition:

"That I also learnt that the 1st respondent spent money in buying votes and or bribing voters to vote for him for instance at Mosobeti, Riamori, Iranya, and Nyaikeno".

However in cross examination, this witness said:

"Concerning paragraph 26 of my affidavit on bribery. I was not present, I did not indicate the source of the information."

In law, that type of evidence cannot come anywhere near establishing such serious allegations of bribery. The other witness, ***James Bundi Nyakeri*** stated in his affidavit that he saw incidence of bribery but he never gave details of the same in his affidavit and never mentioned the names of the voters that were being bribed. In the end he said he was not aware that anybody else saw that incident. Likewise, the evidence of ***Reuben Mokaya Kebaso*** *(PW5)* and that of ***Douglas Nyacheno Omwenga*** *(PW6)* and that of ***David Okero Obonyo*** *(PW7)* all did mention about bribery but they did not mention those allegedly bribed, how the bribery took place and generally, apart from mentioning bribery, they did not adduce proof required within the standards we have indicated above. We have perused and considered the detailed analysis made by the learned Judge on this issue which has included the first respondent's response to that complaint by the appellant and his conclusion which was:

"Be this as it may, it remains that Petitioner's burden to prove bribery to the standard of beyond reasonable doubt and it is not for the 1st respondent to prove his innocence. I do not find that the election offence of bribery has been proved against the 1st Respondent".

We, too, having gone though the evidence, do not find any ground to warrant our interfering with that conclusion, for in law, the evidence that was adduced did not indeed meet the standard required to prove bribery.

That takes us to other complaints. We remind ourselves that ours is to deal only with matters of law and not matters of fact. The next matter we need to discuss is the complaint of arrest and intimidation of the appellant and one of the candidates, PW2. This allegation is in our view serious for if proved it would have meant that one of the candidates and a voter was through the machinations of the respondents either jointly or severally denied, not only the right to vote but also that the candidate was denied the right to observe and ensure fair voting as he could not, being in custody, coordinate his agents, it would go against the constitutional provisions set out above ensuring fair elections. Two matters required to be proved to the satisfaction of the Court. These were, first, what necessitated their being arrested and secondly, were either of the respondents or both involved in their being arrested" We restrain ourselves from discussing the details of this issue as we are as yet not aware whether the criminal case preferred against them has been finalised either way. It is however clear that they were arrested and charged with an offence under ***Section 59 (1) (d)*** of Elections Act No. 24 of 2011. In our considered view, there is no law stopping the Police from charging any person be he a voter or a candidate with an offence under Elections Act if indeed the police believes such an offence has been committed. That, in any event is the reason why the legislature found it fit to entrench Elections offences in the Election Act – so as to prevent interference with fair and smooth running of elections. In their own evidence, the appellant and PW2 state that they were arrested by police officers; and that at the time of their arrest, neither the first respondent nor the second respondent were there. Hear the appellant in his evidence:

"At the time of our arrest there were 4 Police officers. Mr. Timothy Bosire, the 1st respondent was not there. There was also no representative of IEBC at the time of arrest."

He also agreed that he was not arrested at a polling station. The learned Judge again scrupulously went

through all the evidence that was before him as to how the appellant and PW2 connected the respondents to this complaint and found that there was nothing that would throw aspersions on the respondents as to the arrest and detention of the appellant and PW2. We have also perused fully and considered the record, and we are in full agreement with the learned Judge that the two respondents were connected to this issue of arrest and intimidation all as a result of the appellant's and PW2's fertile imagination not supported by an iota of evidence. It could not be a basis for invalidating the election and the learned Judge was plainly right in his rejecting it.

Although there was no specific complaint against the learned Judge's decision on the complaint about the wrong spelling of the name of PW2 who was a candidate, nonetheless as there were several *"blanket"* grounds of appeal stating that the learned Judge did not consider the evidence adduced by the appellant and his witnesses fairly and further, as there was a ground of appeal that stated the learned Judge was biased against the appellant, we have looked into the issues raised in the Petition as well. The only point raised here was that the name of PW2, which was Reuben Motari Okibo, was wrongly spelt in the ballot papers as Rueben Motari Okibo, and that did result into confusion of the voters. We feel with respect that this complaint is neither here nor there. First, it is a matter of fact and the learned Judge did reject it upon cogent reasons. Secondly and in any event, in the entire list of candidates there was no name as close to that of PW2 such that a minor typographical error in the name of PW2 could be confused with. In any case, as the learned Judge did find rightly, there were photographs of candidates and this was meant to supply additional or alternative identification of the candidates so as to avoid any complaint or confusion. Further, in our minds, this alleged confusion, which as we have said could not exist, could not have affected the results as those voters who felt confused only needed to clear this confusion by seeking help which was available. We too reject this complaint.

On the allegations that the duly appointed agents of PW2 and of one Walter E. Nyambati Osebe were denied access to polling stations and to the tallying hall, we are of the view that the appellant and PW2, having admitted that by the time they were arrested at about 11.00 am they had not distributed identification badges and other documents to their party's agents, such agents could not have been allowed access to the polling stations before the time the appellant and PW 2 were arrested because by that time their agents still lacked identification requirements. Further, Mr. Walter E. Nyambati one of the alleged victims of this complaint, did not give evidence on this allegation. This scenario was amplified by David Okero Obonyo (PW 7) who readily stated that he was locked out of the polling station because he was waiting for letter of appointment and badge to be supplied to him so as to enable him participate as agent. This was a matter of fact and the learned Judge responded to it, analysed it and made a sound conclusion on it. We certainly cannot fault him.

The appellant also complained that in some polling stations, no agents signed form 35, while in others more than the required number of agents were allowed to sign the same forms and yet in others not all agents signed the form. ***Regulation 79*** of the Elections (General) Regulations, 2013 states at part (6) that:

"The refusal or failure of a candidate or an agent to sign a declaration Form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation (2) (a),

and part (7) of the same regulation states:

"The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under subregulation (2) shall not by itself invalidate the results announced."

Regulation 6(2) allows the presiding officer to admit into the polling station not more than one agent for each candidate or political party.

There was evidence to the effect that at some polling stations there were agents who were not recorded and that in other polling stations more or less agents were allowed to participate. This was contrary to the regulations. The learned Judge admitted that much. He also admitted that there were some polling stations where there were some alterations on the form 35 and had taken pains to set out all these polling stations and the effect of the same alterations. He also considered the failure to fill form 35s and statutory comments and the use of improvised form as well as the allegations of wrong transfer of voters and announcement of results. All these were considered at length in the learned Judge's judgment. The learned Judge having considered them, agreed that there were cases of irregularities relating to election documents by way of failure of the presiding officers to indicate statutory comments in some stations and to give reasons in the forms for candidates'/agents' default in signing form 35, and other errors in corrections and in alteration of figures and names of polling stations affecting 42 out of 127 polling stations, fourteen (14) of which were counter-signed by the presiding officer, and errors in transposition of figures from form 35 to form 36 in three polling stations.

On our part, as regards the complaints that involved errors connected to Form 35s, and 36, Mr. Otachi could not address us fully on the same as resulting from the way the record was prepared, it was not possible either for him or for us to trace the relevant forms for purposes of comparison much as we perused the entire record.

At the hearing of the petition, the second and third respondents had given evidence to the effect that form 35, held by the appellant and which he annexed to his petition and went at length to advance in his case, were not genuine form 35. The learned Judge accepted that argument. Again that was a matter of fact. The learned Judge had the advantage of seeing witnesses including the appellant and the 2nd respondent as well as witnesses of the third respondent. He was in a better position to know whether or not the form 35s relied on by the appellant were genuine or not. He found, and for reasons, that they were not. This was buttressed by the fact that the origin of the same form 35s, was not authenticated as the appellant claimed he got them from unnamed people while, on the other hand he maintained that his team of agents were not allowed to access the same forms. He contended they were not allowed into the polling stations as agents while on the other hand he contended that the offensive form 35s existed without stating where he got them from. The second and third respondents maintained they were not genuine forms from them which should have had their official stamps. As we have stated, the learned Judge heard both sides and this was a matter of fact. The documents were incomplete and contained entries inconsistent with the records held by the second and third respondents. We find nothing to fault in the learned Judge's analysis and conclusion on that complaint which we also reject. Indeed as we have stated above, we find it difficult to appreciate that complaint because Mr. Otachi and his team of advocates for the appellant found it difficult to trace the relevant form 35 and form 36 in the record so as to address us effectively on the comparable entries and on which ones were properly executed and which were not. We decline to upset the learned Judge's findings on this issue.

There was also the complaint about employment of relatives. The appellant had alleged in his affidavit at paragraph 43 that relatives and supporters of the first respondent, whom he named, were employed by the second and third respondents. This was supported by PW 2 in his affidavit in support of the Petition and added that some of those were employed without any application being made by them and without interview. However, in his evidence in cross-examination before the court, the appellant conceded that he did not have information to support the allegation at paragraph 43 of his affidavit and PW2 said he had nothing to show that one of those who was polling clerk was related to the first respondent and he had no other document before the court on the other employees. This allegation

was not proved and further, we also agree with the learned Judge that it was not proved that the alleged relationship, even if it had been proved, affected the results of the elections in any way for it was not stated and proved as to what each of those alleged relatives did that could have interfered with the final outcome of the elections. Again, whether or not those employees were relatives of the first respondent was a matter of fact and the decision of the learned Judge on it, in our view sufficed.

On the allegation of rigging, the learned Judge considered the appellant's and PW2's evidence, both in the affidavits and in cross-examination and the evidence of the retuning officer. He weighed both in his judgment and accepted the evidence of the retuning officer, on cogent grounds that he spelt out. These were versions of what took place and the learned Judge was better positioned to decide on them. All we say is that in so far as the appellant's evidence was as contained in the cross-examination, that he got that information from an agent whose name he did not know, certainly that information could not be relied on by any court of law as it was hearsay and was thus incapable of being verified. And as PW2 also disowned his allegation saying he was not there when the alleged clerk allegedly rigged the election, surely the court had no option but to reject that allegation and it was properly rejected.

We think we have said enough to demonstrate that looked at from all sides, the learned Judge properly weighed the evidence that was before him and, in our view, it would not be proper to say, as the appellant says, that he casually treated the petition. We have gone through the entire record as earlier stated and in our considered view, the learned Judge treated each complaint seriously and considered each complaint in turn as he had to do and eventually came to his own independent decision on each complaint. We see strength in that approach and certainly no casualness or weakness as alleged.

The learned Judge accepted that there were some mistakes or irregular instances pertaining in the handling of form 35s and 36, but he considered whether the same mistakes went to the root of the elections, i.e. whether they affected the integrity of the Parliamentary Election for Kitutu Masaba Constituency and rightly found no fundamental breaches that affected the integrity of that election. He therefore considered whether the mistakes were such that they could have affected the results and on that aspect he considered the vote differences resulting from the defects both in the alterations in form 35s and caused by the transfer and ended up finding that even if all these irregularities were catered for, still the first respondent remained a winner and by a large margin. In our view, the learned Judge took a proper view of the matters that were before him as regards the effect of the mistakes that were pointed out during the hearing. ***Section 83*** of the Elections Act Chapter 7 Laws of Kenya supports this view. It states:

“83. Non compliance with the law.

No election shall be declared to be void by reason of non - compliance with a 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.”

We too are satisfied that though there were some minor irregularities which the learned Judge rightly observed and pointed out, the same were not breaches of the Constitution and did not affect the integrity of the election, neither did they affect the results.

On the issue of rejection of the application for scrutiny and recount, the reasons advanced and relied on by the learned Judge were sound. The law is clear that the order for recount and scrutiny is not automatic. The applicant must demonstrate acceptable reasons for seeking such orders and here no proper reasons were advanced as is clear in the application and supporting affidavits and the Ruling of

the learned Judge, part of which is reproduced above.

In our view, this was a proper case where the will of the voters could not be ignored and it was rightly allowed to prevail. They spoke and did so loudly and there were no fundamental breaches to move the court to ignore that voice.

In the result, this appeal has no merit, it is dismissed. The respondents shall have the costs of this appeal. Judgment accordingly.

Dated and delivered at Kisumu this 14th day of March, 2014.

J.W. ONYANGO OTIENO

…….

JUDGE OF APPEAL

D. MUSINGA

…….

JUDGE OF APPEAL

S. ole KANTAI

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR