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Citation:	William Kinyanyi Onyango v Independent Electoral and Boundaries Commission (IEBC) & 2 others [2014] eKLR
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Case Summary:	-
Court Division:	Civil
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Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES COURT AT NAIROBI

MILIMANI COMMERCIAL COURTS

ELECTION PETITION NO. 1 OF 2013

WILLIAM KINYANYI ONYANGO.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1ST RESPONENT

THE RETURNING OFFICER KARIOBANGI

SOUTH UHURU WARD.....2ND RESPONENT

ROBERT MBATIA.....3RD DEFENDANT

JUDGEMENT

The Petition before court is the one dated the 11th March 2013 and is filed by William Kinyanyi Onyango, hereinafter referred to as the petitioner, against the three respondents as indicated on the heading of the judgement herein, challenging the election of the 3rd respondent as the County Representative for Kariobangi South (1429), Uhuru Ward.

The petitioner's contention is that on the 6th March 2013, the 2nd Respondent had announced and declared the 3rd Respondent as the purported elected member of the County Assembly for Kariobangi South Uhuru ward, when he knew very well that the results he was announcing were altered and incomplete and therefore did not reflect the true account of the votes cast during the 4th March 2013 General Election. He states that the whole elections were marred with several irregularities and the results were doctored and therefore it was not easy to ascertain the true winner in the said elections. He contends that the alterations or doctored was done to favour one of his opponents and the results were incomplete since the results with the petitioner did not include the results from all the streams. The petitioner further argues that some of his supporters were denied an opportunity to vote due to the inaction of the 2nd Respondent. That the 2nd Respondent was informed that some boys had placed a barrier at the entrance and they were not allowing people to enter the polling station freely, and she did not take any action to remedy the situation.

That one of the petitioner's agents heard a voter asking a presiding officer in charge of stream 2 at Kariobangi South Primary school Polling station, where the Kikuyu line was, which to him, meant that there was a line for a particular community at the polling centre which is against the election rules.

He further claims that some ballot boxes were ferried from the polling station by a person who was not an employee of the first respondent and this demonstrated that there was no transparency in the manner

the elections were conducted.

The petitioner raised questions on the conduct of the 3rd respondent and argued that he had purportedly issued letters of allotment which were not genuine to various people and the petitioner suspected that this act was meant to bribe the voters.

The petitioner avers that he complained about the malpractices witnessed by his agents to the 1st and 2nd Respondents but no action was taken. The malpractices he complained of are that some people were being given more than one ballot paper, that in stream 5 of Kariobangi South Primary school polling station, some voters were allowed to vote without national identity cards, that the petitioner's agents were not given the form 35s and the petitioner resorted to using those that were pinned on the doors. The petitioner argues that the said forms were not signed by all the party agents, had no dates or had varying dates.

He alleges that there were boys who were manning the queues and would not allow voters to penetrate and cast their votes and this was reported to the presiding officer and the returning officer and nothing was done about it.

He states that the presiding officer in stream 2 was directed to take two bunches of ballot papers to stream 15 at about 8.30pm which left the petitioner wondering why this was being done. He further alleges that his agents were asked to go and sleep during the counting and even the 1st Respondent's officials were also asleep while others did the counting and therefore there lacked supervision during the exercise.

The petitioner thus seeks a declaration that the 3rd Respondent was not duly elected as the county representative for Kariobangi South (1429), Uhuru Ward and a nullification of the Certificate issued to him. He also seeks the costs of the petition and any other relief that the court may deem expedient.

PETITIONER'S CASE

During the hearing the petitioner called five witnesses.

The petitioner was the first witness. He basically narrated to the court the events as averred in the petition and the affidavit in support of the same. He told court that he had participated in the 4th March 2013 General Elections and he was a candidate for a ward representative for Kariobangi South, Uhuru Ward. He alleged that there were wars, voter bribery and the polling centres had no lighting and that some voters were being sent away on allegations that their names were not appearing on the voter register. He states that there was no enough security and one Emmanuel who was sent by the Returning officer to resolve the issues was not able to. As a result of that, the petitioner contends that the results declared were not genuine, they were manipulated, altered and were doctored. The petitioner explained that as a result of the manipulations, the parties are holding different results. He referred the court to the documents that he claims to have irregularities. These were the form 35s from stream 1, 2 and 3 in Buruburu primary school polling station where the spoilt votes were not included in the cast votes. In the three streams, the total cast vote was the same as the valid votes which was 687, 615 and 634 respectively. His argument is that since there were spoilt votes, then they should have been deducted from the cast votes to get the valid votes. He told court that the same applied to Kariobangi South Primary School Streams 6 and 11.

The petitioner continued to state that the forms 35 are altered and the alterations are not signed for. He complained that in Dr Mwenje polling station, there was a blank form 35 that was signed by the presiding

officer, which is a clear indication that the results were being manipulated. He stated that he was informed by his agents that the voters were being given more than one ballot paper for each candidate and in support of this, he shown the court the checklists filed by his agents, Maureen at page 48 of the petition and Ferdinand Ayieko at page 57 of the petition.

An attempt by the petitioner to produce mobile phone images allegedly taken on the night of 4th March 2013 during the counting and to run some electronic clips showing the distribution of the allotment letters was objected to by the respondents for failure to comply with the rules of evidence. He however produced in court some letters of complaints written to the Returning officer after the results were declared. These were exhibits 1a, 1b and 1c.

The petitioner argued that there were various forms that were altered and the forms he was holding had different results from what the 1st and 2nd Respondents were holding and what the 3rd Respondent was holding. He made reference to the form 35s filed by the 1st and 2nd Respondent in respect of streams 1 and 5 Kariobangi South Primary School polling station and Stream 3 Uhuru primary school polling station. He stated that the third respondent was declared winner yet, he had results that were different from those the 1st and 2nd Respondent was holding. According to him there was no clear winner since there are three different sets of results. He produced in court the bundle of the form 35s and the bundle of the checklists attached to the petition as exhibits 2 and 3 respectively.

The petitioner testified that there was a line for the Kikuyu community and argued that the respondents had not explained that allegation and the presiding officer had not addressed this issue even when it was raised with her. He argued that the election was marred by voter bribery and issuing of double ballots and therefore urged the court to declare that the 3rd Respondent was not validly elected and nullify his certificate of election.

On cross examination the petitioner told court that most of the information was obtained from agents who are not witnesses in this petition. In particular he stated that he was informed that some people were denied an opportunity to vote. On the issue of there being a kikuyu community line, the petitioner told court that he was informed about the same by one Memba who he was not able to get to swear an affidavit owing to the timelines given by the law. Even the issue of a ballot boxes being ferried by a person who was not an employee of the IEBC, is information given to him by a person who did not swear an affidavit and was not called as a witness.

On the letters of complaints that were dated 6th March 2013, he stated that he would not have managed to complain earlier although the irregularities were discovered on the 4th March 2013 and 5th March 2013. On the lack of IEBC stamp on the letters of complaint, he denied that he had created the letters in question just to attach to the petition. He confirmed that the four people he claims to have been barred from voting were not his witnesses.

On the issue of the results having been altered, the petitioner confirmed that all his agents had confirmed through item 4.17 of the checklists that they were in agreement with the results as declared. The petitioner confirmed that the chief agent of ODM in Kariobangi south was not among his witnesses and that given more time he would have gathered more evidence and availed the same to the court. He conceded that he was aware of the procedure of filing a complaint with the IEBC but he told court that he only made a phone call to the returning officer and followed up with the three letters that were filed in court.

On the allegation that the IEBC denied the petitioner the form 35s, the petitioner conceded that he was aware that he could move to court for an order to have the IEBC supply him with the forms. He clarified

that the kind of election malpractices that he was complaining of were bribery, double or triple allocation of ballot papers, barring of voters from voting and alteration of the form 35s. When shown his letters of complaint, he conceded that he did not complain about voters being given more than one ballot paper for one elective post. On the voters voting without national identity cards, the petitioner told court that he had been informed by his agent, who again was not his witness that one Catherine Kapuliaka of IEBC had been heard asking why voters were allowed to vote without identity cards. He told court that the voters had pulled down the perimeter wall but according to the checklist filed by one Johnson Ngaruiya who was the petitioner's agent, the pulling down of the wall did not influence the voters and only delayed the starting of the exercise (page 54 of the petition).

The second petitioner's witness was one Jane Wairimu Njeru. She told court that on the day before the 4th March 2013 general elections, they were given some letters of allotment by one Muiruri. She indicated that the allotment letters appeared not genuine because her letter had two names yet she had previously used three names and there was an error in that the allotment read Njeri and not Njeru. She confirmed to the court that she knew the 3rd respondent herein and that it was not him who gave the allotment letters to them.

The petitioner's third witness is Johnstone Ngaruiya Murage. He was one of the ODM agents and he was stationed in stream 14 of Kariobangi South Primary school polling station. He told court that on the 4th March 2013, he was at stream 14. According to him, some two TNA (The National Alliance Party) officials kept on bringing voters to jump the voting queue to vote on allegations that these voters had fainted on the queue. He told court that he thought some of the cases were not genuine and therefore the two officials were told not to bring in any other voters. He told court that during the voting exercise some names did not appear on the manual register. He stated that some voters whose names were not in the manual register came in with rubber stamps affixed on their palms and they would explain that their names had been found in the Biometric Voter Register (BVR). The witness told court that he signed the checklist at item 4.17 because the results were correct after the counting. He told court that during the morning, the perimeter wall had been pulled down because voters had started arriving from 5am and the gates were still locked. And because of the people who were brought in to vote for having allegedly fainted and those who came with IEBC stamps affixed on their palms, the witness told court that the election was not fair.

On cross examination, the witness confirmed that he did not indicate on the checklist or the form 35 that voters were sneaked in to vote and he did not complain about those who claimed to appear on the BVR but not the manual register. He confirmed that nobody was barred from voting, there was no chaos, no voter buying or bribery and there was no intimidation during the exercise. He confirmed that the pulling down of the wall only delayed the start of the exercise but did not influence the outcome of the exercise. He confirmed that stream 14 had no problems. He indicated that if one failed to sign the form 35, he was supposed to give reasons why he did not sign.

The petitioner's 4th witness was one Charles Mbendo. He was an ODM agent in Kariobangi South Primary school Stream 9. He told court that during the exercise, he realised that some polling clerks were giving more than one ballot paper for a single elective post. He told court that he reported this to the presiding officer by the name Joyce but Joyce told him that there was no such a thing. The witness told court that later, he found one person with two votes for one post, and this was sorted out. He stated that he agreed with the results as announced and that is why he indicated "yes" on item 4.17 of the checklist. He told court that he remained at the polling station even during counting and no malpractice was noted during the counting since even other agents would not allow. He confirmed that it was only in one incident where a voter was found with more than one ballot for the same elective post. He confirmed to the court that there was no voter buying or ballot stuffing or any malpractice according to the checklist

that he signed.

In cross examination, the witness told court that he could not tell how many polling clerks had given more than one ballot paper for each elective post and he did not know how many voters were given more than one elective ballot for a single elective post. He told court that he had refused to sign the form 35 because he was not satisfied with the results though he did not indicate this on the form.

The petitioner's fifth witness was one Irene Amondi. She was also an ODM party agent during the March, 4 2013 general elections. She told court that she was stationed at Uhuru Primary school polling station at stream 3. Her testimony is that she saw people being given three ballot papers for a single elective post. She told court that she raised the issue with one IEBC official by the name Emily but the official became hostile and ordered her to sit down. She told court that the issue was not sorted out and therefore the elections were not fair. She told court that she was not even given a copy of the form 35. The witness when shown the forms filed by the 1st and 2nd respondents on the one hand and those filed by the 3rd respondent on the other hand, told court that the forms were different. She pointed out that the number of spoiled votes, rejected votes and total votes cast were not tallying in the two sets of forms. While the IEBC form had 641 as total cast vote, the 3rd respondents form shown 637. She stated that the signature appearing on the form filed by the 3rd respondent was her signature but denied that she is the one who signed on the form filed by the IEBC.

In cross examination, the witness was at pains to explain how she signed the form 35 attached to the 3rd Respondent's response to the petition, yet she claims not to have seen the form 35 relating to stream 3 of Uhuru Primary school polling centre. When shown the two sets of forms, she told court that the votes garnered by the individual candidates tallied in both sets. She confirmed that the posting in respect of each candidate tallied and that the alterations related to the upper part of the form. At first the witness denied having filed any checklist but when Mr Wanjohi for the 3rd respondent insisted that all agents were required to file a checklist, the witness stated that she had filed one but did not know why the same was not in court.

The witness told court that she could not name the person who had received three ballot papers and could not remember the names of the polling clerk who issued more than one ballot. She told court that she was present during the counting and at the end of it, she together with the other agents signed the form 35. She confirmed that the individual candidates results as contained in the forms filed in court were as was announced at the polling station. She further told court that the people who were found with more than one ballot for an elective post, had ballot papers relating to the presidential election and not county election. She conceded that she was aware that a complaint ought to be in writing but she did not write down. In re examination, the witness told court that the three ballot papers were being given for all elective posts and not only presidential. She told court that after the counting, they had asked for a recount and it was allowed. She confirmed that the results announced were as shown and filed in court.

1ST AND 2ND RESPONDENTS CASE

The 1st and 2nd Respondents called two witnesses. The first witness was Sarah Friday Amoko. She had worked as a presiding officer in the March 4, 2013 general elections. She was stationed at stream 2 of Kariobangi South Primary school Polling Station. She adopted her affidavit sworn on 20th May 2013 in response to the petition as her evidence in chief.

In cross examination she conceded that the form 35 in respect of stream 2 Kariobangi South Primary school had been amended. This was from valid votes of 729 to a valid vote of 727. The individual results of the petitioner also an alteration in that it was initially 395 but cancelled to 393. She explained the

difference in valid votes by stating that there were stray votes that ought not to have been counted and yet they had been counted and the form 35 already filled by the deputy presiding officer. She told court that she is the one who corrected the entries and countersigned for the corrections. She denied that she altered the forms under the instructions of a third party and denied that she was instructed to take any ballot papers to stream 15 of Kariobangi South Primary school polling station. She denied that there was a queue for the kikuyu community in her stream and explained that the queues were according to the letters of the alphabet. The witness also explained that it was possible to have results of one stream in a form with different serial numbers. The reason is that many forms (not necessarily carbon copies) are filled so that agents get copies and there are copies displayed at the polling centres. To her, it was not unusual to have same results recorded in forms bearing different serial numbers. The witness explained that the results of Sospeter Kimani in stream 2 of Kariobangi South primary school were initially indicated as 35 and the deputy presiding officer indicated to 33 when the results were announced but when the witness counterchecked, the votes were 35 and therefore she indicated 35, which was the correct number. The witness told court that all the cancellations were made when the votes were being counterchecked including the corrections made to the votes cast and votes rejected. She denied that voters were being given more than one ballot paper for each elective post.

The witness told court that the cancellations seen were effected during counterchecking and the effect was to reflect the correct position on the ground.

The 1st and 2nd respondents 2nd witness was Marjorie Patience Owino, the Returning officer Embakasi West Constituency. She told court that on the March 4 2013, she was mainly at the tallying centre, which was at Busara Primary School in Umoja. She told court that the Constituency had four wards and the ward in question was Kariobangi South Uhuru Ward. The witness told court that she would adopt her affidavit sworn on 28th March 2013, the two further affidavits sworn on 20th May 2013 and the supplementary affidavit sworn on the 9th December 2013 as her evidence in chief.

In cross examination, the witness told court that she would mainly rely on information received from the presiding officers and the forms 35 that were forwarded to the tallying centre for tallying. The forms 35 were filled by the presiding officers and the deputy presiding officers to confirm the results of an election and the alterations present on the forms are explained by the presiding officers. She told court that a form 35 which has no results is incomplete and can be manipulated and it ought not to be given to the Returning officer. She denied having received any blank form 35. When shown page 38 of the petition, (a form 35 indicated to belong to Dr Mwenje Polling station and signed but without any results) she stated that she did not receive any blank forms.

She told court that as the returning officer she had received an explanation for any editing that had been done to forms 35 before she accepted the forms at the tallying centre. She conceded that some of the forms annexed to the third respondents affidavit bore different alterations from those annexed by the 1st and 2nd respondents on the upper part but the individual results remained the same. She told court that the alterations are what she could call editing to reflect the correct results. She told court that it was possible to have different serials of forms but for the same stream. In fact she stated that the forms she supplied to the advocates are what she could get from the presiding officers because initially she was not able to access those that had been filed with the IEBC. She told court that this was an exercise conducted by human beings and minor errors were bound to occur. She explained that even the fatigue of having worked long hours would have contributed to the minor errors and hence the editing. She stated that the errors resulted from the way the stray votes and rejected votes were handled and added that stray votes ought not to be added or deducted from anywhere.

She conceded that the form 35 relating to stream 8 of Kariobangi South Primary school did not bear an

IEBC stamp, but her view was that it is not mandatory that an IEBC stamp be affixed on a form 35 to authenticate it.

The witness explained the procedure of verification in order to be allowed to vote. She told court that all those appearing on the Electronic Voter Data (EVD) but missing from the manual register were allowed to vote, and the presiding officer had the power to write the missing names on the manual register. She told court that she was aware of the allegation that some people were denied a chance to vote, but nobody complained to her that he/she had been barred from voting.

On cross examination, the witness explained that the serial numbers of the form 35 may vary even within a stream because many forms are filled. In fact she said a minimum of five forms are filled and this could go up depending on the number of political parties that are participating. On the alterations or amendments, she stated that there was a misunderstanding on how to handle the rejected votes. She told court that valid votes cast is the total votes for all the candidates, while total votes cast is valid votes cast plus the spoilt votes. She told court that this concept was misunderstood and hence the alterations to set the record straight. She told court that the individual candidates' results were never amended.

In stream 5 of Kariobangi primary school, she noted a difference in one vote in the votes cast. The witness went through all the forms 35 filed in court and explained the contents of each of the forms. She stated that the amendments were caused by the mishandling of the rejected votes and that simple arithmetic would confirm the position since the individual results are clear. She told court that the petitioner garnered a total of 9,167 votes while the 3rd Respondent garnered 14,049 votes in Kariobangi south, Uhuru ward.

On the complaints, she told court that she received a complaint from the petitioner on the 6th March 2013 while at the tallying centre. She told court that the chief agents of the TNA and ODM were consistently present from the start of the voting on the 4th March 2014 to the time she announce the final results. The witness confirmed that she had been informed of the presence of some rowdy youths in Kariobangi and she informed the OCS Buruburu and more security was deployed. According to her, the incidents that occurred did not at all affect the results of the election. She stated that the results as they are reflect the will of the people of Kariobangi South. She explained that before the results are taken to the tallying centre, they are first announced at the polling centre by the presiding officers in presence of party agents and that only a final tally is done at the tallying centre.

On the doctoring and alteration of the results, the witness told court that paragraph 15 of the petition was not clear in which polling centre or stream that may have happened and had she been informed of the particular stream or streams, she would have availed the presiding officers to clarify. She told court that the form 35s appeared untidy and that is why she sought an explanation from the presiding officers and this was given and she was satisfied. She told court that even the polling day diary that the petitioner is complaining about in respect of stream 5 Kariobangi, is signed by ODM agents Francis Angote Arwings and Jackline Maganga. She told court that if an agent had any problem with the results, they do not sign the forms or the polling day diary but instead they state the reasons why they have declined to sign.

3RD RESPONDENTS CASE

The 3rd respondent also testified in court. He told court that he voted at Uhuru Primary school polling Centre on the 4th March 2013 at about 4.00pm. According to him, all was peaceful and the elections went on well. He told court that he did not go to Kariobangi South Primary school polling centre, but had agents all over the ward who he kept communicating with. He denied that there was a Kikuyu community queue and explained that the queues were organised alphabetically. He denied ever issued allotment

letters and denied ever having seen the letters attached to the petition at pages 80, 81 and 82. He told court that the results were announced at the tallying centre by the returning officer and he got 14,049 votes while the petitioner got 9,167 votes. To him these results were complete, genuine and a true reflection of the will of the people of Kariobangi. The 3rd respondent stated that they had been taught how to lodge complaints and it must be in writing. He indicated that the complaints as shown to him in court are not made in the proper manner.

In cross examination, the witness conceded that there were amendments to the form 35s on the upper part but not on the candidates' results.

He told court that he did not bribe any one and that paragraph 17 of the petition was only based on suspicion. He denied that he was involved in any electoral malpractices and told court that he had not been summoned by any police officer to answer to any election offence.

The second witness for the 3rd Respondent was James Macharia. He was a TNA agent at Dr Mwenje polling station. He told court that all went on well at Dr Mwenje. He shown to court a checklist that he filled on behalf of the stream 1 agent and confirmed that there were no complaints.

The 3rd witness for the 3rd respondent was Edwin Gitonga Wandia. He was an assistant chief agent with TNA and was dealing with Kariobangi south ward. He told court that he kept going round the various polling centres within the Kariobangi South ward during the polling. He told court that the only significant thing that happened was the pulling down of the perimeter wall at Kariobangi primary school as voters wanted to get into the centre and start voting. He told court that the voting however went on well as the incident of the wall did not affect the exercise. He told court that he did not see any boys restraining voters from accessing the polling centre despite having spent some considerable time at Kariobangi Primary school. The witness told court that there was no for the Kikuyu community. He also told court that he was moving round the polling centres during the counting and he did not see any police officers sleeping.

The 4th witness for the 3rd respondent was Florence Gathoni. She was he was a TNA agent during the March polling and th4th 2013 general elections. She was stationed within stream 9. She told court that there was no vote buying and no bribery within the stream. She also told court that there was no specific line for the Kikuyu community as the names are arranged alphabetically. She told court that the ODM agents were present during the polling and the counting. She told court that she did not see any problem during the exercise.

On cross examination, she told court that she did not see anyone being given more than one ballot paper for one elective post. She described the elections having been conducted in a fair manner.

I have considered the evidence on record as well as the submissions by the parties and my duty is

- i. To determine whether the results as announced were incomplete and doctored as alleged by the petitioner.**
- ii. To determine whether the petitioner has proved that the elections conducted on the 4th March 2013 in Kariobangi South Ward in respect of the county representative were marred with such irregularities so as to render them a nullity.**
- iii. To determine whether the 3rd Respondent was validly elected as the member of the County Assembly of Kariobangi South, Uhuru ward.**

iv. **To determine who should bear the costs of this petition.**

Before dealing with the above issues, I will state that from the onset that the petitioner herein has gone completely outside his pleadings in both the evidence adduced in court and the submissions that he has filed. As I stated in my ruling on scrutiny, parties are bound by their pleadings. The superior courts have also times and again insisted that decisions should only be rendered strictly on the pleadings. A court cannot *suo moto* draft its pleadings, frame the issues and determine those issues. Indeed Muchelule J in **Jared Odoyo Okello vs IEBC and 3 others (EP No. 1 of 2013)** at Kisumu, while quoting Kimaru J. in **Mahamud Muhumed Sirat vs Ali Hassan Abdurahman and 2 others (2010) eKLR** stated;

“It is trite law that decisions rendered by a court of law shall only be on the basis of pleadings that have been filed by the party moving the court for an appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required it to make decisions in respect of matters that were not specifically pleaded.

This court will therefore not render an opinion in respect of aspects of the petitioners case on which he adduced evidence but which was not based on the pleadings that he filed in court and in particular the petition.”

I will therefore be guided by the above decision and I will only render a decision on the matters that the petitioner has pleaded.

Secondly, I will state that the burden of proof in an election petition is firstly on the petitioner. It is for the petitioner to demonstrate to the court that the elections as conducted were not done in a free and fair manner and in accordance with the constitution and the relevant laws. The Supreme Court in the case of **Raila Odinga and 5 others vs The IEBC & 3 Others, Election Petition Number 5 of 2013** stated *“the petitioner must not only prove that there was non compliance with the law, but also that such non compliance did affect the validity of the elections. It is on that basis that the Respondent now bears the burden of proving the contrary.so the petitioner must set out by raising firm and credible evidence of the public authority’s departure from the prescriptions of the law..... it behoves the person who alleges , to produce the necessary evidence in the first place”*

It was therefore the duty of the petitioner herein to bring forth evidence in support of the petition but not to seek to rely on that which he has not brought before this court.

The court will now, guided by the principles above to determine the issues in question.

According to the petition in paragraph 9, the petitioner alleges that the results that were announced were **altered, doctored and incomplete**. From the onset, the petitioner does not give the specific streams or polling centres where he alleges that the results were altered or doctored. It appears like the petitioner is making omnibus allegations and then leaves the court with the task of trying to sift through the allegations and trying to find out in which exact polling centres and streams the petitioner’s case relate to.

Be that as it may, during the hearing, the alterations that the petitioner is complaining of were brought to the fore. The forms 35 filed in court had some amendments or editing on the upper part where the spoilt

votes, total votes cast and rejected votes are indicated. I have had the opportunity to consider the thirty eight (38) forms filed in court on the 20th May 2013 and annexed to the further affidavit sworn by Marjorie Patience Owino the returning officer. It is correct that the forms bear some overwriting or editing on the upper part of the form. In particular the forms are edited on the part of the total votes cast and the rejected votes. The forms 35 in respect of Kariobangi South primary school streams 1, 2, 3, 4, 5, 6, 7, 11, 12, 15 16, and 17 had the amendments. The forms 35 in respect of Uhuru primary school polling station were also amended on the upper part. These are the forms in streams 1, 2, 3, 4 and 6. In Buruburu 1 primary school and Nairobi River primary school, a few of the forms were also amended.

As I have stated above, the editing is on the upper part and not the individual candidates' results. The explanation given by the returning officer is that the rejected votes were mishandled. She explained that the total votes cast should be a total of the total valid votes and the spoilt votes. She indicated that the rejected votes ought not to be added or subtracted from anywhere, yet many presiding officers had accounted for the said votes and hence the alterations.

I have considered that explanation alongside the forms filed in court and the the allegations by the petitioner. I have no reasons to doubt the explanation given by the returning officer since she is the one who received the forms and received the explanation from the various presiding officers. I say this because if the alterations were being made in order to favour a particular candidate, then even the individual candidates' results could also have been tampered with. In any event, it is for the petitioner to demonstrate how the results were materially affected by the alterations. The court cannot infer lack of credibility in the results just because there are alterations in the electoral forms. As held by Achode J, in **Hosea Mundui Kiplagat vs Sammy Komen Mwaita and 2 others, E.P No. 11 of 2013 in Eldoret**, *"the court can only reach a finding emanating from such cancellations and alterations after examining them in the light of the circumstances surrounding the impugned elections. The petitioner has not shown to this court how the alterations referred to had the result of affecting the integrity of the results."*

I will be guided by the said decision and find that the petitioner herein has not shown how the said alterations affected the integrity of the results announced. I find no merit in that allegation by the petitioner.

The petitioner has submitted that the 1st and 2nd respondents have not explained the alterations. With utmost respect to the petitioner, I do not agree with that submission. The Returning officer in her testimony in court while being cross examined by the 3rd respondent and even when questioned by Mr Mukele repeated more than once that the editing was because of mishandling of the rejected votes. This explanation in my view agrees with the contents of the forms as filed to the court. As to whether the alterations would have prejudiced the petitioner, my view is that since they do not relate to the individual results, then they would not at all prejudice any of the candidates and did not affect the result of the election.

And having carefully gone through the forms 35 filed in court, I realise that there were a few forms where the individual results appear to have been edited. In Kariobangi South primary school stream 2, there are alterations in respect of the individual results. The presiding officer in charge of stream 2 appeared in court and explained that she is the one who amended the same after counterchecking the votes. In stream 12, the individual votes are edited, but the total valid votes tally with the cumulative value of the individual votes and therefore there cannot be said to be an anomaly. The total garnered by all the candidates is 739 votes. Stream 16 has also an alteration but it does not relate to any of the parties herein and Jamal Kongo Gathumbi has not complained. In Uhuru stream 1, Sospeter Kimani Njoroje has also not complained and the individual candidates' results are equal to the total valid votes cast and therefore there is no discrepancy.

My conclusion is that the editing or what the petitioner calls altering has been explained and the amendments done were aimed at reflecting the position on the ground and not favouring any of the candidates. In any event this court is alive to the fact that the elections were conducted by human beings who are bound to make errors. The law is also alive to the fact that no elections can be said to be perfect and errors are bound to occur and when discovered, they must be corrected to reflect the true position. My finding is that the amendments have been explained and they did not materially affect the outcome of the result and therefore this court would not need to nullify an election based on that ground. In this I am guided by the decision of Maranga J. in **Joho vs Nyange (2008) 3KLR at 500** where the judge stated, *“There is no election which can be perfectly conducted. However, it is only when such errors, which constitute non compliance with the law, materially affect the outcome of the results that the court will have no option other than to nullify the said results.”*

Other than the alterations, the petitioner has alleged in his evidence that the forms 35s were not signed by all the party agents, some were not dated or had varying dates, and that some had no IEBC stamp. As I stated earlier, the petitioner is simply making omnibus allegations without specifically indicating which particular forms he has a problem with and how that would affect the outcome of the election. In any event, if the agents have not signed the forms, they are under an obligation under Rule 79 (3) of the Elections (General Regulations 2012) to indicate the reasons why they have not signed. The petitioner has not shown this court any form 35 with a reason as to why his agents did not sign. In respect to the IEBC stamp, I did state in my ruling on the scrutiny application that there is no law that requires that a form 35 must bear an IEBC stamp. I did state that the signatures of the presiding officer and the available agents (not all) are sufficient to authenticate a form 35. (Refer to the cited decision in **IEBC & Another vs Stephen Mutinda Mule & 3 others CA No. 219 of 2013 in Nairobi**).

The petitioner in his submissions has urged the court to consider the process and not the final figures. My view is that both the process and the outcome are as important. The process must adhere to the laid down electoral laws while the result guides the court in determining the margin of the win and hence the outcome. In the word of Musinga J. in **Manson Oyongo Nyamweya vs James Omingo Magara & 2 Others, E.P No. 3 of 2008 in Kisii**, *“The court has to consider whether the grounds raised in the petition sufficiently challenge the entire electoral process and lead to the conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. In a democratic election, the means by which a winner is declared plays an important role.....”*

The duty is however on the petitioner to prove that the electoral process was not complied with and go a step further to demonstrate that he was indeed substantially prejudiced as a result of the said infractions. Indeed even section 83 of the Elections Act is clear that *“No election shall be declared to be void by reason of non compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written law or that the non compliance did not affect the results of the election.”* I will be guided by that section of the law and find that the petitioner has not sufficiently discharged that duty and there is no evidence that the elections of the county assembly member of Karobangi South, Uhuru ward were flawed.

The petitioner also complains that the results were incomplete. During the scrutiny application I dealt with this limb of the petition. As I stated in my ruling, the full results have been filed in court. The results of every stream are in court and the results announced by the returning officer are also filed in court. The petitioner has not filed any alternative results to show that what was announced is different from what the IEBC is holding, or that the 2nd respondent announced results before the final tally was done. The IEBC is the official custodian of the election results and the court can only rely on the documents availed by the said Electoral body but not that which did not emanate from them.

The petitioner has even argued that the petitioner is holding different results from the 1st and 2nd Respondents and also that the results by the 3rd respondent are different from what the 1st and 2nd Respondent is holding. With respect, this court together with the parties went through all the forms 35 during the cross examination of the returning officer. It became clear that except for the alterations on the upper part of the forms (which this court has already dealt with) the results in all the forms were in agreement. The petitioner cannot therefore argue that there are three different results. Indeed according to the said forms 35 and the form 36 produced in court, the petitioner garnered 9,167 votes while the 3rd respondent garnered 14,049 votes. The results of the other aspirants are also contained in the form 36 filed in court. My finding is that the results as announced and as filed in court are complete. The burden was on the petitioner to demonstrate what he meant by stating that the results were incomplete and to demonstrate the incompleteness. My view is that the petitioner has not discharged that burden.

While on this, I also note that the petitioner has challenged the authenticity of the form 36 that was filed in court by the 1st and 2nd Respondents. The petitioner argues that it was not even signed by the agents and it appeared to be an email. My take on this is that the form 36 is a tally of the final results and it is actually the cumulative value of the various forms 35. Regulation 83 of the Election General Regulations requires that the Returning officer tally the results from all the polling stations. The form filed in court is signed by the returning officer and it is an annexure to the affidavit filed by the returning officer on behalf of the 1st and 2nd respondent. Under the law it is only the returning officer who can complete the form 36. My view is that since the form was completed and produced in court in accordance with the law, then it cannot be challenged. In any event, what matters is not the format of the form but the content. The form has the full results of Kariobangi South, Uhuru ward and the petitioner has not shown how the form as it is, has prejudiced him. I have also had an opportunity to look at the law and I have not found any provision that requires that the form be signed by the agents.

The petitioner has alleged that the results were also doctored. My view is that for one to demonstrate doctoring there must be evidence that the outcome was different but was doctored to a different predetermined figure to favour one of the candidates. The petitioner has not given any evidence of this. He has based his claim on allegation that since there was a blank form 35 allegedly filled at Dr Mwenje polling centre, the results could have been manipulated. The court only deals with facts. The petitioner must demonstrate the doctoring and cannot seek to rely on the suspicion that since there is a blank form, the source whereof is unknown to the respondents then there was doctoring. The returning officer appeared in court and told court that she did not receive any blank form 35 and was not aware of the document that was shown to her. The question then that arises is where did the petitioner get the page 38 attached to the petition" That has not been explained.

In his submissions the petitioner has also alleged that the individual candidates results in stream 10 of Kariobangi south primary school, do not add up to the valid votes cast. Again I will state that this has not been pleaded and the petitioner cannot seek to build his case outside the pleadings. However even looking at the forms filed in court, that allegation is not correct. The official record of the vote count is the form 35 filed by the IEBC which is the legal custodian of the election results. According to the form (page 12 of the affidavit of Marjorie Patience Owino filed on the 20th May 2013) the valid votes cast was 742. The individual candidates' votes are $40+307+5+39+351=742$. I find no merit in that argument.

The petitioner has alleged that there were several irregularities and malpractices and therefore it was difficult to know who the exact winner was. The irregularities as can be picked from the body of the petition are that;

- a. That there was a queue for the Kikuyu community.

- b. That the petitioner had suspected that the respondent had bribed the voters by issuing them with allotment letters that were not genuine.
- c. That there were ballot boxes ferried by people who were not IEBC officials and this was a clear indication that there was no transparency.
- d. That some of the petitioner's supporters were denied an opportunity to vote by some boys who had created a barrier and the voters could not access the polling station freely.
- e. That the voters were being allowed to vote without national identity cards
- f. That some voters were being given more than one ballot paper for each elective post.
- g. That the ODM agents were also not given the forms 35 when they requested for the same and the respondent had to pull out those that were affixed to the doors.
- h. That his agents were told to go and sleep and finally that some agents were allowing the voters to jump the queue on the ground that they had fainted while queuing.

I will now handle each of the alleged malpractices separately:-

On the first issue, it is common knowledge that elections in Kenya are conducted by use of voter registers. At the hearing, none of the witnesses called by the petitioner led any evidence to show that indeed there existed a queue for a community or a register specifically for the kikuyu community. Despite the petitioner stating that he was informed by an agent that a certain IEBC official was being asked for the Kikuyu queue, the said agent was not called as a witness. This therefore simply remains hearsay evidence which is not admissible. In any event, the witnesses called by the 1st and 2nd Respondents who are IEBC officials did confirm to the court that the queues were according to the alphabet. It cannot therefore be said that there was a queue belonging to the Kikuyu community.

On the allegations of bribery, the petitioner called one Jane Wairimu Njeru as a witness. Unfortunately the elderly lady completely distanced the 3rd respondents from the letters of allotment that were the subject matter of the bribery claims. In any event even the allegation of bribery as indicated on the petition is mere suspicion. The petitioner states "*that.....had not issued any letters of allotment to any individual and I suspect that this was meant to bribe voters.*" The court would only deal with proven facts to nullify an election and not mere suspicions. There is no iota of evidence that has been tendered in court to demonstrate that the 3rd respondent was indeed involved in voter bribery which in any event would constitute an election offence.

The petitioner also alleges that some ballot boxes were transported by people who are not IEBC officials from the polling station. The petitioner has not tendered any evidence to show that any ballot boxes were transported or carried away by stranger. In fact none of the witnesses called by the petitioner even alluded to this allegation. It is not clear whether this allegation as indicated in paragraph 16 of the petition is the same allegation as contained in paragraph 16 of the affidavit in support of the petition. The affidavit in support of the petition on paragraph 16 alleges that the presiding officer in stream 2 was ordered to carry ballot papers to stream 15. Unfortunately, again these are just allegations. The ODM agent in stream 2 who is alleged to have given this information to the petitioner did not appear in court as a

witness. The presiding officer in stream 2, Sarah Friday Amoko appeared in court and denied that any such thing happened. It is upon the petitioner to tender evidence in court to prove his case. This has not been done.

The further allegation is that some of the petitioner's supporters were barred from voting, by some boys who had created a barrier at the entrance of the polling station. None of the people alleged to have been barred from voting has been called to this court to testify. A voter is an adult and therefore competent as a witness. In as much as there are some names listed in the petitioner's letter of complaint dated the 6th March 2013, whoever alleges must prove. It was upon the petitioner to call at least some of the people he alleges to have been barred from voting to demonstrate to the court that indeed the person was registered as a voter in Kariobangi South and that he/she was at the polling centre but did not vote because he/she was simply barred from voting without any apparent reason. This was not done and again the allegation remains unsubstantiated. Indeed the petitioner's witnesses who were the ODM agents confirmed that no voter was barred from voting in the streams where they were manning.

The petitioner further states that some of the voters were allowed to vote without national identity cards. Again none of the witnesses called by the petitioner told court that voters were allowed to vote without identification documents. The allegation that an ODM agent heard an IEBC official by the name Catherine Kapuliaka asking why people were being allowed to vote without national identity cards is not supported by any evidence. The only evidence by the petitioner's witnesses was that voters whose names did not appear in the manual register would come with IEBC stamps already affixed on their palms and they would be allowed to vote. In the words of Johnstone Ngaruiya, this happened when the BVR kits went off in some streams and the voters would have their names checked electronically in the streams where the kits were still functioning and an IEBC stamp would be affixed to differentiate such voters from any other person. The returning officer also explained that the presiding officers were allowed to allow voters whose names were missing from the manual register but appearing on the electronic data register (EDR) to vote and they would include their names on the manual register. With that kind of evidence, I find no irregularity with voters having their names confirmed from the EDR to enable them vote. It would have been a worse evil to turn them away when indeed their names are present in the EDR.

There is also an allegation that some voters were being given more than one ballot paper for an elective post. Of course this is a serious allegation because if proven, it would mean that there was double voting. The petitioner's contention is based on the testimony of Irene Amondi, who told court that she saw voters being given more than one ballot paper in respect of the presidential election. The credibility of this witness came into question during cross examination. The witness denied having received any form 35 and denied having filled a checklist during the election. However when cross examined and shown the form 35 filed by the 3rd respondent the witness conceded that she had filled a checklist and did not know why it was not in court. She also confirmed that she had signed the form 35 and was therefore in agreement with the results in respect of the county assembly as announced. My finding is that this is a county assembly election petition and not the presidential election petition. The witness, agreed with the results of the county assembly as was announced and that is why she signed form 35. The court would not nullify a county election certificate when the alleged mal practice did not relate to that particular election. My view is that the testimony of this witness (if it was to be believed) would have been more relevant in an election petition relating to the election of the president and not the petition herein.

Then there is the testimony of the petitioner's 4th witness which was that he saw a voter with more than one ballot paper. The witness then states that he raised this issue and it was sorted out and that is why he has indicated on item 4.17 of the checklist that he agreed with the results. My view is that since the

witness states that the issue was sorted out and he agreed with the results then this would not materially affect the outcome of the election.

The petitioner further alleges that he was not given forms 35 and he had to pull out those that were affixed on the classroom doors. The petitioner's witnesses testified in court and they all confirmed that they had received the forms. Indeed the checklists of the 3rd and 4th petitioner's witnesses at item 4.17 confirm that they agreed with the results and received copies of the form 35. My view is that there is no evidence to support the allegation that the petitioner's agents were denied the forms 35.

Be that as it may, if the petitioner did not receive the forms 35 from the first respondent, then he had the option of obtaining a court order to assist him get the copies from the Electoral body. The petitioner did not at any time during these proceedings seek such an order and therefore his argument does not hold.

On the argument that the petitioner's agents were told to go and sleep, none of the witnesses called by the petitioner stated that they were told to go and sleep. And in any case, an agent is trained on how to conduct themselves during such an exercise. Their duty is to take care of the interests of their party. It is absurd for anyone to claim that they were told to go and sleep and they actually went to sleep. On the allegation that some voters jumped the queue after pretending to have fainted, it was upon the petitioner to demonstrate that this had happened and also demonstrate how this affected the outcome of the elections. The petitioner's 3rd witness told court that the queue was very long and the people who had been brought stating that they had fainted had come from far behind where the witness could not see. The witness therefore cannot confirm whether the said voters had actually fainted or not. In any event, the petitioner has not demonstrated that he suffered any prejudice by the said voters casting their votes. In fact the only complaint was that the queue was slow.

My finding is that the malpractices and the irregularities that the petitioner alleges marred the elections have not been demonstrated.

And finally the petitioner has submitted that the election as conducted cannot be said to have been fair because there was the use of a particular form 35 with the serial number 35CA142900158412 in several streams. Again, this was not pleaded in the petition. I however realise that during the application for scrutiny, the same argument was brought up and this court made a finding on it. In seeking to convince the court to make a different finding, Mr Were now submits that he did not state that the forms attached to the petition were the correct forms. I do not know whether Mr Were wants to abandon or discredit his own exhibits, but the point is that the forms attached to the petition and those attached to the affidavit by the 1st and 2nd respondent are of similar serial numbers. That means that the forms are not in any way a forgery. This court is unable to come to a different finding other than that contained in its ruling delivered on the 27th February 2014 on this petition and therefore the finding of the court remains.

In conclusion the court finds that the petitioner has not met the standard required in proving electoral malpractices. As was held by Achode J, in **Hosea Mundui Kiplagat vs Sammy Komen Mwaita and 2 others, E.P No. 11 of 2013 in Eldoret**, *"This standard where criminal conduct is alleged, is high and must meet the twin aspects of proving the commission of the offence by the person complained of in the elections either directly or indirectly and further that the irregularities complained of must have affected the outcome of the results."*

The Court of Appeal also in **Rozaah Akinyi Buyu vs Independent Electoral and Boundaries Commission and 2 others, Civil Appeal No. 40 of 2013 (2014) eKLR** reiterated that *"we have considered the grounds of appeal relating to the alleged malpractices in the conduct of the elections and the standard of proof required to establish the same and have come to the conclusion that the appellant*

did not prove to the required standards that there were anomalies or irregularities in the conduct of the election that affected the results as would void them.

This court bearing in mind the burden and standards of proof required finds that the petitioner has failed to prove his case as would have been expected.

Coming to the issue of whether the 3rd respondent was validly elected, my view would be that since the petitioner has not been able to adequately demonstrate that the elections were not free and fair or that they were marred with any serious irregularities, then the said elections were conducted in accordance with the law. In the said elections the 3rd respondent garnered most votes. According to the final tally the 3rd respondent garnered 14,049 votes while the petitioner garnered 9,167 votes. My finding is that the 3rd respondent was duly and validly elected as the member of the county assembly in Kariobangi South, Uhuru ward and the will of the people of Kariobangi South, Uhuru ward must be respected. And therefore the prayer number C of the petition fails.

In conclusion and having considered all the above, I find that the petitioner has not been able to demonstrate that the elections conducted in Kariobangi South, Uhuru ward in respect of county assembly lacked credibility. I will thus dismiss the petition with costs to the respondents.

I will now go ahead and assess the costs of the petition. The general principle of law is that costs follow the event. In determining the costs the courts must consider the circumstances of each case, taking into consideration time taken, the complexity and importance of the matters before court and the effort and skills invested including the research conducted. This petition has been pending in the courts for about one year. The reason is that it was heard by the Chief Magistrates court, went on appeal at the High Court and then re heard again as a retrial in the Chief Magistrates court. No doubt that the parties have spent a considerable amount of time in the prosecution of this petition. Going by the volume of the documentation filed in court, the submissions and the authorities, it is clear that the parties invested time, resources and skills to enable them conclude the petition. All that considered and considering the previous awards granted in election petitions, I will cap the costs of the petition at Kshs 1,800,000/- (One Million, Eight Hundred Thousand only), to be borne by the petitioner. The 1st and 2nd Respondents shall be paid a maximum of Kshs 1M (one Million shillings) while the 3rd respondent shall be paid a maximum of Kshs 800,000/- (Eight Hundred Thousand shillings).

L. M. WACHIRA (MRS)

DEPUTY REGISTRAR

Judgement dated and Delivered in Open Court on the 21st day of March 2014.

L. M. WACHIRA (MRS)

DEPUTY REGISTRAR

I wish to end by commending the parties, witnesses and the advocates who participated in these proceedings. I thank each one of you for the understanding and patience even when I had to retain you in court for long hours without a break. It was for a worthy cause.



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