Case Number:	Civil Appeal 53 of 2013
Date Delivered:	02 May 2014
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Erastus Mwaniki Githinji, George Benedict Maina Kariuki, William Ouko
Citation:	Arthur Kibira Apungu v Independent Electoral & Boundaries Commission & 2 others [2014] eKLR
Advocates:	none
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	ELECTION PETITION NO. 7 OF 2013
Case Outcome:	Appeal dismissed
History County:	Kakamega
Representation By Advocates:	One party or some parties represented
Advocates For:	Donald W. Muyundo of D.W. Muyundo & Associates
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, G.B.M. KARIUKI & OUKO, JJ.A)

CIVIL APPEAL NO. 53 OF 2013

BETWEEN

ARTHUR KIBIRA APUNGU …….. APPELLANT

AND

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION …….. 1ST RESPONDENT

THE RETURNING OFFICER

LUANDA CONSTITUENCY …….. 2ND RESPONDENT

CHRISTOPHER OMULELE …….. 3RD RESPONDENT

(*Being an appeal from the judgment of the High Court of Kenya at Kakamega (E.K. Ogola J.) delivered on 7th October, 2013*

in

ELECTION PETITION NO. 7 OF 2013)

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JUDGMENT OF THE COURT

The March 4, 2013 National Assembly election in Luanda Constituency attracted ten contestants, including the 3rd respondent (Christopher Omulele, the Member of Parliament), the 1st appellant, (Arthur Kibira Apungu) and Julius S. Ochiel, (the 2nd appellant), whose appeal was withdrawn before the hearing of this appeal, with the only issue remaining for determination in this judgment being that of costs. We shall, in the circumstances be referring to the 1st appellant simply as the appellant and to the 2nd appellant only where appropriate.

At the conclusion of the exercise the Returning Officer (the 2nd respondent) announced the following results:-

Christopher Omulele - 8,762

Arthur Kibira Apungu - 6,588

Khalid Njiraini Tianga - 5,202

Julius Abraham Sikalo Ochiel - 4,293

Tom Oscar Alwaka - 2,404

Caroline Alosa Angote - 955

Julius Okola Anjimbi - 595

Daniel Oteno Ndale - 312

Otundo Kennedy Kweya - 161

Aggrey Tiema Kulali - 113,

and declared the 3rd respondent the duly elected member of the National Assembly to represent to people of Luanda Constituency. The declaration, however, aggrieved the appellant who petitioned the High Court at Kakamega for,

i. an order of the scrutiny of cast, rejected and spoilt votes, counterfoils of ballot papers and the register of voters.

ii. an order of inspection of the ballot boxes.

iii. an order of a recount of ballot papers cast and the retallying of boxes cast in all the polling stations.

iv. a declaration as null and void of the parliamentary election in Luanda Constituency and a further declaration that the 3rd respondent was not validly elected.

v. an order that the respondents do pay to the appellant costs of the petition.

The petition was heard and determined both on witnesses' affidavits and oral evidence. The petition and the evidence presented before the High Court pointed to the following grounds:-

i. That the appellant's name on the ballot paper was misspelt.

ii. That the 3rd respondent committed an election offence by engaging in voter bribery.

iii. That the respondents deliberately orchestrated the failure of electronic voting, transmission and tallying system.

iv. That the results relayed by the 1st and 2nd respondents were not verifiable due to poor lighting and visibility in the polling stations.

v. That the 1st and 2nd respondents and their agents introduced three ballot boxes stuffed with ballot papers whose origin and results could not be verified.

vi. That the election was not free and fair due to,

a. intimidation of the appellant's agents by the 2nd respondent,

b. inflation of votes in favour of the 3rd respondent,

c. the failure to publicly display the results at the polling stations,

d. the differences in the figures, shown in the Forms 35 in respect of the same polling centre, and

e. the alterations on Forms 35 without endorsement by agents.

vii. That the police and the provincial administration, instead of providing security were used to intimidate the voters and the appellant's agents.

viii. That the votes cast were not properly transmitted, counted and tallied.

ix. That prior to voting, the ballot boxes were not opened and inspected by the appellant's agents, and

x. That the presiding officers in various polling stations openly displayed bias and favouritism in favour of the 3rd respondent.

Following an application by the appellant and in order to determine some of the complaints raised in the petition, the High Court (Ogola, J.) and pursuant to **section 82 (1)** of the Elections Act, directed the Deputy Registrar to conduct scrutiny in the polling stations where the results were disputed.

The following is the summary of evidence presented in the High Court in respect of the petition.

The appellant complained that when he went to cast his vote he noticed that his surname, Kibira had been misspelt as Kibara and that no sooner had he stepped out of the polling room than his supporters confronted him over this very matter of his name. He believed that as a result of the misspelling of his name, he lost several votes as in his estimation one third of the people who could have voted for him either did not vote or voted for his opponents; that the constituents knew him as Arthur Kibira Apungu and most of them simply called him Kibira. The appellant's witnesses, John Akwale and Samuel N. Terah, testified that illiterate voters were mistreated and sent away by the presiding officers who told them that there was no candidate by the name Kibira. Some who could not read were told to go and get their reading glasses; that the presiding officers insisted on assisting illiterate voters in the absence of the agents except sometimes in the company of agents allied to the 3rd respondent.

On voter bribery it was the contention of the appellant and his witnesses that agents and supporters of the Orange Democratic Movement (ODM) Party on which the 3rd respondent contested, openly urged the electorate to vote for the party candidate. Wycliffe Ominde who was the appellant's agent at Mwitubwi Nursery School polling station indentified Ernest Odungo and James Osieko Owayo, agents and supporters of ODM Party as some of those who offered bribes to voters at the gates of the polling station between 10am and 3pm on the voting day.

Ruth Ong'ayo Onyuanchi, another agent saw the Chief of Emukhuyu Location, Leonidah Okemo, in the company of Agnes Okonyi and one Nditi openly campaigning for ODM, giving every voter Kshs. 200 to vote *"six piece"* for ODM, ie to vote ODM candidates for all the six contested seats; that the bribery was so indiscriminate that the Deputy Chairman of Peace Committee, Bishop Simekha was forced to intervene. Another incident of bribery, according to the appellant's version, was the arrest and prosecution of Tom Amatala Ombima who was said to be either an agent or supporter of ODM. He was found to be in possession of voters' register without authority.

No evidence was led by the appellant regarding the failure of electronic voting, transmission and tallying system, perhaps for the reason that are now public knowledge, namely that, the failure affected the entire general elections.

Evidence on poor lighting and visibility in the tallying hall was to the effect that counting of votes stretched into the night forcing the 1st respondent's employees to use lamps; that the intensity of light from the lamps was so dim that the parties' and candidates' agents had to use lights from their mobile phones. In this condition, the appellant suggested, free and fair results could not be expected.

The issue of three (3) extra ballot boxes allegedly stuffed with ballot papers was introduced by Wycliffe Ominde, the appellant's agent at Mwitubwi Nursery School polling station, who testified that at the tallying centre he saw three additional sealed ballot boxes stuffed with suspicious marked ballot papers, purportedly cast at Mwitubwi Nursery School polling station.

The appellant also presented evidence through John Akwale that the presiding officer at Wanakhala polling station, who he described as a dictator intimidated illiterate voters and the appellant's agents; that he did not allow agents to talk to anybody in the polling room, forced the agents to sign the polling day diary, chased away voters and closed the polling station while voters were still in the queue.

The presiding officer of Esiamarwi polling station, in the testimony of Samuel N. Terah, similarly closed the polling station and chased away some nine people who had lined up to vote; that he openly favoured agents allied to ODM while disregarding those from the other parties.

In Mwitubwi Nursery School polling station it was alleged that the votes were inflated from 5,450 to 6,200 in favour of the 3rd respondent after the visit to the polling station by Hon. Kenneth Marende, the former Speaker of the last National Assembly and a member of ODM. It was also contended that the total votes cast exceeded the number of registered voters.

In Khiwiliba polling station Gladys Karani saw the presiding officer award the 3rd respondent 45 undeserved votes. In the same station, although there were 358 registered voters, it was shown that 381 votes were cast; the 2nd appellant was given 78 instead of 178 votes; that the 2nd appellant's 97 votes in Esibembe Primary School polling station were interchanged with 59 votes for the appellant; there were some 54 Forms 35 which were altered without endorsement.

At Mumboha Primary School stream one polling station there were two Forms 35. In one, the appellant is shown to have scored 73 votes while in the second one he is recorded with 24 votes only, losing 49 votes. The 2nd appellant in this station through the same means lost 51 votes translating to 100 votes lost by the two candidates but gained by the 3rd respondent, whose initial 88 votes moved up to 188 votes.

The respondents denied the foregoing allegations. They however confirmed that as counting went on into the night, they resorted to the use of gas lanterns which fact was clearly recorded in the polling day diary. But they denied that the lighting and visibility were poor. In Esiamerwa polling station, the presiding officer, Mary Nyangweso Tuti maintained that the lighting was sufficient but because of the poor eye sight of some agents due to their age, they had to supplement the lighting with torches. The respondents further averred that all the agents signed all Forms 35 and polling day diary and the few who did not sign failed to do so not because they were prevented.

Two Forms 35 from Ebusyubi polling station were noted to carry different information. The presiding officer, Khiwiliba Primary School polling station denied allegation that he caused agents to sign Form 35 at the beginning of voting. The only thing he did was to ask all the agents to enter their names before the voting began in order to save time; that it was only after the declaration of results that the agents would sign against their respective names. The presiding officer was categorical that illiterate voters would be assisted by himself together with two agents from any party or candidate chosen at random. He refuted the existence of any Form 35 containing different results and that if there was any, it would be a forgery.

Form 35 containing results from Ekwanda primary school polling station had results of one candidate, Caroline Alosa Angote, altered. The presiding officer explained that the figure 22 scored by that candidate was not altered; that he only emphasized the last figure 2. He however conceded that 10 votes were rejected as a result of failure to stamp the ballot papers at the back.

The presiding officer, Mwitubwi Nursery School polling station admitted that she failed to enter the serial number of ballot boxes in the polling day dairy. Later, Wycliffe Ominde, the appellant's agent at the polling station supplied the details which were duly entered in the diary. She insisted that the serial numbers in question were only in relation to the gubernatorial ballot boxes and did not affect the National Assembly boxes. She categorically denied the existence of three strange ballot boxes stuffed with ballot papers and explained that she had only six boxes for each elective post, which she duly handed over to the Returning Officer after the declaration of results; that the votes contained in Form 35 were in agreement with those in Form 36.

Wycliffe Ojina Odede the presiding officer Wanakhele polling station stream one denied claims that he was a dictator, maintaining that he was only firm. He did not force any agent to sign any electoral

document. Like his Mwitubwi Nursery School polling station counterpart, the presiding officer forgot to enter the ballot box serial numbers in the polling day diary. He also admitted that he had a difference of opinion with his deputy on the manner he assisted illiterate voters which difference was resolved.

The presiding officer for Mumboha Primary School polling station stream 1 disowned one Form 35 which indicated that the appellant had 73 votes and 88 votes for the 3rd respondent when infact the correct Form 35 had 24 votes for the 3rd respondent. Both forms were purportedly signed by both the presiding officer and his deputy. The presiding officer testified that he had only 13 Forms 35 all of which contained the same data. He however admitted that he made the alterations on the correct form in respect of the total number of votes cast, and the total number of valid votes but forgot to counter-sign the alterations, even though he stamped the alterations. His admission that the questioned Form 35 may have originated from his office and that both his signature and that of his deputy on the form appear genuine, prompted the learned Judge to order that all original Forms 35 issued by the presiding officer to any person be retrieved, and the ballot box be opened to establish the contents of Form 35 in it.

A near similar situation obtained in Ebusakami primary school polling station where there were 2 Forms 35 with different data. The questioned form carried only single digit entries of votes garnered by all candidates. For instance the appellant's votes were recorded as 3 while the 3rd respondent's are 4. Yet the one recognized by the presiding officer reflected the appellant had 113 and the 2nd respondent 154 votes. The 3rd respondent confirmed that he had only 5 Forms 35. The writing and signatures on the questioned Form 35 were disowned by the presiding officer as forgeries.

Kelly Ongaya Ombima, the presiding officer of Emusenjeli polling station where one Tom Ombima (not his relative) was arrested and later charged with being in possession of a voters' register without authority confirmed that he only received a report of the incident after the suspect had been arrested by one Timothy Ogega, a police officer. He could not tell which party or candidate the suspect was working for.

Apart from these alleged irregularities, the county Returning Officer himself noted the following errors:

i. Essongolo Primary School had three Forms 35 one of which indicating the 3rd respondent as having 89 votes and another form had 69 votes.

ii. Votes cast at Muluanda Primary School were indicated as 580 instead of 490.

iii. In Mundabale Nursery School two votes were awarded the appellant instead of zero (0).

iv. In Esitsimi Nursery School votes cast were indicated as 368 instead of 366.

v. In Hobunakha Primary School, Tom Oscar Alwaka was awarded 431 when in fact he had 341 votes.

In his view, the foregoing adjustments marginally affected the candidates' results but not the ultimate outcome.

The learned Judge considered the evidence summarized in the foregoing paragraphs together with oral submissions and authorities cited by counsel.

Beginning with the question of the misspelling of the 3rd respondents name, the learned Judge expressed the opinion that a name is one of the several ways of identifying a candidate in an election. The others are party symbol, and colour as well as a candidate's photograph. He was satisfied that the misspelling of one name did not occasion confusion or voter apathy; that the misspelling notwithstanding the appellant received the highest number of votes in polling stations from where the appellant called evidence.

On voter bribery the learned Judge, after considering the definition of bribery in **section 64 (1)** of the Elections Act and the evidence presented by both sides, was persuaded that there was no evidence meeting the requisite threshold, first, that Tom Amatala Ombima who was arrested with strategic election material was the 3rd respondent's or his party's agent; or secondly, that the offence with which he was charged had nothing to do with voter bribery.

Similarly, the learned Judge found that the evidence by Wycliffe Ominde that Ernest Odungo and James Osieko Owayo were giving bribes at the polling station was a mere fantasy. The learned Judge wondered how an agent to one candidate could watch as the opponents' agents are influencing votes against his principal from 10am to 3pm and do nothing about it, not even report it to the police. He also found it most unconvincing that the local chief of Emukhuyu Location, Mrs. Lemida Okemo together with Agnes Okonji and one Nditi openly campaigned for ODM and its candidates while bribing each voter with Kshs. 200/-. According to the Judge it was inconceivable that a chief in uniform in broad day light, sitting at the gate of a polling station would for several hours indulge in an open bribing of voters and urging them to vote in a particular manner. Again, he found no evidence that, if indeed there were bribery, it was done at the behest of the 3rd respondent; that the evidence of bribery was shallow and amounted to mere allegations. On failure of electronic equipment the learned Judge found no evidence that the failure greatly affected Luanda Constituency more than any other constituency in the country.

Poor lighting in the counting hall was another complaint. The learned Judge found that all the agents who signed Forms 35 never recorded this fact in the forms, an indication that if indeed the lighting was poor it was of insignificant effect. The brief appearance of Hon. Marende the former Speaker of the last National Assembly, at the polling station, in the leaned Judge's opinion, did not influence voters, the rise of votes for the 3rd respondent being only allegations without proof.

Considering the question of discrepancies in Forms 35, the learned Judge was satisfied with the explanation of the presiding officers and the returning officer that the two strange Forms 35 were

forgeries and that the alterations did not affect the candidates' individual results or the overall outcome. In connection with the alleged three additional ballot boxes stuffed with ballot papers, the Judge found, that no such ballot boxes existed.

The scrutiny exercise ordered by the trial court was intended *"to establish the credibility of the results and put to rest any doubt thereto"*. The scrutiny exercise found nothing untoward in the following seven (7) stations out of the 12 stations where scrutiny was conducted:

i. Mumboha polling station stream 1.

ii. Ebusakami polling station stream 2.

iii. Wanakhale polling station stream 1.

iv. Wanakhale polling station, stream 2.

v. Esibembe polling station stream 2.

vi. Mundabala polling station.

vii. Ebusatsi polling station.

On the other hand, the scrutiny revealed that in:

i. Ebusiralo polling station, the 31 votes said to be rejected were infact valid.

ii. Essongolo polling station the appellant's votes after recount increased to 251 from 249, an addition of two votes.

iii. Mulwalanda nursery school polling station the 2nd appellant's votes improved by four votes, from 362 to 366.

iv. Hobunaka polling station, the appellant gained one vote from 62 to 63 votes.

v. Esitsimi polling station the 3rd respondent lost one vote while 2nd appellant gained one vote.

In the learned Judge's estimation, the errors noted from the scrutiny exercise were *"very minor"* and in conclusion the learned Judge found that:-

"109. It must, however, still be noted that even after the IEBC rectified the results after the said errors, the 3rd respondent still leads with 9,762 votes ahead of his closest challenger, the 1st petitioner with 6,588 votes. The margin of 3,174 votes is too wide for an error allowing nullification of elections.

110. I am satisfied that there were minor errors which affected the counting and tallying exercise and the subsequent declaration of results for Member of National Assembly for Luanda Constituency. I am also satisfied that the irregularities as concerns the tallying exercise were reconciled and corrected by the 1st and 2nd respondents as proved by the scrutiny exercise which the court ordered for particular polling stations. Other irregularities which may not have been corrected were too minor to be the basis of upsetting the results of an otherwise peaceful, lawful and credible election."

With that, the court dismissed the petition and declared the 3rd respondent validly elected member of the National Assembly, Luanda Constituency.

From that decision, the appellant brings this appeal citing 19 grounds, which the appellant, acting in person, his counsel having at a short notice withdrawn, condensed into five and eloquently argued as follows:

i. **Wrong name:** that the learned Judge of the High Court erred in failing to find that the use of the appellant's misspelt surname denied him many crucial votes. The appellant believed that he presented credible evidence that his supporters who were illiterate and who only knew him as Kibira did not vote or did not vote for him upon learning from arrogant presiding officers that his name, Kibira was not on the ballot paper. Related to this question, the appellant submitted that a rumour instigated by the 3rd respondent and his agents that he (the appellant) had been arrested over his citizenship and on an election offence also robbed him of several votes. At Epanga polling centre, for instance, the appellant met 24 stranded voters and 14 voters were turned away from Essongolo polling station. In his estimation, he lost 20 votes per polling station.

ii. **Voter bribery,** was in the appellant's estimation proved by the evidence of the witnesses he called and the fact of the arrest of Tom Amatala Ombima, an ODM village coordinator, with the strategic Principal Voter Register pointed to acts of corruption; that the suspect himself had sworn an affidavit to be a witness on voter bribery but was disallowed to testify by the learned Judge for unclear reasons; that the Strategic Principal Voter Register could only have been placed in the suspect's hand by the 1st and 2nd respondents. The learned Judge also barred the evidence of Benjamin Oyungu Samba, a senior official of ODM, who had evidence of elaborate scheme in which the 1st and 2nd respondents supplied the strategic voter register to the 3rd respondents which was distributed in all the 74 voting centres for the purpose of influencing voters through bribery; that, apart from the arrest and prosecution of Tom Amatala Ombima, there was evidence that Ernest Odungo, James Osieko Owayo, the chief of Emukhuyu

Location (Mrs. Leonida Okemo), Agnes Okonyi and one Nditi were all seen giving bribes to voters.

The appellant urged us to find that the learned Judge erred in choosing the witnesses for him.

iii. **Alteration of Forms 35:** About 30 forms had the data altered without being countersigned. Some contained different results for the same polling station. The results of the retrieved Forms 35 for verification were not presented to the trial court; that agents did not sign Forms 35.

iv. **Scrutiny exercise:** According to the appellant the scrutiny exercise was a sham after the 1st and 2nd respondents failed to avail marked registers and the polling day diaries; that the scrutiny revealed several irregularities.

v. **Costs**: In this appeal and in the High Court costs ought to be borne by the 1st and 2nd respondents.

For these reasons, the appellant invited the court to find that the election for member of the National Assembly for Luanda Constituency was not free and fair, and that the people of Luanda constituency ought to be given another chance to exercise their democratic right to elect a leader of their choice afresh.

In considering the issues arising from this appeal, we remind ourselves that by dint of **section 85A** of the Elections Act, only matters of law fall for determination. We shall be guided by this court's recent decision in **Peter Gichuki Kingara V. IEBC & 2 others** Civil Appeal No. 31 of 2013 as to what constitutes matters of law. The Court said:

"……to us the whole question of whether the trial Judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence with, of course, the usual caveat that we did not see the witnesses' demeanor is an issue of law."

So that where it is demonstrated that the High Court failed to carry out its primary task of evaluating the evidence as it is expected to do and as a result arrived at a flawed decision, the misdirection or non-direction on material points are indeed matters of law.

Viewed from this point, all the five grounds argued in this appeal in our view raise matters of law. In those five grounds, the appellant has made various allegations against the respondents. It is recognized universally that courts do not easily and casually annul elections, otherwise public confidence in the finality and legitimacy of election results will be eroded. That is why **section 83** of the Elections Act, which is the foundation and starting point in the consideration of any electoral disputes, provides 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 result of the election."

Put differently, so long as an election appears to have been conducted in accordance with the

constitutional and statutory principles it will not be vitiated merely because there was non-compliance with any electoral law, unless the no-compliance affected the result of that election. The constitutional principles envisaged by the above provision are those enumerated in **Articles 81** and **86** of the Constitution and the written law is **section 25 (a)** to **(h)** of the IEBC Act.

Germane to this appeal, the principles under **Articles 81** and **86** aforesaid stipulate that the electoral system must uphold:

i. The freedom of citizens to exercise their political rights.

ii. The principle of universal suffrage based on the aspiration for fair representation and equality of vote.

iii. The principle of free and fair elections which must be-

- by secret ballot
- free from violence, intimidation, improper influence or corruption
- conducted by an independent body;
- transparent and
- administered in an impartial, neutral, efficient, accurate and accountable manner.

iv. A simple, accurate, verifiable, secure, accountable and transparent voting method.

v. A system of prompt counting, tabulating and announcement of the results of votes cast by the presiding officer.

vi. An open and accurate system of collating and prompt announcement of results by the returning officer.

vii. Appropriate structures and mechanisms for elimination of electoral malpractice including safekeeping of election materials.

These principles which are reproduced in **section 25 (a)** to **(h)** of the IEBC Act, must be read with the political rights in **section 38** providing, *inter alia,* for the freedom to make political choices; the right to a free, fair and regular elections based on universal suffrage, the free expression of the will of the electors; and the right, without unreasonable restrictions, to vote in any election.

These constitute the yardstick upon which the success of any election must be measured. The burden is upon the party claiming that there was no compliance with these principles to prove that claim. In election petitions, it follows, the burden of proof rests with the petitioner, while the evidential burden initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. See **Halsbury's Laws of England,** 4th Edition Vol. 17.

The legal burden of proof was on the appellant, for he is the party alleging violation of the law and the existence of irregularities in the election. That burden would be discharged if he presented proof on a scale higher than a balance of probability, because election matters are of great public interest and also for the reason that courts are slow to nullify elections.

The above standard of proof is, however not expected to reach the scale of beyond reasonable doubt except where the allegation of malpractice amount to commission of a criminal offence, or an election offence. See **section 107 (2)** of the Evidence Act.

We must now turn to consider the appeal in light of these principles. It is common ground that the appellant's surname, Kibira was misspelt as Kibara. When William Shakespeare wrote the dialogue between Romeo and Juliet in a play going by that name ***(Romeo and Juliet)*** where Juliet asks Romeo:-

"What is in a name" That which we call a rose by any other name would smell as sweet."

quoted commonly as *"a rose by any other name would smell as sweet",* he (William Shakespeare) did not have politics in mind because in politics, name recognition is a critical factor, as candidates with low name recognition are unlikely to receive votes from people who only causally follow politics. When in the last US presidential election it was noticed in the Michigan Electoral College in Lansing that President Obama's first name was spelt as Barak (instead of Barack) in the electoral documents, the process had to be halted for fresh documents to be prepared. We are illustrating by this example the importance of the candidate's correct name on the ballot; that even though President Obama possessed unique features different from his competitors it was nonetheless critical that his correct spelt first name be carried on the voting documents.

In our case, Regulation 68 (1) and (4) of the Elections (General) Regulations, 2012 provides that the ballot papers for use at a National Assembly election shall be in Form 26, and must contain the following details; party or candidate symbol, candidate name, voter's mark and a photograph of the candidate.

Having found that the appellant's name was misspelt, the next issue that follows is the impact of the misspelling of surname on the election results. According to the appellant and his witnesses, many voters who sought to be shown candidate Kibira were told there was no such candidate and were either

turned away or the electorate voted other candidates instead.

In his estimation, one third of the electorate who intended to vote for him did not on account of his wrongly spelt name; that he lost approximately 20 votes in each of the 74 polling stations. But he also confirmed that he personally did not see any voter being turned away. He relied on what his agents told him. For instance PW2, John Akwale saw only one voter going away without voting after she failed to find the appellant's name. PW2, Samuel Tarah noticed some nine women locked out of voting. In view of the denial of these allegations by the 3rd respondent and his witnesses, the burden remained upon the appellant to prove the allegations. None of those turned away or made to vote for other candidates was called to validate these claims. The loss of votes estimated by the appellant at 1/3 or 20 votes per station was not verified by empirical evidence.

It is equally incredible that the agents who made these claims failed to raise them with those overseeing the election and instead went ahead to sign the relevant Forms 35 and the polling day diaries, signifying that all went on well.

In advance of the March 4, 2013 elections, the 1st respondent published a gazette notice in which the appellant's name together with other candidates country-wide were carried. That gazette notice appears to have been the genesis of the appellant's name misspelling. A gazette being a public document, the appellant, an educated politician was expected (and deemed) to have read the gazette and noticed in good time that his name was misspelt. In addition, the requirements in Regulation 68 aforesaid are intended to enable a voter identify a candidate of choice, either by name, photograph, party or candidate symbol and/or colours.

In coming to the conclusion that there was no error of content that would confuse the electorate, we are guided by the test enunciated by this Court in **Dr. Thuo Mathenge & Another V. Nderitu Gachagua & 2 Others** Civil Appeal (Nyeri) No. 29 of 2013 namely:

i. Whether the misspelling of the appellant's surname affected the validity of the ballot paper

ii. Whether the misspelling affected the validity of the candidature of all persons who contested the seat in question.

iii. Whether the misspelling affected the will of the people, and

iv. Whether it affected the outcome.

The misspelling of the appellant's name, we come to the conclusion, had no effect on any of the matters listed above and did not affect the result of the election.

Voter bribery is declared by **section 64** as read with **section 106** of the Elections Act, an election offence punishable on conviction with a fine not exceeding Kshs. one million or to imprisonment for a term not exceeding three years or both such, fine and imprisonment. Bribery is therefore, both penal and election offence, hence the standard of proof is beyond reasonable doubt. As a general rule where evidence is presented in proof of bribery, even of a single act, with the knowledge and approval of a candidate or a candidate's agent, that alone would be sufficient basis to invalidate the election. Did the appellant bring evidence meeting the threshold of proof beyond reasonable doubt that voters were

bribed to vote for his competitors or to abstain from voting"

The arrest and subsequent prosecution of Tom Amatala Ombima in our view was not proof of bribery. Bribery in its many facets, defined and described in **section 64** aforesaid was not proved. No evidence was called to link his arrest to bribery of voters. It was alleged that Tom Amatala Ombima was arrested by Timothy Ogega, a police officer attached to Emusenjeli polling station. The officer would have explained what the suspect was doing when he was arrested but was not called as a witness. In any case the suspect was not charged with voter bribery but with being in possession of a document purporting to be a register of voters without authority contrary to **section 56 (a)** of the Elections Act, No. 24 of 2011. Upon his own plea of guilty the suspect was convicted and sentence to a fine of Kshs. 50,000 or 2 years imprisonment in default.

The suspect swore an affidavit in favour of the appellant's case but was, together with other prospective witnesses barred by the trial court. The appellant has faulted the trial court for doing this arguing that it amounted to irregular exercise of discretion as the court purported to choose witnesses for the appellant. It appears to us that the appellant having filed only 2 affidavits of witnesses at the time of filing the petition as required by **Rule 12 (1)** the Elections (Parliament and County Election) Rules, 2013, sought by an application dated 3rd May 2013 leave to file some 30 additional affidavits out of time. There was a delay of over three weeks from 8th April 2013 when the petition was filed and the time when the application was brought. Despite this fact and the strong opposition by counsel for the respondents, the learned Judge, in the exercise of his discretion under **Rule 20** of the aforesaid Rules, allowed the application. In allowing the application, the learned Judge considered the depositions in each of the thirty affidavits and categorized them into 3 groups; those containing allegations of bribery, allegations against the officials of the 1st respondent (IEBC) and those which the learned Judge found to be speculative, repetitive and without probative value. The learned Judge directed the appellant to make an election of ten affidavits (witnesses) from the 1st and 2nd categories while the 3rd category was altogether disallowed. When the appellant finally made the choice, he filed twenty affidavits!, out of which four were completely new. The court proceeded to strike out 10 affidavits including that of Tom Amatala Ombima, the suspect in the criminal case, which was among the four new ones. Immediately counsel for the appellant orally sought leave to file the aforesaid four affidavits including that of Tom Amatala Ombima. The learned Judge, once more dismissed the application, thereby effectively shutting out the evidence of Tom Amatala Ombima, which was in respect of allegations of bribery.

In view of the facts and circumstances surrounding the manner in which the appellant sought to introduce his witnesses' affidavit, we think the learned Judge properly exercised his discretion in rejecting the affidavits. In terms of **Rule 12** aforesaid, the appellant was expected to know what case he was presenting to the High Court and ought to have filed affidavits of his preferred witnesses at the time he petitioned the High Court. Instead he filed only two affidavits with the petition. After nearly one month, perhaps gathering evidence, he appeared with thirty affidavits. When he was asked to choose ten, he returned with twenty, four of which were not in the earlier list. This was a clear case of abuse of court process, which the court was empowered to prevent. It will be recalled that Tom Amatala Ombima was convicted and sentenced on 5th March 2013. His affidavit was being introduced in June 2013. In other words, if the appellant considered the evidence of Tom Amatala Ombima critical he ought to have availed him earlier. In view of the strict time lines within which election disputes are to be resolved, negligence and complacency have no room.

The second episode of voter bribery, according to the appellant and his witnesses involved two people said to be ODM agents, Ernest Odungo and James Osieko Okwayo. PW4, Wycliffe Ominde, the appellant's agent representing him at Mwitubu Nursery School polling station alleged that he saw the two, who were well known to him, being his cousins, offering bribes to voters at the gate of the polling

station between 10 am and 3 pm. He made a report to the presiding officer who took no action. But he made no report to the police who were present and even though he appreciated that bribing voters is a criminal offence. The presiding officer for this polling station testified that he knew the witness who was an agent in the polling station. He however denied the allegation of bribery at his station, neither did the witness make any report to him. If indeed there was such an open bribery by the two which lasted five hours, it was the duty of Wycliffe Ominde as the appellant's agent to report to the police if the presiding officer did nothing. It is equally unbelievable that with such a claim the witness would still go ahead to endorse the election by signing both Form 35 and the polling day diary. We do not believe his assertion that the signature on Form 35 alleged to be his was a forgery for the question is: why would he sign the polling day diary but decline to sign Form 35" In any case, the presiding officer confirmed that all agents including the particular witness who was known to her, signed Form 35. The burden was on the witness to prove that the signature on Form 35 was not his. We find no merit in the allegation that Ernest Odungo and James Osieko Okwayo were ODM or that they were engaged in voter bribery. The witness himself confirmed this conclusion in his testimony when he said:

"They were offering the bribe at the gate. I could see them from where I sat inside the polling room. I did not see them dipping their hands in their pockets and giving something to voters. I believe they were giving money although I do not know how much."

We reiterate that voter bribery being a criminal act must be proved beyond reasonable doubt. This threshold was not attained by the evidence presented by the appellant. It was properly dismissed.

The final allegation of voter bribery involved the Chief of Emukhuyu Location, Leonidah Okemo and two ladies said to be ODM agents, Agnes Okonji and one Nditi. According to Ruth Ong'ayo Onyanchi, the appellant's agent in Emukhuyu polling station the Chief and her confederates openly campaigned for ODM candidates while bribing voters. Two such voters who were each given Kshs. 200/= were Mary Oganda and Jerusa Ndeda. The presiding officer ignored a report by the witness regarding this. But Bishop Simekha, the Deputy Chairman Peace Committee, who was in the company of his Chairman, warned the chief to stop bribing voters. Leonidah Okemo, the Chief and Agnes Okonji in the testimony denied the allegation. The former attributed the accusations against her to bad blood between her family and that of the witness. Bishop Simekha, confirmed to the trial court that he neither witnessed the bribery nor warned the Chief against it. The Chairman of the Peace Committee who was with Bishop Simekha corroborated the latter's evidence.

Once again, we find no merit in the allegation that Leonidah Okemo and two others bribed voters at Emkhuyu polling station. We are instead satisfied that those claims were actuated by the admitted bad blood between the chief's family and the family of the witness. The witness conceded that she had a criminal charge brought against her following a complaint lodged by the chief's daughter; that there has been bad blood since 2006; and that at the time she was giving evidence of the alleged bribery she was out on bond in the criminal case. With the denial of the chief, Agnes Okonji, and those who were alleged to have witnessed the bribery and in view of the evidence of bad blood, we find no merit in the claims of voter bribery.

We turn to consider the complaint regarding scrutiny and all other irregularities related thereto. Pursuant to **section 82 (1)** of the Elections Act, following the testimony of the returning officer (2nd respondent) that he found certain discrepancies during retallying and transposition of results and on the application of the appellant, the learned Judge ordered for partial scrutiny. This decision was informed by allegations that the appellant's agents were excluded by the 1st and 2nd respondents at various stages from the counting tallying of votes and declaration of results; that there were glaring discrepancies and irregularities in more than 54 polling stations; that there were alterations to Forms 35 without

corresponding endorsement by party agents, the multiplicity of Forms 35 showing different sets of results and serial numbers, the existence of one Form 35 with single digit results, the number of votes cast in excess of the number of registered voters and allegation of Forms 35 results which were not validated by agents. The appellant pointed to the High Court that these discrepancies were indentified in the following polling stations, among others,

Ebusatsi Nursery School stream 2,

Khwiliba, Mwitubwi,

Mumboha Wanakhale Primary School stream 2, and

Essongolo Primary School.

In addition to these, there were also irregularities which were admitted by the Returning Officer in the following stations:

Mundabala Nursery School

Mulwanda Primary School

Hobuneka Primary School and

Esitsimi Primary School

The court in its discretion and on its own motion ordered scrutiny in the following stations:

Mumboha stream 1

Esibembe stream 2 and

Ebusakami stream 2

In addition, the learned Judge ordered a partial scrutiny limited to a re-count to establish the number of votes each candidate garnered in the following polling stations;

Mundabala Nursery School

Essongolo

Mulwanda Primary School

Wanakhale Primary School Stream 1 and 2

Hobunaka Primary School and

Esitsimi Primary School

In the next category Forms 35 in respect of 35 polling stations where it was alleged that there were “massive” alterations to the forms the learned Judge found the use of the word massive to describe the

widespread of alterations to the forms to be an exaggeration and held:-

“The alterations that I have come across are minor and do not in any way affect the results ……To open up these ballot boxes for scrutiny would, in my view amount to an electoral injustice. It cannot be expected that an election of such a magnitude can be done without any mathematical errors. Where those errors have been corrected and corrections endorsed, it would be a violation of the process to open ballot boxes for further scrutiny. What would the court be looking for""”

This decision, although made at an interlocutory stage is properly challenged in this appeal as it is now settled on the authority of **Kakuta Maimai Hamisi V. Peris Pesi Tobiko & 2 others** Civil Appeal No. 154 of 2013, Ferdinand Ndungu Waititu V. Independent Electoral and Boundaries Commission (IEBC) & eight others Civil Application No. 137 of 2013 **and Peter Gichuki King’ara V. Independent Electoral and Boundaries Commission & 2 Others** Civil Appeal No. 23 of 2013, that no appeal lies to this Court from an interlocutory order, ruling or direction by an election court and that a party aggrieved must await delivery of the final judgment by that court before challenging the interlocutory decision.

Section 82 of the Elections Act vests in the elections court the power to order for scrutiny of votes in a manner it may determine. **Rule 33** of the Elections (Parliamentary and County Elections) Petition Rules, 2013, on the other hand, requires that vote scrutiny be ordered for purposes of establishing the validity of the votes cast, and must be confined to the polling stations in which the results are disputed. It has been held, based on these provisions that scrutiny cannot be used as a fishing expedition or as a means of looking for evidence and also that before the election court can order scrutiny and/or recount, the applicant must satisfy the court that there is sufficient reason to warrant scrutiny or recount. See **Harun Meitamei Lempaka v Hon. Lemanken Aramat and 2 others** - Civil Appeal No. 276 of 2013.

That also explains why a petitioner is not expected to seek for the scrutiny of all the votes cast in all the polling stations. For a good measure, courts must as much as possible avoid being drawn into overseeing an electoral process by engaging in an exercise that would best be undertaken by IEBC. A petitioner or an agent who is aggrieved by the vote count or who wishes to have the votes scrutinized, has a chance, indeed an obligation to his principal under **Rules 76** (4) and **80** of the Elections (General) Regulations, 2012 to object to the inclusion or rejection of a ballot paper or insist on the recount of votes.

After the election court has exercised discretion to reject full scrutiny as was the case here, this Court can only interfere with the exercise of that discretion, as was stated in **Harrison Wanjohi Wambugu V. Felista Wairimu Chege and Another** Civil Appeal No. 295 of 2009 if this Court is,**:-**

“……..satisfied that he misdirected himself in some matter and as a result has arrived at a wrong decision, or that he misapprehended the law or failed to take into account some relevant matter.”

The Court went on to cite the decision in **Mbogo V. Shah [1968] E.A** at page 95 where Sir Charles Newbold P. held that:-

“a court of Appeal shall not interfere with exercise of discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case that as a whole that the judge has been clearly wrong in the exercise of his discretion has misdirected himself in some matter and as a result has arrived at wrong decision, or unless it is manifest from the case that as a whole that the judge has been clearly wrong in the exercise of his discretion and that as

a result there has been misjustice."

The learned Judge found that the request for scrutiny on account of multiple Forms 35 with different results in three polling centres was merited as the parties to the petition had agreed that the truth of the matter be found. The court on its own motion had earlier on ordered scrutiny of votes in the very three stations. This issue revolved around Mumbaha stream 1, Esibembe and Ebusakami polling stations where it was alleged there were two sets of Forms 35 bearing different results. In the first form, the total number of valid votes cast is shown as 459 with 8 rejected votes. It shows the appellant scored 73 votes while the 3rd respondent had 88 votes. The second form shows 462 as the total number of valid votes cast, 8 rejected, the appellant scoring 24 votes and the 3rd respondent 188 votes. The Returning Officer and the 1st respondent challenged the authenticity of the first form. That form was introduced by the appellant in his petition.

In Ebusiralo polling station, the complaint was about the mix-up of the ballot box lids and the high number of spoilt votes. For these and other concerns, the learned Judge ordered a recount to establish the number of votes garnered by each candidate in specific polling stations. The court also ordered that the tallies of Ebbiba polling station be added to the final tally.

The scrutiny report filed by the Deputy Registrar and adopted by the trial court as part of the proceedings found as follows:-

i. **Mumboha polling station.**

The origin of the second Form 35 could not be established but the results recorded in the first Form 35 which was contained in the ballot box was the same results used to tally the results, thereby erasing any doubts.

ii. **Ebusikami polling station stream 2**

The source of Form 35 with single digit results was not established. But the results declared conformed with those recorded in Form 35 found in the ballot box.

iii. **Esibembe polling station stream 2**

The origin of Form 35 annexed to the petition at page 151 was unknown. But the scrutiny confirmed that in fact the 3rd respondent had 97 votes while the 2nd appellant (Julius Ochiel) had 59 votes, settling the question of interchanged votes between the two candidates.

iv. **Ebusiralo polling station**

Scrutiny confirmed that 31 votes considered rejected were infact valid and affected all the candidates.

v. **Ebusatsi polling station**

Allegation by the appellant that his votes were awarded to the 3rd respondent were found through scrutiny to be without basis as the figures recorded in Form 35 were found to be correct.

vi. **Wanakhale polling station stream 1**

On physical count of the votes, it was found that the entries in Form 35 were correct.

vii. **Wanakhale polling station stream 2**

Entries in Form 35 were confirmed to be accurate by partial scrutiny.

viii. **Essongolo polling station**

The 3rd respondent had 69 votes while the appellant's votes increased by 2 votes from 249 to 251.

ix. **Mundabala polling station**

The entries in Form 35 were confirmed to be correct.

x. **Mulwanda Nursery School polling station**

The re-count established that 4 votes for the 2nd appellant (Julius Ochiel) were not accounted for. The rest of the results were intact.

xi. **Hobunaka polling station**

The re-count revealed one additional vote to the appellant which was in the packet of another candidate, Tom Oscar Alwaka.

xii. **Esitsimi polling station**

The re-count found that the 3rd respondent had 1 extra vote which was deducted from his 195 votes. The 2nd appellant (Julius Ochiel) gained one additional vote which increased his tally from 73 to 74 votes.

After considering the report the learned Judge found that the purpose for which scrutiny was ordered was achieved and concluded as follows:-

"…...All the irregularities were admitted by the 1st and 2nd respondents. The bulk of them are very minor and that is why I have decided to enumerate each of them in the foregoing paragraphs. The irregularities range from re-writing figure (2) to contesting entries in Forms 35. All these allegations were responded to by the witnesses of the 1st and 2nd respondents to the satisfaction of the Court. More importantly, however, all these allegations of irregularities on the part of the 1st and 2nd respondents were the subject of scrutiny and partial scrutiny limited to re-count processes, which were ordered by the Court. The scrutiny exercise was meant to clarify any conflicts on the entries in Forms 35; explain the situations like in Mumboha polling station stream 1 which had two different Forms 35; explain the allegation of the additional of 3 extra ballot boxes at Mwitubwi polling station and other irregularities. In the foregoing paragraphs, I have already stated the results of the scrutiny exercise."

The learned Judge in the result found that the scrutiny exercise dispelled the allegation of ballot paper stuffing in three alien ballot boxes at Mwitubwi polling station. He ultimately concluded that:-

"……..even after the IEBC rectified the results after the said errors, the 3rd respondent still leads with 9,762 votes ahead of his closest challenger, the 1st petitioner with 6,588 votes. The margin of 3,174 votes is too wide for an error allowing nullification of elections."

We reiterate that in rejecting the application for scrutiny of votes in some of the stations, the learned Judge was exercising a discretion. He gave cogent reasons for doing so. The appellant's case for scrutiny was built on the evidence he presented to the High Court. It was on the basis of that evidence that the learned Judge determined stations in which to conduct scrutiny. The appellant did not expect scrutiny to be conducted even in areas where no purpose would be served. The objective and manner of scrutiny was to confirm or disprove certain allegations.

We are satisfied on the vote scrutiny that the learned Judge did not misdirect himself in any way in settling for the 12 polling stations and rejecting the rest. He properly set out the applicable law and took into consideration all relevant factors in arriving at that decision. The scrutiny report revealed certain omissions and errors as outlined in the affected polling stations set out above. In our opinion, the omissions and errors noted are minor and of no or insignificant consequence on the overall outcome of the election. The additional or lost votes involved small figures that did not have any impact on the final result. The alien forms which were introduced by the appellant were found to have no bearing on the results announced. The onus was upon the appellant to disclose the source of those forms. The alterations in the figures were few and isolated and above all, fully and satisfactorily explained. No evidence, for instance, the serial numbers of the alleged three strange ballot boxes, was supplied in

proof of their existence.

In dismissing the petition, the learned Judge awarded costs to the respondents by capping costs to the 3rd respondent at not more than Kshs. 1m and those of the 1st and 2nd respondents not to exceed Kshs. one million. Once again, the learned Judge, guided by the provisions of **Section 84** of the Elections Act and **Rule 34** of the Elections (Parliamentary and County Elections) Petition Rules, 2013 applied the correct principle and made the proper order regarding costs. The ground on costs too fails and is rejected.

There is only one other issue on costs that we turn to now. In the High Court, both the appellant and the 2nd appellant (Julius Ochiel) were represented by Donald W. Muyundo of D.W. Muyundo & Associates, who also filed the memorandum of appeal in this Court on behalf of the two on 6th November, 2013. On 15th January, 2014, however, the 2nd appellant wrote to this court's Registrar and denied ever instructing the firm of D.W. Muyundo & Associates to file this appeal on his behalf. That was followed by an affidavit by him reiterating that fact.

The firm filed an application to withdraw the 2nd appellant's appeal. In allowing the application with costs to the respondents, the Court directed that the question as to who between the 2nd appellant and his advocate would pay costs be ascertained on 20th March 2014 when the hearing was coming up. On that day, Mr. Muyundo was said to be indisposed and the question of costs was ordered to be determined in the judgment. Mr. Muyundo was however directed to respond to the 2nd appellant's affidavit. We have not seen Mr. Muyundo's affidavit. But, as we have stated at the beginning of this judgment, the appellant who has all along in this appeal been represented by Mr. Muyundo filed what we treated as a notice of change under **Rule 23 (1)** of the Court of Appeal Rules, Mr. Muyundo having apparently withdrawn his services.

It follows that the firm of D.W. Muyundo & Associates has not controverted the contents of the 2nd appellant's affidavit. That being the case, we hold that the firm acted for the 2nd appellant without instructions and therefore must bear the costs of the withdrawn appeal. We accordingly order.

In the circumstances, we dismiss this appeal and order that the appellant shall bear the costs of this appeal in the sum of Kshs. 300,000/- in respect of the 1st and 2nd respondents and Kshs. 200,000/= in respect of the 3rd respondent.

Dated and delivered at Nairobi this 2nd day of May 2014.

E.M. GITHINJI

……

JUDGE OF APPEAL

G.B.M. KARIUKI

……..

JUDGE OF APPEAL

W. OUKO

……..

JUDGE OF APPEAL

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

REGISTRAR

/mgkm