



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
ELECTION PETITION NO. 1 OF 2008
IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT
(CAP 7 OF THE LAWS OF KENYA)

ELECTION FOR KITUTU MASABA CONSTITUENCY
THE PETITION OF JUSTUS MONGUMBU OMITI

BETWEEN

JUSTUS MONGUMBU OMITI PETITIONER

AND

WALTER ENOCK NYAMBATI OSEBE 1ST RESPONDENT
LAWRENCE OLE SEMPELE (RETURNING
OFFICER FOR
KITUTU MASABA CONSTITUTENCY) 2ND RESPONDENT
THE ELECTORAL
COMMISSION OF KENYA 3RD RESPONDENT

JUDGMENT

This was the first election petition filed after the much maligned and discredited **National Assembly and Presidential elections** held on 27th December, 2007 that nearly brought this country to the brink of abyss and precipice. Yet it is the last or second last to be heard and determined. This may appear to be a contradiction in terms. However, there is a history and perfect explanation for the delay.

Initially this petition was presided over rather expeditiously by **Ibrahim J.** Though he had been assigned the petition on 11th February, 2008, he had by 11th July, 2008 determined the fate of the petition. The learned Judge struck out the petition with costs on the grounds that the petitioner had not demonstrated that he had exercised due diligence and found it impossible to effect personal service on the 1st respondent as required by section 20(1) (iv) of the **National Assembly and Presidential Elections Act** before invoking the alternative modes of service, which in this case was by way of advertisement in one English and Kiswahili Daily Newspapers respectively, and also through Kenya Gazette by way of Notice of Presentation of the petition. The Judge opined that it was the court's duty to inquire into and determine whether it could be said that it was impossible to serve the petition personally on the 1st respondent. The discretion or option to invoke alternative mode of service was not an automatic right since personal service was the best and most fair mode of service of an election petition. According to the Judge the purported service through the alternative mode of service was premature and the conditions precedent before embarking on that option had not arisen nor existed. In the result he found and held that the petition was not served upon the 1st respondent within the period prescribed by law or at all. He then proceeded to strike out the petition on that account.

Of course this was a brief setback on the petitioner in his pursuit or quest for determination by this court as to whether the elections in Kitutu Masaba Constituency were free, fair, transparent and carried out in accordance with the law. Undeterred, the petitioner lodged an appeal against the said ruling and or order in the Court of Appeal, being Civil Appeal Number 183 of 2008. This appeal was eventually heard and determined on 7th May, 2010. The Court of Appeal allowed the appeal holding that there was due diligence exercised before alternative means of service was adopted by the petitioner. Accordingly, the decision and orders of **Ibrahim J.** made on 11th July, 2008 were set aside and substituted by an order dismissing the 1st respondent's Notice of Motion dated 7th February, 2008 that precipitated the striking out of the petition aforesaid.

The decision of the Court of Appeal meant that the petition was back to square one. It had to proceed to hearing on merit and in the normal manner. On 17th June, 2010, the **Chief Justice**, appointed **Musinga J.** to preside over the petition in place of **Ibrahim J.** However, as soon as **Musinga J.** took over the petition every attempt to torpedo, stall and or slow down the hearing of the same was made. The record is replete with several adjournments sought, unsuccessful interlocutory applications and indeed appeals from rulings of such interlocutory applications. The frustration coupled with other reasons he could not put on record culminated in **Musinga J.** reclusing himself from the petition on or about 4th October, 2010.

On 5th October, 2010, the Chief Justice appointed me to preside over the petition. Though similar attempts were made to hedge speedy disposal of the petition, we are all happy that almost nine months down the line, this petition is at long last being put to rest. The foregoing notwithstanding we can take comfort or seek solace in the fact that however slow the wheels of justice may grind, they must grind finally.

By his petition dated 11th January, 2008 and filed in court on the same day, **Justus Mogumbu Omiti**, hereinafter referred to as **"the petitioner"** sought from this court the following prayers:-

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

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

c. That the said parliamentary elections in Kitutu Masaba be determined and declared null and void.

d. That the said election of the 2nd respondent to the National Assembly be declared null and void.

e. That the respondents be condemned to pay your petitioner cost of this petition and matters incidental thereto.

f. That such other or further orders be made as this Honourable Court may deem just..."

The petitioner presented the petition as a voter in Kitutu Masaba Constituency as he was entitled to do under section 44 of the previous Constitution.

There can be no doubt at all, that a registered voter can mount an election petition. As properly stated in the case of **Kigen Luka Kipkoriri –vs- Joe Langat and Another, Election Petition Number 4 of 2003** ***"...It is the Constitution of Kenya that bestows the High Court with the power and jurisdiction to hear election petitions ... Besides giving the court jurisdiction, the above also allows a voter in that particular constituency or the Attorney General to file a petition..."***. Of course this holding must have been anchored on section 44 of our former constitution which was in terms:-

"1. The High Court shall have jurisdiction to hear and determine any question whether:-

a. *A person has been validly elected as a member of the National Assembly; or*

b. *The seat in the National Assembly of a member thereof has become vacant*

2. *An application to the High Court for the determination of a question under subsection (1) (a) may be made by any person who was entitled to vote in the election to which the application relates, or by the Attorney General.*

3. *An application to the High Court for the determination of a question under subsection (1) (b) may be:*

a. *Where the speaker has declared that the seat in the National Assembly of a member has by reason of a provision of this Constitution become vacant by that member; or*

b. *In any other case, by a person who is registered as a voter in elections of elected members of the Assembly, or by the Attorney General.*

4. *Parliament may make provision with respect to:*

a. *The circumstances and manner in which, the time within which and the conditions upon which an application may be made to the High Court for the determination of a question under this section...”.*

The aforesaid provision of the former Constitution is still in force by virtue of article 262, sixth schedule of the transitional and consequential provisions of the current constitution which is to the effect that sections 30 to 40, 43 to 46 and 48 to 58 of the former Constitution shall continue to operate until the first general elections are held under this Constitution. Hence the applicable law here is section 44 of the former constitution and as long as the petitioner is able to prove that he was a registered voter and entitled to vote in the constituency as at the time of filing this petition, he has the necessary locus to mount this petition on that basis.

The petitioner states in the petition that **Walter Enock Nyambati Osebe**, hereinafter “*the 1st respondent*” was one of the candidates in the elections held for Kitutu Masaba Constituency and was infact declared the winner with 7,401 votes as opposed to his preferred candidates, **Bosire Timothy** who came third with 7,020 votes. The 2nd slot went to **Mose Nyambega** with 7,146 votes. Otherwise the seat attracted a record number of 33 candidates.

Lawrence Ole Sempele, hereinafter “*the 2nd respondent*” was the returning officer for the said constituency duly appointed by the 3rd respondent which was responsible for the conduct of the elections. After the counting and tallying of the votes cast, the 2nd respondent announced, declared and or published the 1st respondent as the winner of the elections.

The Electoral Commission of Kenya which has since been succeeded by the Interim Independent Electoral Commission, hereinafter “*the 3rd respondent*” gazetted the 1st respondent as the duly elected Member of Parliament for Kitutu Masaba Constituency in the Kenya Gazette of 30th December, 2007.

The gist of the petitioner’s assault on the entire election exercise in the constituency are captured in paragraphs 8 and 9 of the petition. The complaints in paragraph 8 can be condensed into 3 broad grounds to wit, that the elections were not conducted in accordance with the provisions of the **National Assembly and Presidential Elections Act** and **Regulations** made, thereunder, the **Election Offences Act** and other **Statutes**, Secondly, they contravened all principles and laws relating to elections, and finally, that the exercise did not accord with principles of natural justice. Because of the foregoing, the elections were seriously flawed to the detriment of the petitioner. Accordingly, the 1st respondent should never have been declared the winner of the elections. In support of these assertions, the petitioner gives the following particulars:

- *The votes from Nyamakoroto Polling Station were excluded from the final tally.*
- *The 1st respondent and or his agents were allowed by the 2nd respondent and or his subordinate electoral staff to communicate with the tallying clerks so as to influence the final outcome.*
- *The election officials denied Timothy Bosire's agents the opportunity to sign form 16A.*
- *The 2nd respondent failed to announce the results of each polling station at the tallying centre.*
- *The tallying clerk who was a nephew to the 1st respondent, manipulated the results in favour of the 1st respondent.*
- *The 3rd respondent's officials were biased and partisan.*
- *Valid votes cast at Girango Polling Station exceeded the total number of registered voters and those results were thus a nullity; yet the 2nd respondent allowed them to stand.*
- *Entries in the tally sheet for five stations, Mongoni, Nyasore, Ikobe, Miriri and Nyaisa did not reflect the actual votes received by Timothy Bosire.*

In paragraph 9 of the petition, the petitioner complains that:

- *The whole exercise of election was manipulated in favour of the 1st respondent since the 2nd respondent allowed participation in the exercise of presiding officers, clerks and election officials who were known supporters and relatives of the 1st respondent.*
- *2nd respondents allowed the 1st respondent supporters to openly campaign in or within the precincts of the polling station.*
- *The 2nd respondent and or his officers showed contempt for other candidates other than the 1st respondents.*
- *The 2nd respondent and or his officials paid no regard to accuracy and scrutiny in counting of votes received.*
- *The 2nd respondent irregularly and unlawfully gazetted results on 30th December, 2007 and without addressing the complaints made.*
- *The 2nd respondent failed to take control of the tallying centre and finally,*
- *The 2nd respondent officers allowed the clerks to enter into the tally sheet figures which did not reflect the actual votes received, nor the votes as per forms 16A.*

In support of the petition, the petitioner called a total of 8 witnesses. Their evidence is contained in their respective affidavits which I have carefully read and considered.

In summary, the case for the petitioner appears to be that he was the registered voter in Kitutu Masaba Constituency, chief manager and agent for his preferred ODM party candidate, **Timothy Bosire**. In that capacity, it was his duty to traverse the constituency on the election day to talk to and prepare his various agents in different polling stations who were on duty and to receive reports on the voting exercise and subsequently attend the tallying exercise at Nyambaria High School. In the course of his aforesaid duties, he received reports of bribery by the 1st respondent and another candidate, one, **Mose Nyambega** in some polling stations. He also received reports on election materials being delivered late in some polling stations. Save for the foregoing incidents, the voting exercise in most polling stations went on smoothly

and without hitches. At about 8.00p.m on the polling day, he joined other candidates and supporters of various parties or candidates ready for the tallying exercise at Nyambaria High School. When the presiding officers arrived and started submitting their results, he discovered that they were different from the results he had received from his agents in the field. He protested to the 2nd respondent. Indeed the results for Nyamakoroto Polling Station were the subject of such protest. It had been discovered that the presiding officer for this polling station had unilaterally and individually filled form 16A and fiddled with the figures in the process. The 2nd respondent unilaterally excluded those votes from the final tally and had the said presiding officer arrested by police. The tallying centre was disorganized and the 2nd respondent was not in control of the affairs. In the meantime, the 2nd respondent kept on receiving telephone calls and had to leave the hall to answer them. In the process, the 1st respondent had opportunity to directly communicate with the tallying clerk, **Mr. Johnson Moriasi Nyandika**. This illegal communication continued despite his protest. The tallying however, went on until 28th December, 2008, when the 2nd respondent announced the results based on the figures as computed and entered by the tallying clerk in the computer print out.

Unhappy with the results, the petitioner thereafter started gathering information on the tallying exercise from his agents and was startled to discover that some Presiding Officers from Miriri, Ikobe, Nyaisa, Mongoni and Tombe had only submitted results for one stream and intentionally or manipulatively withheld the result from other streams and such withheld results were not factored in the final results used by the 2nd respondent to declare the 1st respondent as the winner.

Before filing the petition he sought and obtained from the 2nd respondent, official documents with regard to the elections. From those documents and particularly forms 17A he was able to establish that there were lots of cancellations and the persons had not countersigned the cancellations and or alterations. Therefore it was not known who had initiated the cancellation. Some figures and the tallied totals were also different than those indicated therein and also those in the computer printout. In some polling stations the figures entered were not reflective of the actual votes cast and in particular the votes for **Timothy Bosire** had been reduced by making the wrong entries or figures which were less. In some stations more voters than those registered voted, for instance, Girango Farmers Co-operative Society. He also confirmed that the 2nd respondent prepared and completed form 16 on 2nd January, 2008 well after the results had been announced and the winner Gazetted on 30th December, 2007. Even then the total votes received by the various candidates are different than the figures used to announce the winner on 28th December, 2007. Again in the absence of the agents and or candidates, the 2nd respondent had unilaterally harmonized the results.

The petitioner too requested the 2nd respondent to supply him with the report he made to the 3rd respondent on the conduct of the 2007 general elections exercise in his constituency. His request was acceded to. Having considered all the documents supplied to him as aforesaid, the inconsistencies in the figures and lack of transparency of the 2nd respondent, it was his considered opinion and inescapable conclusion that it was not possible to tell who actually won the elections in Kitutu Masaba Constituency. As the elections were not conducted fairly and that the 2nd respondent's admission that he later harmonized the figures of various candidates after the announcement and Gazettment of the winner, was in itself an admission of the flawed election process.

The evidence of **Timothy Bosire**, who was the petitioner's preferred candidate and for whom perhaps the petitioner is acting as a proxy in this petition, was that he was a candidate of ODM party. Considering the support he enjoyed in the constituency, he expected to win but was surprised at the results announced by the 2nd respondent. He confirmed that, the petitioner was his Chief agent. He was aware that one, **Eng Maugo**, a commissioner with the 3rd respondent and the District Election Coordinator, hereinafter "**Dec**" had deliberately interfered with the recruitment of election officials. Infact the recruitment done by the 2nd respondent was overturned by **Eng Maugo** and **Dec** on the eve of the elections even though it was 2nd respondent's mandate to recruit. One, **Johnson Moriasi Nyandika**, though initially recruited as a presiding officer, was later assigned the position of tallying

clerk. He later learnt that the said **Johnson Moriasi Nyandika** had blood relation with the 1st respondent in that his mother and 1st respondent were cousins. Therefore his being positioned as tally clerk, was a worked out plan between the 1st respondent, **Eng Maugo** and Dec. The 2nd respondent too announced final results well before all the results from polling stations had been received and tallied. That there was systematic scheme to only key in results of one stream for his votes while from the same polling stations the results of the 1st respondent had been fully tallied and keyed in. The tally clerk further unnecessarily entered more votes for the 1st respondent and failed to tally and or intentionally omitted to fully tally results from the following polling stations, Miriri, Ikobe, Girango Farmers Co-operative and Mongoni. In all these polling stations his votes were downgraded. Finally, he testified that the 1st respondent's results for various polling stations were on the other hand increased at the tallying centre by the tally clerk which gave him unnecessary advantage. As a result, the elections for Kitutu Masaba Constituency were not free, fair and just. Owing to the massive irregularities, the declaration of the 1st respondent as the winner was not justified. Some of these irregularities were actually conceded to, by the 2nd respondent in his report to the 3rd respondent.

In his brief evidence, **Paul Nyatuka Morara**, who was the Assistant Returning officer testified that on 25th December, 2007, he arranged election materials and distributed them to the election officials on 26th December, 2007, ready for elections the following day. On the voting day, he accompanied the 2nd respondent around the constituency to supervise and monitor the progress of the voting exercise. He noted that a few polling stations were missing some materials but he made arrangements to deal with the situation and the exercise commenced though late. Later he went back to Nyambaria tallying hall and started receiving materials from Presiding Officers. In the process he noticed that some ballot boxes were not properly sealed or not sealed at all. He directed such presiding officers to explain in writing the state of those ballot boxes. He confirmed that most presiding officers used only one ballot box for all the materials which presented him with a challenge. He attributed this to inadequate training of Presiding Officers due to fresh recruitment that was ordered by **Eng Maugo** thus interfering with field and training logistics. The position of tally clerk was not advertised as was the case of other election officials or positions. Neither was the appointment subjected to a panel of recruitment.

The evidence of the remaining petitioner's witnesses, **Bosire Makori, Justine Onyisi Mangera, Peter Mecha Okebo, Joseph Mariga Omao** and **Thomas Maosa Ratemo** merely confirmed the petitioner's allegations that his votes in certain streams from various polling stations, were not factored in to the final results. All these witnesses save for one, were polling agents, for the petitioner's preferred candidate and or party.

Bosire Makori was, however a Presiding Officer at Miriri Polling Station. His station had two streams. At the conclusion of the exercise, he tallied the votes and announced the results which the agents of the candidates present agreed with by appending their signatures in form 16A. Thereafter under security escort, he took the results to Nyambaria tallying centre. Later it came to his attention that only results for one stream had been tallied and entered into the computer. To him therefore the votes shown in the computer printout were not genuine.

What was the 1st respondent's take on these accusations? First and foremost, he claimed that the petitioner lacked the requisite legal capacity to file and prosecute the election petition. He had not adduced evidence to prove that he was a registered voter and entitled to vote in Kitutu Masaba Constituency and secondly, that he was the lawfully elected Member of Parliament for the constituency having garnered the highest number of votes cast. He fairly won the elections since they were conducted fairly, freely and transparently. In the alternative if there were any irregularities, they were minor and did substantially or materially affect the final outcome.

In support of these contentions, the respondent himself testified and called 15 witnesses. In brief he testified that he did not communicate with the 2nd respondent and that the tally clerk was not his nephew. Neither did he input in his appointment. The election officials were appointed by the 3rd respondent and were not at all related to him and they never manipulated the electoral process in his favour. None of his

supporters openly campaigned for him in any polling stations nor did he dish out money to any voter or at all on the polling day. He did not also address his supporters at Nyambaria tallying centre before or after the official announcement of the results and even during the tallying exercise. The petitioner never reported the arson incident at Keroka Police Station nor to the Chief, Central Kitutu location.

The other witnesses called by the 1st respondent were **Zadock Abuga Nyangau, Charles Kihara Bosire, Machuki Monyancha, Samuel Moriasu Marani, Samson Mogaka Ratemo, William Ayimba Mongei, David Mokaya Onyanchwa Otino, Evans Onsomu Makori and Henry Osoro Kemoni**. They were all voters and on the material day voted at various polling stations. Their evidence was that the voting exercise went on well and they never witnessed any incidents. They also never saw the petitioner visit the polling stations at which they had voted contrary to his evidence. After voting exercise, some of them proceeded to Nyambaria tallying centre. Those who proceeded there never witnessed any chaos thereat as there was tight security. In the tallying centre, it was not possible for any candidate to address his supporters, since nearly all the candidates, their agents as well as supporters were in the hall. At no time therefore did they witness the 1st respondent address people in the tallying centre.

Leakey Mokua Nyaberi, was alleged by the petitioner to have announced some of the results in place of the 1st respondent and contrary to law. He testified on behalf of the 1st respondent and denied the allegation. His duty in the hall was limited to taking care of the school furniture and other property, a duty he had been assigned by the Principal of the school. He was also the school chaplain.

The last witness called by the 1st respondent was **Abel Oroti**, the Assistant chief, Kiogutwa sub location, central Kitutu location. He knew the petitioner as he came from his area of jurisdiction. He denied the evidence of the petitioner that his brother's house had been burnt and his personal effects and documents that he had kept there, destroyed. He wished to confirm that no such case of arson was reported to him nor had there been a report made to him with regard to threats to the petitioner's life.

The 2nd respondent had all along been represented in this petition by **Mr. Orora** learned counsel who also appeared for the 3rd respondent. Apparently, the instructions to act for both had come from the 3rd respondent as the 2nd respondent had been its employee, agent and or servant in the exercise. All was well until 15th June, 2011 when out of the blues, the 2nd respondent opted to take the matters in his own hands and drop his representation by **Mr. Orora**. He did not explain, then why he had taken such drastic step at such late stage in the proceedings. Not that he was bound to. It is a constitutional right of any person who is a party to a suit to appoint an advocate of his choice or to act in person. Thus the 2nd respondent was perfectly within his rights to fire **Mr. Orora** and to elect to act in person. That right cannot be fettered or clogged. However, when he took the stand, the reasons why he declined further representation by counsel became apparent. In a related election petition filed by **Mose Nyambega**, one of the losing candidates in the election, his same counsel had caused the presiding Judge in that petition to brand him as a person who had parted company with the truth long time ago. This was after the said counsel, brought to him an affidavit which he had already prepared without his input on one Saturday afternoon within Narok town and caused him to sign it. What was contained in the said affidavit was contrary to what he would have said. It exposed him as a liar. He therefore did not take kindly to the rebuke by the Judge. He was not again willing to be taken down the same route since according to him, his counsel and that of the 1st respondent were co-joined twins who were exerting unnecessary pressure on him to toe their line.

In his evidence, he confirmed that he was the returning officer for Kitutu Masaba Constituency in the 2007 General Elections. He had initially been appointed in the same position for Baringo Central Constituency but was later transferred to Kitutu Masaba Constituency. On taking up the appointment, he embarked on recruitment of election officials between 15th and 16th December, 2007. However on 17th December, 2007 Commissioner **Eng Maugo** nullified the exercise. They were forced by circumstances to embark on a fresh recruitment. Due to late recruitment as many as 38 Presiding Officers did not make it for the crucial training exercise held on 19th December, 2007. He confirmed that one, **Johnson Moriasi Nyandika** was initially recruited as a Presiding Officer, but he asked him to step aside as his wife too had

been recruited for the same position. However, his name was again brought to him by Dec to be employed as a tally clerk. As elections were going on he received reports that some aspirants were interfering with smooth flow of elections by inducing voters financially, an allegation he could not, however verify. Tallying commenced at Nyambaria Secondary School hall at about 10.30p.m on 27th December, 2007 and went on until 28th December, 2007. The process was short of his expectations as he was constantly being interrupted by unnecessary telephone calls from **Eng Maugo** and KICC tallying centre. He later learned that **Pastor Leakey Nyaberi** would announce results in his absence anytime he went out to answer the telephone calls. On average he left the tally hall 8 to 12 times to attend to such calls. Some chaos broke out in the hall lasting about 15 minutes after the Presiding officer from Nyamakoroto Polling Station was discovered forging form 16A he was due to present to him. He ordered for his arrest and protection. On one or two occasions he had seen the 1st respondent talk to the tally clerk but cautioned him against it. After the tally exercise was completed at 11.20p.m on 28th December, 2007 and with the pressure to announce the results immediately mounting, he realized that Form 17A had not been filled by his assistants and many Form 16As were not factored in Form 17A and therefore he could not get the totals needed to declare the winner. He therefore ordered for a printout from the computer. It is this printout that he used to announce the results. During the chaos due to manipulation of results from Nyamakoroto polling station, five Presiding Officers left the hall with results from their centres, Nyaisa, Mongoni, Miriri, Gucha DOK and Ikobe only to resurface later when he had declared the winner and transmitted provisional results to Nairobi KICC. After announcing the results, he left for Nairobi for purpose of physically handing over the same. Whilst in Nairobi he again embarked on reconciling various figures in the election day form and upon close scrutiny, he found numerous errors, anomalies, and irregularities which were either due to human error or deliberate. Upon re-tallying with the assistance of the officials of the 3rd respondent, the initial results he had communicated changed. He thereafter made a new result list on 2nd January, 2008 and brought this to the attention of the 3rd respondent.

Later he delivered all election material to the Dec office in Nyamira. They included 259 empty ballot boxes and 161 with ballot papers. All were sealed and were in the custody of the Dec before the 3rd respondent was disbanded. Due to the poor training of Presiding Officers, they stuffed all ballot papers for all the 3 elections in one particular ballot box of their choice. In his opinion, however, the counting, tallying and transmission of election results was completely erroneous as a result of contradictory instructions from KICC tally centre, as it demanded that he gives provisional results only for them to be adopted as final results. 72 out of 111 polling stations in the constituency were found to have various election anomalies, irregularities and did not therefore meet the threshold required in order to satisfy the required standards to declare the elections as being successful. The nature of the noted errors, irregularities and mistakes included but were not limited to the following; 21 out of 29 double streams did not avail form 16A from 2nd streams, 5 Presiding Officers made alterations to the statutory forms but failed to append their signatures or initials, 19 form 16A's had no Presiding Officer's signatures and agents did not sign to authenticate the results.

The 3rd respondent took the same position as the 1st respondent in this petition. That the elections were fairly conducted and in accordance with the law. In the event that there were any irregularities they were minor and did not affect the overall results of the elections in the Constituency

Anyhow, **Lumumba Tai**, the Deputy Returning Officer for the constituency testified on its behalf, that he was in charge of procurement, keeping election materials, security, training and employment of election officials. In conformity with the employment regulations of the 3rd respondent, 2nd respondent and himself recruited the best qualified applicants for the jobs. They then trained them. He denied that **Eng Maugo** ever interfered with the recruitment exercise. On the polling day, the exercise went on smoothly and there were no complaints either written or verbal. Earlier on he had prepared the tallying centre in accordance with the directives given by the 3rd respondent. At around 8.00p.m they started receiving ballot boxes from various polling stations through the various Presiding Officers and tallying started. The candidates and the agents who were in the hall were at liberty to raise any queries if any. No such queries were however raised. He never saw any unlawful communication between the 1st respondent and officials for the 3rd respondent in the tallying centre. Though **Leakey Nyaberi** was in the hall, he was

only there to assist in securing the public address system and the school property. He at no time announced any results of any polling station in the constituency. He denied that **Johnson Moriasi Nyandika** was employed as a tally clerk. In the final tally in which the 1st respondent was declared the winner, the Nyamakoroto Polling Station results were omitted as there were complaints that the presiding officer had manipulated them, in favour of one candidate namely, **Mr. Nyangau Okioma** and that the form 16A was forged for that purpose. The said Presiding Officer was handed over to the police. He denied also that the 2nd respondent announced the final results using interim results as alleged by the petitioner.

Joyce Nyabonyi Onguso, was the Dec, Nyamira District. She was part of the recruitment panel for election officials for the constituency. The recruitment panel consisted of 2nd respondent, Deputy Returning Officer, Assistant Returning Officer and herself. In the recruitment, they consulted the area commissioner, **Eng Maugo** who was in charge of elections in the whole of Nyanza Province. There was transparency in the recruitment exercise and there was no interference of any nature. The subsequent elections in the constituency were held peacefully and after declaration of the winner for presidential, parliamentary and civic, the 2nd respondent brought all the ballot boxes and other election materials to her office and were kept in safe custody. In or about December, 2008, the 3rd respondent was disbanded by parliament and she was ordered by the District Commissioner, Nyamira to vacate her office. She thus left the office without any formal handover. Otherwise the ballot boxes and other materials were left intact in the hands of Administration Police Officers.

Lastly, the 3rd respondent called **Fredrick Hezekiah Owino Odenge**, the current Constituency Electoral Co-ordinator, for Kitutu Masaba as a witness. His evidence was limited to the collection and handing over to the Deputy Registrar of this court the electoral materials and ballot boxes. This he did on 30th September, 2010.

With this testimony, the curtain on the formal hearing of the petition was brought down. Parties thereafter agreed to file written submissions. They subsequently did so and on 1st July, 2011, I allowed respective counsel to highlight orally their written submissions.

I have anxiously considered the petition, the evidence on record, rival submissions of learned counsel as well as the authorities to which I have been referred. However, before I delve into determining the real issues in controversy in this petition, I want to say something albeit briefly on the essence of elections.

According to **Encyclopedia Britanica**, elections are defined as a formal decision making process by which a population chooses an individual to hold public office. Elections may fill offices in the legislative, sometimes in the executive and judiciary, and for regional local government. The process is also used in many other private and business organizations, from clubs to voluntary associations and corporations. As to the above definition, we get the first essence of election. It has been the mechanism by which modern representative democracy has operated since the 17th century. The universal use of elections as a tool of selecting representatives in modern democracies is in contrast with the practice in the democratic archetype ancient Athens. Elections were then considered an Oligarchic institution and most political offices were filled using sortition, also known as allotment, by which office holders were chosen to lot.

In Kenya, however, article 1 (2) of the Constitution of Kenya provides interalia: “...*that the people may exercise their sovereign power either directly or through their democratically elected representatives...*”. According to the declaration on criteria for free and fair elections unanimously adopted by the inter-parliamentary council at its 154th session (Paris, 26th March, 1994), it outlines the essence of elections as follows:

“...Reaffirming the significance of the Universal declaration of Human Rights and International Convention on civil and Political rights which establish that the authority to govern shall be based on the will of the people as expressed in periodic and genuine election, Acknowledging and endorsing the

fundamental principles relating to periodic free and fair elections that have been recognized by states in Universal regional Human Rights instruments, including the right of everyone to take part in the government of his or her country directly or indirectly through freely chosen representatives to vote in such elections by secret ballot, to have an equal opportunity to become a candidate for election, and to put forward his or her political views individually or in association, Conscious of the facts that each sovereign state has the right in accordance with the will of its own people, freely to choose and develop its own political, social economical and cultural systems without interference by other states in strict conformity with the United Nations charter, Wishing to promote the establishment of democratic, pluralist systems of representative government, Recognizing that the establishment and strengthening of democratic process and institutions is the common responsibility of governments, the electorate and the organized political forces, That periodic and genuine elections are necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that as matter of practical experience the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of human rights and fundamental freedoms. In any state the authority of the government can only be derived from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage...”.

Again coming back to Kenya, Free and fair election is an election that is in conformity with Article 81(a) as read together with Article 81(d) and (e) of the Constitution of Kenya which provides that: Article 81(a) citizens enjoy the freedom of exercising their political rights, accordance to Article 38; (d) the election has to comply with the principles of universal suffrage based on the aspiration for fair representation and equality of vote; and (e) free and fair election which are by secret ballot; free from violence, intimidation, improper influence or corruption; conducted by independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.

The election exercise has to comply too with Article 86(a), (b), (c) and (d) of the Constitution of Kenya which provides:

“...86(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; b) the vote cast are counted, tabulated and the result announced promptly by the Presiding officer at each polling station c) the result from the polling stations are openly and accurately collated by and promptly announced by the returning officer; and d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including safe keeping of election materials...”.

The election exercise has to comply to principle, rules and procedures as encapsulated by the **National Assembly and Presidential Elections Act**. Further openness and accountability are usually considered cornerstones of a democratic system of elections. The secret ballot is a relatively modern development, but it is now considered crucial in most free and fair elections, as it limits the effectiveness of intimidation.

Problems that may prevent an election from being **“free and fair”** may take various forms but most common is, tampering with election mechanism. This can include confusing or misleading voters about how to vote, violation of the secret balloting, ballot stuffing, tampering with voting machines, destruction of legitimately cast ballot voter suppression, fraudulent tabulation of results, and use of physical force or verbal intimidation at polling places.

On the whole, the quality of an election is a key ingredient for deepening democratic Governance. Elections are the primary interlinkage between representative democracy and political accountability. High quality elections substantively add value to accountable governance and the realization of citizens expectation. Low quality elections becomes a political liability to democracy if they institutionalize undemocratic culture and practice. But if elections, instead of institutionalizing culture, fuel political instability then they become a political liability for democracy. For a country that prides itself as democratic and adheres to the rule of law, we cannot allow elections to fuel political instability. If election fraud is proved, the courts must step in and remedy the situation if properly moved by victim(s)

of such fraud.

Of course, the law recognizes that an election is an expensive affair in terms of resources and time. It also excites people unnecessarily. The citizenry should not put in an election mood perpetually. That is why the law allows for minor infractions of the electoral process which does not impact negatively on the final results and the will of the people to be ignored. However, in a case such as in this constituency with an overcrowded field of 33 candidates and where the winning margin was hardly 300 votes and where the combined votes of the candidates who lost exceeded those of the winning candidate by a very large margin, the election officials are called upon to be extra vigilant to avoid such infractions as they may come back to haunt them later.

Back to the election petition at hand, I need to remind myself that, the burden of establishing allegations in an election petition lies with the petitioner. A petition is not an ordinary civil suit so that proof must be on standard of balance of probability. Nor is it a criminal case which requires proof to be beyond reasonable doubt. In an election petition, the proof must be between the two standards aforesaid. In other words for a petitioner to successfully prosecute his petition to fruition, he must adduce evidence to support the allegations in the petition on a standard higher than is applicable in ordinary civil cases but lower than the standard of proof required in ordinary criminal cases. This being the case and the petitioner having appeared, testified and called witnesses, the question that requires to be answered is, did he discharge the said burden of proof? Before answering the question, I must isolate issues for determination in this petition. Having gone through the pleadings, the evidence and the submissions, 3 issues clearly stand out for determination in this petition. These are:-

- *Whether the petitioner had the necessary **locus standi** to mount this petition.*
- *Whether there were election irregularities.*
- *Whether such irregularities were fatal or did not substantially and materially affect the outcome of the electoral process and therefore pardonable.*

Dealing with the first issue, as already stated elsewhere in this judgment, the petitioner mounted this petition in his capacity as a voter, which the law allows him to. In his petition he stated that he is an adult Kenyan, and was a registered voter in Kitutu Masaba Constituency for the 2007 elections. Accordingly he was duly qualified to present the petition as such. However the 1st and 3rd respondents have contested that assertion. They allege that, to the extent that the petitioner in his evidence did not produce a copy of his voter's card to prove that he was a registered voter within the meaning of section 44(2) and (3) (b) of the former Constitution and the **National Assembly and Presidential Elections Act**, he had not proved that he was such a voter. That the law makes it mandatory for a person who claims to be a voter to produce in evidence an elector's card. Further, in the absence of an electors card, a register of voters for a constituency must be produced in evidence to prove that, one was a voter in a given constituency. That it is not enough for one to merely state that he is a voter in a constituency without producing the aforementioned requisite documents. Due to the petitioner's failure in that regard, he was therefore not competent to urge the petition. He had no capacity at all to file and canvass the petition.

I do not agree that the only way that the petitioner would have proved that he was a registered voter in Kitutu Masaba Constituency was by production of his voter's card in evidence or a register of voters. I am also not aware of such legal requirement. He could still prove such a fact by other means, for instance oral evidence as he did in this case. Apart from asserting as such in his petition, he made a similar deposition in his affidavit dated 30th September, 2010. In paragraph 4 thereof, he categorically stated **"... THAT I am the registered voter in Kitutu Masaba constituency, was the chief campaigner, manager and was also subsequently the chief agent for ODM party candidate, Timothy M. E Bosire..."**. The petitioner too deposed and stated in court that he voted at Kiogutwa Primary School. By the time of filing his affidavit, he could not produce the voter's card he had used to vote since all election cards had been surrendered to the 3rd respondent in lieu of new ones that were used in the 4th August, 2010 referendum. In other words as at the time of filing his affidavit on 30th September, 2010, no voting Kenyan had a copy of the voters card used in 2007. None of the respondents and or their witnesses

challenged or disputed these facts.

Indeed under cross-examination by **Mr. Orora**, the petitioner stated and I quote “...***The court can only tell that I am the registered voter in Kitutu Masaba Constituency by refereeing to the register where I registered as a voter...***”. In my view, the petitioner was right in taking that position. Under rule 19(d) of the **National Assembly Elections (Election Petition) Rules**, it was the responsibility of the 3rd respondent to ensure that the marked register is delivered to the Deputy Registrar of this court before the hearing of the petition commences. If the 3rd respondent had complied with the statutory requirement aforesaid, the court on its own motion would have called for the register and satisfied itself as to whether the petitioner was a registered voter. It may also have disabused the 1st and 3rd respondents of the notion that the petitioner was not a registered voter. Of course, the 1st and 3rd respondent may want to seek refuge in the old legal adage that he who asserts must prove. However, an election petition is in the nature of an inquiry. It is not the normal civil hearing. As an inquiry, any party with relevant information that may assist the court, reach a just and fair verdict is obligated to bring such information forward. It matters not that such information may not be favourable to such party. There is no room for trial by ambush in an election court. So that the issue of shifting of burden of proof does not actually arise. There is no room to withhold information which is unfavourable with the hope that it may advance a party’s case. The 3rd respondent may have taken steps not to avail the register in the knowledge that since it possessed the petitioner’s voter’s card as well as the register, he will not be able to prove his ***locus standi*** to mount petition. The 3rd respondent cannot be allowed to benefit from its own mischief. Similarly, the 1st respondent cannot be allowed to take a ride on the back of the 3rd respondent’s mischief aforesaid. Again it was still open to the 1st respondent to challenge the petitioner’s ***locus standi*** by availing witnesses to counter that assertion. He could have availed witnesses to say that they did not see the petitioner vote at Kiogutwa and or that he was not a registered voter in the constituency.

The petitioner did testify that due to security concerns arising from his filing of this petition, he had relocated from the Constituency and kept some of his personal documents in his brother’s house. That house was burnt by an unknown arsonists, whilst this petition was pending hearing. He lost some items in the inferno that would have been of assistance to this court in this petition and in particular with regard to his ***locus standi***. A report of the arson was made to Keroka Police Station or was it Nyamira Police Station?

The 1st respondent countered that evidence by producing a note allegedly from Keroka Police Station as well as the evidence of the assistant chief of the area that the petitioner hailed from. However, that evidence was of no value at all since the letter allegedly from Keroka Police Station is not on the official letterhead and the name and position of the author in the police force given. In any event the report of arson could as well have been made at Nyamira Police Station. As for the evidence of the assistant chief, the report was not made to him, but to the chief. I also had the distinct feeling that the evidence from the assistant chief as well as the letter from Keroka Police Station was generated purposely to advance the 1st respondent’s case.

The petitioner deponed on oath and was accepted by all that he was also the chief agent of **Timothy Bosire**, a parliamentary aspirant in 2007. The 2nd respondent, confirmed on oath that he knows for a fact that the petitioner was a registered voter as he checked his details at the time he presented his letter as chief agent, and he confirmed so. He stated that this was the standard policy all over the country for all chief agents. The 2nd respondent would know better as he was the man in the eye of the storm. He was not at all challenged on these assertions.

Finally, I note that counsel for the 3rd respondent did on 19th July, 2010 issue to the petitioner a request for better particulars pursuant to a court order dated 12th July, 2010. In the said request for particulars, counsel did not query or request particulars as regards the petitioner’s standing in the petition, in particular whether he was a registered voter in the constituency. The 3rd respondent, it must be assumed now that it had no qualms at all with regard to the petitioner’s ***locus standi***.

On the whole therefore, I find that the petitioner was a registered voter in Kitutu Masaba constituency and therefore had the necessary *locus standi* to mount and prosecute this petition.

I now turn to consider whether there were election irregularities. On the evidence on record both from the petitioner and respondent, it is common ground that polling stations opened as early as required by law. In a few polling stations with logistical problems, the same were readily addressed by election officials and polling went on smoothly. Voting went on as required by law and no one single voter was prevented from casting his vote. Though there were incidents of alleged campaigning and dishing of money in some polling stations, those reports could not be verified. At the close of voting, the votes were counted in the polling stations and were later transmitted as required to Nyambaria tallying centre. It would appear from the evidence on record that if there were any irregularities, the same could only have been committed at Nyambaria tallying centre and not in the polling stations. So that the allegations by the petitioner that the 1st respondent's supporters openly campaigned in and within the precincts of the polling stations contrary to the regulations and also made false, deceptive and misleading allegations against ODM party are unsupported by evidence on record and thus do not fall for consideration.

As the hearing of the petition progressed other irregularities came to the fore that had not been captured by the petitioner. Infact they were irregularities beyond what was known to the petitioner. Indeed this came through the evidence of the 2nd respondent and Assistant Returning Officer, **Paul Morara**. Should such evidence be ignored. The 1st and 3rd respondents think so. They submit that the petitioner premised his prayers in the election petition on the specific complaints enumerated in paragraphs 8 and 9 of his petition. However in his testimony and that of his witnesses, they generally wandered away from those complaints and the particulars specifically set out in the petition. They went ahead and introduced other complaints. A party is bound by his pleadings. It was thus not open to the petitioner to raise issues and complaints not covered by his petition. To them all the complaints that arose during the hearing of the petition that were not raised or covered by the petition were irrelevant and should not be considered. For this proposition, the 1st respondent relied on the case of **Reuben Ndolo –vs- Dickson Wathika Mwangi Election Petition No. 11 of 2008**.

The petitioner and 2nd respondent think otherwise. To them an election petition being a form of inquiry, anything coming to the fore during the hearing that may have impacted negatively on the final outcome of the elections falls for consideration. In support of this proposition, the petitioner relied on the following authorities:-

- **Election Petition No. 2 of 2008 (Kakamega) Benard Shinali –vs- Dr. Boni Khalwale.**
- **Election Petition No. 3 of 2008 (Kisii), Manson Nyamweya –vs- James Omingo Magara.**
- **Reuben Ndolo (Supra).**

I take the view that an election petition is an inquiry. This I have constantly stated. As such all issues raised in the petition and those which crop up during the hearing whether pleaded or not and which had the potential to affect adversely, the final result and indeed the will of the voters in a constituency must come under spotlight, scrutiny and interrogation. They have to be interrogated and a determination made thereon. In this case all the illegalities and irregularities which impugn the credibility of the outcome of the elections in Kitutu Masaba have to be considered. The need to consider everything that come to the fore during the hearing of this petition is more pertinent in this petition considering the crowded field of the contestants and the margin of difference of votes between the winner and the candidate who came second. It will be a sad day indeed if such evidence which comes through the petitioner, his witnesses, the respondents and their witnesses as well, to be discarded and rendered irrelevant or inadmissible merely on the grounds that the same was not the subject of nay pleading. An election petition is determined on the evidence, law and merit. At the end of the day, what is of prime concern to the court is whether the elections were conducted in a fair, free and transparent manner and that they reflect the will of the voters, and more importantly whether as in this petition the 1st respondent was validly elected. Such determination cannot be made if relevant evidence is locked out on technical grounds that the issues

addressed by such evidence were not pleaded. In any event I am required to determine this petition without undue regard to technicalities.

In this petition, the 2nd respondent, who was the main actor in the elections and at whose feet the buck must stop as to whether or not the elections were properly conducted, conceded to some irregularities. Should this court shut its eyes on such evidence and admissions of wrong doing by the 2nd respondent and his officers on the non-compliance or otherwise of laws governing elections and which directly impacted on the final outcome? I do not for the umpteenth time think so.

What was the additional facts and evidence which came through the hearing of the election petition?

- *The fact that 21 out of 29 double streams did not avail form 16A's from the 2nd stream.*
- *Five Presiding Officer's made alterations to the form 16A's without appending their signatures.*
- *Form 16A's not signed by agents and without statement or reasons for refusal to sign.*
- *Those with various unexplained cancellations and without any signatures to the alteration.*
- *Existence of two contradictory form 17A's, both authenticated, and yet no form 17A was filled at the tallying centre.*
- *The fact that the 1st respondent swore an oath that he was declared a winner with 8,150 votes while the 2nd respondent who so declared him insisted that he had won with 7,401 votes.*
- *The fact that a computer generated form was used to declare results while the election regulations does not recognize any such mode.*
- *The fact of most presiding officers having totally mixed up presidential, parliamentary and civic ballot boxes.*
- *The fact that there are 3 sets of results all claiming to be authentic.*
- *The fact that following the fracas in the tallying centre some presiding officers ran away with the results only to resurface after he had announced the results.*
- *That he had retallied the results in Nairobi alone on 2nd January, 2008 long after he had announced the 1st respondent as the winner and duly had him Gazetted.*

These are serious anomalies going to root of the elections which this court cannot turn a blind eye on. Infact in a report on the conduct of 2007 elections exercise in his constituency that he prepared pursuant to a request by the 3rd respondent, through a letter dated 11th January, 2008, the 2nd respondent makes startling revelations. In pertinent paragraphs he states:

*"...After declaring the winner for Kitutu Masaba Constituency as **Mr. Walter Enock Nyambati Osebe** and after rechecking and analyzing the various results I noted a lot of glaring anomalies where figures in form 16A from different stations were not the same as what was entered in form 17A.*

*I also noted with a lot of concern that the tally clerk whom I later was told is a nephew of the winner had deliberately entered higher figures in various stations in favour of the winner. This I later personally confirmed to be true. However, it was too late for me to change as I had already handed over the certificate to the winner and declared **Walter Nyambati** the winner and hence the new MP for Kitutu Masaba.*

It was also my concern after analyzing the final result of KICC tallying Headquarter I noted that massive

rigging had taken place and the margin of unconfirmed votes was around 750-800 votes given to **Mr. Walter Enock Nyambati** over and above the correct votes as shown in forms 16A from the polling stations. It was also my concern that several Presiding officers and voters especially from Iringa, Moriako, Nyaisa and Mukwerero called me to say **Mr. Nyambati Osebe** was buying votes and doing campaigns on the Election Day. I could not do anything as I was overwhelmed with other urgent issues in other stations.

The results for Kitutu Masaba constituency were therefore, to the best of my knowledge, seriously flawed as many issues came to play which hindered me from giving out the results as they actually were on the ground.

The constant interruptions from headquarters where I was forced to leave the tallying hall several times to answer calls from Nairobi gave the tally clerk the best opportunity to insert higher figures for the MP elect which I could not verify there and then before declaring the winner. Had I changed the winner position then my life would have been on the line as there was already a lot of tension and jubilation. The party mood was unstoppable.

It is therefore my view that owing to the facts stated and with the collusion of electoral officials, the winner of Kitutu Masaba parliamentary seat Mr. **Walter Enock Nyambati Osebe** and the people of Kitutu Masaba including the other 32 aspirants should seek another by-election to determine the true leader for the people...”.

Should such a glaring admission of acts of omission and commission on the part of the election officials be ignored? I do not think so. Again in his simple and self prepared affidavit, the 2nd respondent makes the following important concessions

“ i. Paragraph 26 “THAT after the tally exercise was completed at 11.20p.m on 28th December, 2007 and with pressure to announce the results immediately, I did realize the hand written form 17A was not being filled by my assistants and many form 16As were not in form 17A and therefore I could not get the totals needed to declare the winner. I ordered for a printout from the computer as it was ready and all the figures were already in Nairobi KICC tally centre and this printout is what I used to announce the results at 11.40p.m on 28th December, 2007.

ii. Paragraph 27 “THAT during the chaotic episode emanating from the hall due to Nyamakoroto Polling Station results, 5 or so Deputy or Presiding officers left the hall with results from their centres namely, Nyaisa, Mongoni, Miriri, Gucha DOK and Ikobe and resurfaced later when I had declared the winner and transmitted provisional results to Nairobi KICC (annexture LTS 5)

iii. Paragraph 29 “THAT I embarked on reconciling the various figures in the Election Day forms and upon close scrutiny, I did find numerous errors, anomalies and irregularities in forms and in the tally of votes which were either human error or deliberate.

iv. Paragraph 35 “THAT the counting, tallying and transmission of elections results was completely erroneous and full of contradictory instructions from KICC tally centre as it was demanded we give provisional results only for them to be adopted as final results and mode of transmission was bogged down with system failure. (annexture LTS 9).

v. Paragraph 36 “THAT 72 out of 111 polling stations in Kitutu Masaba constituency were found to have various election anomalies, irregularities and did not therefore meet the threshold required in order to satisfy the required standards to declare the elections as being successful.

vi. Paragraph 37 “THAT the nature of the noted errors, anomalies, irregularities and mistakes were diverse and include but not limited to the following:- 21 out of 29 double streams did not avail F16A forms from the second stream, 5 Presiding officers made alterations to the statutory forms but failed to append their signatures or initials. 19 forms 16As had no Presiding officer’s signatures and agents did not sign to authenticate the results (annexture LTS 10).

Feeble attempts were made by the 1st and 3rd respondents to cast aspersions and or doubts as to the authenticity of the report aforesaid on the grounds that it was undated, unsigned, not addressed to anybody, some portions were erased and there were obvious mistakes. When the 2nd respondent took the stand, he confirmed that he actually authored the report, that the report annexed to the petitioner's affidavit was his file copy since the original was forwarded to 3rd respondent as requested. Thus it could not have had his signature. The erasures and obvious mistakes were typographical. Otherwise he stood by the contents of the report. Though cross-examined at length by both counsels for the 1st and 3rd respondents, he stood firm as to his authorship and authenticity of the report. I am satisfied that indeed the 2nd respondent authored the report and is not a document that the petitioner would have manufactured from River road as suggested to him by counsel for the 1st and 3rd respondents. I am also satisfied that it was one of the documents he handed over to the petitioner upon request.

It is instructive however that the report was authored pursuant to a request by the 3rd respondent. That request was contained in a letter authored by **Joel H. Tsola**, Commission secretary dated 11th January, 2008. Looking at the letter, it was addressed to all returning officers. The 2nd respondent was one such returning officer. I did not hear the 3rd respondent disowning the letter. It means that the said letter went out to all the returning officers and must have elicited some response or reaction. If the 2nd respondent did respond, nothing would have been easier than the 3rd respondent to say so. Or if the report is not the one that he had transmitted to it, it would simply have said so and produced that which he had authored. That the 3rd respondent failed to do any of the above means the report is authentic. This report as well as some of the 2nd respondent's depositions in his affidavit received some backing by the Assistant Returning Officer, **Paul Morara** and some presiding officers. Everything considered, it attest to the fact that all was not well with regard to elections in Kitutu Masaba constituency. This report alone confirms that elections were marred by a multitude of illegalities.

So much for the evidence and complaints which came through during the trial. Coming back to the specific allegations in the petition, I will deal with the complaint that votes from Nyamakoroto Polling Station were excluded from the final tally. It is common ground that the results from the polling station were rejected on account that the Presiding officer was found red handed doctoring them. Perhaps instead of rejecting, the 2nd respondent should have taken the advice of **Lumumba Tai**, to have the recount of the votes done in the presence of all agents. However, since no candidate derived any benefit from the rejection, nothing much really turns on the issue, though the 2nd respondent was perfectly within the law in acting in the manner he did. But of more concern to me is the revelation that during the fracas, 5 Presiding officers, ran away with some results from their polling stations and only resurfaced after the 2nd respondent had declared the winner and transmitted the results to Nairobi. These means that the said results were not factored in the final results before the announcement. Nobody even knows if, during the time that the said Presiding officers were out there, fiddled with them so that even if the 2nd respondent later factored them in as he did his final harmonization in Nairobi, their authenticity is still not assured. Those Presiding officers apparently were from Nyaisa, Mongoni, Miriri, Gucha DOK and Ikobe. It is also instructive that in some of these polling stations only results from one stream instead of two had been captured.

On the evidence on record, I have no doubt at all that **Johnson Moriasi Nyandika** was a tally clerk despite, the 3rd respondent's contention to the contrary. However, I doubt that in the circumstances obtaining in the tallying hall, he would have been allowed to communicate with the 1st respondent. There were other candidates in the hall as well as their agents. There were also members of the public and even election observers. I doubt in those circumstances whether such communication if at all would not have attracted the wrath of those present and a comment, perhaps by election observers. However, what is of concern to me is the manner of his recruitment. Initially he had been dropped as a Presiding officer by the 2nd respondent in favour of his wife. How again he found his way into being a tallying clerk raises eyebrows. I do not buy the argument that it was because of his computer skills. Again what is more intriguing is the attempt by the 1st and 3rd respondents to shield and blurr his presence and the role he

played in the elections. What was it aid of? If indeed he was not a tallying clerk, why couldn't the 3rd respondent avail him to say so from the witness box? Is it possible that he was planted there deliberately to mess up the elections in favour of the 1st respondent? That possibility cannot be wholly ruled out.

Evidence on record by **Lumumba Tai**, the 2nd respondent, **Leakey Nyariki Nyaberi** and the petitioner is to the effect that there was no mechanism established for confirming that the results as announced by the 2nd respondent were the ones entered in the computer. It is on record that once the presiding officers handed over the results to the 2nd respondent, he would announce them and pass the same to his assistant to enter first into form 17A before they were entered into the computer. It would appear from the moment, the 2nd respondent read out the results from Form 16As, he lost the paper trail of the results he had announced. Now if the 2nd respondent was unable to verify that the results he was announcing in the hall were the same ones being entered in form 17A and or even in the computer, how can we be sure that the final results he announced on 28th December, 2007 were the correct ones? The 2nd respondent admitted that though he had delegated the duty to fill in form 17A to his deputy, that was not done and was forced to announce the results on the basis of computer print out. In any event, the law requires that form 17A be filled at the tallying centre as the result stream in and that it must be filled by the returning officer. See Regulation 40 of the **Presidential and Parliamentary Elections Regulations**. The requirement is worded in mandatory terms leaving no room for discretion. For the 2nd respondent to have delegated that responsibility to his deputy it was an act of illegality.

With regard to form 16A, evidence is abound even from the 1st respondent's witnesses, that most of them had no signatures by the candidate's agents. Infact some did not even have the signatures of the presiding officers. See for instance form 16A for Nyambaria Primary School, Riongutu, Kiamoguti Primary School, Nyabioto Teay Buying Centre, Riogoro Primary School, Kerantini Primary School, Mokwerero Bocharia Primary School, Metamaywa Primary School, Mokorongosi Primary School, Mosobeti Primary School, Risa DEB Primary School, Ikonge Primary School, Irianyi Primary School and Mochenwa Primary School polling stations.

Of course the need to have form 16A properly signed and authenticated by those concerned is not a discretionary matter. Rule 35A(5), (6) and (7) of the regulations aforesaid and indeed from the face of the form itself, each agent must be requested to sign, if he declines, he must state why. If he declines, the Presiding officer must himself record the fact on the face of the form. These requirements were inserted for a purpose and can only be overlooked at the peril of the Presiding officer and the entire election process. They were meant to guard against anomalies as were witnessed with regard to Nyamakoroto. They were made a requirement out of the realization that once the votes are counted from the various polling centres, they must be transmitted to a tallying centre within the constituency to be collated with those from other polling station so that an eventual winner is established. Between the polling stations and the tallying centre, there could be an opportunity for the presiding officer to interfere and or doctor such results, hence the need for those concerned to sign the form.

Confronted with more or less similar circumstances in **William Kabogo –vs- George Thuo & 2 Others (2010) eKLR**, **Kimaru J.** said and with which I agree “*...In the case of electoral documents, it is important that the statutory form which contain results that will invariably be required to be verified by other parties, including members of the public, should be written without any alterations or cancellations. The cancellations and alterations in the form 16A's produced in this court raise questions regarding the veracity and authenticity of the said results. The said form 16As cannot be in the circumstances be said to contain valid results of the polling stations in question...*”.

In the case of **Boni Khalwale (Supra) Lenaola J.** had this to say on the issue “*...The form 16As were designed as the primary document in tallying so that once the form 16A was wanting in content, the entire tallying exercise and the results thereafter announced were a complete sham ... once the form 16A were discredited, as they were in this case, there were no proper tally and the whole election was rendered a sham...*”. The same situation obtains. Infact the situation obtaining here is more acute in that 21 out of 29 double streams polling stations did not avail form 16A from the 2nd stream, 5 Presiding

officers made alterations to form 16A but failed to append their signatures or initials and 19 form 16As had no Presiding officer's signatures and agents did not sign to authenticate the results.

The 1st respondent's counter argument is that these allegations can only be verified by reviewing the ballot papers through scrutiny, recount and or review. In the circumstances of this case, Parole evidence alone is not adequate to enable the court exhaustively deal with the issues raised with regard to forms 16A and 17A aforesaid exhaustively. In the absence of scrutiny, which the petitioner had initially sought but subsequently abandoned, such oral evidence, is incomplete and inconclusive. It should therefore be disregarded.

I disagree. Form 16A's produced by both the petitioner and the 1st respondent all had those anomalies. Infact from the evidence, each of them had their own form 16A's. However, the common denominator was that they had the defects referred to above. Between the form 16A's referred by the petitioner, 1st and 2nd respondents respectively, I choose to go by those tendered in evidence by the 2nd respondent. He had nothing to loose or gain by manipulating them. The omissions on those forms being so obvious, it does not require a rocket scientist or scrutiny to detect the anomalies. In any event such scrutiny would not have helped the situation in view of the state in which the ballot boxes were found by **Mr. Odenge** when he went to collect them. The state was aptly captured by the Deputy Registrar's report and in any case, their authenticity was not assured. I said so in my earlier ruling on the application by the petitioner for partial scrutiny. That ruling as it turns out is vindicated by the evidence of **Fredrick Odenge, Paul Morara** and the inspection report by the Deputy Registrar of this court. Infact there is now evidence that out of 140 parliamentary boxes, only 30 such boxes were availed and the same had mixed ballot materials. Most of the ballot boxes were empty. More importantly 7 ballot boxes with the materials disappeared from the store between the day they were delivered by 2nd respondent and the day they were collected for delivery to this court by **Mr. Odenge**. Some ballot materials were in any event strewn on the floor in the store. That being the case it could not have been possible in the circumstances or practicable to conduct scrutiny and recount.

The other complaint by the petitioner was that the entries on the tally sheet for five stations did not reflect the actual votes received by **Timothy Bosire**. We all know that the said **Timothy Bosire** is not the petitioner but was one of the candidates in the election. However, the petitioner was his chief agent, hence the complaint. There is no doubt at all that what was used to announce the final results was computer printout instead of 17A authorized by law. This was illegal. The statutory requirement with regard to form 17A is not discretionary. It is only this form and no other that must be used in declaring the final results. That aside even from the computer printout, it is common ground that in:

- Mongoni Primary School, **Timothy Bosire** was given 36 instead of 83
- Miriri Primary School, he was given 126 instead of 204
- Ikobe Primary School he was given 56 instead of 115
- Girango FCH School he was given 25 instead of 33
- Gucha Primary School he was given 315 instead of 453
- Nyaisa Primary School he was given 21 instead of 26

Curiously, the 1st respondent suffered no such diminishing of his votes. The only rational explanation for the above scenario is that in some of those stations, the respective presiding officers must have taken off with results of some streams, deliberately withheld them and or that the tally clerk, deliberately and illegitimately doctored the entries. It is also instructive that in Riamoni Primary School, the 1st respondent was given 155 votes as against 78 that he was entitled to. The same was repeated at Girango FC where he got 11 votes instead of 72, Sengereri 78 instead of 74 and Kerora where he got 89 votes but was given 83 instead. The 1st respondent under cross-examination conceded to this anomaly. From the foregoing, it is

clear that the tabulation exercise and eventual declaration of results was tilted in favour of the 1st respondent.

The other substantial complaint by the petitioner which I wish to touch on and which in my view was proved by evidence is that the 2nd respondent irregularly and unlawfully caused the results of the elections to be Gazetted on 30th December, 2007 before and without addressing the complaints. The 2nd respondent admitted that he used provisional results to announce the winner. Secondly, it was self evident that as at the time the Gazette Notice was issued on 30th December, 2007, Gazetting the 1st respondent as the Member of Parliament for Kitutu Masaba, the 2nd respondent was still busy harmonizing or reconciling results in Nairobi with the assistance of the 3rd respondent's staff. That harmonization must have been sparked by complaints. It is instructive that he undertook the exercise with strangers in the absence of candidates and or their agents. Nobody knows the tools he applied in reconciling or harmonizing the results. If the results on the ground were dirty, they cannot be sanitized in Nairobi by way of reconciliation and or harmonization.

Ultimately it appears that there were 3 different sets of results all authenticated as accurate by the 2nd respondent. These were results from the computer printout dated 28th December, 2007, the harmonized handwritten form 17A filled on 30th December, 2007 and the form 16 filled on 2nd January, 2008 but each with different tallies. So by how many votes did the 1st respondent win the seat if at all? It is practically impossible to tell.

In the upshot, I am satisfied on the evidence tendered by the petitioner, his witnesses and the 3rd respondent, that the petitioner has discharged the burden of proof with regard to the complaint that agents were denied opportunity to sign Form 16As, 2nd respondent failed to announce the results of each polling station at the tallying centre, entries in the tally sheet for five streams, Mongoni Nyasore, Ikobe, Miriri and Nyaisa did not reflect the actual votes received by **Timothy Bosire**, that the 2nd respondent, and his officers paid no regard to accuracy and scrutiny in counting of votes received. Further that the 2nd respondent, irregularly and unlawfully Gazetted results on 30th December, 2007 without addressing the complaints made, failed to take charge of tallying and finally, allowed his officers to enter into the tally sheet figures which did not reflect the actual votes received, nor the votes per forms 16A.

Were these various irregularities and anomalies serious enough to invalidate the election if they are looked at in the context of the final results? The 1st and 3rd respondent's position is that they were minor and that the petitioner had not demonstrated that they affected the final result of the electoral process. For this proposition, they cite section 28 of the **National Assembly and Presidential Elections Act**, which is to the effect that:-

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

They also take the position that in all the 3 sets of results, the 1st respondent always emerged the winner. Accordingly, the elections in Kitutu Masaba constituency were conducted in accordance with the law and the results reflect the democratic will of the people of that constituency.

The petitioner's position, was naturally and diametrically opposed to that of the 1st and 3rd respondents. His position was that considering all the glaring anomalies, irregularities and incidents of non-compliance with the mandatory statutory provisions of the law, the elections cannot be said to have been transparent, free and fair. Accordingly, the parliamentary elections for Kitutu Masaba Constituency, ought to be declared a nullity, and fresh elections be held forthwith.

As for the 2nd respondent he states in his submissions “...*The ECK national tallying centre, ECK Commissioners, the DEC and the DRO, ARO and tally clerks who were greatly compromised and clearly seen to be receiving orders and instructions from another source other than the Returning officer did all to contribute to the confusion and eventual denial of the correctness of the various anomalies, errors, irregularities and mistakes that when combined together would prove a total failure to produce a credible election to the voters... it is useful to hone in on the causes, immediate and underlying of what took place in Kitutu Masaba Constituency on 2007 (sic) which resulted in a botched electoral process...*”. More tellingly whilst under cross-examination by counsel for the petitioner, when shown various anomalies in the computer generated print out which he relied upon in declaring 1st respondent the winner, after being shown again various anomalies including votes denied **Timothy Bosire** in various stations and votes improperly added to the 1st respondent in some stations; and finally when asked who won the parliamentary elections in Kitutu Masaba Constituency, in a fit of exasperation answered “...*I do not know who won the parliamentary elections in Kitutu Masaba...*”. I will revert to this statement later. Basically, what the 2nd respondent is saying is that the elections were not free, transparent nor fair.

So, what is my take on all these positions? An election should not be upset willy nilly. As stated in the case of **John Fitch –vs- Tom Stephenson & 3 Others**, QBD(2008) EWHC 501. “...*The decided cases, including those which Lord Denning considered in Morgan –vs- Simpson, established that the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches. This is because where possible, the courts seek to give effect to the will of the people...*”.

In view of monunental irregularities committed by the election officials that I have demonstrated in this judgment ranging from using non authorized documents to announce the results, use of provisional results as final results, when some votes from some streams of five or so polling stations had not been factored in, some form 16A not being signed as required, in the alternative not being countersigned following some alterations, non-use of form 17As to announce the results, assigning the task of filling form 17A to a person not authorized and the person not acting on the instructions, diminishing some votes of certain candidates, while enhancing those of eventual winner, the fact that there were three sets of results all authenticated by the 2nd respondent, the fact that the 1st respondent was declared a winner and Gazetted as such, long before the final results were reconciled and harmonized, the fact that the harmonization and reconciliation was conducted by the 2nd respondent in undisclosed place in Nairobi solely with the aid of the 3rd respondent’s staff but in the absence of the candidates and or their agents and finally, in view of the 2nd respondent’s own admission that the elections were botched and he was not certain as to who won the elections, the 1st and 2nd respondents cannot take refuge or solace in section 28 of the **National Assembly and Presidential Elections Act** aforesaid. It is as clear as snow or cotton wool that because of the massive irregularities aforesaid, the election cannot be said to have been conducted in accordance with the principles laid down in law. Indeed it was conducted in breach of the same. The electoral law was honoured much more in breach than compliance and or adherence. In those circumstances it cannot be said that the non-compliance did not affect the overall result of the election. If the person who was in charge of the said election without budding an eye says, he does not know who was the winner of the elections in the constituency and he was best placed to know and tell us, who are we to insist that, the 1st respondent was the actual winner as we are being urged on by himself and 3rd respondent respectively.

Yes, in all the 3 authenticated results, the 1st respondent always emerged victorious. But that is not to say that such victory was deserved if it was as a result of an impugned process. As **Musinga J.** said in **Manson Nyamweya –vs- James Magara & 2 others** (2009) eKLR “... *It must be borne in mind that in auditing an electoral process to determine whether the results as declared in an election ought to be disturbed, the court is not dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was*

not transparent, free and fair. It is not 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 a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there exist favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official. Counsel for the respondents submitted that the first respondent won the election so convincingly that it was clear the will of the people of South Mugirango had been demonstrated. They submitted that it would be improper to interfere with the voters' will. I agree that judicial authority is derived from the people and as much as possible courts should seek to give effect to the will of the electorate. However, in exercising their constitutional duties, courts must at all times act in accordance with the Constitution and other electoral law and regulations made thereunder...". I could not have put it any better. In the end I hold the firm view that serious undisputed anomalies and non-compliance of important and mandatory provisions in election laws committed by the 2nd and 3rd respondents were such that they seriously affected the final results of the parliamentary elections in Kitutu Masaba. It cannot therefore be said that those results reflected the will of the electorate of Kitutu Masaba Constituency.

For the upteenth time, I revert to the emphatic statement by the 2nd respondent that he did not know who won the parliamentary elections in Kitutu Masaba. Does that statement ring a bell? Of course it does. It was first uttered or proclaimed by none other than the chairman of the disbanded Electoral Commission of Kenya, then the boss of the 2nd respondent. That statement is reckless and points to serious dereliction of duty. Unlike in this case, a political solution in the nature of power sharing between the main contenders was conjured up to break the impasse with the nudging of one, **Kofi Annan**. Such solution is not amenable here. These are judicial proceedings with no political solution. The solution must be judicial. There can be no power sharing in the constituency. The constituency can only have one Member of Parliament at a time. The electorate in Kitutu Masaba deserve to know who that member is or should be. It cannot be the 1st respondent for now. The only option available therefore is to order fresh elections and I so hold.

These then are my final orders in this petition:-

- *The elections in Kitutu Masaba Constituency were not carried out freely, fairly, transparently and or in accordance with the law.*
- *The 1st respondent was accordingly not validly elected as Member of Parliament for Kitutu Masaba Constituency.*
- *The elections aforesaid are therefore hereby declared null and void.*
- *A certificate to the above effect shall forthwith issue and be served upon the speaker of the National Assembly in terms of section 30 of the **National Assembly and Presidential Elections Act**.*
- *The Interim Independent Electoral Commission and or its successor should mount a by election in the constituency as required by law.*
- *Because the sins committed and which have led to the success of the petition were committed by election officials in the employment of the 3rd respondent it shall solely bear the costs of this petition.*
- *Considering the length of time, number of witnesses complexity of the matter, the petitioner's plea for certificate of costs of two counsel is not wholly unjustified. I grant it.*

What is now left of me is to appreciate the counsels involved in this petition for their decorum and courtesy extended to the court during the proceedings. In times of gloom as the hearing progressed, they would in their own special way, enliven the proceedings. I also acknowledge their industry, research and diligence.

Judgment dated, signed and delivered at Kisii this 12th August, 2011.

ASIKE-MAKHANDIA

JUDGE