



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
THE ELECTIONS ACT 2011
ELECTION PETITION NO. 4 (as consolidated with)
No. 5 (both) OF 2013
ELECTION FOR THE GOVERNOR OF LAMU COUNTY

SWALEH SALIM SWALEH IMU.....1ST PETITIONER

FAHIM YASIN TWAHA.....2ND PETITIONER

VERSUS

THE INDEPENDENCE ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

SILVANO BUKO BONAYA.....2ND RESPONDENT

TIMAMY ISSA ABDALLA.....3RD RESPONDENT

JUDGMENT

1. Introduction

The Petitioners separately filed their petitions on the 25th March 2013 challenging the election for Lamu County gubernatorial seat in which the 3rd respondent was declared winner among four candidates. The petitioners were candidates for the elections held on 4th March 2013 together with one David Waihiga Mwaure following which the 2nd respondent declared results for each candidate as follows:

David Waihiga Mwaure	-	1,525
Swaleh S. S. Imu	-	4,353
Fahim Yasin Twaha	-	17,785
Issa Timamy	-	19,744

The petitioners were aggrieved by the outcome of the elections and claim that the same was not carried out in accordance with the provisions of the **Constitution**, the **Elections Act** and **Regulations**. These

two petitions were consolidated on 16th April 2013. For purposes of clarity in these proceedings the petitioner in no. 4 of 2013 will be referred as the 1st petitioner and the 2nd petitioner will be the petitioner in no. 5 of 2013.

2. The Petitions

The allegations and prayers in the petitions are substantially different. It will therefore be necessary to summarize and determine the petitioners cases separately.

A) Petition no. 4 of 2013

The petitioner claims that the 1st and 2nd respondents failed in its duty as required by **Section 25 (a)** of the **IEBC Act** in ensuring the freedom of citizen to exercise their political rights under **Article 38** and **86** of the **Constitution** and **Article 21** of the **Universal Declaration of Human Rights** is upheld. He raised the following issues:

- a) the petitioner's name and photographic impression on the ballot paper was disguised making it absolutely impossible to identify him;
- b) the elections were not administered in an impartial, neutral, efficient, accurate and accountable manner;
- c) there was no level playing field for all candidates as required in a free and fair election and the petitioner was denied that right;
- d) the failure by the respondent to use biometric voter registration violated the petitioner's right for credible and accountable election.

The 1st and 2nd respondents irregularly and unlawfully altered both names of the petitioner from Swaleh Salim Swaleh Imu to Swaleh Salim Swaleh contrary to and in serious breach of the law denying the petitioner and the people of Lamu their rights as candidate and voter respectively.

The 1st and 2nd respondents contravened the law by condoning an illegality thereby compromising the outcome of the elections by:

- a) failing to provide the petitioner and his agents with Forms 35 and 36;
- b) by the deputy returning officer one Jonathan Kazungo Ngowa manipulating results by preparing Form 36 for Lamu county elections resulting in a criminal charge against him **Malindi Chief Magistrate Criminal Case no. 180 of 2013;**
- c) filling Form 36 for the gubernatorial elections Lamu County long after announcement;

The 1st and 2nd respondent failed in their duties when they failed to implement the use of BVR and EVID after gazetting their use thereby committing an irregularity and illegality.

- a) There was no verifiable voter register to correspond to the number of people who voted in Lamu.
- b) The voters whose names were not in the manual register were denied their right to vote.

The petitioner prays for orders for:

- a) declaration that Lamu county gubernatorial election were unconstitutional, illegal, unlawful, irregular, null and void;

- b) cancellation of gazette notice declaring 3rd respondent as governor of Lamu;
- c) a permanent injunction restraining any organ, body and or institution from swearing in the 3rd respondent as governor of Lamu county;
- d) an order that the 3rd respondent was not validly elected as governor for Lamu county;
- e) an order for fresh elections in accordance with the law;
- f) an order for compensation to the petitioner under **Article 23(e)** of the **Constitution**;
- g) an order for costs.

Prayer (c) of the petition has been overtaken by events since the swearing of the 3rd respondent.

B) Petition no. 5 of 2013

The petitioner's grievances are based on the premise that the Lamu gubernatorial election was not conducted in a free, fair and credible manner thereby violating the **Constitution** and the **Elections Act**. In particular, it is alleged that accredited agents were locked out of the polling stations by the presiding officers; did not sign Form 35 or be provided with a copy and did not accompany ballot boxes to the tallying centre.

The agents were therefore unable to scrutinize the ballot boxes, papers and other election materials, unable to authenticate ballots at the beginning and close of the stations; to sign Forms 35 and 36 and assess the credibility of the voting process. The presiding officers did not make the necessary statutory comments on the Forms 35 and 36 where agents failed to sign or were barred. The stations named are Mapenya, Kilimani, Mkunumbi, Myabogi and Mikinduni. Chalaluma and Lake Amu are named due to incidents of voter influence.

The petitioner further alleges that the presiding and returning officers colluded with the 3rd respondent to bar his agent in order to facilitate, manipulations, impropriety and tampering with the election process. Several presiding officers and clerks were directly or indirectly related to the 3rd respondent.

Transportation of the officials and ballot boxes was done using vehicles belonging to the 3rd respondent at Mkunumbi. There were incidents of some presiding officers filling election forms in a classroom while others influenced voters. The IEBC officials allowed relatives of the 3rd respondent to mingle with them and access the 2nd respondent's electronic equipment. The failure of the EVID and RPS adversely affected the credibility of the elections for the reason that the 2nd respondent had to use the manual register for voter identification.

The vote counting and tallying was mishandled, tampered with and marred with irregularities. Violence erupted at Myabogi due to protestation by the public against the manner the presiding officer conducted the counting of votes.

At the county tallying centre, the petitioner complains of delayed and flawed results announcement claiming that the events related thereto led to the deputy returning officer being charged with breach of official duty.

The moving of Ndaui Dispensary polling station was illegal and irregular and thereby disenfranchised voters. The petitioner sought for reliefs of recount and scrutiny, nullification of the gubernatorial election and orders for a fresh election with an award of costs of the petition.

C) Responses

The 1st and 2nd respondents

The 1st and 2nd respondents defended their case jointly. In their response, they denied each and every allegation to both petitions and responded as follows:

- (i) that for the petitioner to be elected governor, he had to be registered as a voter in accordance to **Section 5(3)** of the **Elections Act**;
- (ii) the respondents had no obligation to recognize the petitioner's adopted name and deny any negligence, recklessness or carelessness on their part;
- (iii) the petitioner bears the burden of proof to the effect that “Imu” is his populous name and avers that the petitioner used a photo on campaign posters without a Muslim cap;
- (iv) the breach of duty allegations are denied with the respondents stating that the highest standards of credibility and accountability were met in the election process;
- (v) that the deputy returning officer Jonathan Kazungu was acting on his own behalf when he was arrested and did not have the mandate of the respondents;
- (vi) the election process was manual and not electronic configured with various safeguard culminating into a free and fair election, and that the failure of EVID had no effect on the process;
- (vii) it is denied that the petitioners' agents were locked out of polling stations and that the presiding officers acted *ultra vires*.
- (viii) That the elections were conducted in accordance with the **Constitution** and the **Statutes**.
- (ix) The respondent seek for dismissal of the petition with costs.

The 3rd Respondent

All the allegations in the petitions were denied in separate responses. Most of the information used in the response was from the 3rd respondent's agents. Below is a summary of the two responses:

- (i) that the elections of gubernatorial seat were free and fair and were conducted in accordance with the law;
- ii. that the presiding officer acted within his mandate in consultation with the returning officer to transfer the polling facility;
- iii. the voting, counting and tallying of votes at the polling stations was done in a transparent manner and announcements of results done in accordance with the law and none of the petitioners disputed the results;
- iv. the petitioners' agents were not barred from participating in the elections and were present in all the disputed stations and played their roles as agents;
- v. the use of 3rd respondent's vehicle to transport ballot boxes are denied;
- vi. there were no incidents of voter influence or presiding officers acting in excess of their powers;
- vii. The presiding officers were not directly related to the respondent;
- viii. That no relative of the 3rd respondent freely mingled with IEBC officials or accessed IEBC electronic equipment;
- ix. That the manual register used for voter identification was accurate and efficient rendering the process free of manipulation;
- x. That the 3rd respondent's votes were not increased at the tallying centre;
- xi. That the 1st petitioner did not follow the right procedure to correct his name and his correct name is Swaleh Salim Swaleh as reflected on his identity card;

xii. That the IEBC used the photograph presented to them by the 1st petitioner without a Muslim cap;
(xiii) That the petitioners' request on change of name came too late and could not be acted on since ballot papers had already been printed.

xiii. That the 3rd respondent was validly elected and there should be no order for nullification of the election;

xiv. That the petition be dismissed with costs.

3. **The Submissions**

All the counsels for the parties filed written submissions and addressed the court on the law and on the evidence of witnesses regarding to allegations in the petitions.

a) **The 1st Petitioner**

The petitioner said he has adduced evidence that his populous name Imu was omitted from the ballot paper which violated his rights under the Constitution and disenfranchised the voters who could not identify by the name of Swaleh Salim Swaleh used on the ballot and by a photograph which was blurred and lacking of his official clothing of a tie and jacket as well as a Muslim cap. He argued that having been issued with a nomination certificate by his party and the 1st respondent in his preferred name of Swaleh S. S. Imu, the 1st and 2nd respondents were under an obligation to put his preferred name on the ballot as per his written request and in tandem with the nomination papers Forms 17 and 19.

The petitioner addressed the court on **Article 38** on political rights, **Article 86** a provision mandating the IEBC to ensure the election is conducted in a free and fair manner and that all structures and mechanisms to eliminate electoral practices are put in place. **Article 21** of the **Universal Declaration of Human Rights** was cited by virtue of **Article 5** of the **Constitution**.

Regulation 68(4) was cited in relation to the party symbol and name. It was argued that there was evidence to support an election offence by the Lamu county returning officer since his Deputy J. Kazungu Ngowa was convicted of the offence of breach of official duty. The returning officer did not announce the results of the gubernatorial seat as provided by the law. A few highlights on the recount and scrutiny report and on failure of the EVID and the effect were addressed.

The 2nd petitioner addressed the court on the issue of the events at the county tallying centre which according to the petitioner and partly admitted by the respondent, were chaotic and ended in failure to make an official declaration of results. This was an irregularity that rendered the Lamu county elections null and void.

The employment of presiding officers by the 2nd respondent demonstrated favouritism of the 3rd respondent as opposed to other candidates which made it not possible for the 2nd respondent to execute its mandate as provided for by **Article 81** and **86** of the **Constitution**. At polling stations like Mapenya, Kilimani, Myabogi, Mkunumbi, Kiongwe and Mikinduni, agents of the petitioner were barred from the polling station, excluded from the counting of votes, were denied a chance of signing Form 35 and being provided with a copy thereof and were not allowed to accompany ballot boxes to the tallying centre. This resulted in an obscure election process contrary to the principles laid down in the Constitution. The petitioner also addressed the allegation of voter influence and gave a detailed analysis on the recount and scrutiny report highlighting the discrepancies found as well as their effect on the validity election. The petitioner then did an analysis of the law applicable and discussed several authorities relating to the issues in this petition.

(b) **The 1st and 2nd Respondent**

The respondents addressed the court on the burden of proof in election petitions which he said lies on the petitioners not only to prove irregularities but also to establish that the irregularities affected the outcome

of the elections citing several authorities on the issue. The burden does not shift on the respondents to prove that they conducted the election within the law.

On the case of the 1st petitioner, the respondents submitted that the petitioner must be confined to “*the four corners of his petition*” citing Ochieng, J in **Election Petition no.8 of 2013 Suleiman Shabal vs. IEBC & 3 Others** among other authorities. This is in relation to that the 1st petitioner in his petition did not complain about his party symbol or misprinting of the name of his party on the ballot paper. The respondents argued that allowing the petitioner to rely on this new ground would prejudice the respondents who will not be in a position to avail evidence to rebut the allegation at this late hour.

The respondents submit that the name “Imu” is not in the national identity card of the petitioner and that the identity card and all the official documents and academic certificates of the petitioner are in the names of Swaleh Salim Swaleh. The petitioner pleaded with the 1st respondent to assist him to rectify a discrepancy created by his party. Relying on **Article 193 (1) (a)** and **83** of the **Constitution**, the respondents argues that the only acceptable documents of registering as a voter are either the national identity card or the passport. Any attempt to use the nomination papers to change the petitioners were futile. On the photographs, the respondents contend that the digital copy supplied to IEBC by the petitioner was the photograph printed on the ballot paper. The burden was on the petitioner to prove that the digital copy he supplied was different. The respondents contention is that the 1st petitioner's case must fail for those reasons.

As for the 2nd petition, the respondents asked the court to adopt the principles of **Joho vs. Nyange (2008) 3 KLR (EP) 500**, that the petitioner must prove his allegations with cogent evidence.

The agents whom the petitioner said were barred from the polling stations signed on the polling day diary. It was noted that the presiding officer is mandated to admit only one agent per party. Most of the agents signed Forms 35 signifying acceptance of results.

Discrepancies found in the transposition of results did not materially affect the election outcome and affected all the candidates across the board. The errors were not deliberate and were bound to occur. The case of **Wavinya Ndeti vs. IEBC** was cited in this regard.

As for announcement of results from a notebook the court was referred to **Nairobi Election Petition no. 1 of 2013 Ferdinard Waititu vs. IEBC & 8 others** where it was held that Form 36 was not mandatory for the county returning officer to prepare. The case of **Kazungu Ngowa Malindi Chief Magistrate Criminal case no. 180 of 2013** is not relevant to this case because it was not part of the petitioner's evidence.

The transfer of the Ndau Dispensary polling station was within the mandate of the presiding officer and did not affect the voter turn out as well as the outcome of the elections.

The recount and scrutiny report did not show any major discrepancies but a difference of a few votes for each candidates from the results declared. The court was urged to ignore the three (3) stations where counterfoils were missing because it is likely to be a post-election interference. The respondents urged the court to dismiss the petition on the basis that there was no proof of the allegations raised.

C) The 3rd Respondent

The 3rd respondent's submissions were separate for each petition.

(i) Petition no. 4 of 2013

The 3rd respondent addressed the court on the following issues in this petition:

a) Being a registered voter is a pre-qualification for contesting election of County Assembly. The

qualifications for election of County Assembly are the same as those of governor and the documents for registration as a voter are an identity card or a passport.

b) the 1st petitioner having admitted he registered as a voter using his identity card should not claim his name as per the identity card is not correct. His populous name Imu is not in his identity card.

c) It is only the petitioner and his party who can be blamed for printing the name Imu on the nomination certificate and misleading the county returning officer.

d) The petitioner ought to have changed his name through a deed poll other than by way of an affidavit. The court was referred to case of **Rishad Amana vs. IEBC Election Petition no.6 of 2013** was cited.

e) On the photograph, it was submitted that the IEBC used the soft copy photo submitted to it by the petitioner.

f) The petitioner used two different photographs during the campaign one where he wore a Muslim cap and another where he did not have a cap thus causing confusion. It is possible that the petitioner presented to the 2nd respondent two different photographs.

g) On failure of the electronic devices the EVID, the IEBC used the manual register which was reliable and credible and the elections were free and fair. The Supreme Court Petition of **Raila & 2 Others vs. IEBC 2013** was cited as having determined the question of EVID.

h) The petitioner's complaints regarding the 2nd respondents failure to provide copies of Forms 35 and 36 for Lamu West and East constituencies, and Form 36 at county level were not supported by any evidence.

(i) On the judgment in **Malindi Chief Magistrate Criminal case no.180 of 2013 Republic vs. Jonathan Kazungu Ngowa** this court earlier ruled that it was not relevant to this case. There is an appeal pending against the conviction of Kazungu.

(j) The county returning officer tallied results on 6th March 2013, announced them and issued a certificate to the 3rd respondent. The act of Kazungu preparing another Form 36 form is not relevant to this petition.

k) The issue of the party name and symbol were not pleaded in the plaint and cannot be introduced in the petition.

l) The scrutiny and recount report did not show any major discrepancies and the 3rd respondent emerged with the highest number of votes.

m) The 3rd respondent addressed the court on the law on the burden of proof as well as on the effect of irregularities laying emphasis that the court must have regard to the constitutional principles and provisions of **Section 83** of the **Act**.

n) The 3rd respondent urged the court to dismiss the petition with cost commensurate to the complexity and length of this petition.

4. A) Petition no. 5 of 2013

The 3rd respondent framed his response as follows:

a) That the announcement of results by the county tallying officer was done in accordance with the law. Agents were also present during the tallying including those of the petitioners.

- b) That the petitioner did not adduce any credible evidence to prove that elections in Lamu were not free and fair. There is evidence to show registration of voters was done as required, people exercised their voting rights votes were counted and tallied in accordance with the law.
- c) Agents of the petitioner were present at Mapenya, Kilimani, Mkunumbi and Myabogi as the polling diary shows and in any case the absence of an agent shall not invalidate the results. For all the stations, the results were correctly transposed in Form 35 and there was no evidence of tampering by the respondent.
- d) The allegations of 3rd respondent's relatives working as presiding officers was not proved. Presiding officers were appointed by the 2nd respondent on merit and 3rd respondent had nothing to do with it.
- e) In the recount and scrutiny report the 3rd respondent emerged leading with 1798 votes against the petitioners.
- f) The ballot boxes from the stations reached the constituency tallying centre safely as secured by the 2nd respondent and the agents were free to accompany the boxes provided they obtained their own transport.
- g) There was no evidence to support any incident of violence at Myabogi.
- h) The moving of the polling station from Ndau Dispensary to Hanifiya complied with **Regulation 64** and the 2nd respondent had a good reason to do so. There was proof of disenfranchisement of voters.
- i) Upon failure of the EVID, the use of the manual register by the 2nd respondent did not affect the credibility of the elections upon.
- j) The judgment of Kazungu Ngowa is not relevant to this case for the date of offence was on 7th March 2013 after the election process had closed.
- k) The 3rd respondent prays for an order of costs pegged on the length and complex nature of the case.

5. The Issues

Having perused the evidence of the parties in this case, the pleadings and responses, the submissions and the issues filed by the parties at different stages of this petition, the court draws the following issues for determination.

1. Whether the gubernatorial elections in Lamu county were free, fair and credible and conducted in accordance with the principles laid down in Article 81 and 86 of the Constitution, statutes and regulations;
2. Whether any election offences or irregularities were proved and the effect of such offences are irregularities on the election;
3. Whether the 3rd respondent was validly elected as the governor of Lamu county;
4. Who among the parties in this petition will meet the costs of the petition.

6. General Principles

Article 1 of the **Constitution** states that all sovereign power belongs to the people of Kenya and that the people may exercise their sovereign power either directly or through their democratically elected

representatives.

Article 38 which sets out political rights underpins this sovereignty. It provides;

38(1) Every citizen is free to make political choices, which includes the right -

- a. **to form, or participate in forming, a political party;**
- b. **to participate in the activities of, or recruit members for, a political party; or**
- c. **to campaign for a political party or cause.**

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

- a. **any elective public body or office established under this Constitution; or**
- b. **any office of any political party of which the citizen is a member.**

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

- a. **to be registered as a voter;**
- b. **to vote by secret ballot in any election or referendum; and**
- c. **to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.**

These rights protected by **Article 38** are actualised through the electoral system set out in **Chapter Seven** titled, **“Representation of the People.”**

The Court is obliged to consider the quality of the election and see whether it conforms with the principles of elections articulated in **Article 81** of the **Constitution**. Under **Article 81(e)**, the electoral system should comply with the principle of free and fair elections. Elections are free and fair when they are by secret ballot, free from violence and intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

Article 81 provides as follows:

General principles for the electoral system.

81. The electoral system shall comply with the following principles—

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

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

(c) fair representation of persons with disabilities;

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

(e) free and fair elections, which are—

(i) by secret ballot;

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

(iii) conducted by an independent body;

(iv) transparent; and

v. *Administered in an impartial, neutral, efficient, accurate and accountable manner.*

The power granted to the Court under **Section 80(4)** is a new provision introduced by the **Elections Act, 2012**. Its purpose is to give the Court the power declare the intent of the voters which is established once the ballots are counted as the case may be. It is the duty of the election court to give effect to the will of the electorate. The intent of voters is established by the number of votes cast in favour of the winning candidate in an election that is conducted in compliance with the principles set out in **Article 81**. The intention of the voters is determined by reference to the person who garners most votes in a free, fair and credible election. The duty of the court is to strive to preserve the election held in accordance with the Constitution and the law.

Majanja, J in the case of **Wavinya Ndeti vs. IEBC & 4 Others E.P 4/13 (MACHAKOS)** in discussing **Article 82** stated:

One of the principles governing the electoral process under Article 82 of the Constitution is that the election must be transparent and administered in an accurate manner. An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowances must be made for human error. Indeed the evidence is clear that the counting and tallying was being done at night and in less than ideal conditions hence errors which were admitted were bound to occur particularly in tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise, it is important that the ultimate will of the electorate is ascertained and upheld at all costs.

In the case of **JOHN KIARIE WAWERU V BETH WAMBUI MUGO & 2 OTHERS (2008) EKLK 4**, Court set out the standard of proof on page 5 in the following words:

As regards the standard of proof which ought to be discharged by the petitioner in establishing allegations of electoral malpractices, there is consensus by electoral courts that generally the standard of proof in electoral petition cases is higher than that applicable in ordinary civil cases i.e. that proof on a balance of probabilities. The standard is higher than proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases. Allegations of electoral malpractices like for instance bribery require higher proof.

The threshold of proof should in principle be above a balance of probability that is applicable in civil cases though not as high as beyond reasonable doubt that is applicable in criminal cases.

Maraga, J in **Joho vs. Nyange & Another [2008] 3KLR (EP) 500** stated as follows:

Election petitions are no ordinary suits. Though they are disputes in rem fought between certain parties, election petition are nonetheless disputes of great public importance – Kibaki – vs- Moi, Civil Appeal No.172 of 1999. This is because when elections are successfully challenged by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents’ social and economic activities. It is for these reasons that I concur with the election court’s decision on Wanguhu Ng’ang’a & Another –vs- George Owiti & Another, Election Petition No. 41 of 1993 that election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are therefore not the kind of evidence required to prove election petitions. As I have said, they should be proved by cogent, credible and consistent evidence.

As regards the conduct of voting the **Constitution** imposes specific obligations on the IEBC. **Article 86** provides:

86. At every election, the Independent Electoral and Boundaries Commission shall ensure

that-

- a. *whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;*
- b. *the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;*
- c. *the results from the polling stations are openly and accurately collated and promptly announced by the returning officer, and*
- d. *appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including the safekeeping of electoral materials.*

Article 87 provides:-

87 (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

(2) Petitions concerning an election, other than a presidential

election, shall be filed within twenty-eight days after the

declaration of the election results by the Independent Electoral and Boundaries Commission.

(3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.

7. Analysis of the Evidence

A) Petition no. 4 of 2013

The 1st petitioner PW1 in his evidence avers that on the 11th January 2013, he was duly nominated by The Alliance Party of Kenya (APK) to be its flag-bearer in the gubernatorial race for Lamu county. The party nomination certificate bore the name of Swaleh Salim Swaleh Imu. These names were submitted to the county returning officer who issued him with a certificate of nomination dated 1st February, 2013.

The 2nd respondent requested the petitioner to provide his national identity card, his names as he preferred them to appear in the ballot papers, three sets of his passport size photographs duly signed at the back indicating his names as he would like them to appear in the ballot paper and his academic credentials. The petitioner provided the 1st respondent with the said documents and made it very clear that he would like to use his preferred names and swore an affidavit to that effect.

On 27th February 2013, the petitioner discovered that the IEBC website had indicated his name as Swaleh Salim Swaleh contrary to his instructions.

On the same day, the petitioner took over the matter with the 1st respondent's deputy raising his concern and seeking immediate redress. He annexed the request letter addressed to the 1st respondent and to his deputy. The 1st respondent forwarded the letter to his Regional Elections Coordinator, North Coast Region, Anastasia N. Mutua.

In her reply dated 1st March 2013, Mutua wrote to the 1st respondent saying it was too late to effect the change of name because the ballots papers had already been printed. Come the voting day and the petitioner found that the name printed in the ballot paper Swaleh Salim Swaleh and a blurred photograph used on the ballot paper. It was not possible to identify the candidate and people who wanted to vote for him especially the illiterate. As a result of this mix-up, the petition lost many votes in the election. He claims his constitutional rights were infringed, seriously jeopardized and the people of Lamu denied the opportunity of making their political choice for the governor of Lamu county.

The petitioner called three witnesses to support his evidence including one Abdalla Ali Mohamed who did not vote after he failed to identify his preferred choice of candidate Mr. Imu.

Many of his supporters informed him that they were unable to vote and those who voted only did so because they knew the petitioner very closely. The petitioner says his “household” or populous name used in Lamu county is “Imu”. Not many people know him by the names used in the ballot paper Swaleh Salim Swaleh. Many voters called him on the election day lamenting that they could not vote for him as they had not seen his name on the ballot paper.

During the campaign the petitioner used the name Imu and has several development projects in Lamu where he has used the name Imu as a connotation or brainchild. The omission of the said name was tantamount to excluding the candidature of the petitioner from the electorate.

The photo he submitted to the 1st respondent was his image wearing a Muslim cap, jacket and necktie. That on the ballot paper he had no cap, no jacket or neck tie and that the photograph on the ballot was so blurred and it was virtually impossible to identify him.

The petitioner alleges that the failure to use the BVR and EVID electronic systems, fundamentally changed the polling system causing delays and created an environment of lack of transparency. Many voters did not find their names in the register, there was stuffing of ballots and over-voting.

PW2 was a registered voter at Mkomani primary school is only proficient in spoken Kiswahili and cannot read or write. When he went to vote, he was assisted by a polling clerk and voted for other electoral candidates without any problem. When it came to the governor candidate, he gave the name of his preferred candidate “Imu” to the clerk. The name could not be found, and he did not vote for governor.

PW3 was a registered voter at Faza Health Centre. He failed to identify the name and photograph of his candidate Swaleh S. S. Imu. He then saw the name of Swaleh Salim Swaleh and know the petitioner well, he knew those were also his names. He however voted for his preferred candidate.

PW4 was a registered voter at Lamu primary school. On examining the gubernatorial election ballot paper, he missed the name of his candidate Swaleh S. S. Imu. After careful perusal he saw the name of Swaleh which he knew due to his long association with him and cast his vote. PW4 said he also possess the household name “Otherwise” which is populous. His evidence was that in Lamu it is a common thing for people to be referred to by their populous names.

The county returning officer RW 38 in his evidence denied any wrongdoing on his part. He testified that the 2nd respondent acted within the law by using the name of the petitioner in his identity card on the ballot paper. The 2nd respondent complied with the law. On cross-examination, the witness admitted he issued a nomination certificate to the petitioner in the name of Swaleh S. S. Imu. He further said the academic Kenya Revenue Authority certificates and his Commissioner for Higher Education Board documents of the petitioner are in his official names Swaleh Salim Swaleh with the exception of the Diploma for Thermal Engineer course in the name Swaleh Salim.

The petitioner had presented an affidavit to RW38 in which he avers in paragraphs 4, 5 and 6:

- “4. That the names of Swaleh Salim Imu and Swaleh Salim Swaleh refer to one and the same person;**
- 5. That I request the returning officer IEBC, Lamu West constituency, Lamu county to take cognizance of this discrepancy and clear me to run for the forthcoming general elections for the gubernatorial elective post.**
- 6. That the said discrepancy cannot be cleared with my party officials without unnecessary delay and inconvenience as the nomination documents are to be submitted to the returning officer**

IEBC Lamu West constituency office, Lamu county on 31st January 2013 before close of business.”

During cross-examination of the petitioner, the issue of the wrong party symbol and wrong party name arose. His submissions also dwelt on the matters which were not pleaded in his petition. It is trite law that a party must confine himself to his pleadings. It was observed in **Busia Election Petition no. 1 of 2013 Philip Osore Ogutu vs. Michael Onujura Aringo & Others:**

“The grounds upon which an election petition is challenged ought to be contained in the petition (Rule 10(e); and the facts to be relied on by the petitioner set out in the affidavit in support of the petition Rule 10(3) (b) of the Rules”

Ochieng, J in Election Petition of **Suleiman Shabal vs. IEBC & Others Mombasa Election Petition no. 8 of 2013** in an application with similar fact as the Busia petition said:

“The petitioner's case herein must be contained within the four (4) corners of his petition. And the evidence in support of the petition must be found within the affidavits that were filed within the petition.”

The petitioner has not included the issue of the wrong party symbol and party name in the pleadings and in his affidavit of evidence. This court is therefore not obligated to render any opinion to those matters. I uphold the respondents' argument to the effect that the new matters cannot be entertained in the final submissions of the petitioner.

On the issue of the wrong name, the petitioner deponed in his affidavit that the name of Swaleh Salim Swaleh Imu in his party nomination certificate was a discrepancy which he wanted rectified by the returning officer, because it was a bit late for his party to do so. It appears that the county returning officer agreed to assist the petitioner for he went ahead to issue the nomination certificate in the name of Swaleh S. S. Imu. However, the IEBC website did not capture this name instead used the name and on the petitioner's identity card.

The petitioner referred the court to **Section 31(3)** of the **Election Act** which requires a political party after nominating a candidate for election ***“to notify the Commission of the name of the person or persons selected by the party*”**

Regulation 51(2) and **68(3)** were relied on by the petitioner:

51(2). ***“.....The returning officer shall issue a candidate who is validly nominated to contest in a parliamentary, county governor or county assembly with a certificate in Form 21 set out in the schedule”.***

68(3). ***“.....the persons validly nominated under these Regulations shall have their names included in the ballot papers for an election in the same order as they appeared in a notice published in accordance with Regulations 51(5)”.***

The court's reading of the two sub-regulations is that the Commission requires that the party forwards ***“the name”*** of the person selected for nomination to be included in the ballot papers in the same order as they appeared in a notice published in accordance with **Regulation 51(5)**.

The name of a candidate to be used for official purposes must be in tandem with his identification documents as provided for by **Article 193(1) (a)**. The **Article** provides that a candidate be a registered voter in order to qualify to contest an election. **Section 25(1)(a)** states that a person qualifies for nomination as a member of County Assembly if he is a registered voter. The qualification for gubernatorial seat in this context are the same as those of a county assembly member.

A person becomes a registered voter upon his name being entered in the register of voters. **Regulation**

38(a) contains a general requirements for political party candidates

“38. A nomination paper submitted by a political party candidate to the Commission shall:

- (a) contain the candidate's name as it appears in the register of votes;***
- (b) be signed by th candidate and by a proposer and seconder who shall be voters registered in the respective electoral areas, and who shall be members of the political party, and by an authorised official of the political party; and***
- c. be delivered to the returning officer personally by the candidate or by a person authorised by the candidate in that behalf on the day set for the nomination”***

The party nomination certificate submitted to the county returning officer in the name of Swaleh Salim Swaleh Imu was contrary to **Regulation 38(a)**. The law requires that identification documents are either a national identity card or a passport. The preferred name of the petitioner was not contained in his identity card.

In the case of **Rishad Amana vs. IEBC & 2 Others Malindi Election Petition no. 6 of 2013**, Kimaru, J held:

“It is apparent from the foregoing that the requirement that a candidate presents the name to the returning officer that appears in his national identity card and that appears in the register of voters is mandatory. A returning officer has no choice in the matter. He can only issue a nomination certificate to a candidate in the name that he registered himself as a voter. A political party is under an obligation to present to the returning officer a certificate nominating a candidate in the name that appears in the register of voters. Therefore, when a political party decides to issue a nomination certificate to a candidate in the name other than that which appears in the register of voters, the returning officer in such circumstances will be bound to follow the law by issuing the Electoral Commission's nomination certificate in the name of th candidate that appears in the register of voters

The only name that can appear in the ballot paper is the name of the candidate as it appears in the register of voters. The petitioner's complaint therefore has no basis in law. If the petitioner desired the name “Amana” to be included in the ballot paper, he was required first to change his name by deed poll and then request the Electoral Commission to change the name as appears in the register of voters before such a name can be presented during the nomination to the returning officer. The petitioner's complaint in this regard has not been established.”
(emphasis mine)

In the case of **Sarah Mwangudza Kai vs. Mustafa Idd Malindi Election Petition no.8 of 2013**, Githua, J held:

“Secondly, it is difficult to see how the candidates could have been disadvantaged by the exclusion of their preferred names from the ballot paper especially PW6 because from the campaign posters he annexed to his affidavit, it is clear that he was using both his official names and his alias name Ken Chonga in his campaigns. Besides the candidate's photograph and party symbols must have appeared in the ballot papers and voters including illiterate voters could have easily identified them using their photographs and party symbols if they did not know them by their official names”

The law requires that change of name be effected through a deed poll. However, from the petitioner's evidence, it is clear that he did not wish to change the name in his identity card but rather wanted to use his preferred name for the limited purpose of the election.

The petitioner in cross-examination argued that the names of a candidate should appear in the manner that

he wants them to appear per the Statutory Declaration Form 19 for purposes of nomination for parliamentary and county elections. The form bears a footnote that reads:

“The declarant names must be written in the order in which he or she wishes them to appear on the nomination statement and the surname must be unlined.”

My understanding of the footnote is that the candidate is given the choice of the order of his names. The order refers to which name will come first and which one follows or comes last. The footnote does not in anyway imply that a candidate can use names other than those in his identification documents.

It is important to note that the petitioner did not annex Form 19 to his affidavit. The copy used during cross-examination was annexed to the affidavit of the returning officer. In my considered opinion, Form 19 must bear the names of a candidate as they appear in the identification documents.

The discovery of the omission of the preferred name in the 2nd respondent's website came about seven (7) days before the election date. By that time ballot papers had already been printed as the Regional Election Coordinator informed the petitioner through the email sent on 28th February 2013. Even assuming that the request of the petitioner could lawfully be granted, the request was overtaken by events upon printing of the ballot papers.

I find that the 1st and 2nd respondents acted within the law in printing the ballot paper in the name of the petitioner as per his identity card.

The petitioner has failed to prove the allegation that his constitutional rights were violated and that the people of Lamu were disenfranchised by the act of the respondent.

The petitioner complained about the wrong photograph being printed on the ballot paper as opposed to the hard copy photo he handed over in three copies to the 1st respondent. In the hard copy photo, the petitioner wore a Muslim cap, a necktie and a jacket. The respondent's witness RW38 did not specifically respond to this allegation in his affidavit. However, during cross-examination, RW8 admitted he received a soft copy and hard copy photos from the petitioner.

The petitioner did not produce in evidence the soft copy he gave to the 1st respondent although he admitted he had a copy of it. Some witnesses of the respondent were cross-examined on the issue of the photograph. Some said it was not blurred while others said it was.

From the court's observation, the photograph was quite blurred.

However, the question is where the photograph used on the ballot paper originated from. The IEBC insist it is the one the petitioner sent in soft copy which the petitioner denies. The petitioner has an obligation to produce the soft copy so as to prove it was different from the one used by the 2nd respondent on the ballot paper.

The burden of proof lies on the petitioner to establish the allegations in the petition. It does not matter that the respondent fails to call any witness to refute the allegations. The petitioner must prove what he alleges.

The instructions the petition had given the returning officer could not be lawfully implemented. The returning officer appears to have encouraged the petitioner that the instructions would be easily implemented but later learnt that things were beyond his control when the 2nd respondent's website failed to capture the preferred names.

The petitioner alleged that the use of the manual register and failure to transmit the results electronically, fundamentally changed the system of the polling whereby some voters failed to vote for their names could not be found in the manual register. Multiple registers were used and ballot stuffing took place for

lack of accountability for failure to use the electronic devices.

The petitioner did not adduce any evidence to support these allegations. However, the law on use of electronic devices was settled by the Supreme Court in **Election Petition no. 5 of 2013 Raila Odinga vs. the IEBC & Others** when it held:

- a. But as regards the integrity of the election itself, what lawful cause could IEBC have taken after the transmission technology failed? There was no option, in our opinion, but to revert to the manual electoral system, as was done*
- b. It is not surprising that the applicable law has entrusted a discretion to IEBC on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This negates the Petitioners contention that in the instant case, injustice or illegality in the conduct of the election would result, if IEBC did not consistently employ electronic technology. It follows that the Petitioner's case, in so far as it attributes nullity to the election on grounds of failed technological devices, is not sustainable.*
- c. These findings lead us to the conclusion that the voter registration process was, on the whole, transparent, accurate, and verifiable, and the voter register compiled from this process did serve to facilitate the conduct of a free, fair and transparent election.*

The decisions of the Supreme Court are binding on this court and having made a final decision on the matter, this court cannot revisit the issue. Furthermore, these allegations were denied by the 2nd respondent who adduced evidence to the effect that the manual system was transparent, accurate and verifiable. There was no proof of this allegation.

It was alleged by the petitioner that his agents were denied Forms 35 and 36 by the 2nd respondent. Further, that Form 36, a statutory Form required to be filled to show the validity of results was not availed by the 1st and 2nd respondents. The petitioner did not call any of his Alliance Party of Kenya (APK) agents to give evidence on what transpired in the polling stations. Neither was the petitioner present in the polling stations. This allegation was not proved.

The petitioner annexed a charge sheet showing that the deputy returning officer one Kazungu Ngowa was charged with four (4) counts of election offences contrary to **Section 59(1)(j)**. The date of the offence was on 7th March 2013 which was one day after the results were announced. There was no evidence to connect the said charges with the conduct of the disputed election or with its outcome. The petitioner did not call any agent to testify that he or she was not given Form 36 on 6th March, 2013. This allegation was not supported by any tangible evidence and was therefore not proved.

The allegation that the constitutional rights of the petitioner were violated are based on the matters pleaded in the petition that the 1st and 2nd respondents breached the law. Having found that the petitioner has failed to prove those allegations, I find that his claim of violation of his constitutional rights has no factual or legal basis and must fail.

B) Petition no. 5 of 2013

The 2nd petitioner called twenty one (21) witnesses to support his petition which raises several allegations. The 1st and 2nd respondents called seven (7) witnesses while the 3rd respondent had a total of 31. The allegations in the petition translates into several issues which will be analyzed in several sub-headings.

i) Transfer of Polling Station

It was the evidence of the petitioner and his witnesses PW6 and PW7 that Ndaou Dispensary polling station was moved to Hanifiya Muslim school illegally and irregularly. The 2nd respondent did not give notice of the movement to the voters of Ndaou. The distance between Ndaou and Hanifiya was estimated as one kilometre by the petitioner who said that Hanifiya is away from the residential area of Ndaou. The transfer was done without gazettelement as required by the law and it resulted in disenfranchising the voters. The respondent witnesses RW27, RW29 and 31 admitted that the station was moved due to the reason of inadequate space at Ndaou Dispensary which they found could not house the IEBC officials and their equipment. The presiding officer said he made the decision to move the station in consultation with the returning officer Lamu West (RW27) constituency. The respondents said that announcements were done in the mosque in the eve of the elections and early in the morning of the voting day and a notice affixed on the Ndaou Dispensary premises.

Regulation 64 governs transfer of polling stations:

64 (1) Notwithstanding the terms of any notice issued under the Act or these Regulations, a presiding officer may, after consultation with the returning officer, adjourn the proceedings at his or her polling station where there are interruptions by a riot, violence, natural disaster or other occurrence, shortage of equipment or other material or other administrative difficulty, but where the presiding officer does so, the presiding officer shall restart the proceedings at the earliest practicable moment.

(2) The discretionary powers of a presiding officer under sub-regulation (1) shall include a power in the circumstances therein mentioned to transfer the proceedings to another polling station or public facility in the same constituency, and where presiding officer does so -

(a) the presiding officer shall advertise the fact in such manner as is sufficient to bring it to the notice of voters; and

(b) the electoral area for the polling station from which the proceedings are transferred shall, for all the purposes of these Regulations, be deemed to be part of the electoral area of the polling stations to which the proceedings are transferred.

The presiding officer in consultation with the returning officer has the mandate to transfer a polling station where there are interruptions by riot, violence, natural disaster or other occurrence, or other administrative difficulty. The reason for the transfer was explained by the presiding officer to be the limited space of the polling room at Ndaou Dispensary. He said that Hanifiya Muslim school had a larger room sufficient to accommodate the IEBC officials and equipment. The respondent argue that since the polling station retained the same name (Ndaou Dispensary) and that only the facility was moved, there was no requirement for gazettelement.

The announcement in the mosque was done after the decision was reached to move the polling facility. The presiding officer (RW31) and the returning officer said the decision was made on 3rd March 2013 around 7.00 p.m. It is therefore unlikely that any announcement would have been made on 3rd March 2013 at 4.00 p.m. in the mosque as the respondent wanted the court to believe. The announcement which the respondent convinced the court was made is the one of 4th March 2013 around 5.00 a.m. Was this notice made on the morning of the voting day sufficient notice?

In the case of **Mahamud Muhumed Sirat vs. Ali Hassan Abdirahman & 2 Others Election Petition no. 15 of 2008 High Court of Kenya Nairobi**, it was held in a case where two polling stations had been moved two days before the voting day that there was breach of the law for lack of notice. I am in agreement with the finding of Kimaru, J in that case. The 2nd respondent cannot be said to have given notice to the voters of Ndaou on the relocation of the station. The reason for the relocation may be acceptable but there was a breach of **Regulation 64**. The 2nd respondent had a duty to inspect the suitability of the polling station facility before gazetting it which he neglected to do.

The voters of Ndau were inconvenienced by the change for they had to walk to Hanifiya which was about one kilometre away. The respondent said the distance was 400 metres or less. None of the parties gave evidence of measurements of the distance. Taking the longest of one kilometre I find that it is a walking distance which most voters would manage to cover in about 30 minutes. The voter turnout at Ndau of about 87% negates the proposition that voters were disenfranchised. The irregularity did not affect the outcome of the elections.

ii) Acts of violence

The petitioner alleged that there was violence at Myabogi polling station. His witnesses PW16 an election observer testified that there was a commotion at the station caused by people who were protesting the action of the presiding officer for delay of counting votes. Police shot in the air to quell the riot and this forced PW 16 and other agents to leave the polling station at 12.45 a.m. It was later on that she learnt that the commotion had been subdued and that the presiding officer was counting votes with the clerks in the absence of agents. PW15 the TNA agent supported the evidence of PW16 on the commotion. The presiding officer did not testify. PW12 the UDF agent denied there were any chaos or violence. The election observer form filled by PW16 did not indicate any act of violence. The commotion is said to have occurred during the counting of votes and that it was controlled by the security personnel. There was no evidence that the commotion affected the voting exercise or that it developed into violence.

As for the counting of votes by the IEBC officials in the absence of agents, there was no evidence of rigging or any other malpractice adduced by the petitioner.

(iii) Voter influence

On the allegation of voter influence at Kiongwe PW15 said that the 2nd respondent's clerk Nancy Gicheru was whispering to voters outside the polling station which caused a commotion. Nancy did not testify. RW34 the presiding officer testified and denied that his clerk Nancy was influencing voters. The petitioner did not adduce any evidence to prove who was being influenced. No affected voter testified in court. Voter influence is an election offence which requires proof beyond any reasonable doubt. The petition failed to discharge the burden of proof.

(iv) Agents

At Kilimani PW12 a TNA agent testified that she was barred from participating in the election together with her colleague TNA agent one James Njuguna despite producing accreditation documents which she attached to her affidavit. The presiding officer did not testify to rebut the allegations. The Lamu West returning officer was not present at the station and his denial of the allegations cannot effectively rebut the allegations. PW12 was categorical that she did not sign Form 35 or the polling diary because she was not allowed into the station. The diary was signed by one John Waweru and Susan Karimi allegedly a TNA agents in the polling diary. The presiding officer was best placed to explain whether there was over deployment of agents in her station by some parties which may have forced her to bar others. Form 35 for this station was signed by only two agents one Mohamed Badi and Issa K. Muslim. The names and signatures of John Waweru and Susan Karimi alleged TNA agents were missing. Issa K. Muslim testified as RW11 and was the chief UDF agent in Lamu West constituency. On cross-examination, he said he never went to Kilimani on the material day. This casts serious doubt on the authenticity of the document (Form 35). PW12 referred to the form as a forgery. There were no statutory comments made on the form as to failure or refusal to sign or the fact of absence of the agents contrary to **Regulation 79**.

At Kiongwe, PW15 was the TNA agent. He participated in the voting process and signed the polling diary and Form 35 together with 11 other agents. His complaint is that he was barred from accompanying the boxes to the tallying centre and that he was not issued with Form 35. The regulations do not impose any obligation to the 2nd respondent to provide transport for agents. It is the duty of the party to facilitate their agents in the polling exercise. The petitioner did not adduce any evidence of tampering with the ballots after results were declared. RW34 testified that the ballot boxes were transported to the tallying

centre safely and securely.

The witness admitted that the agents did not sign pages 452 of the polling diary to witness the seals used on the ballot boxes at the close of counting. The reason given is that agents had already left the station. The witness did not make any comments in his records to that effect.

The only complaint of the petitioner at Mikinduni was that his agent was not given Form 35 and was barred from accompanying ballot boxes to the tallying centre. RW33 the presiding officer in cross-examination admitted that he did not give all the agents Form 35 and that he gave one copy for all of them. PW17 the UDF agent said he was not given a copy of Form 35 in cross-examination. He said he did not know that he was entitled to a copy. He made his own notes of the polling proceedings. The form was signed by 9 agents with the petitioner's party represented by two agents. The petitioner has therefore proved that Form 35 was not given to agents and the presiding officer did not make the necessary statutory comments.

In regard to Matondoni, PW11 Hemed Rubea Mohamed testified that he was the TNA agent and that he witnessed 11 ballots cast in favour of the petitioner counted for the 3rd respondent. The presiding officer RW30 denied that PW11 was an agent at the station. However, he admitted the issue of the switch of the 11 votes to which he said the error was corrected. He said the mistake was made by his officer one Yasin Bakari while his deputy Asenati Mbiyu was doing the counting. The witness said he took over the work from his deputy after the error occurred.

RW27 UDF agent said that PW11 was not an agent at Matondoni. Although this witness said he was present, he did not sign Form 35. He said in cross-examination in answer to the question why he failed to sign Form 35:

“It is not mandatory to sign Form 35. It is only Jamila and Mohamed Omar who signed.”

PW30 did not explain how he noticed the 11 votes error for it was his deputy who was in charge at that time. Someone must have brought the matter to his attention. PW11 explained that he was not an agent in that station but was appointed by the petitioner to supervise his agents. It was for this reason that he visited Matondoni polling station among others. The witness explained that in the first instance, he was refused entry and later allowed in by none other but the presiding officer. PW11 said that before he entered the polling room he stood at the window and watched the counting of the votes. He noticed the switching of 11 votes and protested to the presiding officer as stated in paragraph 8 of his affidavit. Although RW30 was aware of this allegation of the 11 votes, he never responded to it on oath and neither did he deny on oath that PW11 was not at Matondoni.

However, there was no evidence to prove stealing of ballots or fraud on the part of IEBC officials.

At Lake Kenyatta Stream 4, PW18 the TNA agent fully participated in the process and signed Form 35. His only grievances were that he did not get a copy of Form 35; he was not allowed to record the serial numbers for sealing of ballot boxes; and he was not allowed to escort the ballot boxes to the tallying centre. The respondents witness RW3 who was the UDF agent testified about Stream 3 and said he knew nothing about Stream 4. There was an indication that all the streams were attended to by the same agents. The presiding officer did not testify to refute the allegations regarding breach of **Regulation 79** for failure to issue Form 35 and to allow PW18 to take particulars of the serial numbers. There were no complaints about the results and no evidence of tampering with the ballot boxes on transit was adduced.

On the allegation that IEBC officials used a blue Probox vehicle belonging to agents of 3rd respondent to transport ballot boxes at Mkunumbi to the tallying centre, the petitioner failed to provide evidence of the registration number and the ownership of the car. The UDF agent RW4 denied the allegation and said he did not see a blue Probox car at Mkunumbi. The presiding officer also denied the allegations. The allegation was not proved for lack of better particulars.

At the tallying centre, the petitioner and his agents alleged that there was no Form 36 and that they were

not issued with any. At the constituency tallying centre, the witnesses were not given copies of the results. PW17 the Narc Kenya County tallying agent testified that his Narc Kenya agents in the polling stations were denied their right to be provided with copies of Form 35 and 36 at the polling stations and at constituency tallying centres. He was present at the tallying centre where he was not issued with Form 36. A day after the tallying, the county Form 36 was still not available when he went to the IEBC offices.

The evidence of the returning officers Lamu West RW36 was that he gave the UDF and TNA agents copies of Form 36. He made no statutory comments on the absence of the other party agents and candidates. It was denied by the petitioner that the persons referred to as TNA agents were at the tallying centre.

The Lamu East returning officer PW37 did not refute the allegations of failure to give Form 36 to the agents or candidates.

The evidence of the petitioner and his witnesses was not rebutted on the issue of failing to provide copies of Form 36 to candidates and agents at the constituency and county level. The allegations were proved by the petitioner.

The law relating to participation of agents in the election process is contained in the general regulations. Authorized agents are among the persons to be allowed access to the polling station in accordance with **Regulation 62(1)**. The letter of appointment from the party or candidate and the Oath of Secrecy by the IEBC is sufficient to prove accreditation.

It is clear in **Regulation 62(3)** that the absence of agents shall not invalidate the proceedings at a polling station. This refers to a situation where agents do not attend the polling proceedings or where they are not accredited.

The presiding officer has discretion to admit agents in a polling station as provided by **Regulation 74(3)**.

Rule 74(3) – The presiding officer shall not be obliged to admit more than one agent of any political party, candidate or referendum committee as the case may be to the counting venue.

The purpose of this regulation is to empower the presiding officer to exercise proper control of his station for smooth running of polling proceedings. The presiding officer may admit one party agent and bar another of the same party to avoid overcrowding of the polling room or as dictated by the circumstances of each case. The officer will still be acting within his mandate under **Regulation 74(3)**.

The general regulations are silent on the issue of providing transport to agents to accompany ballot boxes to the tallying centre. As much as providing transport facilities to agents would enhance the transparency and accountability of elections, the Commission is not obligated to give that provision. The responsibility of providing transport to agents still remains the responsibility of the party and the candidates.

In the case of Lenno Mwambura Mbagwa vs. Amason Kingi Malindi Election Petition no. 3 of 2013, Meoli, J held:

“144. Finally, it has been repeated by many of the Petitioners' agents that the IEBC officials did not allow them to accompany the transferred ballot boxes to tallying centres. Although it contributes to transparency, there is no legal requirement for IEBC to provide transport for political party/candidate's agent. But the IEBC officials owed a moral duty to agents in the circumstances of the case if only for the sake of upholding transparency as anticipated by the law. Some agents have stated they took private means to the new venues and the fact that many of the agents concerned signed off the relevant forms at the end of the process, puts to doubt the suggestion of impropriety in the handling of ballot boxes. It is also undisputed, that on all occasions security agents accompanied the ballot boxes during transfer.”

In cases where the agent did not accompany ballot boxes to the tallying centre, there was no evidence of tampering with the ballots which was adduced by the petitioner, unless the contrary is proved, the court believed the presiding officers that they were accompanied by the security personnel to the tallying centre which rules out any post-declaration interference.

Regulation 79 governs the duty of the presiding officers on one hand and the agents and candidates on the other hand. It provides:

79.(1) *The presiding officer, the candidates or agents shall sign the declaration in respect of the elections.*

(2) *For purposes of subregulation (1), the declaration for -*

(a) *presidential election results shall be in Form 34 set out in the Schedule;*

(b) *National Assembly, county women representatives, Senator, county governor and county assembly elections shall be in Form 35 set out in the Schedule.*

2) *The presiding officer shall -*

(a) *immediately announce the results of the voting at that polling station before communicating the results to the returning officer;*

(b) *request each of the candidates or agent then present to append his or her signature;*

(c) *provide each political party, candidate, or their agent with a copy of the declaration of the results; and*

(d) *affix a copy of the declaration of the results at the public entrance to the polling station or at any other place convenient and accessible to the public at the polling station.*

3) *Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.*

4) *Where a candidate or any agent refused or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.*

5) *Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence.*

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

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

8) *After complying with the provisions of this regulations, the presiding officer shall, as soon as practicable, deliver the ballot boxes, and the tamper proof envelopes to the returning officer who shall take charge thereof.*

By virtue of **Regulation 79** the presiding officer immediately after announcement of results and before communicating the results to the returning officer is required to request each candidate or agent present to

sign Form 35 and to provide them with a copy of the results. The fact of refusal to sign by a candidate or agent requires that a candidate or agent to record the reason for refusal. The presiding officer is obligated in case of refusal of a candidate or agent to record the reason for refusal. In case of absence of a candidate or agent, the presiding officer shall record that fact. Providing a copy of results to a candidate or agent is a legal requirement.

Examination of Forms 35 for Lamu County showed that most of them did not contain the required statutory comments contrary to the provisions of **Regulation 79**. The presiding officers did not give any explanations for failure to comply with the law. The court found that these breaches of the law were committed by the 2nd respondent in the disputed stations as well as in a host of others.

Regulation 79(6) provides that the refusal or failure by a candidate or agent to sign a declaration form or to record the reasons for refusal to sign shall not by itself invalidate the results announced.

In the case of **Manson Nyamweya vs. James Omingo Magara & 2 Others, Election Petition no. 3 of 2008 High Court of Kenya at Kisii** Musinga, J expressed himself thus:

“The refusal or failure of a candidate or agent to sign form 16A or to record the reasons for not doing as required cannot by itself invalidate the results as announced by a presiding officer. But as far as the other requirements under Regulation 35 are concerned, failure by a presiding officer to comply is a serious breach which requires appropriate explanation by the officer concerned. Infact, it is an election offence for a a presiding officer, without a reasonable cause, to fail and/or refuse to sign and stamp a form 16A including completing all the parts as required of him under the said regulation. These include the statistical part just above the names of the candidates, reason for refusal and/or failure of a candidate and/or his agent to sign the form and any necessary statutory comments.

I am in agreement that the presiding officer, despite the provisions of **Regulation 79 (6)** has a duty to comply with the regulations and in case of breach, to give an explanation as to non-compliance. This is a legal duty and the 2nd respondent is obligated to fulfil it.

The deployment of agents by political parties and candidates has its financial implications. The agent is entrusted with the duty of overseeing the voting process in the interests of his party or candidate. Their presence and participation in the process enhances transparency and accountability. When the agents are denied the opportunity to oversee the process in whatever stage of the proceedings, the action of the officers concerned portrays obscurity and curtails the very essence of citizens political rights for a free, fair and credible election.

8. Announcement of Results

The petitioner alleges that after counting of the votes cast, the county returning officer declared the 3rd respondent as having the highest number of votes without specifying the number of votes cast for each candidate and left for Nairobi without giving the petitioner the declaration of results as required by the law. He testified that the returning officer did not officially and lawfully announce the results. The winner was declared without the results of the candidates being announced. The following day the deputy returning officer one Kazungu was arrested falsifying Form 36 which he had prepared using mobile phone messages from the returning officer who was already in Nairobi. Kazungu obtained signatures of two agents who backdated the Form 36 to 6th March 2013.

PW17 said he was the Narc Kenya tallying agent at the county tallying centre. It is his evidence that the returning officer RW38 announced winners from a notebook and left in a hurry to Nairobi without preparing Form 36 and giving copies to the agents present. On 7th March 2013, PW17 went to the tallying centre to get a copy of Form 36. It was still not available as he was informed by Kazungu. He left the IEBC office to come later for the form. When he returned, he was given a Form 36 and requested to sign but he declined to do so. Kazungu took the form the Wiper and UDF Agents who both signed and

backdated the form. PW17 reported the matter to police who arrested and subsequently charged Kazungu. He testified in the Kazungu case as a witness. During the hearing of the Petition, the court learnt that Kazungu was convicted of four counts of breach of official duty.

PW18 was a TNA agent testified that he was at the tallying centre on the material day. It was his evidence that the returning officer read the names of the winners for the election without giving for number of votes for each candidate. There was no declaration of results and likewise no signing of Form 36 by candidates and agents as required by the law.

The returning officer RW 38 said he received the two Form 36 from the constituencies (together with the polling stations Form 35) and thoroughly scrutinized them and later filled Form 36 before declaring the candidate returned as the winner and thereafter issued the winner with a certificate. The witness denies that his deputy Kazungu prepared Form 35 on 7th March 2013. He was arrested in a bureau making photocopies of documents. The bureau was normally used by IEBC officials because their office was not equipped with scanners.

In cross-examination, the witness said that the Form 36 prepared by the returning officer was signed by two agents and dated 6th March 2013. He admitted that there were more than three agents present at the tallying centre when he completed the tallying process. He also added that he did not give any agent a copy because no one requested for it.

When cross-examined on a statement he recorded to the police in the Kazungu case RW38 said:-

“It is true I was unable to present the results due to lack of Form 36. I do not know what happened on 7th March 2013.”

Late in cross-examination the witness said:-

“If Kazungu says (in his statement) that I was unable to present results, then he is lying.”

The witness admitted that there is an order in the judgment of the Kazungu Criminal case that he be investigated and charged. The 3rd respondent testified that the results were properly tallied at the tallying centre and that the announcement was done in accordance with the law.

RW8 said he signed the aggregate sheet at the tallying centre on completion of the tallying process. In his affidavit paragraph 42 he said he signed the form with two other agents to confirm correctness of the results. This evidence is rebutted by PW17 who said he saw the two agents sign the form on 7th March 2013.

The petitioner's allegations were denied by the respondent and his witnesses on the announcement of results. However, the court found the evidence of the petitioner and his witnesses credible on the announcement of the results. PW2 gave very vivid and consistent details of the events at the tallying centre and what followed on the 7th March. His evidence was corroborated by that of PW8. These two witnesses were at the tallying centre up to the close of the tallying process and were not requested to sign the aggregate sheet or the Form 36 assuming that it existed. RW 38 did not explain why the aggregate sheet he produced in court was signed by only two agents when there were several agents at the tallying centre. On cross examination RW2 who was the chief campaigner of the 3rd respondent said:-

“I had gone for my copies when Kazungu gave me the form to sign. One Doreen also signed. Paul Wainaina did not sign the form because he was not there.”

The witness admitted that he recorded a statement with the police in the Kazungu criminal case and testified as a witness. He said again in cross examination:

“I signed the form 36 on 7th March 2013 as per my testimony in the criminal case. I admitted I backdated the forms... we had to go to the centre to sign the form on 7th March 2013.”

This evidence contradicts his evidence in chief contained in his affidavit sworn on 17th March 2013.

The evidence of the petitioner and his witnesses was very consistent on what happened at the tallying centre and the events which followed on 7th March 2013. The court comes to a conclusion that the returning officer RW38 did not prepare any aggregate sheet or any Form 36 on 6th March 2013 after tallying the results. The evidence of the parties in this case is very clear that the form given to court by the 2nd respondent is the one which was prepared on 7th March 2013. It bears the signatures of Doreen Kazungu and Salim Mohamed Busaidy RW2 who admitted he signed it on 7th March 2013.

Article 86 of the **Constitution** and **Section 39 (1)** of the **Act** and the regulations provides the guidelines for the commission in announcement and tallying of the results:-

“Article 86 reads

(a) ...

(b) ...

(c) ***the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and***

(d) ...

Section 39. (1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.

(2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.

(3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.

Regulations 83, 84 and **87** contain the detailed procedure for announcement. The law provides that the returning officer announces the provisional and final results in the order in which the tallying is completed. On announcement of the final results, the officer is required to prepare a result declaration and request the candidates and agents to sign. The regulation is silent on the form that a county tallying officer shall use. In my considered opinion, the intention of the legislature was to have **Regulation 83** which sets out the procedure for constituency tallying to also apply to the county returning officer. The law must be interpreted in a manner that gives effect to the spirit constitution which is spelt out in **Article 86** and replicated in **Section 39** of the **Act**. The drafter of the regulations did not intend to leave the returning officer with no defined procedure to follow. I therefore find that the procedure laid down in **Regulation 83** is applicable to the county returning officer.

The returning officer was very clear in his mind about that procedure when he swore his affidavit and when he testified in the before this court on the tallying at Lamu Fort.

The failure to prepare the result declaration form containing the final results was a breach of the law. There was no explanation given for the breach by the returning officer RW38.

In this regard I find in favour of the Petitioner that the results for gubernatorial seat Lamu County were not announced and declared in accordance with the law.

These results were subsequently regularized by the gazettment by the IEBC on 13th March 2013. I do not agree with the petitioner that the results should be nullified for the reason of the flawed announcement.

9. Relatives and Partisan Presiding Officers

It was alleged that several of the presiding officer and other IEBC officials were directly or indirectly related to the 3rd respondent. The petitioner said he knew of his own knowledge and also had information from one of his witnesses Omar Twalib Mzee. The Petitioner mentioned one Harith Swaleh, the presiding officer Mbwapumwali as being the cousin of the 3rd Respondent and one Zaituny Bwanaheri being an employee of the 3rd Respondents law firm. In his evidence affidavit, the Petitioner mentioned other names: Faiz Fankupi, Salim Ali Bunu, Adam Bakari, Rukia Abud, Mr. Ghanima, Mwenye Hussein Ahmed and Shekale Tauzi. One Hafswa Abdalla Diffini, Fatma Baishe, Nasra Hussein Baishe, Jamila Badawy, Halima Ali Tuna and Bunu Said were also mentioned.

In cross-examination, the petitioner said that he did not know these people personally and was relying on the information from his witness Omar Twalib Mzee. The affidavit of this witness was later expunged from the record.

The 3rd respondent denied the allegations made by the petitioner. During cross-examination the 3rd respondent said that the deputy presiding officer at Mbwapumwali was a pupil in his law firm at the material time. She was still at the law firm at the time of hearing this petition. For Hafswa Diffini the 3rd respondent said she was working with the National Museums of Kenya at the time the 3rd respondent was the National Board Chairman. Hafswa testified as a witness of the respondent RW22 and denied playing any role during the elections.

The 3rd respondent said he knew Amina Kale who worked with the National Museums at the material time and who was subsequently nominated as a County Assembly member in Lamu. Amina in her testimony said she is the mother of one Rukia About who was the presiding officer at Mkomani Girls Primary School. Rukia said she applied for the job and was employed on merit by the IEBC.

It was admitted by the 3rd Respondent that Khadija Harith Swaleh the presiding officer Myabogi was his cousin. Khadija did not testify. Rayya Abdalla Issa RW25 testified and denied having been at the tallying centre at the material time. It was her sister Jannat Issa who was at the centre working as a UDF Agent.

PW16 and PW19 testified that Khadija is a cousin to the 3rd respondent and accused her of influencing votes at Myabogi and counting votes in the absence of agents.

The presiding officer did not testify to exonerate herself. However, the officer ought to bear personal responsibility for her actions if found to have committed any election offence. For Khadijah Harith Swaleh, PW16 and PW19 and the admission by the 3rd respondent leaves no doubt that the presiding officer was a cousin to the 3rd respondent.

PW17 and 18 testified about relatives of the 3rd respondent who were at the tallying centre. It turned out to be that there was a mix up of names of relatives and presiding officers by the petitioner and his witnesses.

Jannat Issa RW28 was a UDF agent and admitted she is a sister to the 3rd respondent. On the material day she was at the tallying centre with a computer recording the tallied results. She denied connecting her computer with those of IEBC or using a flash disk to transfer any data. The allegations of transferring data to or from the IEBC computers was not proved in the absence of any evidence as to the particulars of the data. As a sister of the 3rd respondent, the witness was within her rights to work as a UDF agent.

The petitioner must prove that the relatives of the respondent played roles which were aimed at

manipulating or rigging the elections or that they colluded with the 3rd respondent to defraud the petitioner of his victory.

Adam Bakari (PW13) testified that he is an employee of the National Museum since 1984 before the 3rd respondent became the Chairman of the Board of Directors. He was the presiding officer at Lamu Youth Polytechnic. The results of the station were not challenged and no wrong doing was pointed at him.

For Salim Ali Bunu who was said to be the curator of the National Museum, it turned out to be that the Museum curator is known as Salim Mohamed Bunu. He testified as a witness (RW21) and denied campaigning for the 3rd respondent. The petitioner did not adduce any evidence that he or his witness saw RW21 campaigning for the 3rd respondent.

For those people who were mentioned and did not testify, the petitioner adduced no evidence against them.

The Commission is required under **Regulation 4** and **5** to gazette the names of county officers and provide a list of presiding officers to political parties and candidates at least fourteen (14) days before appointment to enable the parties and candidates make any representations. The petitioner ought to have been proactive and deal with any problem well in advance which he failed to do.

It is my finding that the allegations on partisanship of the presiding officers has not been proved. As for the relatives like Khadija and Jannat no wrongdoing was proved against them. These allegations lack proof and are dismissed.

10. Recount and Scrutiny Report

On 20th August 2018, the court ordered scrutiny and recount of votes in 26 polling stations, an audit and tallying of all Form 35 as transposed to Form 36 of all polling stations in Lamu county. The exercise was to include the constituency Form 36 for Lamu East and West. The purpose was to establish the number of votes garnered by each candidate. The exercise was done under the supervision of the Deputy Registrar who filed her report on 27th August 2013.

a) Discrepancies on transposition

Upon checking and adding up the figures on Form 35 and transposing to Form 36, the following discrepancies were found:

1. Lamu Boys Secondary School;- In the Form 35 Fahim Twaha had 18 votes. The audit and tally established that the correct figure was 8.
2. Pandanguo primary school;- According to Form 35 Timamy Issa Abdullahi had 167 while in Form 36 he had 169. The audit established the correct figure was 167.
3. Ngoi primary school;- According to Form 35 Swaleh Salim was said to have 24 votes while on Form 36 he had 34. The audit established the correct figure was 24 votes.
4. Chalaluma primary school;- According to Form 35, Timamy Abdalla was found to have 114 votes after tallying and audit the correct figure was established to be 113.
5. Mugumoini primary school;- According to Form 35 Swaleh was said to have 52 votes while Form 36 indicated 59. The audit established the correct figure as 52 votes.
6. Maisha Masha primary school;- According to the Form 35 Fahim Twaha had 99 votes while Form 36 he had 199. After tallying it was established that the correct figure was 99.

The results before and after the tally were as follows:

Name of candidate	IEBC Results	Tallied Results
Abdallah Timamy Issa	19,744	19,643

Swaleh Salim Swaleh	4,233	4,215
Twaha Fahim Yasin	17,785	17,845
Waihiga David Mwaure	1,525	1,525

	IEBC Results	Tallied Results
Rejected votes	670	852
Total Votes Cast	43,956	40,080

The 3rd respondent decreased his total by 101 votes, Swaleh Salim Swaleh decreased by 17 votes and Twaha Fahim Yasin increased by 60 votes. The total votes of David Mwaure remained the same, at 1,525.

The 3rd respondents leads by a margin of 1,798 votes ahead of the 2nd petitioner while the 1st petitioner maintains position 3.

There were other anomalies found and to which this court has been addressed in the submissions by the parties which I hereby deal with:

(b) Broken and Missing Seals

There were twelve polling stations where the ballot boxes had some broken or missing seals. Most ballot boxes in this category had one or two broken or missing seals on the average. These are:- The ballot boxes were transported from Lamu to Malindi a distance of over 200 kilometres on a rough road, a fact that this court takes judicial notice of. The Deputy Registrar did not find any evidence of tampering with the ballot boxes which means that the contents therein were as they were at the time the 2nd respondent sealed them at the close of the voting process. I therefore rule out any possibility of manipulation of the ballots after the declaration of results and upon sealing of the boxes.

(c) Missing Form 35

Forms 35 were missing from inside the box in the following five (5) stations:

- (i) Mkunumbi primary school
- (ii) Lamu Fort Hall
- (iii) Pate Dispensary
- (iv) Kizingitini Secondary school
- (v) Lamu Social Hall

The 2nd respondent is required to put one copy of the result declaration inside the box before sealing it in addition to other electoral materials. Failure to put a copy of the form inside the box is an irregularity but cannot justify nullification of the results for that polling station. This is based on the premise that there is another copy of Form 35 affixed to the ballot box and the one that was handed over to the returning officer together with the ballots.

d) Missing Counterfoils

There were four (4) stations with missing counterfoils:

- (i) Lamu Girls Secondary school
- (ii) Mkomani Girls primary school
- (iii) Matondoni Dispensary
- (iv) Majembeni primary school

I have been addressed by the parties on this issue which submissions I have carefully considered in preparing this judgment.

It is my considered opinion that all material aspects of the scrutiny and recount report be addressed by this court. Once the report is prepared by the orders of the court, it becomes part of the evidence in that case. Among the 26 polling stations in respect of which the court ordered scrutiny Lamu Girls Secondary, Mkomani primary, Matondoni Dispensary and Majembeni primary school were among them. It is therefore not correct for 1st and 2nd respondents to say that the stations were not scrutinized. For the court to ignore material aspects of the report would be like leaving the some of the issues in the petition undetermined.

The petitioner in the petition prayed for scrutiny and recount of all the votes in the gubernatorial election in Lamu county. The court allowed partial scrutiny and audit of Forms 35 as transposed to Form 36. The report should then be addressed as a whole and not partially as the respondents submitted.

The number of valid votes for the four stations are:

Name of candidate	Lamu Girls	Mkomani Girls	Malondoni	Dispensary	Majembeni	Total
Abdallah Timamy Issa	268	340	240	0		848
Swaleh Sahim Swaleh	21	49	38	49		157
Twaha Fahim Yasin	31	74	184	336		625
Waihiga David Mwaure	5	5	2	46		58
Total						1688

The total for all the candidates of valid votes are 1688.

The issue of missing counterfoils is an irregularity whose impact the court will address at a later stage.

e) Failure to sign Forms 35 by Agents

The 1st petitioner addressed the court on the failure to sign Form 35 from four polling stations namely Lamu Girls, Kilimani primary, Sendemke primary school and Kizingitini primary school. The issue had been addressed earlier in this judgment.

f) Variance between 1st and 2nd respondent Form 35 and the court – generated forms

The petitioner's counsel has drawn the attention of the court to variance between the Form 35 supplied by the 1st and 2nd respondent and the court generated Form 35.

The court made an order on application of the petitioner's counsel that the counsels be supplied with the court generated Form 35 form the Deputy Registrar's record. However, those forms were part of the raw materials that the Deputy Registrar used to prepare the recount and scrutiny report. The forms do not form part of the report and the court rejects any submissions based on those forms.

g) Missing Bundles

The report shows that some bundles of votes were found missing from the ballot box as follows:

- (i) At Lake Kenyatta Primary Stream 4, a bundle of 134 votes were missing. Counterfoils were available.
- (ii) Kizingitini Secondary a bundle of 191 votes is missing. Counterfoils are available.
- (iii) Majembeni primary school a bundle of 59 votes were missing.No counterfoils were available.

The Deputy Registrar states in her report that the bundles missing in the three (3) stations belonged to the 3rd respondent. It is not explained how she arrived at that conclusion. She was using the Form 35 supplied by the 1st and 2nd respondents which indicated a higher figure for the 3rd respondent than what was found inside the box during the tally.

The 1st and 2nd respondent urged the court to disregard the anomalies of the missing counterfoils and missing bundles of votes. The court was urged to follow the decision of Maraga, J in **Joho vs. Nyange** where it was held that post-declaration interference with the ballots is not and cannot be a ground for invalidating the election.

The facts and circumstances in this case are different from the case of **Joho vs. Nyange** in that post-declaration interference had been established in that case. In the case before me, the Deputy Registrar did not find any evidence of tampering with the ballot boxes. She was keen enough to note in her report minor things like one or two broken seals. Had the Registrar noted a major issue of tampering with a ballot box at the commencement of the scrutiny process, the same would have been noted in her report or brought to the attention of the court (and the counsel for the parties) before scrutiny process kicked off with a view of the court giving further orders or directions.

Upon receipt of the ballot boxes by the Deputy Registrar, she prepares a report on the status of the ballot boxes. At the commencement of the recount and scrutiny exercise, the status of the ballot boxes are examined. Any incident of tampering will be noted and addressed promptly. The Deputy Registrar did not note any post-declaration interference in her report.

The 2nd respondent has a legal obligation to take care of the electoral materials and cannot blame it on anyone. Should there be evidence of breaking and interference in the premises where the materials are stored, such an incident ought to be reported to the police for investigation.

The issue of missing vote bundles from a ballot box is an irregularity attributable to the 2nd respondent.

11. Determination

The analysis of the evidence does not establish any election offence on part of any of the parties. However, several irregularities have been proved.

- a) transfer of polling station without complying with the law;
- b) failure by presiding officers to comply with several aspects of **Regulation 79**;
- c) flawed announcement of results;

- d) failure by the returning officers to avail copy of the result declaration to the candidates and agents;
- e) discrepancies in the scrutiny report;
- f) missing ballot bundles;
- g) missing counterfoils.

The court will be guided by the established principles in electoral law.

It was stated by Mwongo, J in the case of Ferdinand Waititutu vs. IEBC & 8 others – Nairobi Election petition No. 1 of 2013:

“The first principle is the sovereignty of the will of the people. This emanates from the Article 1 of the Constitution, under which all power resides in the people. They may exercise it through their democratically elected representatives. Article 38 and other constitutional provisions safeguard the peoples' political rights of self expression.”

Section 83 of the **Act** is based on the principle that a petitioner is not only required to prove non-compliance with the law but must prove that the irregularities materially affect the election. This was clearly stated in the case of Richard Amana vs. IEBC & Others by Kimaru, J in regard to discrepancies and irregularities:

“Apart from that, the Petitioner is required to establish that the errors and irregularities were either occasioned by outright negligence or deliberate action on the guilty party. Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result.”

Common law jurisdictions have consistently maintained the principle in Morgan vs. Simpson (1974) 3 All ER 722 which was upheld in the case of Opitz vs. Wrzesnewsky, (2012) SCC 55:

“At issue in this appeal are the principles to be applied when a federal election is challenged on the basis of “irregularities”. We are dealing here with a challenge based on administrative errors. There is no allegation of any fraud corruption or illegal practices. Nor is there any suggestion of wrongdoing by any candidate or political party. Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the job experience, and the short time frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election.”

On the issue of mathematical errors and discrepancies, the court noted that these were not deliberate mistakes. The presiding officers, for first time in this country were handling six (6) elections simultaneously and at counting time which took place at night in most stations, the officers must have been quite exhausted. The errors were explained by the officers who testified in court and I am convinced that similar circumstances cut across the board. The discrepancies did not substantially affect the outcome of the election.

Bearing in mind the provisions of **Regulations 79(6), 79(7), 97(1)**, it is my finding that the breaches by the presiding officers as regards the candidates and agents, are not reasons enough to invalidate an election.

The flawed announcement of the results by the returning officer may have been affected by long hours at work waiting for delayed results and the need to meet the deadline of submitting the county results to the national tallying centre. The results were subsequently gazetted and thus validated. The tallying process

was completed and winners announced before the returning officer left in a hurry to Nairobi. The petitioners did not establish that the irregularity materially affected the outcome of the elections.

The irregular transfer of Ndau Dispensary polling station though irregular did not affect the voter turnout which was over 86%. One would be very ambitious to expect 100% voter turnout in any election. It was held in the case of **Bura vs. Sarwatta (1967) EA 234** that:

“The transfer of voters and their admission to vote at polling stations other than those allotted to them constituted a non-compliance with the Act but such non-compliance did not affect the result of the elections.”

Article 86(d) of the **Constitution** imposes a duty on the 2nd respondent:

“The duty to ensure that appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including the safe keeping of electoral materials.”

Regulation 73(3) and **(4)** requires that a presiding officer shall seal counterfoils of the used ballot papers in a tamper proof envelope for purposes of being delivered to the returning officer.

Counterfoils are part of the ballot paper issued to a voter and must correspond with the document issued in all material particulars. The accountability of a document is validated by the counterfoil. The significance of a counterfoil in an election is to ensure that the ballots issued to the registered voters are the only ones which go to the ballot box. The essence of a counterfoil is to keep in check malpractices including ballot stuffing.

In the case of **Manson Nyamweya vs. James Magara and 2 others (2009) eKLR**, Musinga, J (as he then was) held:

“If scrutiny showed that the documents in the ballot boxes were substantially non-compliant or that certain statutory documents were not contained therein, a recount of the ballots per se cannot cure the inherent defect. The presence of a ballot paper in a ballot box is validated by the counterfoil thereof and the marked voters register. Without the two there is no telling how it found its way in the ballot boxes”

In the case of **Thomas Mulinda Musau & 2 others vs. IEBC & others – Machakos Election Petition no.2 of 2013** Mutende, J held:

“Lack of counterfoils is therefore grave as the ballot papers in the ballot boxes cannot be ascertained and verified if indeed they were duly cast as votes or not. Missing counterfoils would basically mean that ballot papers in ballot boxes were not the ones used by the voters.”

I am in agreement with the decisions of the court in the two cases that missing of counterfoils in a ballot box affects the integrity of the election. The recount and scrutiny was done in only 26 polling stations out of 136 in Lamu county covering only 35% of the electoral area. There is a great probability that a scrutiny of votes for all the 136 polling stations would have shown a lot more.

The issue of missing vote bundles is in violation of the principles set out in **Article 81** of a free, fair and transparent election. The conduct of the officials of the 2nd respondent in the election is put into question. The will of the people of Lamu county will not be said to have been done with such glaring evidence of manipulation.

The 3rd respondent led with a margin of 1,798 votes upon scrutiny and recount of the 26 stations. I was referred to the case of **Ferdinand Waititu vs. IEBC and Others** where the margin between the petitioner and the respondent was over 85,000 votes which is indeed a very high margin in comparison with the case before me. However, there comes a time depending on the circumstances of each case when a court will not look at number but at the integrity, credibility and fairness of an election.

It was held in the case of **Morgan & Others vs. Simpson & Others All E.R. (1974) 3 that:**

Section 37(1)

An election court was required to declare an election invalid (a) if irregularities in the conduct of the election had been such that it could not be said that the election had been 'so conducted as to be substantially in accordance with the law as to elections', or (b) if the irregularities had affected the result. Accordingly, where breaches of the election rules, although trivial, had affected the result, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections.

The approach that courts should always be guided by numbers is not consistent with the general principles for a free and fair elections. The court has an obligation to embrace standards and values embodied in the **Constitution**. Majanja, J in **Machakos Election Petition no. 7 of 2013 Richard Kalembe Ndile & Another vs. Dr. Patrick Musimba Mweu & 2 Others**, stated in a case with similar circumstances:

“...the court must interrogate the entire process to ascertain the will of the voters in this case Such a determination cannot be ascertained by rejecting evidence that comes to the purview of the court in the course of hearing.”

The judge expressed himself aptly in the same case when he said:

“Taking into account the 409 ballots which could not be accounted for and which the evidence on record is supportive of their existence including the testimony by the respective presiding officers, I find that the issue of the ballots that could not be traced is a relevant issue which though not decisive, this court is entitled and ought to bear in mind in making a finding on the appropriate relief.”

In considering whether the 1st and 2nd respondent conducted the election in a transparent, free and fair manner, the court must of necessity give a purposive interpretation to the **Constitution** and electoral code in order to give effect to **Article 81** and **86** of the **Constitution**.

It is my finding that in view of the foregoing, the 3rd respondent was not validly elected as the Governor of Lamu county on the 4th March 2013. I find petition no. 5 of 2013 successful and hereby order that the election be and is hereby nullified. A fresh election is hereby ordered.

Following my earlier findings, I return the verdict that the allegations in petition no. 4 of 2013 were not proved and the petition is accordingly dismissed.

A certificate shall issue under **Section 86** of the **Act**.

The respondents addressed me the issue of costs. I found their proposals of Kshs.15,000,000/= and Kshs.8,000,000/= total costs to be on the higher side. However, I will make orders for costs which I am convinced are just and fair taking into consideration the nature, length and complexity of the case.

In awarding costs, it is imperative to consider that the 1st and 2nd respondents committed irregularities which have led to the nullification of this election. I order that costs not exceeding Kshs.4,000,000/= be paid to the 2nd petitioner and to the 3rd respondent to be shared equally and to be taxed by the Deputy Registrar. The 1st petitioner shall meet his own costs. The securities deposited by the petitioners in both petitions to be released to them.

I wish to express my gratitude to the counsels for the parties in the petitions Mr. Adoch and Mr. Olaba for the 1st petitioner, Mr. Kilonzo for the 2nd petitioner, Mr. Khagram for the 1st and 2nd respondents and Mr. Odera and Mulandi of Isaac Onyango & Co. for the 3rd respondent, for the distinguished industry they

have put in this petition.

I wish to highly appreciate the contribution of the Deputy Registrar Liza Gicheha, my legal researcher Fred Odhiambo, my secretary Anne Wanyoike, my clerk Samuel Otwere, my security detail Harrison Mwatemo and driver Simon Chirchir in respect of their contribution in their respective duties which led to the successful finalization of this matter.

Delivered, signed and delivered this 25th day of September, 2013 at Malindi.

F. N. MUCHEMI

JUDGE

In the presence of:

Mr. Adhoch for the 1st petitioner;

Mr. Kilonzo for the 2nd petitioner;

Mr. Khagram for 1st and 2nd respondents;

Mr. Odera for 3rd respondent.

F. N. MUCHEMI

JUDGE