



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**  
**Election Petition No. 9 Of 2013**  
**IN THE MATTER OF THE ELECTIONS ACT, 2011**  
**AND**  
**IN THE MATTER OF THE ELECTIONS OF THE SENATOR**  
**OF LAMU COUNTY**  
**BETWEEN**

**HASSAN ABDALLA ALBEITY.....PETITIONER**

**VERSUS**

**ABU MOHAMRD ABU CHIABA.....1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Petitioner in this petition is **HASSAN ABDALLA ALBEITY**. He was one of the nine candidates who contested for the seat of Senator, Lamu County in the General Elections held throughout the Republic of Kenya on 4<sup>th</sup> March 2013. He was nominated by the United Democratic Forum Party (UDF). The 1<sup>st</sup> Respondent **ABU MOHAMED ABU CHIABA** was another candidate in the race running on the The National Alliance Party (TNA).

The other candidates in the race were the following;-

1. **Adam Zeinab Musa**
2. **Ariku Charles Musungu**
3. **Githuka Micah Nganga**
4. **Kihenjo Bathoromew Chege**

5. **Lali Abdulrahman Aboud**
6. **Mwenyeali Seif Sheyumbe**
7. **Wakahiu George Njenga**

Lamu County is divided into two electoral constituencies namely Lamu East and Lamu West Constituencies. It had a population of 52,394 registered voters.

2. The General Election was conducted, managed and supervised by the Independent Electoral and Boundaries Commission (IEBC) pursuant to its mandate under **Article 88(4)** of the **Constitution** and **Section 4** of the **Independent Electoral and Boundaries Commission Act 2011**.

3. On 6<sup>th</sup> March 2013, the 2<sup>nd</sup> Respondent (IEBC) through the County Returning Officer announced the results of the Senatorial Election (the Election) and declared the 1<sup>st</sup> Respondent as the duly elected Senator for Lamu County (hereinafter referred to as the County) having obtained the majority votes of 15,086 while the Petitioner was the 1<sup>st</sup> runner's up with 14,688 votes.

The Petitioner was aggrieved by these results and was dissatisfied with the manner in which the election had been conducted by the 2<sup>nd</sup> Respondent. He challenged the results by filing this Petition on 3<sup>rd</sup> April 2013. In his prayers, he sought the following orders:

- a. ***An order for scrutiny, recount and re-tallying of all the Senatorial votes cast in each polling station in Lamu County.***
- b. ***That the 1<sup>st</sup> Respondent, Abu Mohamed Abu Chiaba was not duly elected.***
- c. ***An Order that the Petitioner having gathered the greatest number of votes cast for Senator's election is the duly elected Senator for Lamu County.***
- d. ***That Costs of the Petition be awarded to the Petitioner.***

3. During the pretrial conference held on 28<sup>th</sup> May 2013, the court with the consent of the parties gave directions on the hearing of several interlocutory applications which had been filed by the parties as well directions relating to the main hearing of the Petition.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents had filed applications dated 24<sup>th</sup> May 2013 and 27<sup>th</sup> May 2013 attacking the validity of the Petition and seeking that it be struck out for non-compliance with electoral laws.

The Petitioner had also filed two applications dated 24<sup>th</sup> May 2013.

In the first application, the Petitioner had sought orders of the court compelling the attendance of the Deputy County Returning Officer for Lamu County Mr. Jonathan Kazungu Ngowa as a witness while in the 2<sup>nd</sup> application, the Petitioner had sought orders of scrutiny and recount of votes cast in all polling stations in the County.

4. The court directed that the application for scrutiny and recount of votes be held in abeyance to be prosecuted later in the proceedings. The other three applications were to be argued together on 4<sup>th</sup> June 2013 which was done.

In a ruling delivered on 20<sup>th</sup> June 2013, this court dismissed each of the three applications with costs for lack of merit.

The application for scrutiny and vote recount was argued inter parties on 13<sup>th</sup> August 2013 and in a ruling delivered on 21<sup>st</sup> August 2013, this court allowed a recount of votes cast in all polling stations in the county.

In the course of the hearing, the Petitioner called a total of six witnesses who included the Petitioner. The 1<sup>st</sup> Respondent called a total of nine witnesses while the 2<sup>nd</sup> Respondent called a total of five witnesses.

The Petitioner was represented by learned counsel Mr. Ndegwa while the 1<sup>st</sup> Respondent was represented by learned counsel Mr. Balala. The 2<sup>nd</sup> Respondent was represented by learned counsel M/s Muraguri.

### **THE PETITIONER'S CASE**

5. The Petitioner's case is grounded on pleadings in his Petition and the affidavit evidence filed together with the Petition in accordance with **Rule 12(1)** of the **Elections (Parliamentary and County Elections) Petition Rules of 2013 (The Rules)**. The affidavits were all sworn on 2<sup>nd</sup> April 2013.

In his Petition, the Petitioner averred that the conduct of the whole electoral process was marred with grave and serious irregularities and malpractices as it was not held in accordance with the principles enumerated under **Article 81** of the **Constitution**, provisions of the **Elections Act** and the **Election Regulations** made thereunder. The Petitioner contended that the election was not free and fair and that the results did not reflect the will of the electorate in Lamu.

6. It is the Petitioner's case that the final tallies declared by the 2<sup>nd</sup> Respondent through its officials at some polling stations and tallying centres had many material anomalies which affected the accuracy of the results.

In particular, the Petitioner complained that there were transposition errors when transferring results entered in some Form 35's to the statutory form used to declare final results (Form 36) which had the effect of inflating the number of votes garnered by the 1<sup>st</sup> Respondent and deflating votes obtained by him.

In paragraph 8 (a) and (b) of the Petition, the Petitioner specifically pleaded 8 polling stations in which the said transposition errors had occurred.

In Lamu West Constituency, he singled out Lamu Boys, Lamu Social Hall, Hindi Dispensary, Lamu Social Hall II, Kauthaura Primary School and Sese Primary School. In Lamu East Constituency, the Petitioner cited Kizingiti Secondary School and Pate Dispensary. The Petitioner averred that the eight polling stations were just examples of other polling stations in the county where he had noted tallying discrepancies.

7. The Petitioner alleged that the transposition errors from Form 35 to Form 36 and miscalculation of votes cast as shown in entries in Form 35's prepared for some polling stations deprived him of a total of 978 votes. He cited by way of example Forms 35 for Ndau Dispensary and Witu Primary School polling stations.

It was his contention that if the court were to allow his prayer for scrutiny and recount of votes in the county, It would discover that he had in fact won the election having garnered the majority votes of 15,666 as opposed to the 1<sup>st</sup> Respondent's votes of 15,086.

8. According to the Petitioner, the 2<sup>nd</sup> Respondent committed several other irregularities which compromised the integrity, credibility, accuracy of the results. He claimed that the 2<sup>nd</sup>

Respondent failed to ensure transparency in the conduct of the election as its officials excluded his agents from various polling stations: that his agents were either denied access or were ejected from some polling stations: that this denied them an opportunity to participate in the counting, tallying of votes and verification of the results. He gave Pate and Mapenya Primary Schools as examples of those polling stations in which his agents were ejected without any lawful reason.

9. Other breaches of the law allegedly committed by the 2<sup>nd</sup> Respondent were failure to extend polling time particularly in Kiunga Polling station: failure to provide election materials particularly form 35's: failure to use electronic devices for voter identification and transmission of results and failure to issue original copies of form 35's to candidates and agents present at the tallying centres on request.

10. With regard to the 1<sup>st</sup> Respondent, the petitioner pleaded that the 1<sup>st</sup> Respondent had committed the electoral offence of bribery either directly or indirectly through other persons associated with him. He alleged that the 1<sup>st</sup> Respondent gave money to voters to induce them to vote for him or to refrain from voting for the petitioner

11. Lastly, the Petitioner challenged the validity of the results of the election by claiming that the results were announced by the County Returning Officer before he had tallied the votes obtained by each candidate in the two constituencies of Lamu East and Lamu West and before he had prepared, dated and signed a County Form 36 as required by the law.

It is the Petitioner's case that the County Form 36 submitted by the 2<sup>nd</sup> Respondent as proof of the results was an illegal document which was unlawfully made on 7<sup>th</sup> March 2013 by the Deputy Returning Officer. In support of this allegation, he relied on the arrest, prosecution and conviction of the Deputy Returning Officer in **Malindi Criminal Case No. 180 of 2013**.

12. In the course of the hearing and in submissions made on his behalf by his counsel Mr. Ndegwa, the petitioner introduced allegations of other malpractices and irregularities allegedly committed by the 2<sup>nd</sup> Respondent's officials in the conduct of the election which were not specifically pleaded in the petition. This related to the claim that most Form 35's were unreliable because they contained unauthenticated alteration of results: and that some of them did not bear the names of the streams in respect of which they had been prepared.

The other irregularity not pleaded in the petition was the 2<sup>nd</sup> Respondent's alleged violation of the law by relocating voting venue from Rubu village and Mambore Primary school to Kiunga polling station without publishing a notice to that effect as required by the law.

For the foregoing reasons, the Petitioner urged the court to find that the election had not been conducted in accordance with the Constitution and the law. He invited the court to nullify the election and grant him costs of the petition.

### **THE 1<sup>st</sup> and 2<sup>nd</sup> RESPONDENT'S CASE**

13. Upon being served with the petition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their respective responses in accordance with **Rule 14(1)** of the **Rules**.

The 1<sup>st</sup> Respondent filed his response on 22<sup>nd</sup> April 2013 which was accompanied by his supporting affidavit and eight other affidavits sworn by his witnesses.

In his response and in the evidence tendered before the court, the 1<sup>st</sup> Respondent denied the Petitioner's claim that his election was riddled with electoral malpractices and irregularities. He maintained that his election was conducted by the 2<sup>nd</sup> Respondent in a free, fair and transparent manner in accordance with the **Constitution** and the law.

In particular, the 1<sup>st</sup> Respondent denied that the 2<sup>nd</sup> Respondent made transposition errors when posting results in Form 35's to the two constituencies Form 36's used to tally and compile the County Form 36. He contended that the petitioner had not proved that he was deprived of any vote in the tallying process.

14. In response to the claims alleging malpractices and irregularities by the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent denied that such irregularities occurred in the conduct of the election and called witnesses to disprove those allegations by the Petitioner.

The 1<sup>st</sup> Respondent also specifically denied that he had committed any electoral offence including bribery either directly or through other persons associated with him as alleged by the petitioner.

19. In a nutshell, the 1<sup>st</sup> Respondent asserted that the entire electoral process including the counting, tallying of votes and announcement of the results was done in an open and transparent manner and that he was validly elected as the first senator for Lamu County having obtained majority votes in the election: that the election was free and fair: that its result was a manifestation of the will of the people of Lamu and that it ought to be upheld.

Finally, he urged the court to dismiss the petition with costs for lack of merit.

20. On its part, the 2<sup>nd</sup> Respondent filed its elaborate and lengthy response on 2<sup>nd</sup> May 2013. It was supported by an affidavit sworn on even date by the County Returning Officer Mr. Silvano Buko Bonaya. In addition, the response was accompanied by five other affidavits sworn by the Presiding Officers for some polling stations namely Mapenya Primary School, Pate Primary School and Kiunga Primary School and the Returning Officers for Lamu East and Lamu West Constituencies. In the course of the hearing, these Presiding Officers, Constituency Returning Officer and the County Returning Officer testified in support of the 2<sup>nd</sup> Respondent case.

21. In summary, the 2<sup>nd</sup> Respondent's case is that it conducted and managed the Senatorial election substantially in accordance with the requirements in the **Constitution**, the **Elections Act 2011** and the Elections (General) Regulations 2012 made thereunder. That the results announced by the County Returning Officer declaring the 1<sup>st</sup> Respondent as the winner of the election on 6<sup>th</sup> March 2013 were accurate, credible and valid and reflected the will of the electorate in Lamu expressed in a free, fair and a transparent election.

22. Like the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent denied that there were any transposition errors in the transfer of votes from Form 35's to the Form 36's in both Lamu East and Lamu West Constituencies. Its case was that the results reflected in the Form 36 for Lamu East and West Constituencies were accurate and valid devoid of any errors. Though admitting that there were minor arithmetic errors in the calculation of total votes cast in a few polling stations in the county, the 2<sup>nd</sup> Respondent asserted that an error on total votes cast did not affect the votes credited to each individual candidate including the Petitioner and that such arithmetical errors could not have affected the accuracy of the results or the outcome of the election.

23. In response to the claim that it abandoned the electronic voter identification system in polling stations and adopted the manual register which was open to manipulation, the 2<sup>nd</sup> Respondent maintained that the electronic voter identification system was designed to be the first step in voter identification which was to be followed by identification using the manual register which contained the voters biometric details and passport size photograph. And that the constitution and the law governing elections contemplated a manual system of voting, counting, transmission and announcement of results; that the use of electronic devices and technology in the voting process and transmission of results was meant to be an additional safeguard to ensure that the electoral process was more efficient and transparent and was not meant to be a substitute of the legally recognized manual electoral system.

24. The 2<sup>nd</sup> Respondent also specifically denied all the irregularities and electoral malpractices attributed to its officials by the petitioner in his pleadings. In particular, it denied that the petitioner's agents were excluded from Pate and Mapenya primary school polling stations: that there was disruption of voting at Kiunga polling station: that its officers did not observe the polling time prescribed by the law and that any voter was disenfranchised at Kiunga polling station.

In conclusion, the 2<sup>nd</sup> Respondent asserted that the petitioner had failed to discharge the burden of proof to the required standard and urged the court to find that no basis had been laid to justify the annulment of the 1<sup>st</sup> Respondent's election as the Lamu Senator. It invited the court to uphold his election and to determine that the Petition was unmerited and consequently dismiss it with costs.

26. During the pretrial conference, learned counsel for the parties consented to filing agreed issues for determination by the court.

In the list of agreed issues filed on 26<sup>th</sup> June 2013, parties settled on the following broad issues for determination by this court.

i. *Whether the 1st Respondent was validly elected and declared as Senator for Lamu County in the elections held on 4<sup>th</sup> March 2013.*

(ii) *Whether the Lamu County Senatorial election held on 4th March 2013 was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the constitution and all relevant provisions of the law.*

(iii) *Whether the vote counting and tallying process reflected the voter's choice in Lamu County Senatorial election.*

(iv) *Whether there is need for scrutiny and recount of all votes cast for the Lamu County senatorial election held on 4th March 2013. (v) What consequential declarations, orders and reliefs should the court grant based on the determination of the petition?*

27. I have considered the pleadings and all the evidence presented to the court by the parties. I have also paid regard to both written and oral submissions made by counsel on record for the respective parties.

In their submissions, parties made reference to the general principles that govern the conduct of electoral dispute resolution which includes the law relating to the burden and standard of proof in election petitions.

It is important for this court to address its mind to some of these general principles before embarking on the process of resolving the issues framed for determination in this Petition.

28. I choose to start with the principle of the sovereignty of the people of Kenya enshrined in **Article 1** of the **Constitution of Kenya**. This Article gives emphasis to the supremacy of the people of Kenya in matters of governance. It provides that all sovereign power resides in the people which they may exercise either directly or through their democratically elected representatives.

**Article 1** is given effect by **Article 38** which secures the people's rights to make political choices in electing their leaders in free, fair and regular elections. The sovereign power of the people is expressed and actualized through elections. And it this expression of the people's will in making their political choices that the electoral design in chapter seven of the **Constitution** and the **Elections Act** is meant to safeguard, ascertain and implement.

The primary duty therefore of an election court is to ascertain the true and free will of the voters expressed through the ballot and where possible give it full effect. This principle in my view goes to the core of electoral dispute resolution.

29. The other principle that should guide the court in electoral dispute resolution is the principle that election petitions are different from ordinary civil suits. They are special cases in a category of their own.

In SARAH MWANGUDZA KAI V MUSTAFA IDD SALIM & TWO OTHERS MALINDI ELECTION PETITION NO. 8 OF 2013, I stated the following regarding the special nature of election petitions:-

*“Election petitions are not like ordinary civil suits. They are unique in many ways. Besides the fact that they are governed by a special code of electoral laws, they concern disputes which revolve around the conduct of elections in which voters exercise their political rights enshrined under Article 38 of the Constitution. This means that electoral disputes involve not only the parties to the Petition but also the electorate in the electoral area concerned.*

*It is therefore obvious that they are matters of great public importance and the public interest in their resolution cannot be overemphasized. And because of this peculiar nature of election petitions, the law requires that they be proved on a higher standard of proof than the one required to prove ordinary civil cases.”*

In JOHO V NYANGE & ANOR (2008) 3 KLR (EP) 500, Maraga J expounded on this principle and explained why election petitions are matters of great public importance and should not be taken lightly.

He expressed himself in the following terms:-

*“Election Petitions are no ordinary suits. Though they are disputes in rem fought between certain parties, election petitions are nonetheless disputes of great public importance – KIBAKI v 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 in WANGUHU NGANGA & ANOR v GEORGE OWITI & ANOR, Election Petition No. 41 of 1993, that “Election Petitions should not be taken lightly.”*

30. The other all important principle which is in my view the bedrock of electoral dispute resolution is the one embedded in the law relating to the burden and standard of proof.

Given the special nature of election petitions, the burden and standard of proof required in their resolution is different from the one required to prove other civil suits. However, just like in civil suits where parties shoulder the burden of proving their respective cases the burden of proof in election petitions rests on the petitioner since he/she is the one who seeks the nullification of an election.

This is in tandem with the cardinal precept of the law of evidence codified in **S107** of the **Evidence Act** which requires that a person urging the court to give judgment on any legal right or liability citing the existence of certain facts bears the burden of proving the existence of those facts.

31. In determining whether a Petitioner has discharged the burden of proof required to nullify an election, the court must be guided by **Section 83** of the **Elections Act** which states that:-

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

32. The above provision implies that elections are not perfect. That incidences of malpractices and irregularities are bound to occur but that it is only those grave irregularities or breaches of the law which affect the outcome of the election that would justify the annulment of an election and that evidence showing substantial compliance with the Constitution and the law in the conduct of an election would be sufficient to have it upheld.

In the circumstances, a Petitioner who seeks to have an election nullified on the basis of irregularities and malpractices in the conduct of elections must prove by cogent and credible evidence that not only did those irregularities occur in the disputed election but that they affected its outcome.

33. This legal principle was aptly captured by our Supreme Court in the recent case of **RAILA ODINGA V UHURU KENYATTA & 3 OTHERS IN ELECTION PETITION NO. 5 OF 2013** where the court stated:-

***“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”***

34. The threshold of proof envisaged by **Section 83** of the **Elections Act** has been interpreted by a long line of authorities both locally and in other jurisdictions which have given meaning to the term **“affected the result”** of an election. This is what is now referred to as the materiality test.

This test was discussed by the High Court of **TANZANIA IN MBOWE V ELILIFOO [1967] EA 240, 242** where Georges CJ stated as Follows:-

***“In my view in the phrase “affected the result,” the word “result” means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.”***

In **COL. KIZZA BESIGYE V YOWERI KAGUTA MUSEVENI & ELECTION COMMISSION PRESIDENTIAL ELECTION NO.1 of 2001, MULENGA**

JSC explained the meaning of the phrase **“affected the result of an election in a substantial manner”** as follows:-

***“To my understanding therefore, the expression non-compliance affected the result of the election in a substantial manner as used in section 58(6)(a) can only mean that the votes candidates obtained would have been different in a substantial manner, if it were not for the non-compliance substantially. That means that to succeed the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that the winning majority would have been reduced. Such reduction however***

***would have to be such as would have put the victory in doubt.”***

In this Petition, the court will be guided by this test to determine whether irregularities or malpractices proved by the Petitioner if any, adversely affected the outcome of the disputed election.

35. As regards the standard of proof, it is settled law that the standard of proof in election petitions is higher than the balance of probabilities required in civil cases but lower than proof beyond reasonable doubt demanded in criminal cases.

However, where there are allegations of commission of electoral offences, a very high degree of proof similar to that of proof beyond reasonable doubt is required:-

See **BERNARD SHINAL MASAKA VS BONI KHALWALE & 2 OTHERS** [2011] EKLK, JOHO V NYANGE & ANOR [2008] 3 KLR (EP) 500; SARAH MWANGUDZA KAI V MUSTAFA IDD SALIM (Supra) RICHARD KALEMBE NDILE & ANOR V CR. PATRICK MUSIMBA MWEU & THREE OTHERS EP MACHAKOS EP NO. 1 & 7 OF 2013 [2013] EKLK among others.

36. The Supreme Court after reviewing several local and foreign decisions on this matter settled the law in Kenya when it held in the **RAILA ODINGA CASE (Supra)** that;

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

In determining whether any allegation in the Petition has been proved against the Respondents to the established legal standard, this court will be guided by relevant Articles in the **Constitution of Kenya 2010**, the provisions of the **Elections Act** and the **Election (General) Regulations 2012** which together comprise the law that governs the conduct of elections in Kenya.

37. Having said that, I now turn to deal with the issues framed for determination in this Petition. But before embarking on that exercise,

I wish to observe that issue No. (iv) has already been determined by this court and is now spent.

It was determined in a Ruling delivered by this court on 21<sup>st</sup> August 2013 following an application made by the Petitioner seeking scrutiny and recount of all votes cast in Lamu County. In that Ruling, the court ordered a recount of all votes cast in the County with the aim of ascertaining the correct number of votes obtained by each candidate in the contested election.

With that issue resolved, only four issues remain for this court’s determination. I notice that the 2<sup>nd</sup> and 3<sup>rd</sup> issues are grossly interrelated since they are concerned with alleged non compliance with the law regulating the conduct of elections.

For this reason, I propose to deal with them together as one issue then thereafter deal with issue no. 1 and finally issue no. 5.

***Whether the Lamu County Senatorial Election was conducted in a free, fair, transparent and credible manner in compliance with the Constitution and the relevant provisions of the Law.***

38. In summary, the Petitioner’s case as can be ascertained from his pleadings and from submissions made by Mr. Ndegwa is that the election was not conducted in accordance with the constitution and the law as the 1<sup>st</sup> Respondent either individually or in association with other

persons committed the election offence of bribery while the 2<sup>nd</sup> Respondent's agents committed electoral malpractices and irregularities which impeded on the conduct of a free and fair election.

Just to remind ourselves of the allegations made in the Petition, the petitioner complained that the 2<sup>nd</sup> Respondent's officials either denied his agents access to some polling stations or ejected them from therein while the voting process was ongoing; that they failed to observe polling time; that they abandoned the use of technology in identification of votes and transmission of results; that they committed serious errors in the vote counting and tallying process which affected the outcome of the results and finally that they conducted elections in a venue different from the one specified in two gazetted polling stations.

**39.** In response, the Respondents denied each of these allegations and asserted that the Petitioner had failed to adduce tangible evidence to prove the existence of the alleged irregularities or how if at all the alleged irregularities affected the validity of the results: that the election was conducted in a free, fair and transparent manner and that its outcome reflected the will of the electorate in the county.

**40.** Given the rival positions taken by the parties, it is important for the court to determine the key elements of a free and fair election in order to effectively resolve the dispute in this Petition.

My take is that a free and fair election is one which is conducted in compliance with the principles enunciated under **Article 81** of the Constitution. It must be an election which is held in conformity with the principle of universal suffrage based on the aspiration for fair representation and equality of vote. The casting of votes must be by ballot, free from violence, intimidation, improper influence or corruption. And it must be conducted in a transparent, impartial and accountable manner by an independent body like the 2<sup>nd</sup> Respondent in this Petition.

To ensure that its objective of transparency in the conduct of elections is achieved, the **Constitution** at **Article 86** obligates the Independent Electoral and Boundaries Commission (IEBC) to ensure that the voting system used in elections is simple, accurate, verifiable, secure, accountable and transparent; that votes cast are counted, tabulated and results announced promptly at each polling station by presiding officers after which they are accurately collated and promptly announced by the returning officer at tallying centres.

**41.** It is against this background that this court will consider the irregularities identified by the petitioner in support of his petition with a view to establishing whether they have been proved to the required standard.

It is however instructive to note, as was correctly pointed out by Mr. Balala and M/s. Muraguri in their submissions that the Petitioner appears to have abandoned most of the grounds raised in his pleadings and had crafted new ones in the course of the hearing and in his submissions. In his submissions, both written and oral, the Petitioner made no mention of irregularities touching on his claims of voter bribery, exclusion of party agents from polling stations; failure of IEBC to observe voting hours, to provide election materials particularly Form 35 to some polling stations; failure to issue Form 35's to candidates or their agents; failure to display or affix Form 35's for public viewing in polling stations, and abandonment of technology in the voting process and transmission of results.

This notwithstanding, this court is duty bound to consider each of those alleged irregularities since they still form part of the Petitioner's complaints in the Petition. I propose to deal with each of them separately.

**(a) Voter Bribery**

**42.** In paragraph 26 of the Petition, the Petitioner accused the 1<sup>st</sup> Respondent of having directly

or indirectly through other persons bribed voters by giving them money to either vote for him or refrain from voting for the Petitioner. In support of his Petition, the Petitioner testified as PW1. In his evidence he did not say that he witnessed any incident of bribery perpetrated by the 1<sup>st</sup> Respondent personally or by any other person on his behalf at any polling station. He was clear in his evidence that he remained at his home in Witu on Election Day after he cast his vote at Witu Primary School. He did not visit other polling stations. In support of this allegation, he tendered evidence in the form of affidavits sworn by Mohamed Ahmed Khalid and Mohamed Ahmed Ali who also testified as PW5 and PW6 respectively.

**43.** PW5 testified that on election day while outside Shela Primary School polling station, he witnessed one Athumani Michi (Mr. Michi) bribing voters on their way to vote. On being cross-examined by Mr. Balala, PW5 alleged that he saw about ten people being bribed by Mr. Michi. That they took the money and failed to vote. He made no connection between Mr. Michi and the 1<sup>st</sup> Respondent.

**44.** PW6 on his part deposed that he saw Mr. Michi bribing voters at Shella Primary School; that he heard Mr. Michi instructing those voters to vote for Mr. Ali Chiaba (1<sup>st</sup> Respondent) ; that the bribery incident caused a physical commotion between Mr. Michi and one Ali Mohamed Ahmed which had to be quelled by the intervention of security personnel.

In his evidence in cross-examination, PW6 testified that he saw Mr. Michi bribe about five illiterate voters who had been assisted by some undisclosed agents to vote: that the voters were given money after the agents confirmed that they had voted for Mr Ali Chiaba.

In addition, PW6 claimed that Mr. Michi was Mr Ali Chiaba's chief campaigner. This witness did not however tell the court how much money he saw Mr. Michi giving to the voters. This information had it been given would have given his evidence some measure of credibility.

**45.** After analyzing this evidence, I find it wanting in several material respects. To start with, PW5 and PW6 though they claimed to have been eye witnesses to the bribery incident gave contradictory accounts of how the alleged bribery was executed.

PW5 claimed that he saw voters being bribed outside the polling station as they were on their way to vote. That they took the money but for some undisclosed reasons failed to go and vote.

PW6 on the other hand alleged that the voters were being bribed after voting once agents who had assisted them to vote confirmed they had voted for the 1<sup>st</sup> Respondent. In my view, the discrepancies in these witnesses evidence cast aspersions on their credibility.

**46.** Secondly, the names of the agents who facilitated the alleged bribery were not disclosed and none of them nor any of the voters who were allegedly bribed were called as witnesses by the Petitioner to support the bribery allegations. The petitioner did not also adduce any evidence specifying the amount of money which had allegedly changed hands between Mr. Michi and the assisted voters.

Thirdly and most importantly, other than the oral assertion by PW6 claiming that Mr. Michi was Mr. Chiaba's chief campaigner, no other evidence was tendered documentary or otherwise to show that there was any relationship between Mr. Michi and the 1<sup>st</sup> Respondent.

**47.** In his evidence, Mr. Chiaba denied that he had engaged in any act of bribery either personally or through any other person. In particular, he denied any knowledge of Mr. Michi or that he was one of his supporters. His witnesses DW5 Amina Omar and DW6 Fahima Araphat TNA Agents stationed at Shela Primary school, the scene of the alleged offence denied having witnessed any bribery incident at the station.

DW5 added that she did not see Mr. Michi with any money nor was any money recovered from him after his scuffle with Ali Mohamed Ahmed. That she knew Mr. Michi very well and according to her, he was an ODM supporter. This assertion by DW5 was not contradicted by any other evidence or challenged by the petitioner in cross-examination.

**48.** Bribery, besides being an election offence is also a criminal offence. It is created under **Section 64** of the **Elections Act**. It is a serious offence which on conviction attracts a heavy penalty of a fine not exceeding Kenya shillings one million or imprisonment for a term not exceeding three years or both. The standard of proof in election offences is proof beyond reasonable doubt and it was incumbent on the petitioner to prove the alleged offence against the 1<sup>st</sup> Respondent by adducing cogent, consistent and credible evidence.

Having carefully analysed the evidence adduced by the petitioner, I find it insufficient to prove the offence of bribery to the threshold required by the law.

a. **Exclusion of Agents**

**49.** It is the Petitioner's case that his agents were excluded from participating in the tallying and counting of votes. In his petition, he singled out Pate and Mapenya Primary Schools as the polling stations in which his agents were ejected when vote counting was ongoing. PW2 Fadhil Abbas Faruq a voter at Pate Primary School testified that he was at the polling station when he saw a UDF Agent one Shela Fumbo being thrown out of the polling station; That counting of votes continued in his absence since he was not allowed to re-enter the polling station.

However, in his evidence under cross-examination, this witness contradicted his evidence in chief by claiming that when the results were being announced, he saw all party agents and IEBC's officials in the polling station. This evidence suggests that even the petitioner's agents were in the polling station and had therefore participated in the counting and tallying process. This was indeed the position as looking at the Form 35 for Pate primary school polling station, it is clear that the UDF agent who had allegedly been thrown out Mr. Shela Fumbo had actually signed the form together with other agents verifying results declared at the station.

**50.** Another witness called in support of this allegation is PW4 Mohamed Bin Omar. In his evidence in chief PW4 declared that he had been appointed as the UDF agent assigned to Mapenya Primary School Polling Station. This claim was denied by the petitioner who maintained in his evidence in cross-examination that this witness was a "**roaming agent**" not assigned to any particular polling station and that his agent for Mapenya primary school was Mohamed Abdulswamed.

**51.** When pushed by M/s Muraguri in cross-examination, this witness owned up and stated that he was in fact not an agent at Mapenya primary school but was appointed as a supervisor of agents in four polling stations in Mapenya area. He also admitted that the reason he was thrown out by the Presiding Officer was because only one agent was allowed per party during counting and there was another agent for his party Mohamed Abdulswamed in that station: that when he was ejected, his colleague Mohamed Abdulswamed was left behind to take care of the petitioner's interests .

In my view, this admission by PW4 settles the issue of alleged exclusion of the Petitioner's agents from Mapenya Primary School.

**Regulation 62** of the **Election Regulations** empowers a presiding officer to regulate the number of persons to be admitted in polling stations and **Regulation 62(2)** specifically prohibits the admission of more than one agent per candidate or political party.

Given the provisions of **Regulations 62(2)** and the aforesaid admission by PW4, it is clear that the ejection of PW4 from Mapenya Primary School was on account of reasons recognized by the law.

It did not therefore amount to an irregularity as alleged by the petitioner. In light of the foregoing, I concur with the submissions made by Mr Balala and M/s Muraguri that the Petitioner did not provide tangible evidence to prove his claim that his agents were irregularly excluded from the polling stations cited in the Petition.

In any event, **Regulation 62(3)** provides that the absence of agents shall not invalidate the proceedings at a polling station.

b. **Lack of Provision/Issuance of Form 35S and failure to display the same in polling stations.**

52. In his Petition, the petitioner pleaded that the 2<sup>nd</sup> Respondent breached the law by failing to provide statutory forms namely Form 35 to various polling stations. He did not specify the polling stations where form 35's had not been made available by the 2<sup>nd</sup> Respondent but in his supporting affidavit, he restricted this claim to Mandayawi Polling Station.

From the rest of the petitioner's pleadings, the documents in the court record and from the petitioner's own evidence, it is obvious that this allegation is misplaced and is without any foundation for the following reasons;

53. To start with, the petitioner had pleaded that the results of the election were invalid as there were transposition errors in the transfer of results from Forms 35 to Form 36. He specified eight polling stations where the errors had allegedly occurred which were supposed to be representative of all other polling stations in the county. In this pleading, the petitioner was implying that Form 35's had been available in all polling stations as this is the only way that results of the election could have been recorded in polling stations.

Secondly, the form 35's prepared in all polling stations in the County were furnished to the court by the 2<sup>nd</sup> Respondent in compliance with **Rule 21 (b)** of the **Rules** and were used by the Petitioner's advocate in his examination of witnesses during the hearing. The said forms were also found inside the ballot boxes when the court conducted the recount exercise as can be seen from the Deputy Registrar's Report which was duly signed by all nominees who represented all the parties herein in the recount exercise.

54. Turning now to the evidence adduced by the petitioner to support this allegation in respect of Mandayawi polling station, the only polling station specifically pleaded in his supporting affidavit, it is instructive to note that the petitioner called only one witness PW6 Mohamed Ahmed Ali who testified that he had been assigned to that polling station as a Wiper Democratic party agent while the petitioner insisted in his evidence in cross-examination that PW6 was a UDF agent. And though PW6 in his evidence in chief had alleged that due to the unavailability of Form 35 in the station no agent was able to verify results recorded in the polling station, he made a complete turnaround in his evidence in cross-examination on being shown a duly completed Form 35 for Mandayawi polling station. He confirmed having signed it together with other agents. He therefore contradicted his evidence making it completely worthless.

55. To counter the allegation, the 1<sup>st</sup> Respondent called one witness DW7 Bonface Mbutia Ndungu a TNA agent who on Election Day was stationed at Mandayawi polling station while the 2<sup>nd</sup> Respondent adduced evidence through the testimony of DW10 who was the Presiding Officer for that polling station.

In view of the discredited nature of the evidence offered by the petitioner in support of his allegation, I do not find it necessary to consider the evidence tendered by the Respondents in rebuttal.

In any event, this court had opportunity to see a duly completed Form 35 for Mandayawi Polling

Station and confirms that it actually existed as stated by the Respondents witnesses. It is therefore this court's finding that the petitioner has not proved that the 2<sup>nd</sup> Respondent breached any law by failing to supply necessary election materials to polling stations in the County.

**56.** Regarding the allegation that the 2<sup>nd</sup> Respondent's officials denied candidates or party agents present at various polling stations copies of the original Forms 35 upon request, it is my view that this allegation not unlike several others pleaded in the Petition is a very generalized averment which is not helpful to the petitioner's case. And there is a good reason for making such an observation because how can the court be expected to adjudicate on such a pleading when no particulars are given about the identity of candidates and agents who were allegedly denied the statutory forms and in which polling stations.

General allegations were also made about failure to display or to affix Form 35S for public viewing in undisclosed polling stations. It would have been desirable and very helpful to the court had the petitioner stated with precision the polling stations which had been affected by the alleged irregularity.

**57. Regulation 83(1) (d)(i) of the Election Regulations** requires that a returning officer shall give any candidate or agent present in the tallying centre a duly signed and dated copy of the declaration of results (Form 36) at the end of the tallying process. **Regulation 79(1) (c)** makes a similar demand on presiding officers who are supposed to provide a copy of declaration of results (Form 35) to not only candidates or agents present in the polling stations at the time of announcement of results but also to each political party.

**Regulation 79(1) (d)** also requires presiding officers to affix a copy of Form 35 at conspicuous places in polling stations.

This is an important requirement as it is aimed at ensuring that members of the public who may not be present in polling stations at the time results are announced are also notified of the results recorded at particular polling stations. This information can be used by any member of the public who is minded to compare results recorded in polling stations with the final result announced by the returning officer when declaring the winner of an election.

It is my view that this Regulation enhances the constitutional requirement of transparency in the conduct of elections and it is a regulation that Presiding Officers in polling stations should strictly adhere to.

**58.** In our case, the Petitioner did not adduce even an iota of evidence to prove that the requirement of this Regulation was not observed in any polling station in the County. Similarly, the petitioner failed to call any of his agents as witnesses to prove that they were denied Form 35 upon request. It is therefore my conclusion that the petitioner has failed to prove that the aforementioned irregularities did exist in the conduct of the disputed election.

It is also my view that even if such proof existed, such irregularities by their very nature would not have been material as to affect the outcome of the election.

### **Voting hours**

**59.** In paragraphs 29 and 30 of his Petition, the Petitioner alleged that in his strongholds, the 2<sup>nd</sup> Respondent failed to extend polling hours in polling stations where voting had been disrupted. He gave the example of Kiunga Polling Station where voting was allegedly interrupted for about one hour when two agents a Mr. Harun and Mr. Abu were being ejected from the station. That the Presiding Officer breached the law by failing to extend polling time by an hour to compensate for the time lost due to the alleged disruption in voting and by denying over 80 voters who had been on the que by 5.00pm an opportunity to cast their vote before he closed down the polling station.

**60** Polling time is regulated by **Regulation 66** of the **Election Regulations**. **Regulation 66 (1)** and **(2)** requires that voting should commence at 6a.m and end at 5.00pm but that voting time may be extended to an indefinite period after 5.00pm to allow all voters who had been on the queue at 5pm to cast their vote before the polling station is closed.

**Regulation 64 subsection (3)** empowers a Presiding Officer to extend polling time in polling stations where voting had been interrupted by adjournment of proceedings under **Regulation 64(1)** or for any other valid cause in consultation with the Returning Officer.

In my view, prolonged disruption of voting for any reason would constitute “*valid cause*” to justify extension of polling time after 5.00p.m

**61.** In support of this allegation, the Petitioner called one witness who testified as PW 3 Unnhymnn Athman. In her evidence in chief, she deposed that voting at Kiunga was interrupted not for one hour as alleged in the petition but for about two hours as Harun and Abu were being ejected: that the station was closed at 5.00pm meaning that voting time was not extended to cover for lost time in the voting process and that about 80 voters who were already on the que at that time were not allowed to vote.

In her evidence in cross-examination, PW3 claimed that all the anomalies she allegedly witnessed at Kiunga polling station were in respect of Stream 3. She claimed that she had been appointed by the Petitioner to be his agent in Stream 3. The Petitioner in his evidence denied having appointed PW3 as such and categorically denied that there was a third Stream at Kiunga polling station. He maintained that Kiunga polling station had only two streams, a fact which was confirmed by DW3 Samuel Obara the area OCPD, DW4 Swaleh Mohamed Atik the TNA chief Agent in Lamu East, DW8 Atik Mohamed the area chief and DW12 Omar Shee Shemote the station’s Presiding Officer.

The court did not also come across any Form 35 prepared in respect of a third stream at Kiunga polling station when it was examining all the Form 35s submitted to the court by the 2<sup>nd</sup> Respondent.

In view of the foregoing, there is no doubt that Kiunga Polling Station had only two Streams. It is therefore obvious that PW3 was not a truthful witness and her claim regarding a third Stream at Kiunga had no factual basis. Her evidence including the claim that voting had been disrupted in that station is unworthy of belief and cannot be relied upon by this court.

**62.** This is unlike the evidence tendered by the Respondents to counter the allegations made by PW3 which I have no reason to doubt. I accept the evidence of all the defence witnesses who testified in response to those allegations because their evidence was consistent and credible. They all testified that there was no disruption at Kiunga Polling Station and that the station was closed at 5.30pm; that by 5.30pm no voter was waiting to vote and that therefore no voter was disenfranchised in that station.

Consequently, it is my finding that the petitioner did not discharge his burden of proof concerning alleged irregularities committed by the 2<sup>nd</sup> Respondent relating to voting time and disenfranchisement of voters either at Kiunga Polling Station or any other polling station for that matter.

### **Failure of technology**

**63.** The Petitioner in his pleadings at paragraphs 21, 22, 23 and 24 claimed that the 2<sup>nd</sup> Respondent abandoned the use of electronic devices for voter identification and transmission of results. That IEBC reverted to the use of manual systems which according to him were untrustworthy and were susceptible to manipulation. This claim was not rebutted by any evidence to the contrary by the Respondents. It was therefore admitted.

This admission by the Respondents did not however absolve the petitioner from his obligation of proving that failure of IEBC to use electronic equipment in voter identification and transmission of results was in fact an irregularity which compromised the integrity of the voting process and failed to deliver credible results.

It was not enough for the petitioner to state that the system was prone to manipulation. The Petitioner should have adduced evidence to prove that IEBC officials in Lamu County deliberately misused the manual system to his disadvantage in a way that affected the outcome of the election.

Besides, **Section 39(2) of the Elections Act (the Act)** and **Regulation 82 (1) of the Election Regulations** leave no doubt that the use of the manual system of voting, tallying of votes and announcement of results was by itself not violation of the law.

A reading of **Section 39(2) of the Act** and **Regulation 82 (1) of the Election Regulations** clearly reveals that results in electronic form are supposed to be provisional. The final tallying of results was to be done manually.

In the **RAILA ODINGA VS IEBC & OTHERS (supra)** the Supreme Court settled the law on the use of electronic equipment and technology in the conduct of elections. It held that the IEBC had the option of using either manual or electronic voting or a combination of both in compliance with **Section 44** of the **Elections Act** and subject to **Regulation 60** of the election Regulations. The important consideration being that an election should be conducted in a free and fair manner in accordance with the principles in the Constitution.

**64.** The court takes judicial notice that the Electronic Voter Identification Devices (EVID) meant to identify voters by officials of the 2<sup>nd</sup> Respondent and Result Transmission System (RTS) used by the presiding officer for transmission of results to the Returning Officers malfunctioned during the last general elections and were used to a very limited extent countrywide in all categories of elections including the presidential election. The failure of technology was not a problem unique to Lamu County. And it affected all candidates equally.

In view of the above, I find that the petitioner has failed to adduce evidence to show that failure of technology disadvantaged him; that it led to the holding of an election which was not free and fair and that it affected the validity of the results.

#### **Voting at Kiunga for Rubu and Mwambore Polling Stations**

**65.** In his written submissions, learned counsel for the Petitioner Mr. Ndegwa sought to introduce another ground in support of the Petition. He submitted that elections in GAZETTED polling stations known as Mwambore primary school and Rubu village were conducted illegally at Kiunga polling station; that under **Regulation 7(1)(b) and (c) of the Election Regulations**, IEBC had published **Gazette Notice NO. 1454** of 1<sup>st</sup> February 2013 designating Mwambore Primary School and Rubu village as distinct polling stations; that voting by the people of Rubu and Mwambore villages ought to have taken place at the physical locations of the designated polling stations there having been no notice issued by IEBC in accordance with **Regulation 7(3) of the Election Regulations** changing the location of the said polling stations to Kiunga Primary School.

**66.** It is significant to note that the conduct of elections at Kiunga Primary School for the people of Rubu and Mwambore villages as a ground used to impeach the disputed election was first raised in the Petitioner's submissions. It was neither pleaded in the Petition nor did it form part of the Petitioner's evidence. It was first introduced in the course of cross-examination of the 2<sup>nd</sup> Respondent's witnesses.

Mr. Balala and M/s Muraguri in their respective submissions strongly urged the court not to consider or make any determination on this ground and any other ground not pleaded in the

Petition based on the cardinal legal principle that parties are bound by their pleadings.

Mr. Ndegwa on the other hand strenuously submitted that the court ought to make a determination on this ground or any other ground that arose in the course of the hearing since it touched on the question that the court needs to answer in this Petition which is whether the 1<sup>st</sup> Respondent was validly elected as the Senator for Lamu County.

For this proposition he relied on Manjaja J's decision in **RICHARD KALEMBE NDILE AND ANOTHER V DR MUSIMBA MWEU & 2 OTHERS (2013) eKLR** and **KUKAL PROPERTIES DEVELOPMENT LIMITED V MALOO & OTHERS (1990-1994) EA 281..**

In support of her submissions, M/s Muraguri relied on an authority from the Malawian Supreme Court in **MALAWI RAILWAYS LIMITED V P.T.K NYASULU.**

**67.** I have considered the party's rival submissions on this point. And though I entirely agree with Mr. Balala and M/s Muraguri that ordinarily parties in civil suits are bound by their pleadings and the court ought not to entertain or make determinations on matters not covered by the party's pleadings, I am of the view that an election court enjoys a special jurisdiction which is inquisitorial in nature.

An election court and indeed this court has a clear mandate to inquire into and determine whether a disputed election was conducted in accordance with the law, whether it was free, fair and transparent and lastly whether the winning candidate was validly elected. It therefore follows that any ground which is relevant to a determination concerning the validity of results whether or not pleaded in the petition ought to be considered by the court off course after ensuring that no prejudice would be occasioned to the opposing parties.

It is my considered view that an election court should be flexible in its approach in the conduct of its inquiry as this is the only way that it can make a fair and substantive determination of all issues raised in an electoral dispute. Such an approach would be in tandem with **Article 259 2(d)** of the **Constitution** and **Section 80 (1)** of the **Elections Act**, which enjoins courts to administer substantive justice.

**68.** In this case, I am satisfied that no prejudice will be caused to the Respondents if the court were to consider this new ground even if it was raised in the petitioner's submissions considering that the issue featured prominently during the hearing of the Respondent's case. The Respondents through their witnesses namely DW3, DW8 and DW13 admitted that the people of Rubu and Mwambore villages voted at Kiunga primary school and proceeded to give a detailed explanation why voting could not have taken place at the designated polling stations in Rubu and Mwambore. The facts relied upon by the petitioner in the aforesaid new ground were therefore not contested.

Secondly, both Respondents were served with the Petitioner's submissions and had opportunity to respond to the issues raised in the new ground in their submissions which they did in their written submissions.

**69.** With that said, I now proceed to consider the legality or otherwise of IEBC's conduct in allowing the people of Rubu and Mwambore villages to vote at Kiunga polling station on 4<sup>th</sup> march 2013.

As stated earlier, It is not disputed that the people of Rubu and Mwambore voted at Kiunga Primary School though their designated polling stations were at Rubu village and Mwambore Primary School. DW13, the Returning Officer for Lamu East conceded that the IEBC did not publish the requisite notice required under **Regulation 7(3)** to change the venue of voting from the designated polling stations to Kiunga Primary School when he stated as follows in his evidence under cross-examination;

***“There was no Gazette Notice advising people of Rubu and Mwambore to vote at Kiunga polling station. They did not need it since as a tradition they always voted at Kiunga Primary School.”***

Though under **Article 83 (3)** of the Constitution **IEBC** is mandated to make administrative arrangements to facilitate eligible citizens to vote, failure of the IEBC to publish a notice as required under **Regulation 7(3)** of the **Election Regulations** amounted to a breach of the law and was therefore an irregularity in the conduct of the election.

**70.** This irregularity however is not one which could have affected the outcome of the election. This is because there is undisputed evidence offered by the two Respondents proving that not a single soul was living in either Mwambore or Rubu villages on the election date; that the whole population in those villages were displaced by the shifta menace and that everybody moved and settled at Kiunga where they had been residing for many years. That they have always voted at Kiunga Primary School even in the General Elections of 2007 and during the Referendum.

There is also undisputed evidence to the effect that even for purposes of participating in the disputed election, they had been registered as voters at Kiunga primary school and that the inhabitants of these two villages actually exercised their right to vote though at a different location from the designated polling stations. Since the petitioner did not tender any evidence in support of this ground, there is no evidence to suggest that the voters in these two villages were disenfranchised by failure of IEBC to issue and publish a notice as required by the law.

**71** As a matter of fact, the evidence on record shows that the voters of the two villages voted in great numbers. The form 35s submitted in court for Rubu village and Mwambore primary school indicates that out of 62 registered voters at Rubu village, 55 voters casted their votes. This translated to a voter turn out of 89%. Mwambore Primary school polling station had 124 registered voters out of which 113 of them voted. This translated to an impressive 91% voter turn out. Besides this high voter turn out, the statutory forms used to declare results in those polling stations and the result of the recount conducted by the court shows that the petitioner actually won in those two polling stations having garnered a total of 85 votes compared to only 28 votes obtained by the 1<sup>st</sup> Respondent. This is clear evidence that the IEBC's breach of the law as regards voting outside the designated polling stations did not in any way disadvantage the petitioner.

#### **Transposition errors/irregularities in Form 35's & Form 36's**

**72.** In his pleadings and in submissions made on his behalf, the Petitioner claimed that some Form 35s used to record results in the county were irregularly made after the announcement of results by the Presiding Officers and after they were handed over to the agents. Mr. Ndegwa argued in his submissions that this is why forms for Witu Primary School, Witu Mjini Secondary School and Ndaui Dispensary annexed to the Petition were different from rectified forms availed to the court by the 2<sup>nd</sup> Respondent after the Petition was filed. That some forms were not signed by agents allegedly because they were not made at the polling stations; that the forms were unreliable as some of them like those for Lake Kenyatta did not specify the Streams in respect of which they had been prepared; that they bore uncountersigned alterations and contained transposition errors made when posting results from forms 35 to 36.

And that because of all these irregularities, he lost about 900 votes as his votes were reduced while those of the 1<sup>st</sup> Respondent were inflated.

During his evidence in cross-examination however, the Petitioner confirmed that he was not deprived of any vote as a result of transposition errors in the eight polling stations he had specifically pleaded in his Petition or on account of arithmetical errors in the calculation of total votes cast shown in some Form 35's, errors which were admitted by the 2<sup>nd</sup> Respondent but which, in his admission did not affect the individual votes obtained by each candidate.

73. Having made that observation, it is worth noting that the above irregularities are the same ones that the Petitioner relied on in his application for scrutiny and recount of votes cast in all polling stations in the County. It is worth noting that the gravamen of the Petitioner's case has always been that he had won the elections having garnered the greatest number of votes cast and that if the court were to order a recount of all votes cast in the County, it would discover that he had legitimately won the election.

With this in mind and considering the submissions made by Mr. Ndegwa concerning the aforesaid irregularities in Form 35's and the existence of two sets of Form 36's for the two constituencies in the County, the court was satisfied that some doubts had been cast on the veracity of the results and in a ruling delivered on 21<sup>st</sup> August 2013 ordered a recount of votes cast in all the polling stations in Lamu. In that ruling, I stated as follows regarding why I thought a recount of all votes cast in the election was necessary: -

***“I have taken the trouble to audit all the forms 35 and 36 submitted by the parties either as annexures to their pleadings or by the 2<sup>nd</sup> Respondent in compliance with Rule 21(b) of the Rules. I have noted that some of the forms 35 produced by the IEBC (2<sup>nd</sup> Respondent) in respect of some polling stations have alterations on votes indicated for the candidates which were not authenticated by the Presiding Officers by countersigning against them. Such polling stations are; Mtangawanda Primary School, Chandani Primary School, Lamu Fort Hall Stream II, Matondoni Primary School, Lamu Youth Polytechnic, Ndeu Primary School, Katsaka Kairu Primary School and Chalaluma Primary School. Worth noting is also the fact that there are some polling stations which had more than one form 35 such as Witu Primary School, Witu Mjini Secondary School and Ndau Dispensary.***

***In view of the above, it is clear to me that reasonable grounds exist to cast doubt on the veracity of the results captured on the two statutory forms which doubts can only be cleared by a recount.***

The court went further to state with regard to the allegations that some Form 35s and 36 had been unlawfully made after announcement of the results:-

***“Moreover, given that at the heart of the Petitioner's case lies the claim that the statutory forms used in the disputed election were not authentic, a recount of the votes for the entire county will enable the court ascertain not only the integrity of the election process but also the will of the people of Lamu County when they went to the ballot to choose their representative to the Senate.”***

74. The purpose of the recount exercise was to enable the court ascertain for itself the accuracy of the results shown in all the Form 35's and Form 36's prepared in the election. It was meant to determine the actual number of total votes obtained by each candidate in all polling stations in Lamu County by independently counting each ballot cast by voters in the county. This was the only way in my view the court would have ascertained the will of the voters in the county. In the circumstances, I agree with Mr. Balala's and M/s Muraguri's submissions that where a court makes an order for either scrutiny and recount of votes or a recount of votes like the one which was ordered and undertaken by this court, the recount exercise cures any irregularities or errors that may have been committed by the 2<sup>nd</sup> Respondent in the process of tallying, counting and presentation of results in the statutory forms used to declare results.

Secondly, since the recount exercise involves opening up of the ballot boxes and undertaking a fresh count of votes from the ballots papers themselves (as can be seen from the methodology used by Deputy Registrar as shown in her report) the result of the exercise also settles any complaints made by the Petitioner regarding the alleged making of Form 35's or Form 36's after the announcement of the results of the election.

**Alleged invalidity of Constituency Form 36's and the County Form 36.**

75. In his submissions, Mr. Ndegwa advanced the Petitioner's position that there are no valid results in the Senatorial election in Lamu for three main reasons:-

Firstly, that the Form 36 for Lamu West Constituency was invalid and cannot be used to evidence results for the constituency since it was neither signed nor dated by the Returning Officer.

Secondly, that the 2<sup>nd</sup> Respondent had disowned the computer generated Form 36 for the constituency which it had furnished to the court in compliance with **Rule 21(b)** of the **Rules** and was purporting to rely on the handwritten copy of Form 36 annexed to the 1<sup>st</sup> Respondent's pleadings which was inadmissible in evidence.

Thirdly, that the County Form 36 which was used to announce the results was an illegal document which was made by the DRO Mr Jonathan Kazungu Ngowa after announcement of the results by the County Returning officer.

76. Mr Ndegwa also attacked the validity of Form 36 for Lamu East on grounds that the one submitted to the court was different from the one given to his agent at the tallying centre in the sense that its column for total votes cast, rejected and spoiled votes had not been completed while the one submitted to the court had those details.

He implied that the document had been made after announcement of the results. He did not however call any witness to testify that the Form 36 for Lamu East had been made after the results were announced. In any case, it is common ground that total votes cast which includes rejected and spoilt votes do not in any way impact on individual votes obtained by each candidate. The inclusion or exclusion of those votes could not have affected the accuracy of the results.

77. I will now deal with the three grounds raised by Mr Ndegwa to attack the validity of form 36 for Lamu West and the County Form 36. I will start with a consideration of the first two grounds together and thereafter deal with the last one separately.

In support of the first ground, Mr. Ndegwa submitted that the Form 36 for Lamu West Constituency had no probative value since it was neither signed nor dated by the Returning Officer. For this proposition, he relied on the case of **WILLIAM KABOGO GITAU V GEORGE THUO & 2 Others [2010] eKLR** where the court held as follows:

***“A form 16A which is not signed by presiding officer cannot constitute valid results which can be accepted for tallying by a returning officer. A form 16A which is not authenticated by the stamp of the electoral body cannot be said to contain valid results which can be validated.”***

He also relied on the majority decision by the Court of Appeal in **JAMES OMINGO MAGARA & 2 OTHERS V MANSON ONYONGO NYAMWEYA, [2009] eKLR** where the court stated that a Form 16A which is not signed by the Presiding officer raises serious legal issues which may not be resolved by a forensic audit of an election for it was the signature of the Presiding Officer which would authenticate the document as having been prepared by a person in-charge of the particular polling station.

78. It was also the Petitioner's case that the County Returning Officer (C.R.O.) Mr. Silvano Buko Bonaya had testified that an unsigned and undated Form 36 was not acceptable and that therefore, he did not have jurisdiction to accept the form and use it for purposes of tallying results for the county and compiling the County Form 36. And that in the absence of a valid Form 36 for Lamu West, there were no valid results for the whole county since the form was one of the election instruments used to tally results for the entire county. For this reason, Mr. Ndegwa urged the court to nullify the 1<sup>st</sup> Respondent's election.

79. In his response, Mr. Balala submitted that all issues touching on irregularities of Form 35's or Form 36's were cured by the recount ordered by the court and the results thereof.

Relying on the decision by Majanja J in **RICHARD KALEMBE NDILE'S CASE** (*supra*) while ruling on an application for scrutiny and recount, Mr. Balala urged the court to bear in mind that an election is a human endeavour and though perfection was an aspiration, allowance must be made for human error.

80. On her part, M/s Muraguri in her submissions urged the court to consider the function and role of a Form 36 in an election. She submitted that a Form 36 contains the aggregate results collated from Form 35's; that Form 35 is the true record of results as contained in the ballot box which are transposed to Form 36 and the results are then tallied; that the results in County Form 36 are the ones used to declare the winner in county elections and not the constituency Form 36's. And that the county Form 36 was dated and signed by the County Returning Officer together with some agents including the Petitioner's agent.

81. M/s Muraguri also invited the court to take judicial notice of the activities that took place in the tallying centre for Lamu West Constituency where the Returning officer had to receive Form 35s from 101 polling stations for six elections: that human error and mistakes could occur in such circumstances. Relying on the case **JOHO V NYANGE**, (*Supra*) M/s Muraguri urged the court to find that such an error cannot be used to invalidate the results.

82. After considering the party's rival submissions on this point, I find that it is not disputed that the Lamu West Form 36 does not bear the name of the Returning Officer, that it is not dated nor signed by the Returning Officer.

With due respect to Mr Ndegwa, I do not find substance in his submission that the CRO did not have jurisdiction to use the Form 36 for Lamu west in the tally of the County results because since it was not dated or signed by the Returning officer (RO), it was "***unacceptable.***"

Learned counsel did not remember to tell the court in his submissions that the County Returning Officer had also testified that he had considered the Form 36 for Lamu west to be valid as its authenticity was not in question given its title and the endorsement of the IEBC's stamp on its face.

It is also important to note that Mr. Ndegwa did not question the accuracy of the results declared in that statutory form.

83. I now wish to turn to the authorities cited by Mr Ndegwa in support of his submissions namely the **WILLIAM KABOGO GITAU CASE** and the **JAMES OMINGO MAGARA CASE** (*supra*) These authorities are distinguishable from the present case. I wish to observe that these two cases were decided in the previous legal regime where election results in polling stations were recorded in a form known as Form 16A. Form 16A in that regime is the equivalent of our current Form 35.

The two cases relate to the legal effect of failure to date and sign form 16A (our form 35) by the Presiding Officers at polling stations but in this Petition, the Petitioner has not questioned the validity of Form 35's prepared in the disputed election. He has only questioned their admissibility in evidence on grounds that they are uncertified copies of the originals which had not been brought within the provisions of the **Evidence Act** which allows admission of secondary evidence.

This court had occasion to rule on this issue in its ruling delivered on the 25<sup>th</sup> July 2013. I have no intention of revisiting the issue again in this judgment save to add that a challenge on the admissibility of documents is quite different from a challenge on their legal validity.

**84.** The authorities cited by the petitioner are not applicable to this case since the Form 35's in this petition are duly signed and dated by all the Presiding Officers. They also bear an IEBC stamp. Their validity is therefore beyond question.

I concur with M/s Muraguri's submissions that Form 35's are the Primary documents used to record results in an election and when their validity is not disputed, they express the voters will in an election. In Kimondo J's words in **KAKUTA MAIMAI HAMISI V PERIS TOBIKO Nairobi Election Petition No. 5 of 2013.**

***“Form 35 records the total votes cast, the valid votes, rejected votes and the total registered voters. It is a snapshot of the materials in the ballot box ...***

It is common ground that when results are recorded in Form 35's, they are thereafter tallied and posted to Form 36's for the constituencies and eventually to the County Form 36.

This in my opinion means that if there are no issues regarding validity of Form 35s or accuracy of results recorded therein and there is no evidence to suggest that the election had not been conducted in a free and fair manner, the Form 35s reflect the will of the electorate in choosing their political leaders as expressed in the ballot paper.

The form 36 is a secondary document and its validity or otherwise or any irregularities it might contain cannot change the results declared in Form 35s.

**85.** I do not think that the failure to date and sign a form 36 can invalidate the results declared therein. It is not in doubt that the last general elections presented to the IEBC and its officials an unprecedented challenge of enormous proportions.

In my opinion, the magnitude of the work that was in the hands of Mr. Stephen Karani the Lamu West Constituency Returning Officer and the pressure to deliver results within short timelines must have resulted into fatigue and lack of diligence on his part. His failure to sign and date the form 36 must have been an inadvertent omission which can be attributed to human error. Besides, this was a post-counting anomaly which could not have affected the will of the electorate. In any event, this irregularity was cured by the recount of the votes cast in the County which verified the votes which had been cast in Lamu West for each of the contestants in the disputed election.

**86.** In my view, the attack by Mr. Ndegwa on the validity of Form 36 for Lamu West Constituency takes the form of a technical objection on a matter of form of a document as opposed to its substance. It is an objection that cannot be sustained in the new constitutional dispensation which lays a lot of emphasis on substantive justice.

**Article 159 (2)(d) of the Constitution** which is replicated in **Section 80 (1) (d) of the Elections Act** obligates courts to disregard procedural technicalities and to administer substantive justice. It is my finding that the failure to date and sign the Form 36 for Lamu West was an irregularity which could not have affected the validity of the results declared in the County Form 36.

If the court were to sustain Mr. Ndegwa's objection, it would be tantamount to ignoring the fact that the people of Lamu West actually voted and their votes were recorded in the respective statutory forms. It would amount to an interference of their sovereign power to elect a leader of their choice to represent them in the National Assembly as a Senator.

**87.** As regards the claim that the form was inadmissible in evidence given the provisions of **Section 35 of the Evidence Act** and the fact that it was not submitted to the court by the IEBC but by the 1<sup>st</sup> Respondent, I find that this is yet another objection made by the Petitioner on a procedural technicality.

In my considered view, the important point to note is that Mr. Stephen Karani (DW14) in his

evidence identified the form 36 as the document he had prepared declaring results for the Constituency. Under the law of evidence, he is the author/maker of that document. This means that the authenticity of that Form 36 is not in doubt.

There is no complaint by the petitioner that the content of the Form 36 for Lamu West or rather the results declared therein had been altered by the 1<sup>st</sup> Respondent. It is therefore irrelevant in my view whether the form had been submitted to the court by the 1<sup>st</sup> Respondent or by the 2<sup>nd</sup> Respondent because either way, the Form 36 would still be part of the court record and subject to the court's consideration when resolving issues raised in the Petition.

**88.** Finally, it is now time to consider the alleged invalidity of County Form 36. This allegation appears to have formed the backbone of the petitioner's case. Mr. Ndegwa in his submissions claimed that the County Form 36 lacks legal validity mainly because it was unlawfully made by the Deputy Returning Officer for Lamu County (DRO) after the CRO had announced the results of the election; that the DRO made the County Form 36 on 7<sup>th</sup> March 2013 and backdated it to 6<sup>th</sup> March 2013 purporting it to be the document used in the announcement of the results. That these facts are proved by the arrest, prosecution and conviction of the DRO in **Malindi Criminal Case No. 180 of 2013**; that the judgment of the subordinate court was a judgment in rem under **Section 44 of the Evidence Act** and that it was binding on this court on findings of fact made therein.

It was Mr. Ndegwa's further submission that the making of the statutory form after the announcement of the results was an illegality which affected the validity of the results.

For this reason, he invited the court to nullify the election of the 1<sup>st</sup> Respondent to give the people of Lamu a chance to participate in fresh credible elections.

The CRO testified before the court as DW15 and narrated how he declared the results of the election on 6<sup>th</sup> March 2013 from a Form 36 he had prepared, dated and signed on the same date.

While admitting that his deputy was arrested and prosecuted in **Criminal Case No. 180 of 2013**, and that he testified as a witness in that case, he failed to see what bearing the prosecution of the DRO had on results he had already announced on 6<sup>th</sup> March 2013.

His evidence was largely corroborated by DW13 and DW14 who confirmed in their evidence that they saw the CRO tallying results from the constituency Form 36's on 6<sup>th</sup> March 2013 and compiling the County Form 36 before announcing the results on the same day.

**89.** Counsel for the Respondents in their submissions argued that the Petitioner had not adduced any evidence to prove that the County Form 36 was made on 7<sup>th</sup> March 2013 and not on 6<sup>th</sup> March 2013 when the results were announced. They submitted that only this court is constitutionally mandated to determine the validity of elections and the court in doing so cannot rely on the proceedings and judgment of a lower court. It was their contention that the judgment of a subordinate court was not binding on this court being the High Court.

**90.** Having analysed the evidence adduced on this allegation and the submissions by the parties, I wish to state from the outset that I wholly agree with Mr. Balala's and M/s Muraguri's submissions that the subordinate's Court's Judgment evidencing the conviction of Mr. Kazungu Ngowa in **Criminal Case No. 180 of 2013** is not binding nor persuasive to this court. This is an obvious fact and Mr. Ndegwa's submissions that the subordinate's court judgment was binding on this court are clearly misplaced.

It is my view that this court can only make a determination on the allegation made by the petitioner based on the evidence placed before it in the course of the hearing. And the only evidence before the court on this claim is the evidence given by the 2<sup>nd</sup> Respondent's witnesses including the CRO since no evidence had been tendered by the petitioner in support of his

allegation on this point. Even the judgment by the subordinate court evidencing the conviction of the DRO which the petitioner so heavily relied upon in a bid to prove his allegation on the alleged invalidity of the County Form 36 was not properly produced as evidence in this petition. It was handed over to the court by Mr. Ndegwa from the bar.

**91.** Looking at the evidence before the court, I find that the 2<sup>nd</sup> Respondent has proved that the CRO actually made a Form 36 on 6<sup>th</sup> March 2013 after tallying results from the two Constituencies which he used to announce the results. I make this finding from the evidence tendered by DW13 and DW14 who testified that they saw the CRO make the County Form 36 after tallying results for the County. There is also evidence to corroborate DW15's evidence that after announcement of the results, he proceeded to Nairobi and handed over results declaration forms (County Form 36) for the County elections including the declaration of results for the senatorial election to the team leader at the national tallying centre at the Bomas of Kenya. The declaration of result forms were received by the said team leader as per the confirmation of receipt contained in the document titled "**Hand over by Returning Officer to team leader**". I notice that the first part of the document signed by the County Returning Officer is dated 6<sup>th</sup> of March 2013 while the second part confirming the receipt of the declaration of result forms by the team leader is dated 7<sup>th</sup> of March 2013. The County Returning Officer explained the discrepancy in dates on the two parts of the document by saying that the form 36 of the Senatorial election was received by the team leader after midnight hence the date of 7<sup>th</sup> March 2013. **See document titled Hand Over by Returning Officer annexed to the County Returning Officer's affidavit at page 27 of the 2<sup>nd</sup> Respondent response.**

**92.** I have looked at the County form 36. It is dated 6<sup>th</sup> March 2013 and it is signed by the CRO and two agents who included the Petitioner's agent Mr. Salim Busaidy who also dated it 6<sup>th</sup> March 2013. The Petitioner did not call his agent as a witness to deny that he had signed the form on 6<sup>th</sup> March 2013 or to say that he had signed it on 7<sup>th</sup> March 2013 and backdated it to 6<sup>th</sup> March 2013.

In view of the foregoing, I have come to the conclusion that the petitioner has not proved by any evidence that the County Form 36 was an illegal document. I am satisfied that there was no irregularity in the Form that could have affected the validity of the results declared therein.

**93.** For the foregoing reasons and findings on all the alleged irregularities which had been identified by the Petitioner in this Petition and those which cropped up in the course of the hearing, I am convinced that the Petitioner has failed to discharge his evidential burden of proving that the said irregularities existed save for one of them. And even for the irregularity that was proved, there was no proof that it adversely affected the outcome of the election.

### **Results of the Recount**

**94.** As stated earlier in this judgment, this court ordered a recount of the votes cast in all polling stations in Lamu County on 21<sup>st</sup> August 2013 following an application filed by the Petitioner.

The recount exercise was supervised by the Deputy Registrar of the High Court at Malindi who filed her report on 28<sup>th</sup> August 2013. The report was served on the parties on the same day it was filed in court.

It is important to note that the report was duly signed by the nominees who had represented each of the parties during the entire recount exercise including the Petitioner's nominees. They all signed the report without noting any objections, negative comments or protest.

The table below shows results of the recount as shown in the Deputy Registrar's report.

SERIAL NO.	NAME OF CANDIDATES	TOTAL NO. OF VOTES CAST (RE-COUNT)	TOTAL NO. OF VOTES CAST (IEBC)	DIFFERENCE AFTER THE TALLY
1.	ABDULRAHMAN ABOUD ALI	2,055	2,052	3
2.	ABU MOHAMED ABU CHIABA	15,162	15,086	76
3.	BATHROMEW CHEGE KIHENJO	1,025	1,029	-4
4.	CHARLES MUSUNGU ARIKU	257	260	-3
5.	GEORGE NJENGA WAKAHU	813	826	-13
6.	HASSAN ABDALL ALBEITY	14,368	14,688	-320
7.	MICAH NGANGA GITHUKA	5,278	5,270	8
8.	SEIF SHEYUMBE MWENYEALI	2,675	2,659	16
9.	ZEINAB MUSA ADAM	1,599	1,578	21
	<b>TOTAL</b>	<b>43,232</b>	<b>43,448</b>	

95. In their final submissions, each of the parties made submissions on the results of the recount which I have carefully considered.

As can be seen from the foregoing table which makes a comparison between the results announced by the County Returning Officer on the polling day in respect of the total votes obtained by each of the candidates in the election and the total number of votes garnered by each

candidate after the recount and any variance thereof, it is clear that the results announced by the Returning Officer were by and large accurate save for a few mathematical errors.

The results show that some candidates lost and others gained a few votes after the recount.

Cumulatively, the results of the recount demonstrates that there were no major discrepancies in the counting and tallying of votes by the IEBC's officials which could have affected the outcome of the election. The report does not show that the tallying process favoured the 1<sup>st</sup> Respondent as had been alleged by the Petitioner in this Petition. In fact the results show that the Petitioner was wrongly credited with a total of 320 votes.

**96.** After the recount, the Petitioner lost 320 votes while the 1<sup>st</sup> Respondent gained 76 votes such that the 1<sup>st</sup> Respondent's votes increased from 15,086 to 15,162 while those of the Petitioner reduced from 14,688 to 14,368 votes. From these results, it is clear that the 1<sup>st</sup> Respondent had won the election having obtained the majority votes of 15,162. The Petitioner was the 1<sup>st</sup> runner's up having garnered a total of 14,368 votes. The winning margin thus increased from 398 to 794 votes. The difference between the results declared by the IEBC and the results of the recount show a thin margin of error of about 0.5% which is obviously so negligible that it could not have affected the validity of the results of the election.

**Was the 1<sup>st</sup> Respondent validly elected as Senator for Lamu County**

**97.** My evaluation of all the evidence presented by the parties in this Petition leaves me with no doubt that the election was conducted and supervised by the 2<sup>nd</sup> Respondent substantially in accordance with the constitution and the relevant law in a manner that was free, fair and transparent. Mr. Ndegwa in his submissions in support of his application seeking scrutiny and recount of votes cast in the election alluded to this fact when he stated :-

***“Let me clarify finally that in our application we are not asking for a scrutiny of the votes. We abandoned the prayer for scrutiny and state that we are only interested in a recount of the votes cast in the whole county. We are saying that the voters voted correctly and only a recount is necessary.”***

By this statement, Mr. Ndegwa was in my opinion confirming the Petitioner's position that he was satisfied with the way the voting process was conducted and that his grievance lay in the counting and tallying process and in the way that results were declared.

**98.** It is clear that the people of Lamu exercised their sovereign power and expressed their will through their participation in the election which this court was able to ascertain by a recount of all valid votes cast for each candidate who participated in the disputed election by an examination of the actual votes cast in the election.

The will of the people is expressed by the majority votes secured by the winning candidate and the primary duty of an election court is to sustain that will by giving it full effect. This court therefore cannot interfere with the will expressed by the people of Lamu in choosing the 1<sup>st</sup> Respondent Mr. Abu Mohamed Abu Chiaba as their representative to the Senate and must respect it.

Consequently, it is my decision that the 1<sup>st</sup> Respondent was duly and validly elected as the Senator for Lamu County in the general election held on 4<sup>th</sup> March 2013.

In the circumstances, I find that the Petition filed by the Petitioner lacks merit and it is hereby dismissed.

**99.** On the issue of costs, it is trite that costs follow the event.

The Petitioner has failed to prove his case as presented in his Petition and he is liable to pay the costs of both Respondents. This court therefore awards costs of the Petition to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

Under **Rule 36(1)** of the **Elections (Parliamentary and County Elections) Petition Rules 2013**, this court is empowered to apportion and cap the costs payable to parties in an election petition.

Taking into account the input, level of research and effort made by the parties in the course of the hearing and the number of day's taken to conclude the hearing, I will cap the costs payable to the Respondents at a maximum of Kshs 4,000,000 to be shared by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents equally. It is emphasized that the total costs to be paid to both Respondents should not exceed Kshs. 4.000.000.

The security deposit made by the Petitioner will be retained by the court pending taxation of costs by the Deputy Registrar.

A certificate in accordance with **Section 86(1)** of the **Elections Act** shall issue.

In conclusion, I wish to thank all counsel appearing in this Petition namely Mr. Ndegwa, Mr. Balala and M/s Muraguri for their co-operation and their splendid performance in prosecuting and defending the Petition.

I also commend my Legal Researcher Carolene Kituku, my Secretary Leonidah Nyaboke and Court Clerk Caroline Kadaga and other members of staff at the High Court in Malindi for their support in facilitating the timely determination of the Petition. Special mention must be made of M/s Liza Gicheha the Deputy Registrar of this court for her administrative support.

**C. W. GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at MALINDI this 26<sup>th</sup> day of September 2013**

In the presence of:-

Mr. Ndegwa instructed by Ndegwa Muthama & Katisya Associates for the Petitioner

Mr. Balala & Abed for the 1<sup>st</sup> Respondent

M/s Muraguri instructed by Muriu Mungai & Co. Advocates for the 2<sup>nd</sup> Respondent.

**C. W. GITHUA**

**JUDGE**