REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ELECTION PETITION 4 OF 2013

JOHN MURUMBA CHIKATI…….……
PETITIONER

Versus

THE RETURNING OFFICER,TONGAREN CONSTITUENCY…….....…1ST
RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION……..2ND
RESPONDENT

DAVID ESELI SIMIYU…….……3RD
RESPONDENT

JUDGMENT

INTRODUCTION

[1] This is one of the election petitions which were filed under the Constitution of Kenya, 2010. The Petitioner and the 3rd Respondent together with other candidates, contested for the seat of Member of National Assembly for Tongaren Constituency in the General Elections held on 4th March, 2013. On conclusion of the elections, the 3rd Respondent was declared by IEBC as the Member of National Assembly for Tongaren Constituency. The Petitioner was, however, aggrieved by the declaration of the results which declared the 3rd Respondent the winner of that election contest. He then, in exercise of his constitutional right of access to justice, filed this petition to challenge those results. The petition was filed on 8.4.2013 through AMEYO GUTO, ETOLE CO. Advocates. On the same day the petition was filed so also a security in the sum of Kshs. 500,000 was deposited in court vide receipt no. 0226206 in accordance with the law.

THE PETITION

Orders sought

[2] The Petitioner has prayed for the following reliefs:

1. *A declaration that the excess of votes cast in comparison with the registered voters in some*

polling centres, duplication and double entry of votes in the final tally sheet, the differences in votes cast in forms 35 with those with the final tally sheet, the deliberate omission of the Petitioner's votes in some polling centres in the final tally sheet contravenes Article 86 of the Constitution.

2. *An order that there be a scrutiny and recount of votes in the areas affected.*
3. *A declaration that denying some people the right to vote amounted to the violation and/infringement of their constitutional right to vote as entrenched in Articles 38 of the Constitution.*
4. *A declaration that the deliberate refusal by the presiding officers and the 1st Respondent to allow the Petitioner's agents to record the serial numbers of the remaining un-used ballot papers and not to supply them with Forms 35 was wrong, illegal and malicious.*
5. *A declaration that there was harassment and violence against voters by the 3rd Respondents agents which disrupted the election process by inflicting fear in the voters and hence low turnout in some polling centres.*
6. *A declaration that the last minute laying off of some trained and sworn IEBC polling clerks and subsequently hiring or untrained and unsworn polling clerks for clerical purposes was wrong, illegal and was aimed at mismanaging the whole electoral process to the advantage of the 3rd Respondent over the other candidates.*
7. *A declaration that DAVID ESELI SIMIYU was not duly elected in the said election of 4th March, 2013,*
8. *A declaration that the whole election process was marred with electoral mismanagement, massive irregularities and malpractice, including interference and mishandling of electoral materials by IEBC officials and therefore the whole process is null and void.*
9. *A declaration that the 1st Respondent deliberately mismanaged the election process, manipulated the final results, colluded with the 3rd respondent by giving him undue advantage over other candidates, was partisan and partial contrary to Articles 10 (2) c, 81 (e) and 86 of the Constitution.*
10. *An order that there be a repeat of elections of member of National Assembly for Tongaren Constituency, Number 224.*

11. *Cost of the suit be awarded to the petitioner.*

12. *Any other or further relief as this Honourable court may consider fit and proper in the circumstances.*

Grounds upon which petition is founded

[3] The Petitioner broadly states that the said election was marred by massive irregularities and malpractices. He pleaded that the way the elections in dispute were conducted completely violated the provisions of the Constitution, the Elections Act and the Independent Electoral and Boundaries Commission Act. He, however, cited the following specific incidents, irregularities and malpractices:

a). *Over 200 IEBC polling clerks who had been hired, trained and taken oath of secrecy were laid off on the eve of the Election day and replaced with the untrained and unsworn clerks who did not understand the complexity of the electoral process.*

b). The IEBC Returning officer contravened the provisions of the law by failing to provide the political parties with a list of polling clerks in each polling centre in the constituency.

c). The deliberate refusal and/or failure by the IEBC polling clerks to use electronic BVR kits as provided by the law and transmit the results electronically was wrong and illegal.

d). Votes cast in nine (9) polling centres exceed the number of registered voters in those centres.

e). There was duplication of results in the final tally sheet in four (4) polling centres where the 3rd Respondent had more votes than all other candidates.

f). There were no results recorded in the final tally sheet for Mitoto Cattle Dip (004) and Neema RC Primary School (063) for all candidates.

g). At Muliro Primary School (071) the results for the Petitioner as captured in Form 35, were not reflected in the final tally sheet whereas all other candidates' results for the same centre are reflected.

h). In some polling centres, the number of votes declared and recorded in Form 35 varies with the number of votes recorded in the final tally sheet.

i). In some polling centres the number of votes cast, inclusive of the rejected and spoilt votes for the Member of National Assembly sharply vary with those of the County Representatives, Senator, Women Representative Governor and the President within the same centres.

j). The Presiding Officers declined to issue Forms 35 to Petitioner's agents and to agents of other parties except the agents for the 3rd Respondent.

*k). On 5th March 2013, an IEBC Presiding Officer, one P**ATRICK WANJALA SIKETI** was found cutting the seals of ballot boxes using a hacksaw blade and stuffing into the ballot boxes more ballot papers and has since been charged at Kimilili Law Courts in **CRIMINAL CASE NO. 365 OF 2013**.*

l). At Lukhuna FYM Primary School polling centre (089), voters were turned away at 2.30 p.m. by the Presiding Officer on allegation that the ballot papers had been exhausted.

m). The petitioners agents were denied entry into Naitiri Market Matatu stage (039) and Sirakaru S.A. Primary School (037) polling centre while the 3rd Respondents agents were allowed unrestricted ingress and egress in the centres.

n). At Pwani Cattle Dip (047) and Makumu Primary School (046) polling centres, two voters who had died were marked on the voter register as having voted.

*o). At Pwani Cattle dip polling centre, an elderly woman one, **TERESA NEKESA BARASA** found that her name on the manual register had been crossed indicating she had voted yet she had not.*

p). There was assault, harassment and intimidation of the Petitioner's agents and supporters by the 3rd Respondent's agents.

q). There was collusion by the IEBC Returning Officer, presiding officers and polling clerks to fabricate the final results in favour of the 3rd Respondent.

[5] For the foregoing reasons, the Petitioner prayed that the court nullifies the election of the 3rd Respondent as the Member of the National Assembly for Tongaren Constituency.

RESPONDENTS RESPONSES

[6] The Respondents filed their respective responses and provided legal and factual answers to each and every allegation pleaded by the Petitioner. Broadly put, they denied that the election was marred with electoral malpractices and instead pleaded that it was substantially conducted in accordance with the Constitution and all applicable electoral laws. They also averred that even if there were errors, those were ordinary human errors in any human enterprise. They prayed for the petition to be dismissed with costs.

COURT'S RENDITION

EVALUATION OF EVIDENCE AND SUBMISSIONS

PRELIMINARIES

Burden of proof: legal burden of proof and evidential burden

[7] In every judicial proceeding, the subject of burden and standard of proof will forever remain one of preliminary significance. I will settle it by re-stating what I said in **BGM HC EP NO 2 OF 2013 LUKOYE V ALFRED SAMBU & 3 OTHERS** that:

> *[34] The two terminologies; the burden of proof and standard of proof are closely related subjects, albeit distinct, they have been wrongly used interchangeably. More trouble is found in understanding that burden of proof entails legal burden of proof and evidential burden. The legal burden of proof in an election petition rests with the Petitioner; for he is the party desiring the court to take action on the allegations in the petition. The evidential burden initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shifts to the party who would fail without further evidence. See HALSBURY'S Laws of England, 4th Edition, vol. 17. Therefore, where the Petitioner has laid prima facie evidence against the Respondent including the Electoral Body which as a matter of law must be a Respondent in an election petition, the law says that evidential burden has been created on the shoulders of the Respondent who would fail if he does not adduce evidence in rebuttal. These incidents of legal burden and evidential burden were clearly enunciated in the case of* ***RAILA ODINGA V IEBC & 3 OTHERS SEPREME COURT OF KENYA ELECTION PETITION NO 5 OF 2013*** *when the Supreme Court rendered itself thus;*
>
> > *''…a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden''.*
>
> *And also that:*
>
> > *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 did affect the validity of the elections. It is on that basis that the respondents bear 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 asse acta: all acts are presumed to be 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''.*
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> *[35] It is, thus, not in doubt that at the point where the Respondent would fail without further evidence, the Respondent should discharge the evidential burden through offering evidence in rebuttal. If the Respondent offers no evidence in rebuttal, judgment may be entered against him on the basis of the preponderant evidence adduced by the Petitioner. The Petitioner will not succeed because the Respondent has not offered evidence in rebuttal but because the Petitioner has proved his case to the required standard of proof,*

and the absence of evidence in rebuttal by the Respondent only sanctifies the confidence of the court to enter judgment in favour of the Petitioner. Of the essence is that the evidential burden is the obligation of the Respondent once it has been properly created by the evidence tendered, and failure to discharge the evidential burden disadvantages the Respondent with the result that he fails and the Petitioner succeeds.

Standard of proof

[36] The standard of proof refers to the level or degree of proof demanded by law in a specific case in order for the party to succeed. It is now settled that in election petitions, the standard of proof in allegations other than those of commission of electoral criminal offences is higher than that of balance of probabilities required in civil cases although it does not assume the standard of beyond-reasonable-doubt. However, where the Petitioner alleges commission of criminal offences, the standard of proof on the criminal charges is beyond-reasonable-doubt. Judicial authorities on this subject are legion and I need not multiply them except to cite a few; ***RAILA ODINGA V IEBC & 3 OTHERS SEPREME COURT OF KENYA ELECTION PETITION NO 5 OF 2013, BERNARD SHINALI MASAKA V BONNY KHALWALE & 2 OTHERS [2011] eKLR,*** *and* ***JOHO V NYANGE & ANOTHER (NO 4)(2008) KLR (EP) 501.*** *The ultimate test that the evidence must satisfy, thus, is;*

''Did the Petitioner clearly and decisively show the conduct of the election to have been devoid of merits, and so distorted, as not to reflect the expression of the people's electoral intent? (RAILA ODINGA V IEBC & 3 OTHERS SEPREME COURT OF KENYA ELECTION PETITION NO 5 OF 2013)

[8] The preliminaries have been tackled. I now wish to state the issues and then proceed to make the overall impression on the submissions by the parties and place the evidence tendered in court on the threshold set by law for a complete determination of the issues in controversy herein.

ISSUES

[9] Parties tendered evidence and filed submissions on the four issues agreed by parties and framed by the court. The issues were

1) Whether the elections were conducted in accordance with the law by the 1st and 2nd Respondent

2) Whether the 3rd Respondent was validly elected

3) Whether the 1st Respondent engaged in acts of violence; and

4. *Whether there should be a scrutiny and recount of votes.*
5. *Cost of the suit.*

THE FRAMEWORK

[10] The Petitioner relies heavily on breaches and non-compliance with the law in the conduct of the election in dispute by IEBC and its electoral officers. He pleaded that the election in dispute was not conducted in accordance with the constitutional principles on free and fair elections. The Petitioner was categorical that the legal basis for the petition is the Constitution, Elections Act and the Independent Electoral and Boundaries Commission Act. That should dictate the framework and approach the court should adopt in determining this dispute. The General Principles for the Electoral System are provided in Article 81 of the Constitution that-

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

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

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

(c) fair representation of persons with disabilities;

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

(e) free and fair elections, which are

(i) by secret ballot;

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

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner

[11] Parliament then enacted the Elections Act and other subsidiary legislations to provide for a robust legal framework for the conduct of elections in accordance with the Constitution. And where there is an election petition, election courts have been ordained by the Constitution and the law, to inquire into and examine whether the election in dispute complied with those Constitutional principles, and the Laws and Regulations governing the conduct, management and supervision of Elections. After which, the court should reach a decision on the basis of the relevant law. This case should be weighed against Section 83 of the Act which provides;

> *"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."*

[12] Following the path in **BUSIS HC EP NO 3 OF 2013 JOHN OKELLO NAGAFWA V IEBC & 2 OTHERS,** it is not disputed that where an election is challenged largely on non-compliance with the law by the electoral body, it would be quite profitable, in construing section 83 of the Elections Act, for the court to draw guidance from the propositions made in the words of Lord Denning in **MORGAN VS SIMPSON [1974] 3ALL ER 722** where he stated at page 728-

> *"Collating all these cases together, I suggest that the law can be stated in these propositions (1) If the Election was conducted so badly that it was not substantially in accordance with the law as to Elections, the Election is vitiated, irrespective of whether the result is affected, or not … (2) If the Election was so conducted that it was substantially in accordance with the law as to Elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the result of the Election. (3) But, even though the Election was conducted substantially in accordance with the law as to Elections, nevertheless if there was a breach of the rules or mistake at the polls and it did affect the result then the Election is vitiated."*

ISSUE 1: WHETHER THE ELECTIONS WERE CONDUCTED IN ACCORDANCE WITH THE LAW BY THE 1ST AND 2ND RESPONDENT

[13] The Petitioner made numerous allegations on malpractices and irregularities committed by the 1st and 2nd Respondents which according to him rendered the election invalid. I will deal with each of those allegations conclusively.

Flawed recruitment of polling clerks

[14] The Petitioner testified and submitted that election is not an event but a process involving voter registration, nomination of candidates, campaigns, actual voting, tallying and announcement of results. Each of those steps is vital for free, fair and impartial electoral process. Therefore, if any step is compromised, the results of the elections are affected. According to the Petitioner, the 1st Respondent pre-designed and planned to bend the law by manipulating results and engaging in massive electoral malpractices. He cited one of the malpractices consisted in flawed recruitment of polling clerks and failure to avail the list of agents to political parties and candidates as required by law. He contended that the 1250 prospective polling clerks identified and recruited were reduced to 1,111 then to 724 in a spun of few hours. The reduction was suspect and the polling clerks who were finally hired did not take the oath of secrecy as required by law. That was tantamount to a conspiracy to manipulate results. The affidavit of Robert Mutoro was referred to but I should state that he was not called as a witness for cross-examination and so his evidence is worthless. The less I talk about Robert Mutoro the better.

[15] The Respondents particularly the 1st and 2nd Respondent discounted the allegation that the polling clerks were not properly recruited. Mr Alfred Rono, the IEBC witness explained how the polling clerks were recruited. The initial number earmarked for recruitment was 1290 but recruited only 1,111. That number was later reduced to 724 upon instructions by IEBC. The witness told the court that he and his deputy selected 724 polling clerks from the group of 1,111 recruited earlier. The selection was on the basis of merit and qualifications and took the best among the best. The exercise was transparent and those who were given the job were trained accordingly for the job. The training was for two days which he considered to be adequate given the nature of the work of a polling clerk.

[16] Such a malpractice should be proved on a standard higher than a balance of probabilities but not as high as beyond any reasonable doubt. See **RAILA ODINGA V UHURU KENYATTA & 3OTHERS** and **JOHO V NYANGE (2008) KLR (EP) 500.** The explanation by Alfred Rono on the recruitment of the electoral officers was a plausible one which the court accepts as such. On the other hand, it is the duty of the Petitioner to prove the allegation that the recruitment was suspect and was indeed a conspiracy to manipulate results. The conspiracy theory should have pleaded and proved all essential elements of a conspiracy in legal terms. Other than just stating the recruitment was suspect, there is no single tangible evidence of a scintilla of suspicion or conspiracy on the part of IEBC or any other person for that matter. The Petitioner also claimed the agents were not trained or were not trained properly. One would have expected the Petitioner to have placed before the court technical evidence which showed that the training the agents underwent was not sufficient for the job or was bogus simply tailored to hoodwink the electorate. But, ultimately, it ought to have been shown that the flawed recruitment eventually affected the results of the election. Section 83 of the Elections Act is quite apt that non-compliance with the law should be such that it affected the results. That has not been established by the Petitioner. That ground therefore fails.

Cutting of seals and ballot boxes: the case of Patrick Siketi

[17] The Petitioner testified and submitted that the Respondents seem to justify the illegality in the actions of Patrick Wanjala Siketi of cutting of ballot boxes. It is not in dispute that the incident took place and the said Patrick Wanjala Siketi was arrested and charged with the offence of Interfering with Election Materials Contrary to Section 58 (h) of the Elections Act in **KIMILILI PMCRC NO 365 OF 2013**. The incident, according to the Petitioner was a negation of the Constitution, especially Article 81 and 86(d). Thus, it affected the elections. The Respondents argued and submitted that the incident related to a ballot box for the County Representative and,

therefore, did not affect the results for the Member of National Assembly.

[18] The incident was quite unfortunate and is abominable in an election. It must, however, be established that it affected the result of the election in dispute. A criminal offence was committed by an IEBC Officer. But the fact of commission of the offence is one thing whilst the effect of the offence to the integrity of the election is another thing altogether. Invalidation of election results on the ground of electoral offences will depend on a number of legal considerations. The major ones would be who committed the offence and the nature of the offence? For instance, if the candidate commits act of bribery, the election is void even on a single incident; whereas, if the bribery is by the agents, it is permissible to allow the candidate to claim exoneration from the acts of the agents. It is also the view of the law that where the bribery was by another person, it would invalidate a candidate's election if it was so extensive that it affected the results. See **HALSBURY'S LAWS OF ENGLAND VOL 15 PARAS 113 & 114.** In the case of Patrick Wanjala Siketi, it must be established that the offence committed seriously impeached the integrity of the election, in that; the results produced thereto were fundamentally affected. That is why the law was tailored that the electoral officers are held personally responsible for the offences they commit. If it was to be the contrary, a single and simple regulatory offence would be used to invalidate the entire election. I do not, therefore, think it will be fair for the Petitioner to state that the Respondents are justifying an illegality when they say that the incident did not affect the results for the Member of the National Assembly. The Petitioner must prove to the standard set that the non-compliance with the law by IEBC Officer affected the results. If the non-compliance with the law was in the nature of commission of an offence, the standard of proof thereof is very high; beyond reasonable doubt.

[19] The evidence tendered by the Petitioner was that Mr Patrick Siketi was cutting ballot boxes and seals. Serial numbers that were provided by witnesses were not shown to have been serial numbers for ballot boxes and seals used in the election in dispute. The fact that he was arrested and charged in court for interfering with election material is a matter before the trial court and the less the court talks about it the better. But strictly speaking, in law the fact that he was arrested and charged in court does not *per se*, in an election petition, prove beyond reasonable doubt that he committed the offence. That fact would need more cogent evidence, particularly now that a claim of ballot boxes having been were cut is being made, for that is not the subject of the criminal trial at Kimilili; proof of that specific charge of cutting ballot boxes is needed if the court is to act on the matter under section 87 and make a report to the DPP. The Petitioner was surprised that the person was charged with interference with only one ballot box for County Representative and cast doubt on the matter. But he was not able to categorically dispute the charge sheet was accurate. Going by the evidence by the Petitioner and his witnesses, Patrick Wanjala Siketi cut ballot boxes and seals of unknown number. Nonetheless, Patrick Wanjala Siketi is already charged with a criminal offence and reliance on section 87 may not be appropriate on that count. Even the Petitioner's Witness No. 10 **MOSES WEHANJA WENANI** did not say much. He only said that he was aware that an official of IEBC had been arrested for cutting and stuffing ballot boxes. The Petitioner did not establish beyond reasonable doubt that the person committed an offence of cutting ballot boxes and seals whose numbers have been tendered before the court, nor did he establish that the non-compliance would put the victory of the 3rd Respondent to any doubt.

Pre-marking of register: denial of right to vote

[20] The Petitioner's witness, Teresa Nekesa Baraza (PW-5) told the court that she was registered a voter at Pwani Cattle Dip Registration Centre. She checked the register and confirmed her name was there. But she did not vote at Pwani because she was told by the polling clerks when she presented herself for voting that her name was not in the register. She was then sent to Pwani FYM Primary School where she was told her correct polling station is Pwani Cattle Dip. She went back a third time to Pwani Cattle Dip Station and that is when the polling clerks told her that her name had been crossed and so she had already voted. She insisted she had not voted at all. The witness did not produce any evidence to show that she was a registered voter at Pwani Cattle Dip Station polling station.

[21] The Petitioner called yet another witness **CHRISTINE NASWA SIMIYU** who said that she was an agent for UDF Party at Pwani Cattle Dip Polling Station to corroborate the evidence of PW-5. The only difficult the court finds with the evidence of PW6 is that she was a party agent who had been trained on what to do in the event there is any malpractice in the polling station she had been assigned; i.e. the agent ought to record any such incident and refuse to sign Form 35. But, she confirmed to the court that she did not record anything in or refuse to sign Form 35. She voluntarily signed Form 35 which was shown to her during cross-examination. She confirmed also that the results contained in that Form 35 reflected the votes that were counted in her presence. The allegation was a clear violation of the right of voters and should have been taken more seriously by PW6; refuse to sign Form 35 and record reasons for her refusal, make an official report to the police or do such other things that a prudent party agent would do to secure evidence on the matter. If she really observed the tribulations of PW5 the way she claimed in her evidence, then nothing would have been easier than for her to indelibly demonstrate it in Form 35 and thereafter register official complaint in the manner provided in law. As an agent that was her duty and the law has been so tailored to keep record of all happenings as safe design for answers when the integrity of the election has been question. In her evidence, the court observed that she took the matter in the most casual manner and also failed to give much detail that would persuade the court to say the issue has been proved. Those shortcomings strike a blow to the evidence of PW5 rather than corroborate it. The only quarrel she had was that she was not given Form 35. That matter needed evidence that would prove it beyond balance of probabilities for it to be a properly established ground to nullify an election. I find that it falls short of the standard required and it fails.

Principal Register of Voters and excess voting

[22] The Petitioner contended in his evidence and submissions that the 1st Respondent sent to him a register via e-mail which was attached as JMC-5(b). He urged the court to find that the 1st Respondent deliberately sent the wrong register to the Petitioner in order to confuse him in the preparation of campaigns. He further argued that the 1st Respondent applied double standards by sending different registers to the Petitioner and the 3rd Respondent. The e-mail produced is electronic evidence which must accord to the legal requirements if it should be proof of a particular fact. The Petitioner could not prove that the e-mail was indeed send by IEBC although it bears the address purportedly belonging to Alfred Rono, the Returning Officer. The e-mail address was alfredronoh@gmail.com. There was need for the Petitioner to provide evidence that the address was the official address for IEBC to communicate such crucial electoral information. Secondly, the annexure being a web-based document generated through printing process, the Petitioner ought to have provided evidence which guarantees the integrity of the annexure as required in law. Those things were lacking with the effect that the annexure is put to doubt. Indeed in cross-examination by Mr Miller, the integrity of the e-mail extract was seriously questioned.

[23] The 1st Respondent supplied the Principal Register of Voters pursuant to the order of the court and agreement of parties. The Principal Register of Voters provided was the one prepared in accordance with section 3 of the Elections Act with all details set out in Form A in the Schedule to the Elections (Registration of Voters) Regulations, 2012. That Register was served upon the Petitioner. The Petitioner accepted that the Register provided by IEBC was the proper register of voters. The document he relied upon did not have the names and other details of the registered voter as a register should have. He only fastened a quarrel on the fact that IEBC sent to him the wrong document. Has he shown that indeed IEBC conspired to confuse him or that it used double standards by sending different registers to candidates? That is the question that I should consider. As the court observed earlier on, the e-mail communication was not shown to have emanated from the official address of IEBC. I agree with the submissions by the 1st and 2nd Respondents that the document purportedly sent to the Petitioner was not the register of voters. That was apparent on the face of the document itself. Every citizen, including the Petitioner should know what the law provides about the register; its contents. From the onset, the Petitioner should have realized that the document he was holding did not have the names of voters and other relevant details thus not

in conformity with the register of voters under the law. He should have been vigilant and registered a protest officially with IEBC on the alleged register sent by the Returning Officer. IEBC had the Principal Register of Voters published and posted in their website for access by the public. Although the Petitioner argued that the website was jammed, he ought to have sought some confirmation of sort from IEBC on the authenticity of those documents, and so on and so on. He did not do any of these things or anything to obtain the correct register. He just went ahead to use the document. As conspiracy is a contrived design to defraud, it must be established in law as required. The Petitioner must show that there was an agreement among the Respondents to disadvantage the Petitioner and favour the 3rd Respondent by issuing different registers to different candidates. That is where real proof that the election in question was a fraud, not free and fair lies. Those are issues which the court would consider in arriving at a decision on the matters raised. The Returning Officer denied having sent the document to the Petitioner. In sum, the Petitioner did not prove the conspiracy theory on the issuance of different registers to disadvantage him whilst offering undue advantage on the 3rd Respondent. The ground fails.

[24] Following the decision of the court with regard to the document the Petitioner relied on in calculating the number of votes allegedly in excess of the registered voters, that claim, invariably, was based on a misconception. It is, therefore, not proved as required by law.

Ghost/illegal polling streams

[25] It was the contention of the Petitioner that there were illegal streams that were created by the Presiding officers in Ndalu, Makhanga and Naitiri polling stations. The Returning Officer **Mr ALFRED RONO** denied that IEBC officers created illegal polling centres in Tongaren Constituency. According to the RO, there were polling stations with two streams. This was done where the station had more than 600 voters. The candidates were informed in advance of creation of extra streams as a matter of election management. All parties were informed verbally of all the streams created. Nairitiri (031) had two streams according to Form 36 although Form 35 for Naitiri stream 2 was missing. Form 36 shows there was a second stream for Naitiri. The RO told the court that the errors in Form 36 do not go to the root of the election. The constituency had 119 polling stations and 134 polling streams. From the evidence on record, it is clear that candidates were aware that polling stations with a huge number of voters were to be provided with more than one stream. The Petitioner acknowledged that fact except that in Ndalu, Makhanga and Naitiri polling stations, the results of one stream had not been credited in Form 36 or were credited in Form 36 but Form 35 was missing. The court is satisfied the streams created were not illegal. The instances complained of were very few and the numbers involved are small and ascertainable which, even if deducted from the final results or added to the results of the respective candidate, would not affect the results. It is in two stations where double entry is recorded. The votes left out are very few to change the results. The errors are not of a profound effect.

[26] It has been acknowledged by the 1st and 2nd Respondents that there were some few human errors which were occasioned by the fact that the officers were human and tired after staying awake for many hours. The court is aware that world over there has never been a perfect election. Some errors would be present except the court should be minded to ask if those errors were of a nature that affected the results. It is only the critical or fundamental errors that affect the results of an election, which constitute a proper ground for nullification of an election. They may be widespread and massive or just few errors but which are of monumental or profound adverse effects on the integrity of the electoral process. Whereas I agree the error were few, it is not per se the quantity but the effect of those errors on the results that counts.

Form 35 and 36: inaccuracies, duplication and non-entry of results

[27] The Petitioner has made a statement which I find to be at very high level of generalization; that *most of the forms had not been signed or when photocopying was done, signatures and other initials were deliberately left out.* Such submissions will require specificity of the particular forms and the nature of the shortcoming. That notwithstanding, the Petitioner has cited some examples

where there was duplication of results entered in Form 36, to wit, Naitiri FYM Primary School (032), Lungai Primary School (), Makhanga Cattle Dip (040), Sango Dispensary (041), Namunyiri R.C.E.A Primary School (114), St. Paul's Secondary School, Narati (115).

[28] Some other results were omitted from Form 36 such as for Mitoto Cattle Dip (004), Neema RC Primary School (063) and Muliro Primary School (071). The Petitioner also contended that there were some Form 35s which were missing. To him the entries must be accurate; *free from error, exact, as a record, precise.* With these inaccuracies and missing statutory Form 35, the announcement of the winner was premature. The Petitioner referred the court to the thinking by Lord Denning in the case of **MORGAN v SIMPSON [1974] 3 All ER 722 at 728.**

[29] The Respondents admitted that there were few errors in Form 36 but that cannot substantially alter the results. According to them, the few mentioned areas had about 1,000 voters. The petitioner cannot beat Eseli even if all these votes in the affected areas were credited to him. The errors in Form 36 can only be explained by reference to Form 35, which is the primary source. The results are given to the RO through a hard copy of Form 35 by polling clerks. Results are then announced from Form 35 and not Form 36 in the presence of candidates and agents. Any person who objects to results that have been announced should raise it at the tallying centres or polling station. It is possible for errors to be made. Neema Primary School results were not entered (063) although there was no dispute registered by the Petitioner on it. The station had 179 voters and if the results are factored in, the gap between Petitioner and Eseli can only be larger. The 1st and 2nd Respondents testified that only results for Mitoto Cattle Dip that was not received. And those votes even if they are included will not change the will of the people of Tongaren. The Respondents found grounding in the law that he would still have declared the winner even if all results had not been received provided that the remaining results will not change the overall results. It was his duty to declare results nonetheless. He further explained that the Form 35 for Mitoto Cattle Dip had been inadvertently locked in the ballot box which would have required a court order to re-open the box. He, therefore, did not see any reason to insist for those results to be availed.

[30] Upon evaluation of the evidence and the statutory Form 35 and 36 in issue, it is clear that there were errors. For instance, Naitiri FYM Primary School is indicated to have had two streams in Form 36 and results for two streams were entered in the form. But, there was only one Form 35 for Naitiri which gives one result of 164 total votes cast. The other entry under Naitiri must have been an error. It could be that the second results indicated under Naitiri are for Lungai as explained by the Returning Officer. However, the results for Lungai stream 2 were 377 and not 356. But that error could be reconciled by looking at Form 35 and only 11 extra votes will be added to the total number of votes cast. The other duplication is on Makhanga Cattle Dip. A similar entry is found under Sango. The results that were erroneously entered were 194. An easy reconciliation is possible by looking at Form 35. The figures are quite small and may not be said to affect the results. The errors are of a nature reconcilable in arithmetic stunt. They were not widespread or in profound proportions which would put the victory of the 3rd Respondent to doubt. I note that there was a general consensus that IEBC created more than one stream in polling stations where registered voters exceeded 1000. From the record and the register of voters, Naitiri had a total of 435 registered voters and could not, therefore, be one of the stations which needed more than one stream. I also believe the explanation by IEBC that Makhanga Cattle Dip (040) had only one stream. It had 141 registered voters. The first entry should be the correct one for Makhanga. The second one was erroneously entered for Makhanga though it was result for Sango. The error is reconcilable by looking at Form 35. The duplication could not therefore have affected the result in the sense of the law as to call for nullification of the results. The consideration the court should emphasize upon is the effect the errors will have on the results as provided for in section 83 of the Elections Act. See also the cases of **JOSIAH & 4 OTHERS V OGUTU & ANOTHER (2008) 1 KLR (EP)** and **JOHO V NYANGE & ANOTHER (NO 4) (2008) 3 KLR at 501.** Lord Denning's thought was about affecting the results even where it may seem that the elections were conducted substantially in accordance with the law. That is the qualitative test which should also apply here.

BVR Kit, EVID and ERT Systems

[31] These abbreviations are not new to Kenyans, for having been notorious during the national tallying of Presidential results as well in the election Petitions filed in the Supreme Court of Kenya following the elections for 4th March, 2013. BVR stands for Biometric Voter Registration Kit, EVID for Electronic Voter Identification Devices and ERT for Electronic Results Transmission System. I will not bother much on their various application and usage for fear of being branded a masquerade in electronic empire. The Petitioner pleaded in his petition that IEBC deliberately refused and or failed to use Electronic Kits as provided by law and transmit the results electronically which was wrong and illegal. The 1st and 2nd Respondents replied that despite best effort to use the electronic devises, the technologies experienced challenges not only in Tongaren but countrywide. The Petitioner made very terse submissions on the issue in his oral submissions that BVR failed throughout the Republic. Their purpose was noble; to minimize malpractices and enhance transparency. Their failure opened the election to malpractices. Little evidence was led on this issue by the Petitioner and only one of his witnesses, **AMMON WANYONYI** deposed in his affidavits on the failure of BVR Kits in Tongaren Constituency. But in spite of the scanty evidence offered by the Petitioner, the matter must be settled by the court for it had been pleaded. The decision by the Supreme Court of Kenya in the consolidated election petition by **RAILA ODINGA AND AFRICOG** offers a pointed answer to the allegations herein that:

> *''We take judicial notice that, as with all technologies, so it is with electoral technology: it is rarely perfect, and those employing it must remain open to the coming of new and improved technologies. Analogy may be drawn with the traditional refereeing methods in football which, as there defects became apparent, were not altogether abandoned, but were complemented with televisions, monitoring, which enabled watchers to detect errors in the pitch which had occurred too fast for the referees and linesmen to notice...But as regards the integrity of the elections itself, what lawful course could Independent Electoral and Boundaries Commission have taken after the transmission technology failed? There was no option, in our opinion, but to revert to the manual electoral system, as was done''.*

[32] There was no evidence that the electronic Kits were used in the compilation of the results in the election in dispute. Accordingly, I wish to state that the issue has been settled by the Supreme Court and I will say no more.

Use of Violence on Voters

[33] The Petitioner alleged that the agents of the 3rd Respondent intimidated, harassed and assaulted the supporters and agents of the Petitioner. The Petitioner and his witnesses did not identify the people responsible for the violence or connect them with the 3rd Respondent. These allegations impute criminal charges and must be proved beyond reasonable doubt. There was no concrete evidence that was adduced to prove commission of the criminal offence of Using Violence on Voters to the standard of beyond reasonable doubt. Although registration numbers of the two vehicles which were alleged to have transported the alleged goons was provided to court, there was no specific evidence to prove the vehicles conveyed gangs in the first place, and in the second, to unleash violence on voters or supporters. That connection is vital in a claim such as this, and the ground thus fails.

Closure of polling station before time

[34] **JULIUS BAKASA WASIKE** was the Petitioner's witness No 2 and was a candidate for the seat of Member National Assembly for Tongaren Constituency during the election in dispute. His complaint was that he was informed through his phone that Lukhuna Polling Station had been closed at 2.00 p.m. He did not, however, name the person who gave him the information about the malpractices nor tender anything that showed he received the alleged call. He did not also name any of the voters he claimed he found stranded at Lukhuna Polling Station when voting had been stopped. He alleged that he called the Returning Officer on the matter although he did not depose

to that fact in his affidavit. Albert Makhanu Wanjala was one of his agents at Lukhuna station who signed Form 35 and did not raise any objection.

[35] On further cross-examination by **MILLER,** he claimed over 100 people did not vote. Yet he did not indicate the names of people who did not vote. He simply looked at the votes cast and the registered voters to arrive at the assessment of the number of people who did not vote. When the station was re-opened at 4.00 p.m. some people came back and voted. He did not know how many people came back to vote. He knew at least one person who did not vote. According to Form 35 at page 103 of IEBC

documents, registered voters were 685 and 563 voted. That was a substantial turn out. He received most votes at Lukhuna polling station. Form 35 at page 105 of IEBC documents shows registered voters were 685 and 590 voted which was a substantial voter turn-out. He also received most votes in that stream.

[36] In re-examination by **MR. LETOLE,** he said that he saw people going away after Lukhuna polling station was closed early and then re-opened. The Returning Officer Patrick Sitati produced ballot papers after they had made some noise. Despite all these things, his agent signed the Form 35 and they did not make any comments on any malpractice.

[37] **LINET SWALA** was the Petitioner's witness No 3. She said that she was in the voting hall at Lukhuna Film Station when ballot papers ran out. She became concerned and asked the Presiding Officer about it. Voting stopped until 4.30 p.m. when it resumed at 4.30 p.m. when some people came back and voted. Voting was then closed at 5.00 p.m. as there were no people on the queue. In a complete contradiction, she said that there were people waiting to vote at the time the polling station closed. She confirmed that Lukhuna Film Station had 685 registered voters and 563 turned out to vote.

[38] **LINET SWALA** became dramatic when she was asked by **Mr MILLER** whether she any relationship with the Petitioner. She protested vigorously in disapproval of that question. She denied that the Petitioner did help her to get the IEBC job. But she could not explain why she shared BOX number was 5027-00506 Nairobi with the Petitioner. Although she told the court that she had no personal interest in giving evidence in the case, the court observed her demeanour to be quite wanting and she was not truthful in her evidence especially on the reasons why she chose to testify in favour of the Petitioner.

[39] The two witnesses did not give the details of the voters who were stranded when the station was allegedly closed illegally. That was a grave matter which needed to be proved specifically by calling the affected voters to testify. None was called or even identified or at all. The witnesses confirmed that the agents even for the political party on which **JULIUS BAKASA WASIKE** contested signed Form 35s without recording the occurrence they were speaking to. The way the witnesses chose to handle the incident is most undesirable for they ought to have recorded the details I have noted above and taken the preferred action in dealing with the situation in a more careful manner. The allegation is, therefore, not proved and it fails.

ISSUE 2: WHETHER THE 3RD RESPONDENT WAS VALIDLY ELECTED

Form 35: unstamped, unsigned by agents and bears no comments

[40] The Petitioner submitted that the 3rd Respondent was not validly elected. The major reason he cited was that the election was conducted in a manner that was not in accordance with the Constitution. He urged that forty four (44) Form 35s were not stamped thus vitiating the election. Others were not signed by agents or by all agents. In addition, other Forms did not bear Presiding Officer's statutory comments. He relied on the case of **WILLIAM KABOGO GITAU V GEORGE THUO & 2 OTHERS [2010] eKLR.** The court in that case set out the qualitative approach that looks more into the effect of malpractices upon the systems and processes employed

in the conduct of the elections. The number of votes by which the candidate won will not be the issue where the integrity of the process has been fundamentally dented by electoral malpractices. Any malpractices which seriously impeach the process so also impeach the results coming from that process. Has the Petitioner established malpractices which seriously impeach the integrity of the process and the results of the election in dispute?

[41] Some few Form 35s in Tongaren Constituency had errors as I have noted earlier. The errors include failure to stamp the forms and lack of statutory comments. Statutory comments have been provided for in the Form by law. They serve a useful purpose; to assist the court, the public and IEBC to assess the integrity of the election. In a sense, they are one of the legal sources of information on the conduct of the elections. When they are absent a large portion of useful information is unavailable especially where it is needed in the resolution of an existing dispute. The court has said in **BGM HC EP NO 2 OF 2013 MOSES LUKOYE V ALFRED SAMBU & 3 OTHERS** that even where there were no ugly incidents, so to speak, any positive comment will serve the purpose of assessing the integrity of the election; whether it was free and fair. It is, therefore, not apt to state that there was nothing worth of commenting on because there were no adverse issues. Nevertheless, lack of statutory comments does not *per se* vitiate or invalidate the Form and cannot by itself be a basis for a nullification of results. The Petitioner should prove his case by establishing to the required standard all the malpractices or irregularities he is alleging happened during, and which vitiated the election. In that context, the failure to state the statutory comments in the Form will only be an added ground to the other cogent evidence the Petitioner will have adduced against the electoral body in the manner it conducted the elections. Failure to record the comments in the Form will also entitle the court, once the Petitioner has adduced prima facie evidence, to place evidential burden on the electoral body to prove the contrary.

[42] What about Form 35 which had not been stamped? The court takes the view that affixing the official stamp is important, but, lack of it does not invalidate the Form. The requirement of the law under regulation 79 of the Elections (General) Regulations, 2012 (hereafter General Regulations) is that the Presiding Officer signs the statutory Form. Under Regulation 5 of the General Regulations, Presiding Officer includes the Presiding officer and Deputy Presiding Officer duly appointed by IEBC. The statutory Form is valid once it has been signed by the Presiding officer; both the Presiding Officer and the Deputy Presiding Officer or by either of them. The Forms were signed by the Presiding Officers appointed for the polling stations in question and therefore, lack of the official rubber stamp does not invalidate the Form or the results thereto. It is only one Form 35 for Milele FYM Primary School which had not been signed by either the Presiding Officer or Deputy Presiding Officer. The Form had been stamped, but that is not sufficient in law. The results for Milele FYM Primary School were invalid and should not form part of the overall results. The questions, however, is if the exclusion of those results would affect the results announced. Certainly it does not.

[43] In the same vein, Regulation 79 does not require that the statutory Form must be signed by agents. It states clearly in Regulation 79 (6) & (7) that absence of candidates or agents or failure to sign the Form by candidates or agents does not invalidate the results declared in the Form.

[44] In sum, the allegations impinging the Form 35 on grounds of lack of a stamp, signatures of all agents and statutory comments fall short of the required thrust for it to be a basis for nullification of an election results. Much more is needed say, how the lapses affected the results. That is lacking in this case. The ground is not proven and it fails.

Failure to supply agents with Form 35

[45] Although the Petitioner did not submit on this ground of his petition, some evidence was adduced towards that end by the Petitioner himself and by his witnesses namely; **COLLETA WANYAMA LUMULI** and **CHRISTINE NASWA SIMIYU** both claimed to have been agents for UDF Party at Kewa Polling Station and Pwani Cattle Dip Polling Station, respectively. The Respondents also submitted on the issue. In cross-examination they established that **COLLETA**

WANYAMA LUMULI and **CHRISTINE NASWA SIMIYU** did not annex the letter of appointment as an agent. **COLLETA WANYAMA LUMULI,** however, claimed to know the Presiding Officer as Martha and the Deputy Presiding Officer as Philip Kongani. She also told the court that she knew the agents from the other parties who were with her including Allan Muyumba, Erastus Simiyu Wanyama, Miriam Nasimiyu and Jesto Mang'ara. Both witnesses, however, witnessed the counting and signed the Form 35s. **COLLETA WANYAMA LUMULI** said she was the first one to sign the Form. What is of essence is that, all that she told the court was not stated in her affidavit and specifically paragraph 5 which was the principal paragraph on the gist of her complaint. The appointments of both witnesses as agents were put to question. It is not surprising that the Form 35 at page 38 of IEBC documents does not bear the name or signature of **COLLETA WANYAMA LUMULI** who claimed to have been the first one to sign the Form. All she has done is to state generally that the Presiding Officer declined to give her Form 35 without essential details. There was no much information on the matter; the affidavit and her evidence in court did not give much information about the other agents for whom she swore the affidavit and the failure to be provided by Form 35. In the circumstances, the claim is feeble and unsubstantiated by evidence. It has no solid basis and has not been proven. It fails.

Denial of entry to polling station

[46] The Petitioner made allegations that his agents were denied entry to Naitiri Market (039), Sirikaru S.A. (037) and Lukhuna stations. **MOSES WEKHANYA WENANI** who claimed to have been appointed the chief agent of UDF Party testified in support of this allegation. He did not, however, produce the appointment letter in court. That lapse puts to doubt the status of the chief agent which he claimed to have had at the time. He also simply made generalized claims that he was denied entry to Naitiri market, Sirakaru and Lukhuna stations. Those allegations were not supported by any evidence. The claim is not proven as by law required. The witness of the 1st and 2nd Respondents **GENTRIX MACHUMA SIPETI** gave evidence that she did not prevent any agent who was properly appointed to enter into the polling station. I find that the claim by the said **MOSES WEKHANYA WENANI** that he was entitled to sign Form 35 at the time is misplaced in the face of the fact that he had not been committed as a party agent to any particular polling station. I do not wish to expand that point further.

''Dead voters''

[47] The allegation that dead voter were marked as having voted is somewhat a serious allegation that would impinge on the integrity of the elections if proved. The Petitioner alleged that two deceased voters namely **SHEM MUKHEBI WALUMBE** and **PENINAH NAKHANGU SITATI** were marked as having voted at Pwani Cattle Dip (047) and Makumu Primary School polling stations, respectively. The Petitioner produced a letter from the Assistant Chief of Kabufwe Location as prove of the deaths of the two voters before the elections. The letter is not the original. I also agree with the submissions by the 1st and 2nd Respondents that the letter cannot be evidence of death as it is not a certificate of death issued under the Birth and Death Registration Act. Its evidentiary value is therefore nil for the purposes of proving the death of the two voters. The allegation is not therefore, proven and it fails.

Comparison of results for Presidential, Senatorial, County and Woman Representative Elections

[48] On this issue, I cannot do any better than to find and hold in the step of the ruling by **E. Ogola J** in **KK HC EP NO 6 OF 2013 JUSTUS GESITO v IEBC & 2 OTHERS** that;

> *''It is possible that a voter chooses to vote for only one elective position, say Presidential, and leaves the rest. The outcome is that the results of the six elective posts will not tally. For that reason alone, the Court cannot delve into the results of other elective posts in comparison to that of the Member of National Assembly, for doing so will be setting a dangerous precedent''.*

Scrutiny

[49] The Petitioner has in his submissions sought for scrutiny and recount of votes cast in the election in dispute. He has cited several reasons, the major ones being that; 1) he has established that there are discrepancies in Form 35 which can only be verified through scrutiny; 2) some Form 35 are missing and can only be found in the ballot boxes; 3) the overriding objective of the court and Article 159 of the Constitution would justify scrutiny in the interest of substantive justice. The Respondents especially the 3rd Respondent have resisted the prayer for scrutiny on the reasons that; 1) the application had been made earlier and denied by the court; 2) the application is tantamount to re-opening the suit; 3) the application should be made formally.

[50] The relevant law that governs scrutiny is section 82(1) and rule 33 of the Elections Act and Election Rules, respectively. Section 82(1) of the Elections Act provides:

> *82(1)-An election court may, on its own motion or on an application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may allow."*

[51] Rule 33 of the Election Petition Rules, 2013 provides further that:-

> *33 (1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.*

[52] According to Rule 33(2) of the Election Petition Rules, 2013, the court must be satisfied that there are sufficient reasons to order scrutiny or recount of the votes. However, scrutiny under Rule 33 (4) shall be *confined* to the polling stations in which the results are *disputed*.

Purpose of scrutiny

[53] H. A. Omondi J in the case of **BGM HC EP NO 5 OF 2013 PHILIP MUKWE WASIKE v JAMES LUSWETI MUKWE AND TWO OTHERS** captured the purpose of scrutiny very well as follows:-

1. *To assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.*
2. *Assist the court in determining the valid votes cast in favour of each candidate.*
3. *Assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process.*

[54] I am also guided by the observations by Warsame J (as he then was) in the **ELECTION PETITION NO.1 OF 2008, DICKSON DANIEL KARABA V HON. JOHN NGATA KARIUKI & 2 OTHERS**, that:-

> *…the purpose of the exercise…was to ascertain whether there exist any material discrepancies between the results captured in Form 35 which necessitates the determination of the number of votes cast and obtained by each aspirant. It is only after this exercise that the court can form an opinion whether the results contained in the Form 35 are correct***.**

When an order of scrutiny and recount may be made

[55] As the court stated in **BGM HC EP NO 3 OF 2013 [2013] e KLR**, the legal dimension for granting the relief of scrutiny is contained in Rule 33(2) of the Election Petition Rules, 2013; that the court must be satisfied that there are sufficient reasons to order scrutiny or recount of the votes in only the polling stations in which the results are *disputed.* Sufficient reason is shown when enough materials have been placed before the court which would impel the court to order scrutiny

or re-count of votes. Sufficiency of the materials so placed before the court will depend on the nature of the claims being put forward by the Petitioner in support of scrutiny and the court's evaluation of the evidence in support of those claims. The weight that the court will attach to the pieces of evidence provided will also depend on the grave effect the matters complained of would have on the integrity of the electoral process and the results that were announced. In one sense, the court should be able to conclude that the irregularities complained of are of a nature that would completely compromise the electoral process such that the results coming out of such process cannot be said to be free and fair. In another sense, the irregularities or malpractices cited should also be capable of affecting the results. That is the satisfaction the court should look for in an application for scrutiny or recount. I find support of this stand I have taken in numerous judicial decisions, say, HASSAN ALI JOHO V. JOTHAM NYANGE & ANOTHER **(2006) e KLR** where the court held:-

> *An order for scrutiny can be made when it is prayed for in the petition itself and when reason for it exists....It is made when there is ground for believing that there are irregularities in the election process or if there was a mistake on the part of Returning Officer or other election official.*

And also the case of **WILLIAM MAINA KAMANDA V. MARGARET WANJIRU KARIUKI & 2 OTHERS (2008) EKLR** where the court observed:-

> *Where statutory forms are not signed as prescribed in law, it would be difficult to determine whether the results shown in the forms represent a true and accurate account of the ballots.*

[56] I have evaluated the evidence tendered in court and have come to certain conclusions and findings. The findings are that the irregularities cited including errors, duplication of results, lack of statutory comments, lack of official rubber stamp and only some agents signing the statutory Form 35, did not affect the result of the election in dispute. When that is put on the scale, the inescapable conclusion is that there has not been established any or sufficient reason for the court to order scrutiny. There was no claim or proof that the Forms had not been properly signed by the IEBC official. I therefore, disallow the request for scrutiny and recount of votes.

[57] One reconciliation though; Rule 33 of the Elections Rules should be read together with section 82 of the Elections Act. The phraseology *'at any stage'* used in rule 33(1), in so far as it relates to the scope when scrutiny may be applied for, should be understood within the words *'during the hearing of an election petition'* used in section 82(1). My own view is that hearing does not close until parties have made their final submissions unless they have expressed to the court that they do not wish to make written or oral submissions. Thus, submissions are part of the hearing and scrutiny may be applied for at that stage.

CONCLUSIONS AND FINDINGS

[58] The allegations that the election was not conducted in accordance with the Constitution and the Elections Act have not been proved. The irregularities and errors established in the statutory Forms were not of the kind of non-compliance that would affect the results or put the victory of the 1st Respondent in doubt. The errors could be associated with human errors expected in any activity which was conducted by human beings. On this persuasion, see the decision by Maraga J (as he then was) in the case of **JOHO V NYANGE (2008) 3KLR (EP) 500.**

[59] The available evidence does not clearly and decisively show that the election was devoid of merits, and so distorted, as not to reflect the will of the people. The integrity of the process was not seriously impeached as to vitiate the results coming from that process. Substantially, the elections were conducted in accordance with the constitutional principles girding the elections. The elections were not vitiated and so they were free and fair. They were the reflection of the will of the people. Accordingly, the 3rd Respondent was validly elected as the Member of National

Assembly for Tongaren Constituency. The petition is, therefore, dismissed.

On costs

[60] The court awards costs to the Respondents. Under rule 36(1) (a) of the Elections Rules, the court is empowered to specify; the total amount of costs payable; and the persons by and to whom the costs shall be paid. The court is aware that counsels for the 1st, 2nd and 3rd Respondents travelled from Nairobi in all occasions they were required to appear before the court. Accordingly, costs to the 1st and 2nd Respondents shall not exceed Kshs 1,500,000. Costs to the 3rd Respondent shall not exceed Kshs 1,000,000. The security for costs that was deposited in court shall remain so deposited pending the taxation of costs in accordance with Rule 37 of the Elections Rules, and shall be paid out toward the costs that shall have been taxed. It is so ordered.

Industrious advocates

[61] I must commend the advocates who were involved in this case for their industry and well-researched submissions. I saw deliberate and visible efforts by counsels to push the law from where it currently seems to end; leap-frog development of the law as envisaged in Article 259 of the Constitution. The patience and the energy they exhibited in the conduct of these proceedings rejuvenated the court to follow suit; and the timelines that were set were duly met. The punctuality attending this case was superb.

Dated, signed and delivered in open court at Bungoma this 30th day of September 2013

F. GIKONYO

JUDGE

30/9/2013

Before: Hon. F. Gikonyo, Judge

CA: Khisa

APPEARANCES:

Petitioner represented by Letole

Respondents represented by Lubulelah for 1st and 2nd Respondents, Miller and Wena for 3rd Respondents.

COURT: Judgment delivered in open court.

F. GIKONYO

JUDGE