



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
ELECTION PETITION NO.3 OF 2013

MUSIKARI NAZI KOMBO PETITIONER

Versus

MOSES MASIKA WETANGULA1ST RESPONDENT

I.E.B.C2ND RESPONDENT

MADAHANA MBAYAH3RD RESPONDENT

JUDGMENT

INTRODUCTION

[1] On 4th of March, 2013, the people of Kenya went into the first General Elections under the Constitution of Kenya, 2010. It was a unique election of its kind for; it was the first General Election under the Constitution of Kenya, 2010; and it consisted of six distinct elections for; President, Member of the National Assembly, Member of the Senate, Women Representative, Governor, and Member of the County Assembly. The Petitioner and the 1st Respondent were among those who contested for the Member of the Senate in that election of 4th March, 2013. The 1st Respondent was declared the winner in the election and, therefore, the Senator for the County of Bungoma. The Petitioner was aggrieved by that declaration and filed this petition. For completeness of record, the results that were announced for each candidate by IEBC which are under contestation were as follows:

<u>Name</u>	<u>Party</u>	<u>Votes Scored</u>
Lawrence Simiyu Sifuna	(URP)	14,631
Moses Masika Sifuna	(Ford-Kenya)	154,469
Mukhisa Kituyi	(UDP)	21,741
Musikari Nazi Kombo	(New Ford- Kenya)	125,853
Nixon Jeremiah Kukubo	(RPK)	3,678

[2] Following the announcement of results, the 2nd Respondent published a Notice in the Kenya Gazette dated 13th March 2013 declaring the 1st Respondent as the elected Member of the Senate for the County of Bungoma. For ease of reference and to avoid a dull repetition the Senatorial election for the County of Bungoma held on 4th March 2013 shall be referred to as the election in dispute.

THE PETITION

[3] The Petitioner filed this petition on 8th April, 2013, paid the requisite court fees and deposited the security for costs as required under the Elections Act and the Elections (Parliamentary and County Assembly Elections) Petition Rules, 2013 (hereafter Elections Rules).

Relief Sought

[4] The Petitioner prayed for the following reliefs:

- a) Scrutiny of votes recorded as having been cast in the aforesaid Senate elections for the County of Bungoma from all polling stations in the election held on 4th March 2013.
- b) Scrutiny of votes recorded as having been cast in the aforesaid Senate elections for the County of Bungoma from all polling stations in the election held on 4th March, 2013.
- c) Scrutiny of the rejected, void and spoilt ballot papers from all polling stations relating to the County of Bungoma.
- d) Recount of all valid ballot papers cast at the said Elections.
- e) The Senate Elections held on 4th March 2013 in the County of Bungoma be determined and declared null and void.
- f) It be determined that the 1st Respondent has not been and was not validly elected as the Member of Senate for the County of Bungoma.
- g) The said election of the 1st Respondent as the Member of Senate Assembly for the County of Bungoma be determined and declared null and void and a certificate to that effect be issued to the Speaker of the Senate.
- h) Such election offences and electoral malpractices on the part of omission and commission of the 2nd and 3rd Respondents as disclosed and found by this Honourable Court be reported to the Director of Public Prosecution for appropriate action.
- I) The Honourable court do find that the 1st Respondent has committed serious electoral offences and order him barred from participating in subsequent elections for a period of at least five years or as the court may deem just and expedient.
- j) The Respondents jointly and/or singularly be condemned to pay Petitioner's costs and the incidentals to this petition.
- k) Such further, other and consequential orders as this Honourable court make lawfully make.

Grounds of the petition

[5] The Petitioner set out numerous grounds on which the petition stands and also set out specific allegations against the Respondents and particulars thereof in support of the petition. He filed a Supporting Affidavit and a Further Affidavit pursuant to leave of the court. He also filed witness affidavits who would speak to the various allegations of commission of electoral offences and malpractices. The allegations he made broadly put relate to:

- 1) Violations of the Constitution and the Elections Act and Elections (General) Regulations, 2012;
- 2) Massive and widespread electoral malpractices; and
- 3) Commission of electoral offences.

[6] The Petitioner has, however, set out the specific allegations in the petition as follows:

- a) That there were breaches and violations of the provisions of the Elections Act and the Elections (General) Regulations, 2012, massive irregularities and/or electoral malpractices by the 1st Respondent personally and/or with and through his agents, campaigners and supporters and also by the 2nd Respondent, its officers and employees including the 3rd Respondent. The malpractices affected the results.
- b) The election in dispute was neither conducted in compliance with the Elections Act and the Regulations nor in accordance with the principles laid down in the electoral law and the Constitution of Kenya 2010- the principles of natural justice, rule of law and democracy.
- c) That the acts and omissions by the employees of the 2nd Respondent in the election in dispute were rampant, so fundamental and grave that the results of the election in dispute could not be said to be a true, lawful and proper expression of the will of the people of the County of Bungoma. Those acts and omissions negated purpose of electoral dispensation in the Constitution and must be nullified together with the declaration of the 1st Respondent as the winner of the elections in dispute.
- d) That the results for the election in dispute as announced, declared and published by the 2nd Respondent's officers and employees contained widespread instances of manipulation of returns in Forms 35 and 36 and in some instances the votes cast exceeded the number of registered voters.
- e) That the 2nd Respondent and its officers and employees failed to establish electoral systems which are accurate, secure, verifiable, accountable and/or transparent as required by the Constitution, the Elections Act and the Regulations and declared results which in many instances had no relation to votes cast at the polling stations.
- f) Further, the 2nd Respondent officers and employees developed methods and systems of election which were opaque and intended to manipulate the results.
- g) That there was a huge discrepancy between the votes cast in the election in dispute and those cast in the Presidential, Gubernatorial and Members of Parliament elections.
- h) That the 2nd Respondent and its officers, staff and other persons committed criminal offences under section 59 (1) (j), (k), (l) and (m) of the Elections Act for doing acts and things that they are prohibited from doing.
- i) That there was actual ballot stuffing, multiple voting or gerrymandering or

inflating of the number of votes in the tallying thereof by the 2nd and 3rd Respondents or their officers or they condoning or connivance at the foregoing malpractices to the advantage of the 1st Respondent.

j) That the 2nd Respondent and its officers and employees employed and relied on a manual tallying system which system was not only illegal and irregular but lacked transparency, accountability and which system was used by the 1st Respondent in collusion with the 2nd Respondent's officers and employees to manipulate the electoral process and in particular during the voting, counting, tallying and transmission of election results for County of Bungoma.

k) That the 2nd Respondent officers and employees excluded the Petitioner's agents from several counting and tallying centres and declared the election results for the senate seat on unsigned Form 36s. There was a multiplicity of Form 36's with variant entries, alterations and corrections which were made without the knowledge or involvement of the Petitioner's agents.

l) That the final results of the tallying undertaken, conducted and announced by the 2nd and 3rd Respondents in Form 36 for County of Bungoma do not correctly add up in the total sums for the different candidates and are, therefore, not a true and correct reflection and record of who ought to have been declared the winner of the March 4, 2013 County of Bungoma Senate elections.

m) On diverse dates between December 2012 and 4th march 2013 the 1st Respondent engaged personally and/or through his agents /servants in massive and widespread electoral malpractices and committed numerous election offences during the voter registration, voting, counting, tallying and declaration of results of the election in dispute. The malpractices and offences committed greatly undermined the legality, integrity and credibility of the results of the election in dispute.

n) On or about September 2012, the 1st Respondent held a meeting at Bungoma with his campaign agents and supporters where he laid out a strategy to be executed jointly and with the assistance of the 2nd respondent's officers and employees to have as many people as possible double register as voters in several registration centres including at Matibo Friends Registration Centre and Chebukaka Boys Registration Centre. He also called a meeting on 26.2.2013 at Generation Hotel at Bungoma Town to strategize on further manipulation of electoral process in his favour.

o) That the 2nd Respondent, its officers and employees allowed voters who had been registered more than once to cast their votes at Matibo Friends Polling Station and at Chebukaka Boys Polling.

p) That the 1st Respondent personally and/or with his agents and servants committed offences of bribery and treating of voters prior to the polling day and on 4th March, 2013. He held a number of meetings where he bribed and treated those in attendance by giving money after which he asked them to vote for him and the other candidates vying under the CORD Coalition.

Meetings where bribery and treating of voters took place:

1) Meeting for Bishops and pastors held at Nzoia Guest House on 5th February 2013-he gave those in attendance a sum of Ksh.2,000/= each.

2) On 20th February 2013, at a Meeting at Red Cross Kanduyi convened by

religious leaders-he, together with Hon. Alfred Khangati gave the pastors a total sum of ksh.260, 000/=.

3) On 3rd March 2013 at the home of one of his agents, at Misikhu Market, he gave ksh.200/= to each of those who attended.

4) On 3rd March 2013 at a campaign meeting convened by his agents at the home of the late Francis Saraduki, the 1st Respondent's campaign agents gave Kshs 100 to each of the more than 400 people who attended.

5) On 4th March 2013 the 1st respondent through his agent one Mr. Makwata bribed voters at Mupeli Polling Station; through his agents Dickson Mang'oli and Amos Wafula Khamara bribed voters at Namamuka Polling Station and Mungeti Polling Stations respectively; canvassed for votes at Kamasielo YM Primary School Polling Station and gave voters on the queue money; the 1st Respondent bribed and treated voters at Nabende Primary School Polling Station, Ngalasia Polling Station, Nalondo Primary School, Nalondo DEB Polling Station, Khalaba Market Polling Station, Namosi Polling Station, Sikata Polling Station and Kabuchai Polling Station.

- q. That the 1st Respondent directly and/or through his agents/servants conducted election campaigns and meetings outside the stipulated campaign period and in particular on 3rd March 2013, through his agents and supporters he convened and held a campaign meeting at Misikhu Market.
- r. That the 2nd Respondent's officers and employees at various polling stations in The County of Bungoma manipulated voters who needed assistance during the election in dispute to cast ballot papers in favour of the 1st Respondent and other candidates vying on Ford Kenya or CORD tickets.
- s. On diverse dates and times during the period January 2013 the 1st Respondent engaged directly by himself and/or through his agents and servants in acts of intimidation, threats and harassment of your Petitioner's supporters and agents.
- t. The 2nd Respondent's officers and employees allowed and executed a widespread and massive scheme where they pre-marked senate ballot papers in favour of the 1st Respondent and stuffed them into various ballot boxes e.g.. at Chebukwabi Polling Station, Khamulati Factory Polling Station, At Siuna A. C. Primary School Polling Station,-voters were issued with pre-marked ballot papers and when they enquired about it the Presiding Officer became hostile and ordered them to drop the ballot papers in the respective ballot boxes. At Kimilili Old Market Polling Station, a Presiding Officer assisted voters and marked about 40 ballot papers in favour of the 1st Respondent
- u. At Naitiri High School Tallying centre, a Presiding Officer stuffed ballot boxes with papers that had not legally and regularly passed through the vote casting process.
- v. That the officers of IEBC deliberately made false and inaccurate entries in the Statutory forms in order to give undue advantage to the 1st Respondent e.g at CDF Musese Market Tallying Centre, the entries made in Form 36 were very different from those announced at Baraki Polling Stations; at Sibanga Polling Station, the total number of votes cast for the senatorial elections were more than the number of registered voters.
- w. The officers appointed by the 2nd Respondent deliberately, knowingly and intentionally denied the Petitioner and or his lawfully appointed and accredited agents' access into polling stations e.g. Kamukuywa, Malakisi ACK, Buko Primary School and Kitayi RC Polling Stations and consequently denied access to the sorting, counting and tallying of the senate election results. Excessive force and biased security personnel were used to prevent and order Petitioner's agents out of polling stations e.g Kitayi primary School.
- x. That the 2nd Respondent's officers knowingly and deliberately refused and denied the Petitioner's lawfully appointed and accredited agents access to the statutory forms and to information in respect of the election in dispute during the voting and counting, tallying and declaration of results.
- y. On or about 5th March 2013 the Presiding Officer for Lukhuna Polling Station cut the seals of

- ballot boxes and stuffed ballot papers into the said ballot boxes. The officer was arrested and charged in court.
- z. The 2nd Respondent conspired with the 1st Respondent, his agents and/or servants to create artificial power blackouts at the County of Bungoma tallying centre and/or deliberately used and employed unsuitable and unlit tallying rooms. The power blackouts and poor lighting conditions were used and/or employed to rig the said elections. At CDF Musese Tallying Centre, the lights went off on the night of 5th March 2012 for over 30 minutes and when the lights resumed, the various party agents were chased away from the station by over 50 armed security officers.
 - a. The 2nd Respondent's electoral officers allowed persons and individuals who were not registered as voters to cast ballots at various polling stations resulting into over-voting.
 - ab. The 2nd Respondent and its electoral officers failed and/or refused to reconcile and sanitize the results from the various polling stations to the extent that it was not possible to tell which results was the correct and true reflection of the voting in the election in dispute. The voting, counting and tallying of the election in dispute was vitiated by gross and widespread irregularities and malpractices which fundamentally impugned the validity of the results as declared by the 2nd Respondent.

Specific allegations on error in Form 36-Constituency and County levels

- bc. The results announced by Returning Officers for Mt. Elgon, Sirisia, kabuchai, Bumula, Kanduyi, Webuye East, Webuye West, Kimilili and Tongaren Constituencies did not and were not corresponding with the results announced at the various polling stations of the said constituencies. The results announced at Tongaren Constituency were very different form the results stated and declared in Form 36 for the County of Bungoma Senate elections.
- cd. The results declared for Webuye East Constituency showed that the votes cast in favour of the Petitioner were 12,478 in figures and Twenty One thousand Two Hundred and forty eight in words.
- de. The 2nd Respondent's Returning Officer for Tongaren Constituency prepared and issued different Form 36's for the County of Bungoma Senate elections which forms showed different figures of the votes cast in favour of the Petitioner herein.
- ef. The form 36 declaration of election results for senate elections for Mt. Elgon Constituency did not include results for polling station number 62 Teremi S. A. Primary School.
- fg. Several Form 36s for the senator elections were not signed by the candidates' agents.
- gh. The senate results for Webuye East Constituency were materially different in the figures given for the final tally of votes cast from the Presidential, gubernatorial and women representative in the same county.
- hi. In several polling stations, the number of registered voters was inflated in the principal voters register and in Form 35 contrary to what was contained in Form 36.

Other allegations

- ij. Several names were removed from or added on the principal voters' registers for the County of Bungoma on or before the 4/3/2013 senate elections.
- jk. Several Form 36s for the senator elections were not signed by the candidates' agents.
- kl. The 2nd Respondent's Officer allowed dead voters to cast in several polling stations during the March 4th, 2013 elections.
- lm. The 2nd Respondent's electoral officials conducted part of the tallying of the votes cast during the March 4th 2013 elections at unauthorized and illegal places and stations and with the help and assistance of unauthorized person/s. In particular; on 4th March 2013 the Presiding Officer at Binyenya Primary School Polling Station allowed Mr. Marani Manyonge, a ford Kenya polling/counting agent to count the ballot papers and the said officer went to sleep. The Returning Officer and Presiding Officer for Bumula Constituency engaged the services of an unauthorized person to distribute Forms 35 and other election materials and equipment to various polling stations in the said Constituency, and in the reconciliation of the votes cast and tallied at Bungoma Council Hall and in the preparation of Form 36 for Bumula Constituency Senate elections. On 5th March 2013, they also engaged the services of an unauthorized and unqualified person to enter the

- manual data relating to the election in dispute using the excel worksheet.
- mn. On 5th March 2013 at about 5.00 p.m the Returning Officer for the County of Bungoma announced the results of County of Bungoma Senate election and declared the 1st Respondent as the winner of the said election which announcement was illegal and irregular and in violation and breach of the Elections Act and the regulations made thereunder.
- no. The Presiding Officer for the said polling stations ordered all the party/election agents out of the said station after the recounting of the votes cast but before the said agents had signed Form 35.
- op. The presiding officer at Kimilili Bus Park Polling Station marked ballot papers for assisted voters without the various election agents witnessing the said assistance.
- pq. At Lurare Polling stations the 2nd Respondent's Presiding officer and clerks were issuing voters with four ballot papers leaving out the ballot papers for Senator and Member of Parliament.

[7] By reason of the foregoing, the Petitioner averred and asserted that the entire electoral process for the election in dispute was irredeemably compromised and tilted in favour of the 1st Respondent. Further, due to numerous and widespread irregularities and electoral malpractices stated in the petition, it was and still is impossible to determine whether the registered voters in the County of Bungoma duly exercised their free will in voting for their Senator. Accordingly, the Petitioner pleaded that the results declared by the 3rd Respondent and gazetted by the 2nd Respondent were untenable, null and void and an abuse of the County's electoral system and process. That, for the reason of the illegalities, irregularities and malpractices stated and averred in the petition, the 1st Respondent is guilty of election offences which offences included but are not limited to illegal campaigns and meetings, bribery, treating and voter manipulation. Consequently, the Petitioner averred and asserted that no free and fair elections were held for Member of the Senate for the County of Bungoma.

RESPONDENTS' RESPONSE

[8] The Respondents filed their respective responses and filed affidavits in reply to the allegations by the Petitioner. In their responses they denied each and every allegation in the petition in a specific way. Each allegation was granted a legal or factual answer in the meticulously drafted responses by the Respondents. The Respondent made a specific rejoinder on the errors pointed out by the Petitioner to which they answered that such were human errors expected in an election as long as it is conducted by human beings. Those errors were very few and did not affect the results of the election in dispute.

[9] They also called witnesses in rebuttal of the allegations by the Petitioner. In broad terms, they argued that the Petitioner has not pleaded his case with sufficient particularity as required in law in order to give the Respondents sufficient notice of the case they should answer to; that the Petitioner did not prove the allegations to the standard required in law; the Petitioner dwelt on generalities and evoked words such as massive and widespread which looked powerful in appearance but feeble in substance and were not supported by any cogent evidence; there were no irregularities or malpractices which could have affected the validity of the results; the Respondents, either by themselves or through their agents did not commit any electoral offences; the elections were conducted substantially in accordance with the Constitution and law; the elections were free, fair and reflected the will of the voters of the County of Bungoma; the 1st Respondent was validly elected; and the petition should be dismissed with costs.

COURT'S RENDITION: EVALUATION OF EVIDENCE AND SUBMISSIONS

PRELIMINARIES

Mode of proceeding

[10] The court will state the agreed issues which the court should determine. Then; all allegations by the Petitioner and the responses thereto by the Respondents shall be fitted in and interrogated under the specific issue they relate to. The analysis of the evidence-witness

testimonies and documentary-tendered in support or rebuttal of those allegations will be treated in the like manner. And of course, the court will apply the relevant law to the facts, place the evidence on the scales of proof and then apportion appropriate weight on the evidence evaluated. The court will not engage itself into a leisurely and expansive regurgitation of evidence already contained in the proceedings as that would cause a muddle-up of facts, unnecessary repetition or an abrupt turn in winding up the real issues. Instead, the court will adopt a more coherent approach where the relevant evidence is fit to the specific issue it seeks to support or deny. That way, it is much easier to disentangle the *ad hoc* evidence tendered into identifiable detail tending to prove or disapprove a particular issue. I will start with matters which are really preliminary.

Improper pleadings

[11] The Respondents have attacked the pleadings filed by the Petitioner as being improper, imprecise and at a very high level of generalization. They contend that a petition should specifically set out the grounds in such succinct manner and specificity that would give the respondents sufficient notice concerning the case they have to answer to. They quoted the cases of **HOVE V GUMBO (HC 7752/2002) HIGH COURT OF ZIMBABWE, CHARAN LAL SAHU & OTHERS V SINGH (1995) LCR (Const), QUINNE-LEANDRO V JONAS MAGINLEY AG 2010 CA 8 COURT OF APPEAL ANTIGUA and BARMUDA, DR. JOHN OLUKAYODE FAYEMI V OLUSEGUN ADEBAYO ONI & OTHERS NIGERIA COURT OF APPEAL, JOHN WAWERU and KIARIE V BETH MUGO & 2 OTHERS NBI HC EP NO 13 OF 2008** only to mention but a few.

[12] Mr Ndambiri submitted that the Petitioner has clearly set out reasons why he was aggrieved. Particulars and grounds for the cause of action have been well set out. It is that specificity in setting out the particulars that enabled the Respondents to respond to the petition in such appropriate way they did.

[13] The common thread that runs through these judicial authorities is that pleadings should be drafted with such particularities which are necessary to disclose the case the respondent are to answer to. The allegations should be specific as opposed to generalized ones. The particulars needed in law to disclose the cause of action must be concisely and clearly stated. In election petitions, this legal requirement must be adhered to given the nature of election disputes. I have looked at the petition and it has been carefully crafted with sufficient particulars as to disclose triable issues, and also sufficient to disclose the case the Respondents are faced with. The meticulous and targeted responses filed by the Respondents attest that they were responding to a case-properly drafted. The petition is, therefore, properly before the court and I will proceed with the determination of the real issues in controversy.

THE QUESTION OF BURDEN AND STANDARD OF PROOF

[14] In every judicial proceeding, the question of the burden of proof and the standard of proof is and should always be determined at the outset in every legal proceeding. Parties submitted on it extensively and provided relevant judicial decisions. I have read all the authorities cited by counsels on this subject, but I can do no better on the subject than to restate here below what I stated in the case of **BGM HC EP NO 2 OF 2013 MOSES WANJALA LUKOYE V BERNARD ALFRED WEKESA SAMBU & 3 OTHERS.**

Burden of proof: Legal burden of proof and evidential burden

[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 shift 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 SUPREME 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 esse 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”.

[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, however, 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 SUPREME 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)***

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

[15] The following were agreed as the issues for determination by the court:

- 1) Whether or not the election of the Senator of The County of Bungoma as conducted by the 2nd Respondent herein was substantially in accordance with the Constitution and all the relevant laws including the Elections Act and the Elections (General) Regulations, 2012.*
- 2) Whether or not the election of the Senator of the County of Bungoma as conducted by the 2nd Respondent had such massive and widespread irregularities that it would render the said election null and void.*
- 3) Whether or not the 1st, 2nd and 3rd Respondents committed widespread electoral malpractices and offences before and during voting, tallying and announcement of results in the elections of the Senator for County of Bungoma as would substantially alter or interfere with the results of the said election.*
- 4) Whether or not the tally of the votes in the election of the Senator for the County of Bungoma was manipulated or consisted of such malpractices and irregularities as would substantially affect the integrity of the said results.*
- 5) Whether a sufficient legal basis for an order of scrutiny and/or recount of the votes has been made and demonstrated by the Petitioner in the election of the Senator of the County of Bungoma.*
- 6) What are the orders that the Honourable Court can make in respect to the Petition herein including an order for costs.*

[16] The court will treat Issues No 2, 3 and 4 together for they bear an almost inextricable nexus. The result of the court's analysis of those issues will give the answer to Issue No 1 and ultimately determine whether or not the 1st Respondent was validly elected. For purposes of analysis, Issues No 2, 3 and 4 will be considered under **WHETHER THERE WERE ELECTORAL OFFENCES, MASSIVE AND WIDESPREAD ELECTORAL MALPRACTICES AND IRREGULARITIES AND WHICH AFFECTED THE INTEGRITY OF AND THE RESULTS OF THE ELECTION FOR SENATOR FOR THE COUNTY OF BUNGOMA**. But, apart from the major issues, there are other matters which were raised and should be determined from the outset.

THE OTHER MATTERS

The matter of Wasilwa Advocate

[17] This issue saddened the court and the other counsels involved in this petition. The advocate we are talking about is Makhakara Henry Wasilwa. He is an advocate of considerable experience and presumably, of a pedestal stature; then I believed could not be fallible to negligent and culpable conduct-conduct unbecoming. But on the contrary, he appeared before the court knowing very well that his status as an advocate was not clear, or let me say "in-active" to

borrow the phrase by LSK in their website. But the court pardoned him after hearing him, his advocate, and the other counsels in the petition and on receipt of relevant documents from the Law Society of Kenya. He committed yet another ‘sin’-he published in the Facebook material regarding this case which was quite prejudicial to the proceeding and inclined towards contempt of court. Yet again, he was pardoned by the court. But the matter did not end there. Mr Ndambiri insisted that despite the pardon, the proceedings in which he participated were tainted and incompetent for having been conducted by a person who was not competent as legal counsel. Mr Ndambiri argued his application in the submissions.

[18] Counsels for the Respondents have made submissions on the matter. They have appealed to the court to invoke Article 159 of the Constitution and the overriding objective of the court to sustain the proceedings for the sake of substantive justice.

[19] The arguments placed before me on the issue by both divide, are subtle. I have carefully considered them. I wish to repeat, as I held then, that the action by Mr Wasilwa was most deplorable and must be discouraged all the time and whenever it manifests itself. It is common knowledge that the Law Society of Kenya felt aggrieved by those members of the bar who engaged their services knowing they have not obtained practising certificates. Their grief is most understood within public-spirited mandate of LSK, particularly when election petitions were dismissed on that account. That awareness that a public cause should not be lost on such negligent front by its members is laudable. I am happy to note LSK promised to take appropriate action against such rogue members.

[20] That aside, I believe that the Constitution commands the court to always adopt an interpretation of the law which gives effect to the objects and purposes of the Constitution. Wasilwa was among the five advocates who were representing the 1st Respondent and the cross-examination which he conducted does not in any way prejudice the Petitioner. In any case, the Petitioner had his right of re-examination on new issues which might have arisen in cross-examination including the one conducted by Wasilwa Advocate. Expunging those proceedings which relate to the 1st Respondent would not only be a great injustice to the 1st Respondent but to the due process of the law generally, and this cause in particular. That would be a negation of the constitutional principles of justice. I therefore, uphold the proceedings consisting in cross-examination of witnesses conducted by Mr Wasilwa, and they shall remain part of the record.

The question of the Nigerians

[21] This question of the three Nigerians was introduced by the 1st Respondent who associated the presence of the three individuals with cultism, dark and shadowy practices. The Respondent accused the Petitioner of using cultism and dark forces to quest for political power. He further re-introduced the matter of ‘*Khulia Silulu*’ that the Petitioner had been found guilty of in a past election petition case of **ELIMA VS ONARE & ANOR. (EP 2008) KLR**. The Petitioner, on the other hand, admitted that in February 2013 he hosted three leaders from Nigeria and they also attended a political rally at Kamukuywa Market. He, however, denied that the three leaders behaved in a manner likely to suggest that they or the Petitioner espoused cultism, dark or shadowy forces in quest for power. According to the Petitioner, the three visitors from Nigeria visited him as friends and also as members of ACPEEU Parliamentary Assembly to which the Petitioner is the President. He denied asking for any assistance towards his election campaigns from the three visitors. The Petitioner further denied existence of a binding oath amongst the Bukusu and as far as the judgment in the case of **ELIMA VS ONARE & ANOR** was concerned, he said the judgment was later quashed by a law that was passed by Parliament.

[22] The presence of the three Nigerians in a political rally organized by the Petitioner was solely aimed at imputing an adverse trait on the character and demeanour of the Petitioner as a politician; that he was engaged in cultism to quest for power. The finding of the court in the case of **NAIROBI HIGH COURT PETITION 64 OF 1993 JOSEPH MALOBA ELIMA VERSUS MUSIKARI KOMBO** was to introduce the previous character of the Petitioner as such person.

There was really no explanation or description as to what ‘*Khulia Silulu*’ entails although from the above decision, it is apparent it was a form of illegal ceremony to bind and scare voters. That charge on the character of the Petitioner is a serious matter which must be established to the satisfaction of the court. Other than alleging that the Petitioner openly associated himself with and publicly paraded persons of dubious character from Nigeria at Kamukuywa, and that the three Nigerians were captured on Citizen TV engaging in curious acts, chanting unintelligible utterances, and displaying calabashes which emitted strange smoke, there was no concrete evidence to support the claim that the Petitioner or the three Nigerians espoused cultism and other dark and shadowy forces in his quest for power. First of all the 1st Respondent did not specifically claim that the Petitioner engaged in ‘*Khulia Silulu*’ or any form of illegal oathing or ceremony. In any case, for such allegations to succeed, the essential elements of the illegal oathing or ceremony must be specifically proved beyond reasonable doubt for they are criminal in nature and once proven the culprit is liable to be indicted. The Television clips ought to have been produced in accordance with the law on electronic evidence. Concrete evidence on what the alleged acts entail ought to have been adduced. None of these things were attained. I find and hold the allegation has not been proved and it fails.

SUBSTANTIVE ISSUES: ISSUES NO 2, 3 AND 3 RESTATED

WHETHER THERE WERE ELECTORAL OFFENCES, MASSIVE AND WIDESPREAD ELECTORAL MALPRACTICES AND IRREGULARITIES WHICH AFFECTED THE INTEGRITY OF AND THE RESULTS OF THE ELECTION FOR SENATOR, THE COUNTY OF BUNGOMA.

[23] Issues No 2, 3 and 4 are reproduced below in the manner they were agreed and framed. They relate to allegations on commission of electoral offences, massive and widespread electoral malpractices and irregularities. Each of the allegations which fall under the broadly re-stated issue above shall be carefully discerned and determined. But eventually each issue as framed hereunder shall be answered. The issues as framed are:

2) Whether or not the election of the Senator of The County of Bungoma as conducted by the 2nd Respondent had such massive and widespread irregularities that it would render the said election null and void.

3) Whether or not the 1st, 2nd and 3rd Respondents committed widespread electoral malpractices and offences before and during voting, tallying and announcement of results in the elections of the Senator for The County of Bungoma as would substantially alter or interfere with the results of the said election.

4) Whether or not the tally of the votes in the election of the Senator for the County of Bungoma was manipulated or consisted of such malpractices and irregularities as would substantially affect the integrity of the said results.

THE ALLEGED ELECTORAL OFFENCES

[24] The court has already settled the standard of proof on allegations of commission of criminal offences; i.e. beyond reasonable doubt. The Petitioner made a number of allegations that the Respondents, either by themselves or through their agents and/or servants,, committed electoral offences which rendered the entire electoral exercise null and void. The relevant allegations were as here below.

A) Interference with Election Materials: Cutting of Ballot Boxes and Seals

[25] **PW5 Henry Wekesa Pole** testified on this allegation. He was an agent for Maendeleo Democratic Party. On 5th March 2013, at about 12 Noon, he was at St. Patrick’s Naitiri High

School waiting to escort the ballot boxes to the counting hall. While in the queue to escort ballot boxes, he saw a Presiding Officer pick two ballot boxes, one for Senator and another for National Assembly and put them aside. The officer then knelt down, picked a hacksaw blade from his back trouser pocket and started cutting the seals of the ballot box. After opening the box he picked two rolls of what looked like ballot papers and stuffed them in the ballot box. He started cutting the seals for the other box but PW5 jumped from the queue, picked the seals that were cut and grabbed the Presiding Officer by his shirt. PW5 then raised alarm and members of the public including Mr Chikati, one of the candidates for the seat of National Assembly came to assist. The Presiding officer was arrested with the help of police officers. The police took away the cut seals, the hacksaw blade and other new seals.

PW5 gave the serial numbers of the boxes the Presiding Officer was cutting; Serial Number 115126 for the National Assembly ballot box; and Serial Number 050706 for the Senator box. He also gave the police force number of one of the police officer who arrested the said PO to be No 77797. He later recorded a statement before the DCIO within the tallying centre compound. The Presiding Officer was later charged and arraigned in court at Kimilili.

[26] On cross-examination he confirmed his appointment as an agent and produced the appointment letter. He also confirmed that the 1st Respondent did not cut the seals in question. He stated that he is aware the ballot box serial number noted in the charge sheet was different from the one he witnessed and wrote down on 5th March 2013. He insisted that the serial numbers he recorded were the correct ones. He, however, stated that he did not give the serial numbers to the police since they too were present. The seals had their own numbers different from the ballot box serial numbers and he provided the police with all that information. He has testified in the criminal case facing the Presiding Officer and he raised the issue on ballot box serial numbers. He also noted that the ballot boxes were never produced in the criminal case.

[27] On further cross-examination by the 2nd and 3rd Respondent's counsel, PW5 said that he believed the Returning Officer of the affected Constituency should also have been arrested. The incident was witnessed by many people including the agents who were there. He said that 5-6 seals were cut and he clearly read the ballot box serial numbers. The police officers who arrested the presiding officer did not remove the rolls that had been stuffed in the ballot box.

[28] The court takes judicial notice of the fact that the Presiding Officer for Naitiri High School Polling Station, one **PATRICK WANJALA SIKETI** was arrested and charged with the offence of Interfering with Election Material Contrary to Section 58(b) of the Elections Act, 2011 in **KIMILILI PMCCRC NO 365 OF 2013**. That matter is before the trial court and the less I say about it the better. This is a live example of the difficulties that may arise under section 87(1) of the Election Act. The court had occasion to say something about that section in **BGM HC EP NO 2 OF 2013 MOSES LUKOYE V BENARD ALFRED SAMBU & 3 OTHERS** as follows:

*[43] A necessary detour; without making a decision, section 87 of the Elections Act may invite legal arguments. The words used in the section...**proved at the hearing to have been guilty of an election offence** gives room for an argument that, by virtue of that section, the election court also sits as a trial (criminal) court. But that argument will be oblivious of; 1) that an election proceeding is a proceeding **Sui generis**; it is not a criminal proceeding; and 2) that an election proceeding is not clothed with the staple criminal protections available in a criminal proceeding. This court is aware of the requirement under section 87(1) of the Elections Act that the person cited, in the petition, for allegedly having committed electoral criminal offences should be afforded **an opportunity to be heard and to give and call evidence to show why he should not be reported**. However, that requirement alone is not a sufficient protection as is provided in a real criminal trial. That is not the end of the discourse. More trouble is found in a rogue imagination that the words in section 87(1) of the Elections Act assigns the decision of the election court the vitality of a finding of guilty as in a criminal trial. If that thinking prevails, the requirement to make a report to DPP does not make any sense in law. Yet another critical*

matter; the person so found to have committed an offence may rightly raise a defence of double jeopardy in the subsequent criminal prosecution by the DPP.

[44] *That is not all. Conceptually, the subordinate court before which the person will be being prosecuted for an offence based on a finding by the High Court under section 87(1) of the Elections Act, will not avoid to ponder at least two things; 1) that the matter had been proved before a higher court; and 2) that proof was on a standard of beyond any reasonable doubt; that the person **have been guilty of an election offence**. Take for instance a practical example in **KIMILILI PMCCRC NO 365 OF 2013 R V PATRICK WANJALA SIKETI** where an IEBC official was arrested and charged with an election offence; which is also an issue before the election court. The two proceedings-the petition and the criminal trial-are proceeding contemporaneously. Many questions abound which I suppose should re-ignite a critical rethink on the way the section should be couched in a manner that reconciles all these concerns. My own view is, however, that the finding by the election court should be understood as a finding within a petition for purposes of a decision in that petition. Which in turn means; the record of the petition and the report to the DPP on commission of election offences, become sources of information which may found a criminal investigation and or prosecution of the person concerned. That way, any legal contradiction in or objection to the section may be avoided. Invariably, a legislative recast of the words **...proved to have been... guilty of an election offence** may be necessary. At the moment, courts of law are experienced in dealing with such statutory situations by assigning an interpretation that cures the mischief, removes any serious legal objection and gives effect to the intention of Parliament.*

[29] In any event, the Petitioner did not prove beyond reasonable doubt the charge they are imputing on the part of the said PO i.e. the stuffing of ballots, cutting ballot boxes specifically for the National Assembly and Senator. These are different charges from the one the said PO is facing at Kimilili court and needed proof beyond reasonable doubt. Doubtless, it was not claimed by the Petitioner that the 1st Respondent committed the offence and there was no prove the said PO was his agent or accomplice. The allegation fails.

Pre-marking Ballots

[30] **PW11 Ignatius Wafula Simiyu** filed the affidavit sworn on 8/4/13. He stated that he was a registered voter and went to Siuna SA Primary School on 4/3/13 to cast his vote. After properly being identified, he was issued with 6 ballot papers. At the polling booth, he marked the ballot papers for the County Assembly/Ward Representative and County Women Representative but when he looked at the ballot papers for the National Assembly and Senate candidates, both were already marked in favour of Suleiman Murunga and Moses Wetang'ula, respectively. He enquired from the PO why he was issued with pre-marked ballot papers, but the PO became hostile and ordered him to drop the ballot papers in the ballot box and leave the station immediately or else he will be arrested.

PW11 reluctantly dropped the ballot papers in the box and a second attempt to inquire from the PO on the matter bore no fruit. He complied and left the station immediately and went to Chebukwabi Market where he met Mrs Beatrice Nyongesa and shared the incident with her.

On 12/3/13, Mrs Nyongesa called him and asked him whether he was still keen on pursuing the incident on pre-marked ballot papers. He confirmed his willingness to seek justice on his right to vote. He was advised to go to Hon. Kombo's home the next day for advice which he did. He then filed the affidavit in the court record.

[31] On cross-examination, he was categorical that he was chased away by the PO and the police. He also insisted that he did not collude with Beatrice Nyongesa on the matter. He, however, confirmed that he did not know the officer who gave him the pre-marked papers.

[32] **PW15 Solu Simiyu Khaemba** gave sworn evidence on his affidavit sworn on 8/4/13. In the affidavit, his evidence is that on 4.3.13 he went to vote at Chebukwabi FYM Primary School at about 9.00. He was first given five (5) ballot papers less that for the Senate seat. He complained to the PO who ordered one of the clerks to give him the ballot paper and when he went to the polling booth to mark he discovered it was already marked in favour of Moses Wetang'ula. When he asked for a fresh ballot paper the PO and the clerks refused to replace it, turned hostile and ordered him to drop the Senate ballot paper in the box. He did as ordered. Later the same day he went to report the incident to his employer Mary Naswa Munanda whom he met the following day. She advised him to seek audience with Hon. Kombo which he did on 13/3/13 at Hon. Kombo's home.

[33] On cross-examination, PW14 said that he reported the incident to Mary Naswa Munanda because she was his employer. He had also reported the matter to the police who were present at the scene although he did not state that fact in his affidavit. He admitted, however, that he had some eye-sight problem. In re-examination, PW14 said that he was not assisted to vote and that he marked the ballot papers by ticking. It is only the last ballot paper for Senator that had been pre-marked.

[34] The allegation on pre-marked ballots is a serious criminal offence directed at the IEBC officials who issued him with the allegedly pre-marked ballots. Cogent evidence is needed to attain the high standard of beyond reasonable doubt. The particular officers who issued the ballots were not identified by name. That is an essential aspect of the kind of offence being alleged. The witnesses did not really convince the court that they reported the incidents to IEBC or police as is required for such serious matters. Other than the averments in their affidavits, there was no formal complaint that was made whatsoever. These things are important and would give credit to the oral evidence adduced. In the absence of sufficient evidence, the court finds that the allegation for pre-marked ballots has not been proved and it fails.

Bribery claim against Petitioner by 1st Respondent's

[35] **WASARI WANYAMA** a witness called by the 1st Respondent made an allegation against the Petitioner; that the Petitioner in February 2013, at Peter Nyongesa Mukenya's home said in Bukusu that he developed Nangwe, brought roads to the area and therefore he was asking for votes from the audience. He also witnessed Kombo giving 50/ to the people present. But the witness was quick to add that he did not take the money thereby recanting the contents of paragraph 6 of his affidavit which stated that he received Ksh.50. He termed that averment as a typing error. To say the least, the witness demeanour was wanting. The court observed the witness was not telling the truth. He also did not report such a serious crime to any person or the police. The witness even attempted to assign some unsubstantiated reason why he thought Kombo gave the money. That allegation was not proved at all and it fails. Maurice Makhanu also alleged that the Petitioner gave him and his wife each Kshs 5,000 but he did not label the money as a bribe for he said he had known Kombo as a friend and leader for some time. It even emerged in cross-examination that the witness had visited the Petitioner two other times before and he was provided with transport. There was no evidence beyond reasonable doubt that the Petitioner bribed the witness and his wife as an inducement to make them vote for a particular candidate or political party in the election held on 4th March, 2013. The allegation also fails.

Violation of Public Officer Ethics Act

[36] The 1st Respondent imputed a charge on the Petitioner that he used a public officer to campaign for him. He called **STANLEY WANYONYI WASWA** who testified that the Petitioner engaged Gladys Naliaka Wekesa, the area chief for South Bukusu Location, to spearhead his campaigns in contravention of Public Officer Ethics Act. The witness did not, however, take any action; did not report the matter to the police or to relevant oversight bodies. He made another accusation; that at the burial of wife of Protus Wanyonyi, the said chief announced that Kombo had given a contribution of Ksh.3000 to bereaved families. The witness also made a contribution

of Ksh.100 and he told the court he there was nothing wrong for Kombo to have made a contribution. There was also nothing wrong with Kombo going to see the area chief. The evidence is superficial and cannot sustain the allegations on the scale of beyond reasonable doubt. It fails.

Bribing and Treating of voters, and undue influence against the 1st Respondent

[37] The Petitioner levelled allegations of bribery and treatment of voters against the 1st Respondent. The offences of Treatment of Voters and Bribery are established under sections **62 & 64** of the Elections Act. Under Section;

62(1) A candidate who corruptly, for the purpose of influencing a voter to vote or refrain from voting for a particular candidate or for any political party at an election—

(a) before or during an election—

(i) undertakes or promises to reward a voter to refrain from voting;

(ii) gives, causes to be given to a voter or pays, undertakes or promises to pay wholly or in part to or for any voter, expenses for giving or providing any food, drinks refreshment or provision of any money, ticket or other means or device to enable the procurement of any food, drink or refreshment or provision to or for any person for the purpose of corruptly influencing that person or any other person to vote or refrain from voting for a particular candidate at the election or being about to vote or refrain from voting, for a particular candidate, at the election; or

(b) after an election, gives, provides or pays any expense wholly or in part to or for any particular voter or any other voter for having voted or refrained from voting as aforesaid, commits the offence of treating.

(2) A voter who accepts or takes any food, drink, refreshment, provision, any money or ticket, or adopts other means or devices to enable the procuring of food, drink, refreshment or provision knowing that it is intended to influence them commits the offence of treating.

64.(1)*A candidate who—*

(a) directly or indirectly in person or by any other person on his behalf gives, lends or agrees to give or lend, or offers, promises or promises to procure or to endeavour to procure any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter or to or for any other person in order to induce any voter—

(i) to vote or refrain from voting for a particular candidate;

(ii) to attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for an political party or candidate;

(iii) corruptly does any such act on account of such voter having voted for or refrained from voting at any election, for a particular candidate; or

(b) directly or indirectly, in person or by any other person on his behalf, gives or procures or agrees to give or procure, or offers, promises, or promises to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter—

(i) to vote for or refrain from voting for a particular candidate; or

(ii) corruptly does any such act on account of such voter having voted for or refrained from voting;

(c) in any manner unlawfully influences the result of an election;

(d) directly or indirectly, in person or by any other person on his behalf, makes any gift, loan, offer, promise, procurement, or agreement to or for any person in order to induce that person to

(i) procure or endeavour to procure the election of any person; or

(ii) procure the vote of any voter at any election;

(e) upon or in consequence of any gift, loan, offer, promise, procurement or agreement, procures or engages, promises or endeavours to procure, the election of any person, or the vote of any

voter at an election;

(f) advances, pays or causes to be paid any money to, or to the use of any other person with the intent that such money or any part thereof shall be used in bribery at any election, or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part used in bribery at any election;

(g) being a voter, before or during any election directly or indirectly, in person or by any other person on his behalf receives, agrees or contracts for any money, gift, loan, or valuable consideration, office, place or employment for himself or for any other person, for voting or agreeing to vote or for refraining or agreeing to refrain from voting for a particular candidate at any election;

(h) after any election, directly or indirectly in person or by any other person on his behalf, receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or to refrain from voting for a particular candidate at the election;

(i) directly or indirectly, in person or by any other person on his behalf, on account of and as payment for voting or for having voted or for agreeing or having agreed to vote for any candidate at an election, or an account of and as payment for his having assisted or agreed to assist any candidate at an election, applies to the candidate or to the agent of the candidate for a gift or loan of any money or valuable consideration, or for the promises of the gift or loan of any money or valuable consideration or for any office, place or employment or for the promise of any office, place or employment; or

(j) directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates, gives or procures any office, place or employment to endeavour to procure any office, place or employment, to or for such other person, or gives or lends or agrees to give or lend, or offers or promises to procure or to endeavour to procure any money or valuable consideration to or for any person or to or for such other person on behalf of such other or to or for any person, commits the offence of bribery.

(2) Any person who in consequence of that person's acceptance of any consideration votes or refrains from voting commits an offence.

[38] The Petitioner alleged that the 1st Respondent engaged in treating and bribery of voters in various occasions before and during voting. The purpose of the treating and bribing of voters was to induce and influence the voters to vote for the 1st Respondent and the other CORD Coalition candidates during the election in dispute. It was also to influence and induce the voters to refrain from voting for particular candidates or parties. The Petitioner stated that he received the information on bribery and treating of voters by the 1st Respondent and his agents from the Petitioner's agents whom he believed to have told him the truth. He also received information on the 1st Respondent's campaign on 3rd March 2013 from his agents whom he had no reason not to believe. The Petitioner called witnesses who tendered evidence on treating and bribery of voters. I will evaluate each witness's evidence- for the Petitioner and Respondents-on the subject and make appropriate decisions.

[39] There are those instances where the Petitioner claimed that the bribery was done by the 1st Respondent in person, while there are others where it is claimed bribery and treating of voters was by the agents and campaigners of the 1st Respondent. I will deal with the latter category first.

Bribery by agents

[40] The first Petitioner's witness to give evidence on the issue was **PW3 Leonard Sakwa Mukwana** who swore an affidavit sworn on 8/4/13. He stated that he was a registered voter and one of the Mobile Agents for New Ford Kenya in charge of Musikoma and Tui Murakaru Wards in Kanduyi Constituency. At Namamuka Polling Station PW3 witnessed a Ford Kenya agent called Dickson Mang'oli (nicknamed Ang'ala) giving money to voters within the polling station

and reported the incident to New Ford Kenya team leader who went to the scene of the incident only to find that Mr Dickson Mang'oli had disappeared? PW3 further stated in his affidavit that on the same day, he received a call from one Dennis Mukhebi who was also a member of the New Ford Kenya team about money being issued to voters on the queue at Mungeti Polling Station by a Ford Kenya agent by the name Amos Wafula Khamara. He reported the matter to the Administration Officer attached to the area Chief's Camp and after the said Amos Wafula realized that PW3 had reported the matter to the police, he confronted the witness but the confrontation was stopped by the Officer who ordered Amos Wafula to leave the station. At this point, it is prudent to state what the **1st RESPONDENT'S WITNESS NO.13 DICKSON SIFUNA MANGOLI** said about this allegation. He said he did not know Leonard. He also denied he was Dickson Mangoli alias Ang'ala and that he gave out any money to any person.

[41] Leonard had specifically singled him out as the person who was bribing voters in the queue. The said Dickson denied he is the person implicated in the bribery claim. What the witness did not do is to adduce concrete evidence that would leave no doubt that Dickson Sifuna Mang'oli was indeed the person who was bribing voters. The other incident that Dennis Mukhebi informed the witness about a Mr Amos Wafula Khamara bribing voters went a little bit further; it was reported to the administration police although it was based on hearsay and the particular administration police to whom the report was allegedly made was never called as a witness. The record of the purported report was also not tendered before court. Leonard did not at all report the matter to the police which would have identified the 1st Respondent's witness as the real culprit of the alleged crime. One other thing; the witness did not establish any nexus of principal-agent between the said Dickson Mang'oli (alias Ang'ala) and the 1st Respondent. That allegation, therefore, fails as against the 1st Respondent and also as against Dickson Sifuna Mang'oli.

[42] The evidence of **PW10 Kennedy Simiyu Werunga** on alleged bribery of voters at Mama Dina Sirengo's home was characterized by contradictions and does not in a pointed manner prove the facts alleged by him. It was not possible to decipher even with keen circumspection what exactly he was vouching for. I will, therefore, treat his evidence as indecipherable and dismiss the allegations by the witness.

[43] **PW12 Evans Mumbwani Wosula** averred in his affidavit sworn on 8/4/13 that he was a registered voter at Kamasielo FYM primary School where he voted on 4/3/13. He was also an agent for New Ford Kenya Party. On the voting day he witnessed one Mr Juma Masinde, a campaigner for Moses Wetang'ula canvassing for votes on the queue at Kamasielo Station and was giving voters in the queue Kshs 200/- each. He reported the incident to the Presiding Officer who then ordered the said Mr Masinde to leave the station. The PO did not record any statement from the witness.

[44] As I stated earlier, there was no evidence whatsoever which proved that the perpetrators of the offence of bribery alleged were agents of the 1st Respondent. All the elements of bribery and the person or persons who received the bribe were absent. Those allegations by **PW 10** and **PW12**, therefore, fail.

Meeting at the Home of the Late Saratuka

[45] The evidence of **PW16 Isaac Masika Khaemba** was another instance where bribery was alleged to have taken place and was committed by the agents and campaigners of the 1st Respondent. He averred in his affidavit sworn on 8/4/13 that, on 3.3.13 between 10.00am and 2.pm, he together with his friends Dennis Wanyonyi and George Khisa from Kibochi area attended a meeting convened at the late Francis Saranduki's home by a Mr Lucas Watta, Hon. John Munyasia and Kisika Mabuka on behalf of the Hon. Moses Wetang'ula. He was informed of the meeting by one Denis Wanyonyi. The meeting was addressed by Hon. Moses Wetang'ula's supporters and it was a political meeting in that the speakers urged farmers to vote for Wetang'ula during the elections to be held the next day. Mr Kisika Mabuka told those in attendance that the

meeting was not convened for sugarcane farmers. He asked those in attendance to turn up in large numbers and vote for Wetang'ula. The people in attendance were grouped into groups of ten (10) people and each group was given Kshs 1,000/- to share. The money was passed over from John Munyasia to Lucas Watta.

[46] On cross-examination, PW15 said that he was a farmer too and the late Saranduki was not a re-known agricultural demonstrator. The fish farming had started only recently. He said that there is only one fish pond on the late Saranduki's farm managed by his widow. He confirmed that the meeting he attended at the late Saranduki home was political and money changed hands although he did not report the matter to the police. The money was given by the 1st Respondent's campaigners who told the recipients that the money came from the 1st Respondent. He said he knew John Munyasia who was a Ford-Kenya supporter for 10 years; on whose ticket the 1st Respondent contested the Senate seat.

[47] The 1st Respondent said the meeting at the home of the late Saratuka was a meeting for farmers and not political meeting. He called witnesses to support his position. The 1st Respondent's Witness No.7 **TOPISTA MWIMA WASILWA** was the principal witness on the matter for she was the owner of the piece of land where the meeting took place. She swore an affidavit on 23.4.2013. She is the widow of the late Francis Saratuki Wasilwa. She told the court that she was a farmer in sugarcane and bananas growing, a fish farmer and chicken farmer. She started chicken rearing in 2007 and was 2 years old in that business. She told the court in cross-examination that she started fish farming 9 months ago. She attended training for her farming. She could not have harvested the fish last year (2012) as they were not mature. She said she had used all the 10 (ten) acres of land on farming. She said that on 3.3.2013 there was a meeting convened by Lucas Wattah-sugarcane representative. Wattah had announced on the radio on 2.3.2013 that there will be a meeting on 3.3.2013. About 90-100 people attended. She allowed the meeting because she knew the political campaign period was over. She was teaching the participants on how to do farming using her farm. She denied that money was to the participants. She said that Hon. John Munyasia was not in the meeting at her home.

[48] The other witness for the 1st Respondent to testify on this meeting was **JOSPHAT KHAFWELI KISIKA A.K.A MABUKA**. He swore the affidavit dated 23.4.13. He testified that on 3.3.2013, he was at the meeting convened at the home of the late Saratuki. In cross-examination, he said that the meeting had been convened by Lucas Wattah who was his colleague (Director of KESCA) and a farmer. The witness was the representative of sugarcane farmers. He said the meeting took place between 10-1.30pm. Ordinarily, he takes advantage of any opportunity to address the plight of the farmers. He addressed the participants who about 90-100 people in the meeting. There was however no public address system. The meeting began with prayers, then introductions. Managers of Nzoia Sugar Company also attended the meeting but he could not remember their names. Teachers also attended. Lucas Wattah together with Topista led the guide into the farm and the various types of farming on the land. They were divided into groups and he could not tell what the people in the other groups were doing. The land was about 40 acres. It was large. There were many cows – grade and kienyeji on the land- bee farming, tomatoes and chicken were carried out on the farm. There were many chickens. There were two fish ponds. He was only interested in talking to the participants about sugar cane and he was not interested in politics. He insisted the meeting was a domestic gathering which was not affected by the prohibition on political rallies. He did not seek to know if it was authorized by the administration. In cross-examination by Gumbo he denied any money was dished during the meeting. He also told the court that the meeting was attended by people of all walks of life, men, women and children. He further said that some were farmers. Again he changed that he presumed every participant was a farmer. In re-examination he said he knew the deceased; was his uncle and he had 4 wives. Topista was one of them. His aim was to discuss with the farmers about the case in which Nzoia had misappropriated their funds.

[49] On the meeting at the late Saratuka's home, the Petitioner offered evidence that the

meeting was a political meeting and had been used to bribe the participants to vote for the 1st Respondent and other CORD Coalition candidates. They alleged that Mr Lucas Watta, Hon. John Munyasia and Kisika Mabuka, who were agents of the 1st Respondent, gave out money to the participants to vote for CORD Coalition. 1st Respondent's Witnesses No 7 and 8 talked much about that meeting. Witness No 7 was the beneficial owner of the land on which the meeting was held and witness No 8 was a blood relation of the deceased. Their evidence would ordinarily carry preponderant weight on the meeting in question held on the land. But fundamental contradictions emerged in their testimonies. First, the widow told the court that the land was 10 acres whereas witness 8 said it was a large farm of 40 acres. That difference was not explained at all although he said his uncle had four wives. Witness 8 also said there were many cows – grade and kienyeji on the land, bee farming, tomatoes, chicken and two fish ponds. Topista only said was engaged in sugarcane, bananas, fish and chicken farming.

[50] Witness 8 was even more dramatic. He first claimed that there were people from all walks of life; men, women and children. He then changed that line and claimed that some of the participants were farmers. That is not all. He changed the changed story and said that he presumed all the participants were farmers. The witness was not truthful at all and was giving evidence to suggest a particular situation. Take for instance when he said that he was a representative of sugarcane farmers who had taken advantage of the meeting-an opportunity which had readily presented itself. He said he is apt at taking such advantage for the benefit of the farmers. That aside, he went to the meeting to discuss a case where Nzoia Sugar Company had misappropriated farmers' funds. Yet he did not know the names of the Managers from Nzoia Sugar Company who were also in attendance. If indeed the meeting was convened to discuss farming, the Managers from Nzoia Sugar Company who attended must have been the relevant personnel in farmers' issues. Fathom this! As an enthusiastic representative of the farmers, which he claimed to be, it must be taken, he was dealing with the relevant Managers of Nzoia Sugar Company on issues touching on farmers as frequent as it is necessary, and I suppose one on one. His testimony that he did not know the names of those Managers who attended, leaves a lot to be desired. But all is explained by his demeanour when he was testifying and the kind of evidence he gave, that; it is highly doubtful he was telling the truth and I treat his evidence as such. His insistence that he attended the meeting or that it was not a political meeting or that no money changed hands and so forth is put to serious doubt. There is some evidence that tends to show that the meeting was a political meeting. But it is not fully established beyond reasonable doubt that the convenors Mr Lucas Watta, Hon. John Munyasia and Josephat K.A.Kisika Mabuka bribed the participants or were propagating the political agenda of the 1st Respondent. The agency nexus between them and the 1st Respondent is lacking although there is every indication they were affiliated to Ford Kenya and the larger CORD Coalition. It has not been proved that they committed the offence of bribery of voters. The threshold has not been met on that allegation in respect of the meeting at the late Saratuka's home.

Meetings at Nzoia Guest House, at Kabula and Red Cross

[51] The most contested meeting were those held at **Nzoia Guest House, at Kabula and Red Cross**. The Petitioner called **PW4 Joseph Machine Wekesa** to speak to the question of bribery and treatment of voters in those meetings. He filed an affidavit sworn on 8/4/13. He was a registered voter at Mukhaweli Polling Station. He was also a member of Word of Life Church in Sang'ala. On 5/2/2013, he claimed to have attended a meeting of Pastors and Bishops at Nzoia Guest House on the invitation of Rev. Joseph Barasa of Reformed Church. The meeting was attended amongst others by Hon. Eseli Simiyu, Hon. Wetang'ula and Bifwoli. He described the routine in the meeting. First, a Catholic Priest, one Father Wanyonyi opened the meeting with a prayer and Hon. Wetang'ula introduced the guests and later replied to one of the speaker's (Bishop Bushebi) remarks on how political leaders had ignored the church and that they were only good at buying votes from the Christians. He stated that after the meeting, Hon. Wetang'ula gave each of the 21 pastors and bishops Kshs 2,000/- as a token of appreciation.

[52] In his affidavit, PW4 stated that on 18th February 2013, he was invited by former Councillor Henry Majimbo Okumu of ODM to, and attended a meeting at St. Peter's Pastoral Centre at Kabula. Hon. Wetang'ula was one of those who attended the said meeting. Hon. Wetang'ula in his address emphasized that during the oncoming elections, all elective seats should not go to the North (Namutala people) and the people of the South (the Sudi) should ensure they retained the Senator seat. Not all participants agreed with Hon. Wetang'ula's sentiments but some did. The meeting ended at about 1.30 p.m. and Hon. Wetang'ula gave Kshs 500/- to each of the 300 participants.

[53] PW4 also stated in his affidavit that he attended a meeting of Pastors and Bishops from the entire The County of Bungoma at Red Cross Bungoma Branch headquarters which was attended by among others Hon. Wetang'ula and Hon. Alfred Khangati. The main agenda of the meeting was on how the church leaders were to mobilize colleagues and followers to vote for the 1st Respondent as Senator and for other candidates of the CORD Coalition. Hon. Wetang'ula and Hon. Alfred Khangati contributed a sum of Kshs 260,000/- for the pastors and bishops to share on their way back home. Each of the church leaders was given Kshs 1,000/-

[54] PW4 was cross-examined on the allegation that on 20/4/2013 he was attacked by four people at his home, took his ID card and forced him to sign some documents. He denied having voluntarily signed the affidavit at page 55 of the 1st Respondent's pleadings and claimed the affidavit was coercion. He claimed that he later learnt that his ID card which had been stolen from him had been used in and annexed to the affidavit supporting the 1st Respondent's case. PW4 denied he voluntarily signed the affidavit and denied the contents therein. The matter raised by the witness was subjected to a criminal investigation and a report was made to this court that the said witness only reported loss of his ID card and not the alleged assault when his ID he alleges was forcefully taken away. The witness testified that he attended three meetings. There are other witnesses by the Petitioner and the 1st Respondent who testified on the said meetings. The court will, therefore, evaluate evidence on the three meetings in entirety and then make its finds.

[55] **PW6 Bishop Judith Nanjala Wechuli** also gave evidence on the issue of treating and bribery of voters. She swore her affidavit on 8/4/2013. She told the court that she is a Bishop at Prophetic Christian Church. She was a registered voter at Baptist Primary School. She attended the pastors and bishops meeting held at Kanduyi Red Cross Bungoma on the invitation of Rev. Musundi Henry on 22/2/2013. The said meeting was also attended by the 1st Respondent who was one of the people who addressed the meeting. The 1st Respondent and Khang'ati placed money at the table and counted it. It was a total of Kshs 260,000. The money was then passed over to Bishop Francis Khaoya on behalf of the pastors. The 1st Respondent, Alfred Khang'ati and Wafula Wamunyinyi who were all CORD candidates urged the pastors to go and hunt for votes for them and turn up to vote on 4.3.2013. The money was an incentive for the pastors and bishops to mobilize voters to support and vote for the 1st Respondent for the Senate seat and also to support other candidates of the CORD Coalition like Hon. Khang'ati and Hon. Wamunyinyi. Although she did not state who distributed the money, she testified that each of the pastors in attendance was given Kshs 1,000/-. She did not, however, receive the token for she considered herself a Bishop and should not partake of such tokens.

[56] PW6 was cross-examined but she insisted she was invited to the meeting via SMS which she had kept in her phone. According to her the meeting was held on a Friday and she was in attendance during the entire meeting. She witnessed the pastors and bishops receiving the money but she declined to take the money she had been offered. She did not, however, report the incident to the police or to IEBC. After the money had been distributed Hon. Wetang'ula asked the pastors to campaign for him.

[57] Yet another witness, **PW7 Nehemiah Mkubwa Kinisu** testified about his attendance in a meeting of pastors and bishops held at Red Cross Bungoma Branch offices in his capacity as a member of the Red Cross Bungoma. He had been invited by SMS by Rev. Musundi. Bishop

Machausi and Pastor Musundi sent out message for the meeting. He refused to withdraw anything in his affidavit, he only made a correction i.e. the message inviting him to the meeting was sent on 21.2.2013 but the meeting was on 22.2.13. In his affidavit sworn on 8/4/13 he stated he was registered as a voter at Lupinda Polling Station. He participated in the election held on 4/3/13 as an observer on behalf of Mwatikho National Rehabilitation Centre, a human rights organization based in Bungoma. The meeting of pastors and bishops held at Red Cross Bungoma Branch offices was addressed by Hon. Wetang'ula who thereafter, gave Rev Musundi and Bishop Macheusi a total sum of Kshs 260,000/- to distribute to the pastors who had attended the meeting. The participants pledged to mobilize their followers to vote for Hon. Wetang'ula as Senator.

[58] PW7 was categorical that the money that the 1st Respondent gave in the meeting was not a donation or tithe to the church; in Kiswahili he said...''*hii si fungu la kumi*'' . To him that was a bribe although he did not use the word bribe in his affidavit. From the onset, the court will not say anything about the purported report by his organization as no report was tendered in court.

[59] The 1st Respondent denied completely that he or through his agents bribed or influenced any person to vote for him. He called witnesses who supported his position on the matter. The 1st Respondent told the court that he convened a meeting on 7.12.12 at Nzoia Sugar Company Stadium. There were no church leaders at the stadium but at the guest house. The heads of the church leaders at Nzoia guest house were Bishop Mechumo and Machausi. The church leaders had gathered there to pray. Father Wanyonyi of Catholic Church also attended the prayers. There was anxiety amongst the church leaders of the position he should vie for. At Nzoia Guest House, the Bishops could not ask for lunch as they were respectable people and could fend for themselves. He said Bishop Wechumo will come to testify on the meeting and what happened there. He however clarified that Bishop Macheusi was not in the meeting at Nzoia Guest House. But he was not sure about the attendance of Bishop Machausi as he may have come late to the meeting.

At the stadium, there was a large crowd amongst them were members of the Bukusu Council of Elders led by Mzee Henry Wanyonyi, party officials, sitting councillors, maendeleo ya wanawake, a few teachers, young people and boda boda people. The Petitioner admitted that he addressed the meeting at the stadium. He further testified that after the meeting nobody approached him for lunch. He called witnesses to support his position.

[60] The 1ST Respondent called **MAURICE SIMON MAKOKHA MAKHANU** to testify in response to the several affidavits that had been filed by the petitioner and respondents' witnesses. Munyasia and Waswa swore affidavits and he was drawn to those affidavits. He said he is the one who convened a meeting at St Patricks Centre at Kabula on 20.2.2013 to support Lawrence Sifuna for Senator. He sent out invitations to all guests except Hon. Wetangula. Khangati was invited formally. However, after Hon. Wetangula had pleaded with him and his colleagues had prevailed on him, the witness allowed Hon. Wetangula to attend the meeting. The witness read in court the declaration of the meeting. He denied the declaration was a divisive document but one which was promoting unity by sharing power. The declaration was about complaints by the people from the South where Hon. Wetangula comes from. Khangati who contested under ODM (CORD Coalition) is the one who funded the meeting. The witness contributed Ksh.10, 000 while Khangati contributed Ksh.150, 000. Kshs 110,000 was used to pay transport for the delegates. According to the witness, Hon. Majimbo Okumu shared out the money. He was also in ODM CORD Coalition. He, however, confirmed that he did not include the preceding information in his affidavit. He also told the court that on 10.2.2013 Hon. Kombo visited him at his home in the evening and gave him Kshs 10,000. He had been in leadership with Kombo and both were in AMANI coalition. At the time Hon. Kombo visited, the witness was with his wife and other 5 elders namely; Wilfred Mattangah; and 2. Wilfred Simiyu. The elders were his "situate" which in Bukusu language means "my company". They were having a drink i.e. White Cap and Tusker brands. Kombo gave the witness and the witness' wife each Ksh.5, 000 making a total of Ksh.10, 000. He took the money for it was a token sum and he did not want to embarrass him. My wife did not request for any financial assistance. She is a teacher and I am there to take care of her.

Neither he nor his wife had ever gone to Kombo to seek for financial assistance. He, however, confirmed that he had only visited Kombo in Nairobi on two occasions and he gave him transport.

[61] The 1st Respondent also called the **Right Reverend GEORGE MECHUMO** to testify on the meeting at Nzoia Guest House. The witness is the Bishop of Diocese of Bungoma of Anglican Church having been consecrated and dethroned as Bishop on 11.11.2009. He corrected the error in his affidavit that he had attended a meeting on 7/12/13 and said that the meeting was on 7/12/12. He attended the meeting but he did not hear Hon. Wetangula say that politicians were good at buying votes from Christians. He denied he was given any money by the 1st Respondent or any other person.

[62] **Right Reverend GEORGE MECHUMO**, the Bishop of Diocese of Bungoma of Anglican Church confirmed that he attended the meeting held on 7/12/2012 at Nzoia Guest House. According to the Petitioner's evidence in court, the heads of the church leaders at Nzoia guest house were Bishop Mechumo and Machausi. The church leaders had gathered there to pray as there was anxiety amongst the church leaders why the 1st Respondent had opted out from the Presidential race and instead was forming an alliance with ODM and Wiper parties. They wished to know which position the 1st Respondent was to vie for. The growing anxiety amongst church leaders presents political connotations on the part of the Bishops as church leaders. But I will come to that later.

[63] **BISHOP JULIUS WAFULA MACHEUSI** was yet another witness of the 1st Respondent to testify on the meeting at Nzoia Guest House. He swore an affidavit on 23.4.2013. On cross-examination by **Ndambiri** he told the court that on 7.12.2012 he met the 1st Respondent at Nzoia Guest House for prayers and blessing. He said he attended, albeit late, the meeting at Kanduyi which had been convened by Francis Khaoya. He, however, did not need an invitation to the meeting for he was a Bishop. He learned of the meeting later and he went there at 11-12.30pm. It was a normal Bishops consultative meeting. Clergymen and laymen were also invited in the meeting. Hon. Khangati and his wife were there. Wamunyinyi was there also. These were their members. Although he could not have known what had happened before his arrival to the meeting, he insisted that he did not see any money being given and he was not made aware that money had been given to some participants.

[64] When cross-examined by **Mr Gumbo** he said that he had also attended the meeting at Kanduyi on 21.2.13 at about 10.30am which was attended by Hon Khangati, Hon. Wafula Wamunyinyi and the 1st Respondent. The 1st Respondent came to the meeting for spiritual blessings from the church leaders. No money that was contributed by 1st Respondent in the meeting. But he could not tell whether the other Bishops received money.

[65] It was the 1st Respondent's testimony that Bishop Machausi was not in the meeting at Nzoia Guest House. He was not sure about the attendance of Bishop Machausi although he qualified it that the Bishop may have come late to the meeting. But the evidence of Bishop Macheusi was wavy; he would take a position at one time and then changes it at the next. The court noted that aspect of his demeanour.

These meetings at Nzoia Guest House and Red Cross

[66] In these two incidents, the allegations of bribery of voters were made against the 1st Respondent in person. The meeting at Nzoia Guest House was a political one. The agenda could be discerned from what the Bishops themselves told the court; the growing anxiety amongst the church leaders with regard to the position the 1st Respondent was going to vie for since he had opted out from the Presidential race. The only evidence that he dished money in that meeting came from **REVEREND JOSEPH MACHANI WEKESA**. There is, however, one issue that

needs clarification. All the witnesses for the 1st Respondent gave evidence in respect of a meeting at Nzoia Guest House held on 7th December, 2012 whereas **REVEREND JOSEPH MACHANI WEKESA** attended a meeting at Nzoia Guest House held on 5th February, 2013. These were two meetings. The one of 7th December, 2012 was to discuss the decision by the 1st Respondent to opt out from the Presidential race and instead form a coalition with ODM and Wiper Democratic Party. That of 5th February 2013 was to rally the church leaders to support his bid for Senate seat. I note that the said witness had sworn an affidavit on 18th April, 2013 in support of the 1st Respondent's case. That affidavit denied the earlier one sworn on 8th March, 2013 in support of the Petitioner's case. What is surprising is that even in the said affidavit he reiterated that he attended a meeting at Nzoia Guest House on 5th February, 2013 where the 1st Respondent was present and addressed the meeting. There is no doubt that there were two meetings from the evidence by the Petitioner, the 1st Respondent and their witnesses. The 1st Respondent did not make any substantive address to the allegations about the other meeting for 5th February, 2013. However, it may not be safe to base a report to the DPP on the evidence of a sole witness. Not sufficient evidence to prove the meeting of 5.2.2013 took place or that the 1st Respondent bribed and treated the Bishops.

[67] The clearest incident where the 1st Respondent was alleged to have been involved directly with corrupt activities of bribery and treating of voters is the meeting held at Red Cross, Kanduyi on 22.2.13. There is no doubt as to the date of the said meeting as submitted by the 1st Respondent. The 1st Respondent admitted in paragraph 33 of his Replying Affidavit to the petition his attendance in the meeting at Red cross which was held on 22.2.2013. I reproduce paragraph 33:

33. THAT on 22nd February, 2013 at the invitation of Hon. Khang'ati, I, in company of Hon. Wamunyinyi met some Church elders who had been hosted at Kanduyi Red cross.

[68] All witnesses called by the Petitioner gave a succinct account of what transpired in the meeting particularly that the 1st Respondent together with Khang'ati bribed and treated pastors and bishops by giving out a sum of Kshs 260,000 to them as an incentive to mobilize voters to vote for him and other CORD Coalition candidates. The major witnesses were Bishop Judith Nanjala Wechuli, Nehemiah Mkubwa Kinisu and Reverend Joseph Machani Wekesa. The 1st Respondent has submitted that Reverend Joseph Machani Wekesa's evidence is unbelievable. They further submitted that the evidence of Bishop Judith Nanjala Wechuli, Nehemiah Mkubwa Kinisu and Reverend Joseph Machani Wekesa contradicted each other in material respects; each of them gave a different account of the meeting at Red Cross on 22.2.13. They were not agreed on the date the meeting took place; some say it was 20.2.13 while others say it was 22.2.13. Paragraph 211 of the submissions by the 1st Respondent lays a specific attack on the evidence of Bishop Judith Nanjala; that *nowhere in her affidavit did she state the 1st Respondent placed the money on the table and/or counted it or announced the figure*. I do not wish to say much about that submission except to reproduce paragraph 6 of the affidavit by the said Bishop thus;

6. THAT the money was placed on the table and counted by both Wetang'ula and Khang'ati.

[69] The 1st Respondent makes further submissions on the evidence of the three witnesses; that they were not consistent on the figure of Kshs 260,000. On the contrary, the court finds that they were consistent on the amount of money involved i.e. Kshs 260,000. They were also consistent on the date the meeting took place i.e. 22.2.13. **PW7 Nehemiah Mkubwa Kinisu** clearly explained that it was the SMS which he received on 21.2.13 but the meeting at Red Cross was on 22.2.13. That is a plausible clarification of the averment in his affidavit which the court observed and

communicated to the Respondent's counsel that the averment is in the league of ambiguous sentences capable of more than one meaning. The Petitioner and his witnesses established that there was a meeting at Red Cross on 22.2.13 which the 1st Respondent and Khang'ati attended. The Petitioner has also been proved beyond doubt that the 1st Respondent and Khang'ati gave a sum of Kshs 260,000 to the pastors and bishops who were present. The essence of that transaction in the meeting and the giving of the money were; 1) to induce them to vote for him and other CORD Coalition candidates; and 2) for them to mobilize and influence voters to vote for him and other CORD Coalition candidates. That was a corrupt act in the nature of bribery and treating of voters whose purpose was to influence and induce voters to vote for particular candidates and belonging to a particular political party in contravention of sections 62 and 64 of the Elections Act. The purpose of the money was also to induce and influence voters to refrain from voting for particular candidates and political parties. These are the objectives of section 62 and 64 and they have been established. In sum, all the essential elements of bribery and treating of voters were proved against the 1st Respondent and Hon Khang'ati beyond reasonable doubt. Such activities of giving tokens to voters or groups of people are common place during elections in Kenya and people find no fault with it. But it is a serious electoral offence which courts of law should stand up against if an impeccable electoral exercise is to be realized in Kenya.

Double registration and voting

[70] The Petitioner stated that one of his witnesses George Sitati Wekesa had sworn an affidavit where at paragraphs 7-8 he said he knew that there was double registration of voters at Matibo Friends and Chebukaka Boys Primary School registration centres and one of the people who double registered and double voted during the March 4 elections was Christine Nekesa Waswa. The Petitioner got the information on Christine Nekesa Waswa from the Provisional Voter Register a copy of which was given to him by IEBC.

[71] **GEORGE SITATI WEKESA** testified as the Petitioner's witness NO 2. In his affidavit dated 8/4/13 he stated that he was a member of a steering committee set up by the 1st Respondent in September, 2012 which was in charge of the general strategies and structures to be employed in ensuring that the 1st Respondent won the The County of Bungoma Senate seat. He told the court that one of the strategies was to ensure that as many people as possible were registered. Then, he informed the court that the 1st Respondent introduced a scheme to register voters more than once and also encourage them to vote more than once. He gave his assurance that nothing would happen to those voters. His explanation was that the scheme was designed to cheat the computer which was possible. And it entailed; interchanging the names of a voter; and omitting from or adding a digit to the original number in the identity card of the voter. Indeed he showed several voters cards which he had. He gave the name of Christine Wekesa Weswa as one of the people who had been registered and voted twice. The court then asked the witness to submit to the court a list of the 40 people he alleged had been registered twice. He supplied the list and the court commenced an inquiry into the matter. The Deputy Registrar, High Court, Bungoma was tasked to carry out the exercise and file a Report. All parties were involved in the exercise. The Report was filed in court. For completeness of record the Findings of the Inquiry are reproduced below.

Report and Findings of the inquiry

[72] I reproduce the Report herein below:

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ELECTION PETITION NO.3 OF 2013

REPORT ON THE LIST AVAILED TO COURT ON DOUBLE REGISTRATION

Pursuant to the order issued by the Hon. Judge on 14th June 2013, the principle registers in respect of the 40 people alleged to have voted twice were availed and the marked registers extracted from the presidential ballot boxes in the presence of all parties. The 40 people were then summoned and 18 of them did appear before the Deputy Registrar.

The observations made from the marked registers and when they appeared are as follows:

[1] **MUTORO FLORINE NELIMA**

When she appeared, she indicated that she voted once at Sichei Polling Centre. On the marked register, her name was crossed, and she appears on the exceptions list which indicates that she is not allowed to vote. The identity card that she availed agrees with the particulars indicated on the marked register i.e. ID number and name.

[2] **WANGALIBA RICHARD MWANJA**

When he appeared, he stated that he did not vote as he was sick. He stated that he did not register twice. On the marked register, his name is not crossed and he appears on the exceptions list as not allowed to vote.

[3] **WAFULA MEDILA BULEYWA**

When she appeared, she indicated that she was not double registered and that she voted once at Nateka Poling Centre.

On the marked register, her name is crossed and she appears on the exceptions list which indicates that she is not allowed to vote.

[4] **WANYONYI NASIMIYU EPHAMIA**

When he appeared, he stated that he voted once at Nandigwa Polling Centre and that he did not register twice. On the marked register, his name is not crossed and he appears on the exceptions list that indicates he is not allowed to vote.

[5] **KULOBA JULIANA NASIMIYU**

When she appeared, she indicated that she registered once and voted once at Khakimayo polling station.

On the marked register, her name is not crossed and she appears on the exceptions list which indicates that she is not allowed to vote.

[6] **MUTHONI JUSTIN**

She stated that she registered once and voted once at Khakimayo polling station.

On the marked register, her name is not crossed and she does not appear on the exceptions list of double registration list

[7] **LOICE LUSIMBO MUSALIA**

She stated that she registered once and voted once at Nambalai Polling Station

On the marked register her name is crossed and she appears on the exceptions list which indicates that not allowed to vote.

[8] **PETER WANIMO BELI**

He stated that at registration when he was-walking out, he was called back and told his details had not been saved on the computer and hence the process of registration was done again on the same day and he was issued with one card. He stated that when he went to do verification before elections, he found that he had been registered twice and he told the IEBC officials who told him they would rectify. He stated that during the elections, he voted once. On the marked register, his name is crossed and he appears on the exception list which indicates that he is not allowed to vote.

[9] **SIMIYU DENNIS SINYELI**

He stated that he registered once at Namaondo Primary School and voted once.

On the marked register his name is crossed and he appears on the exceptions list which indicates he is not allowed to vote.

[10] **BENARD FWAMBA SITATI**

He stated that he did not vote as he was an IEBC clerk based at Makhunga Primary.

On the marked register, his name is not crossed and he does not appear on the exceptions list.

[11] **KHISA FLORENCE NASIMIYU**

She stated that she registered once and voted once at Namakelo polling Centre.

On the marked register, her name is crossed and she does not appear on the exceptions list or double registration list.

[12] **BARASA AGNETA NABWILE**

She stated that she registered once and voted once at Namos Centre.

On the marked register, the name appears twice at position No.3 and 4. The ID number for both positions i.e. 3 and 4 are the same, 803520 and the date of birth are both indicated as 1.01.1950 for positions 3 and 4.

The only difference is the photos placed at position 3 and 4. At position 3, the name is crossed and at position 4 the name is not crossed. Both the names at position 3 and 4 do not appear on the duplicate or exceptions list.

The ID number that he gave when he appeared before me was 8038520. It does not agree with the ID numbers in position 3 and 4.

[13] **MAFUTU JULIUS WANJALA**

He stated that he registered once and voted once.

The marked register was not inside the presidential box and was not traced.

[14] **JAMES KHWATENGE WEKESA**

He stated that he registered once and voted once at Kyua Primary School.

On the marked register his name is crossed and he does not appear on the exceptions list.

On the marked register, his name appears as indicated above, on the list provided to court on double registration his name appears as James Khwate Wekesa.

[15] **WEPUKHULU MIRIAM NALIAKA**

She stated that she registered once and voted once at Sanandike polling station. Her name is crossed on the marked register and she does not appear on the duplicate or exceptions list.

[16] **WAFULA ERICK MWIMA**

He stated that he did register once and he did not vote as he was sick.

On the marked register, his name is not crossed.

[17] **WEBEKA JENIFER NAMUKURU**

She stated that she was registered once and she voted once and that she was assisted to vote by a clerk.

On the marked register her name is crossed and she appears on the exceptions list which is indicated not allowed to vote.

[18] **CHRISTINE NEKESA WESWA**

When she appeared, she stated that she did register twice and that she voted twice. She stated that she first registered at Matibo Friends Primary school then after two weeks she registered at Chebukaka Primary school. She stated that on 4th march 2013, she 1st went to Matibo Polling Station and voted and that ink was not applied on her finger.

She stated that she then went to Chebukaka Primary School and voted again.

When she appeared, she had not brought her ID and voter registration card. She went home and brought two voter registration cards (copy attached) and her ID card No.30530496.

On the marked registers, her name does not appear on both Chebukaka Boys Primary School and Matibo Friends Primary. There is a duplicate list on both the registers indicating that she is not allowed to vote.

[19] **MUSUMBAI PATRICK MATETE**

He did not appear on the marked register. His name is crossed. He is not on the exceptions or duplicate list.

[20] **MASIKA PAMELA NASAMBU**

On the marked register, her name is not crossed and she does not appear on the exceptions list or duplicate list. She was not traced and hence summons could not be served.

[21] **BARASA CARO**

Her name is not crossed on the marked register. She appears on the exceptions list. She was not traced and hence summons could not be served.

[22] **THOMAS PATRICK NAFULA**

On the marked register, his name is crossed. He appears on the duplicate list which indicates not allowed to vote. He did not appear, summons was served upon his wife.

[23] **MAKHANU MESHACK MUTAKI**

On the marked register, name crossed and he appears on the exceptions list which is indicated that not

allowed to vote.

[24] **MONDAY STEPHEN SIMIYU**

On the marked register, name not crossed. The name appears on the exceptions list.

[25] **MULONGO FRANCIS WANAKAI**

On the marked register, name crossed. The name on the marked register is indicated as Mulonja Francis Wanakai. He appears on the exceptions list which is indicated that not allowed to vote. He did not appear. Summons was served upon his family member.

[26] **MABONGA GODFREY WANJALA**

Name crossed on the marked register and he does not appear on the exceptions list or duplicate list. He was not traced and hence summons could not be served.

[27] **GEOFREY BARASA WANJALA**

Name crossed on the marked register. He appears on the exceptions list twice which list indicates not allowed to vote.

[28] **WALIAULA NAFULA MASINDE**

Her name crossed on the marked register and her name does not appear on the duplicate or exceptions list. She was not traced and hence summons could not be served.

[29] **AINEA MASIBO KOYABE**

Name crossed on the marked register and name appears on the exceptions list. He was not traced and hence summons could not be served.

[30] **ROSEMARY WANYONYI NASAMBU**

Name crossed on the marked register and her name appears on the exceptions list which indicates that not allowed to vote. She was served but she did not answer to the summons.

[31] **BULUMA VIOLET NANJALA**

Name crossed on the marked register and her name appears on the exceptions list. She was not traced and hence summons could not be served.

[32] **NGEYWA MILLY CHEPTOO**

Name crossed and she does not appear on the exceptions or duplicate list.

[33] **KUTETE EVERLYNE NANJEKHO**

Name not crossed on the marked register. He name appears on the exceptions list. She was not traced and hence summons could not be served.

[34] **JUMA ROSEMARY NALIAKA**

Name crossed on the marked register and she appears on the exceptions list. She was not traced and hence summons could not be served.

[35] **MUCHA JOHN WANYONYI**

On the marked register, two names as indicated above appear at positions 177 and 178. Both the names are crossed; they both do not appear on the duplicate list or exceptions list.

[36] **MASINDE ISAAC MULONGO**

Name crossed on the marked register and appears on the exceptions list. He was not traced and hence summons could not be served.

[37] **IMBWAKA MODESTER IMONJE**

Name not crossed on the marked register. Appears on the exceptions list. She was not traced and hence summons could not be served.

[38] **WEPUKHULU MILDRED NANGALI**

The register was not found in the box and she was not traced for service.

[39] **GEOFREY BARASA WANJALA**

He was not traced for service and register not found.

[40] **KATA LOICE NELIMA**

He was not traced for service and register not found.

DATED at BUNGOMA this 6th day of June 2013

ATIANG MITULLAH

DEPUTY REGISTRAR

HIGH COURT, BUNGOMA

Analysis by Court of and Submissions on the Report

[73] The inquiry was prompted by the evidence of **GEORGE SITATI WEKESA** which was tendered in support of the Petition. Parties were asked by the court to submit on the Report which was sent to all the parties through their advocates by the Deputy Registrar, High Court, Bungoma. The Petitioner is of the view that the Report reveals that there were double registrations of voters and voting more than once in The County of Bungoma. To them the evidence of **GEORGE SITATI WEKESA** is credible. As a result, they argued, the integrity of the electoral process was completely impeached. The 1st Respondent submitted on the matter; that the witness claimed to have been a party to a scheme to subvert the electoral process. Moreover, even if there were voters who had been registered more than once, then that was cleaned up during the process of cleaning of register by IEBC which fact the witness was aware of. He further submitted that none of the persons inquired on voted twice as alleged. He termed the evidence of the witness to be incredible and a fraud. Mr Ocieng Oduol in his submissions in court made an appeal to the court to commit one **CHRISTINE NEKESA WESWA** for perjury.

[74] The court has observed from the Report that substantial majority of the people **GEORGE SITATI WEKESA** claimed had been registered more than once were indeed removed from the register of voters and were in a duplicate list or exceptions list for voters who were not allowed to vote. In law, such restriction on a voter's eligibility to vote is based on a ground known in law. Although there was no particular reason that was given by the Report for the restriction imposed

on eligibility to vote of those voters, there is really nothing to doubt what the witness was saying about double registration, for that is in law a proper ground to disentitle a voter from eligibility to vote. It is cruel, therefore, to label the witness a liar. That aside, majority of those voters who were not allowed to vote indeed voted although the Respondents seem to disagree because there was no specific finding by the DR that they voted. First of all, the Report is a report of this court and was answering to specific questions on double registration and voting. The finding by the Deputy Registrar that a name had been crossed could not have meant just anything or nothing in the context of the inquiry into electoral process. It is the legal procedure of voting under Regulation 68(e) of the Elections (General) Regulations, 2012 at the polling hall the voter identifies himself using the document he used to register with-ID card or Passport-then the name of the voter is marked normally by crossing it out; then the voter is issued with ballot papers for purposes of voting. At least the crossing of the voter's name in the register signifies his intention to vote and if after being issued with ballot papers such a voter decides not to vote the ballot papers will be returned and accounted for in accordance with the Regulations. In our case, those who appeared before the DR and their names had been crossed in the register confirmed they voted. I suppose that, even where a voter's name had been crossed but he refuses to be issued with ballot papers and goes out, the PO should be able to record that kind of strange occurrence in relation to the voter to safeguard the integrity of the marked register as an important election material which helps to unravel many legal issues on the number of people who attended the polling station on the election day, issuance of ballot papers, number of those who voted, votes cast and so on. In the circumstances of this case, and in the absence of evidence to the contrary, the crossing of names of the persons under inquiry in the marked registers herein, well understood, refers to and signifies voting. The marked registers under scrutiny were the ones that were used during the election and are the basis of the Report herein. From the Report, the name of **MUCHA JOHN WANYONYI** appeared twice in the marked register, i.e. at positions 177 and 178. Both names had been crossed although they do not appear on the duplicate list or exceptions list.

Voting by voters not entitled to vote

[75] From the Report by the DR on Double Registration and Voting, there is clearly an electoral malpractice on the part of IEBC officers and the persons who voted when they were not entitled to vote. According to Section 10 of the Elections Act, eligibility to vote does not extend to a person who has been prohibited from voting under any written law. Under Section 57 of the Elections Act a person who has committed electoral offences shall not be eligible to vote in that election or the next. Section 58 of the Elections Act establishes as electoral offences where a person votes at any election when they are not entitled to vote or votes more than once in any election. Given the results of the Inquiry and the law applicable on the matter, the evidence of **GEORGE SITATI WEKESA** was properly before the court, and, therefore, it was not a fraud or perjury as claimed by the Respondents. His evidence is believable.

[76] One other important issue; the submission by the Respondents that **CHRISTINE NEKESA WESWA** perjured herself when she claimed she was registered twice and voted twice. The Petitioner was the first one to allege that **CHRISTINE NEKESA WESWA** had been registered twice and voted twice. **GEORGE SITATI WEKESA** repeated similar claims and stated that she was registered as **Nekesa Christine Weswa** at Matibo Friends Primary School and as **Weswa Christine Nekesa** at Chebukaka Primary School. The two names appeared in the register which the Petitioner had been provided with by IEBC. During cross-examination, IEBC informed the court that was a provisional register compiled before the clean-up of the Register of Voters had been done. Nevertheless, this issue is to be resolved by looking at the relevant part of the Report on **CHRISTINE NEKESA WESWA** which was as follows:

When she appeared, she stated that she did register twice and that she voted twice. She stated that she first registered at Matibo Friends Primary school then after two weeks she registered at Chebukaka Primary school. She stated that on 4th march 2013, she 1st went to Matibo Polling Station and voted and that ink was not applied on her finger.

She stated that she then went to Chebukaka Primary School and voted again.

When she appeared, she had not brought her ID and voter registration card. She went home and brought two voter registration cards (copy attached) and her ID card No.30530496.

On the marked registers, her name does not appear on both Chebukaka Boys Primary School and Matibo Friends Primary. There is a duplicate list on both the registers indicating that she is not allowed to vote.

[77] The last sentence is of particular importance: “*There is a duplicate list on both the registers indicating that she is not allowed to vote*”. The duplicate lists in which she had been prohibited from voting were in respect of the registers for *Chebukaka Boys Primary School and Matibo Friends Primary*. These are the stations she claimed to have registered in and also voted. Four things are clear; 1) her name was not in the marked register for *Chebukaka Boys Primary School and Matibo Friends Primary*; 2) her name appeared in the exception list for *Chebukaka Boys Primary School and Matibo Friends Primary*; 3) she was not allowed to vote in that election; and 4) such prohibition must be on a ground known in law. At the moment the only explanation why she was prohibited from voting is what she told the court in the inquiry; that she had registered twice at *Chebukaka Boys Primary School and Matibo Friends Primary*. She also claimed to have voted twice at *Chebukaka Boys Primary School and Matibo Friends Primary*. She had in her possession two registration cards which are part of the record of the inquiry. There was a trend that also emerged in the scrutiny exercise which shall be treated later in full, of crossing out names in the exception list. As her names appeared in the exception lists for *Chebukaka Boys Primary School and Matibo Friends Primary*, it is not possible to say with certainty that she did not vote. The material before the court suggests she could be telling the truth. And as such the court does not consider pursuing the offence of Perjury to be a feasible option. But she may have committed an electoral offence which is best dealt with under the regime of section 87(1) of the Elections Act and make a report to the DPP, for further investigation into the matter to establish commission of electoral offences in an election petition.

[78] It is quite startling that she claims to have voted twice and indelible ink was not applied on her finger as was prescribed in law. That is not all. Her name was not appearing in the marked register, but in the exception list. Then, on whose name did she vote? I do not want to speculate but when the court will be considering the Report on Scrutiny and Re-count these questions will get answers as similar incidents were revealed by that Report.

[79] I have found that there was malpractice on the part of IEBC officers manning the concerned polling stations as well as the particular individuals who were not entitled to vote but they voted nonetheless. I also find the argument by the 1st Respondent that the issues on double registration and voting were not pleaded to be short of the true position of things. The petition and the affidavit in support clearly plead those issues and witnesses were called to speak to them. Paragraphs 22 and 23 of the petition pleaded double registration of voters and voting. At this point, I am forced to address, with tremendous respect, the submission by the 1st Respondent that...*the Court record would show that paragraph 22 of the petition was struck out*... That is wholly incorrect. The correct position is that paragraph 22 of the Affidavit in support of the petition was the one that was struck out by the court. That paragraph alleged that the 1st Respondent engaged in intimidation, threats and violence on the supporters of the Petitioner. Another misrepresentation in the submissions of the 1st Respondent which needs instant clarification was that the inquiry was merely to facilitate investigations for possible election offences. The scope of the inquiry was much wider and the documents to be scrutinized were clearly delineated by the order of the court made on 13th June, 2013 made with the agreement of parties. The full rendition of the said order is reproduced below that:

The court suo moto directs the DR to take particulars of all those people alleged to have

registered and or voted twice. The DR should conduct the exercise into the matter on the following directions and extent:

- a) that the IEBC shall deliver to the DR, High Court, Bungoma, all the marked registers on all the polling stations where the 40 people were alleged to have voted twice for scrutiny by the court.
- b) that the DR will record any information on this matter as observed or ascertained from the registers.
- c) the DR should also be provided with the principle register of voters for the respective polling stations under inquiry.
- d) the DR should record the details of the marked registers and the register of voters as they appear in respect of the 40 people alleged to have been registered and voted twice.
- e) the DR to also ascertain the actual existence of all the 40 people whose names appear in the list provided to court and titled "DOUBLE REGISTRATION".
- f) the DR to make a report of the inquiry to the court on or before 2.7.13.
 - g) Johnson Masinde Simiyu Advocate and Alfred Ndambiri will be the official representatives for the 1st Respondent and the Petitioner respectively. Erick Gumbo will officially represent the 2nd and 3rd Respondents in the exercise. However, the counsels may deputise any other person to attend the exercise on their behalf but on written instructions directed to the court and the DR.
 - h) the DR shall in consultation with the said representatives agree on the time, place and the manner of conducting the inquiry shall be had.
 - I) the inquiry by the DR does not extend to cross-examination of the persons under inquiry or any other person who will be involved in the process. The DR, however, may seek for information that is incidental to the inquiry from the persons under inquiry or involved thereto.

F.Gikonyo

JUDGE

[80] The inquiry was, therefore, much wider than claimed by the Respondents and was not based on nothing but on the allegations in the pleadings, evidence tendered before court and the law. In any event, it would be a negation of constitutional principles on resolution of electoral disputes for a court of law to turn a blind eye to such serious irregularities which have been established to have occurred in the election in dispute. In the instant case, however, the malpractices have been properly pleaded and laid bare before the court. What is remaining is to establish; 1) whether the malpractice was as a result of the scheme allegedly contrived by the 1st Respondent to subvert the electoral process; and 2) whether the malpractice impeached the integrity of the electoral process, thus, affecting the validity of the results?

Scheme to subvert electoral process

[81] Although **GEORGE SITATI WEKESA** confessed to have been a member of the steering committee allegedly set up by the 1st Respondent to subvert the electoral process through

registering people and making them vote more than once, there was no sufficient evidence to prove the scheme was hatched by the 1st Respondent. However, his evidence, that of **CHRISTINE NEKESA WESWA**, the findings of the Inquiry Report and that of Scrutiny, proves there was a serious electoral malpractice.

WHETHER THE ELECTORAL MALPRACTICES HEREIN IMPEACH THE INTEGRITY OF THE ELECTORAL PROCESS AND AFFECTS THE VALIDITY OF RESULTS IN THE ELECTIONS OF THE MEMBER OF THE SENATE FOR THE COUNTY OF BUNGOMA

[82] This is the ultimate question which must be answered before the court could say whether or not the 1st Respondent was validly elected. In addition to the foregoing findings of the court, the court proceeds to analyse and make further findings on the Report on Scrutiny and Re-count of votes.

REPORT ON SCRUTINY AND RE-COUNT OF VOTES

Voting by persons not entitled to vote

[83] The Report on Scrutiny and Recount also revealed the same incidents found in the Report on Inquiry on Double Registration and Voting. Persons who were not entitled to vote voted. The Report listed the following names of people who were in the exceptions list and were not allowed to vote but still voted in the election: It was easily verifiable that they voted by looking at the number of crossed names, votes cast, spoilt and rejected votes. They all tallied. The names were:

1. Mulati Lucas Wanyonyi-Sibembe ECD
2. Lutawa Floice Chimatuni-Misikhu Mixed Pry. Sch
3. Juma Felista Khisa-Brigadia Makutano Dispensary
4. Recha Everylne Vakhoya-Mitua Education Centre
5. Wephukhulu Mildred Nangali-Mitotpo Cattle Dip
6. Kuyuni Benson Simiyu Alukohe-Sikata Pry. School Stream 1
7. Kata Loice Nelima-Chwele Youth Polytechnic Stream 2
8. Tawayi Ann Nanjala-Luuya Pry. Sch Stream 1
9. Wafula Fred Wekesa-Chebichi Pry. Sch Stream 1
10. Nalume Beatrice Mukoya-Walanga FYM Pry. School Stream 2
11. Kisaka Jafred Wamocha-Misimo Pry. Sch Stream 1
12. Mukanda Richard Wafula- Misimo Pry. Sch Stream 1
13. Wakhungu Seline Usude- Misimo Pry. Sch Stream 1
14. Pichi Roselyne Namalwa- Buko RC Pry. Sch Stream 1

Marked Register and exceptions list: both marked

[84] What is more surprising is that in some instances, names were crossed in both the exception list and the marked register. It is worthy of repeating that the results entered in the respective Form 35 on votes cast clearly shows these people voted and the votes they cast were included in the results. Where the number of names crossed in both register differs with votes cast, the difference is accounted for in the rejected and spoilt votes. Such malpractice strikes at the heart of the entire electoral process and certainly cast doubt on the credibility of the election. Those names were:

1. Luvonga Byrone Mwiroti-Misikhu Mixed Pry. Sch. Stream 1
2. Mukhisende Francis Sindani- Misikhu Mixed Pry. Sch. Stream 1
3. Makokha Emily Jaiga- Misikhu Mixed Pry. Sch. Stream 1
4. Wafula Janet Nekesa- Misikhu Mixed Pry. Sch. Stream 1
5. Wamalwa Janet Nasimiyu- Misikhu Mixed Pry. Sch. Stream 1
6. Watuloh Annessmillah Nelima- Misikhu Mixed Pry. Sch. Stream 1
7. Wekesa Job Nabibia- Misikhu Mixed Pry. Sch. Stream 1

8. Lutilo Martin Wafula- Misikhu Mixed Pry. Sch. Stream 2
9. Muchembeli Protus Wangokho- Misikhu Mixed Pry. Sch. Stream 2
- 10.Sifuna Praxides Mwanaida- Misikhu Mixed Pry. Sch. Stream 2
- 11.Muyila Isaac Wafula-Lungai Pry. School Stream 1
- 12.Mukhwana Wilson Sichangi-Lungai Pry. Sch. Stream 2
- 13.Divi Silvia Tsikhungu-Namboko R.C Pry. Sch
- 14.Khaemba Richard Wanjala- Namboko R.C Pry. Sch
- 15.Kwora Lona Naswa- Namboko R.C Pry. Sch
- 16.Madara Realyne Muronji- Namboko R.C Pry. Sch
- 17.Namusyule Respah Mukwana- Namboko R.C Pry. Sch
- 18.Sitweti Joseph Soita- Namboko R.C Pry. Sch
- 19.Wasike William Wanjala- Namboko R.C Pry. Sch
- 20.Kwanusu Michael Sirongo-Milele FYM Pry. Sch. Stream 2
- 21.Machana Samuel Khamala- Milele FYM Pry. Sch. Stream 2
- 22.Misiko Mary Wanjala- Milele FYM Pry. Sch. Stream 2
- 23.Nangendo Rael Nakhumicha- Milele FYM Pry. Sch. Stream 2
- 24.Sokori Rogers Simiyu- Milele FYM Pry. Sch. Stream 2
- 25.Wafula Maximilan Naliaka- Milele FYM Pry. Sch. Stream 2
- 26.Wanjekeche Vincent Kunani- Milele FYM Pry. Sch. Stream 2
- 27.Wekesa Maurice Munialo- Milele FYM Pry. Sch. Stream 2
- 28.Akalo Mary Ongachi-Lusoko Pry. Sch. Stream 1
- 29.Akumonyo Laurent Muhanja- Lusoko Pry. Sch. Stream 1
- 30.Alubina Simiyu Richard- Lusoko Pry. Sch. Stream 1
- 31.Barasa Elias Nyongesa- Lusoko Pry. Sch. Stream 1
- 32.Benard Wangila Wanjala- Lusoko Pry. Sch. Stream 1
- 33.Bronson Nyukuri Kisaka- Lusoko Pry. Sch. Stream 1
- 34.Buchunju David Barasa- Lusoko Pry. Sch. Stream 1
- 35.Caren Wekesa Nasambu- Lusoko Pry. Sch. Stream 1
- 36.Chaburukha Everylne Nafula- Lusoko Pry. Sch. Stream 1
- 37.Erick Wanyonji Barasa- Lusoko Pry. Sch. Stream 1
- 38.Eunita Adongo Achieng- Lusoko Pry. Sch. Stream 1
- 39.Kikenyi Millicent Nelima- Lusoko Pry. Sch. Stream 1
- 40.Lusweti Rose Nanyama- Lusoko Pry. Sch. Stream 1
- 41.Maina Josephine Kilui- Lusoko Pry. Sch. Stream 1
- 42.Mis Cecilia Sikhoe Masinde- Lusoko Pry. Sch. Stream 1
- 43.Mwikali Marietta Munyoli- Lusoko Pry. Sch. Stream 1
- 44.Nasimiyu Margaret Wafula- Lusoko Pry. Sch. Stream 1
- 45.Nasongo Felistus Nafula- Lusoko Pry. Sch. Stream 1
- 46.Nasongo Joseph Wamalwa- Lusoko Pry. Sch. Stream 1
- 47.Okumu David Wabwile- Lusoko Pry. Sch. Stream 1
- 48.Okumu Ruth Neununa- Lusoko Pry. Sch. Stream 1
- 49.Simiyu Peter Wafula- Lusoko Pry. Sch. Stream 1
- 50.Situma Bramwel Matakala- Lusoko Pry. Sch. Stream 1
- 51.Solome Sanduku Namaemba- Lusoko Pry. Sch. Stream 1
- 52.Victor Machio Namusasi- Lusoko Pry. Sch. Stream 1
- 53.Waboya Alfred Wangusi- Lusoko Pry. Sch. Stream 1
- 54.Mukwana Wilson Sichani-Lungai Pry. Sch.
- 55.Wanjala Robert Barasa-Luuya DEB Pry. Sch Stream B

[85] Other names were added by hand on the register and were allowed to vote without giving or recording any explanation or showing legal authorization or making necessary reference to the legal source or register known in law. These names were:

1. Mary Nangosia Manasi-Nalondo S.A Pry. Sch.
2. Faith Nabangala Nabarwa- Nalondo S.A Pry. Sch.
3. Sara Kwaka Namukhono- Nalondo S.A Pry. Sch.

4. Beniteta Naliaka Matumbai- Nalondo S.A Pry. Sch.
5. Caro Nasimiyu Nalialu- Nalondo S.A Pry. Sch.

Inside the Marked Register for Wabukhonyi Primary School Stream 1 there was a separate sheet with names written by hand without appropriate reference, authorization or authentication, say, people without geometric features.

Two identical registers in same polling station

[86] At **MISIKHU MIXED PRIMARY SCHOOL BOX S/N 048378** two identical registers were found for stream 1 and a total of 384 names had been crossed on both registers for stream 1. The common names which had been crossed in both registers were:

1. Luvonga Byrone Mwiroythy
2. Mukhisende Francis Sindani
3. Makokha Emily Jaiga
4. Wafula Janet Nekesa
5. Wamalwa Janet Nasimiyu
6. Watuloh Annessmillah Nelima
7. Wekesa Job Nabibia

[87] At **NAMBOKO R.C. PRIMARY SCHOOL BOX S/N 048080** two identical registers were found and a total of 489 names had been crossed on both registers. The common names which had been crossed in both registers were:

1. Disi Silvia Tsikhungu
2. Khaemba Richard Wanjala
3. Kwora Lona Naswa
4. Madara Realyne Muronji Muronji
5. Namusyule Respah Mukwana
6. Sitweti Joseph Soita
7. Wasike William Wanjala

[88] At **MILELE FYM PRIMARY SCHOOL BOX S/N 050709 STREAM (2)**, two identical registers were found and both had been marked. A total of 435 names had been crossed in both registers. The common names which were marked in both registers were:

1. Kwanusu Michael Sirongo
2. Machana Samuel Khamala
3. Misiko Mary Nanjala
4. Nangendo Rael Nakumicha
5. Sokori Rogers Simiyu
6. Wafula Maximilan Naliaka
7. Wanjekeche Vincent Kunani
8. Wekesa Maurice Munialo

[89] At **LUSOKHO PRIMARY SCHOOL BOX S/No. 050955 STREAM 1**, two identical registers were found and both the registers had been marked. A total of 241 names had been crossed on both registers. The common names which had been marked in both registers were:

1. Akalo Mary Ongachi
2. Akumonyo Laurent Muhania
3. Alubina Simiyu Richard
4. Barasa Elias Nyongesa
5. Bernard Wangila Wanjala
6. Bronson Nyukuri Kisaka
7. Buchunju David Barasa
8. Caren Wekesa Nasambu
9. Chaburukha Everylne Nafula
10. Erick Wanyonyi Barasa
11. Eunita Adongo Achieng
12. Kikenyi Millicent Nelima
13. Lusweti Rose Nanyama
14. Maina Josephine Kilui
15. Mrs Cecilia Sikhoe Masinde
16. Mwikali Marietta Munyoli
17. Nasimiyu Margaret Wafula
18. Nasongo Felistus Nafula
19. Nasongo Joseph Wamalwa
20. Okumu David Wabwile
21. Okumu Ruth Neununa
22. Simiyu Peter Wafula
23. Situma Bramwel Matakala
24. Solome Sanduku Namaemba
25. Victor Machio Namusasi
26. Waboya Alfred Wangusi

[90] Similarly, there were two identical registers found for stream 2 for **MISIKHU MIXED PRIMARY SCHOOL** and a total of 376 names had been crossed in both registers. The common names which had been crossed in both registers were:

1. Lutilo Martin Wafula
2. Muchembeli Protus Wangokho
3. Sifuna Praxides Mwanaida

[91] Two identical registers were also found in **MFUPI MARKET, MAKUNGA S.A PRIMARY, LUNGAI PRIMARY SCHOOL** (in both streams), **MITUA EDUCATION CENTRE, LUUYA DEB PRIMARY SCHOOL**

Added names: By hand

[92] At **Nalondo S.A Primary [018] Box S/N o. 049414**, five names were added on the register by pen and crossed. The names were:

- i. Mary Nangosia Manasi
- ii. Faith Nabangala Nabarwa
- iii. Sara Kwaka Namukhono
- iv. Beniteta Naliaka Matumbai
- v. Caro Nasimiyu Nalialu

Marked register was with the RO; no Form 35 affixed to or inside the box

[93] At **CHWELE YOUTH POLYTECHNIC (002) BOX S/No. 056397 (STREAM 2):**

(a) Form 35 was neither affixed to box nor found inside box.

(b) The register was not in the presidential box. The returning officer availed the marked register to the DR during scrutiny which he said he had retrieved from the black box at the Constituency office.

[94] It is an electoral irregularity for the RO to be in possession of election material at that stage. The marked register for **CHWELE YOUTH POLYTECHNIC (002)** was with the RO until the time of scrutiny is when he availed it to the DR. In this polling station, there was no Form 35 affixed to the Box or inside the box. The cumulative effects of such irregularities will be concluded after the court has analysed all the evidence.

[95] From the Report on scrutiny and recount, a trend emerged regarding the proportion among the number of ballot papers used; the number of crossed names; and the number of votes cast. But there were some instances where there was a huge difference between the number of ballot papers used, votes cast and the number of people whose names were crossed. In such a case, it is not possible to verify how the ballot papers and how many were issued correctly when there is a big disparity between the number of names crossed/marked in the register, the number of votes cast and the number of spoilt or rejected votes. Regulation 69(e) of the Elections (General) Regulations was not enacted in vain. The presence of the handwritten names of voters was not explained at all by IEBC who were involved in the scrutiny exercise and were also called upon to make submissions on the report. It cannot be assumed that those were voters without Geometric features or that there must be some other lawful explanation. Look at the examples below of **Wabukhonyi Primary School (024)** and see that it is impossible to verify how many ballot papers were issued or issued correctly.

Wabukhonyi Primary School[024] Box S/N 056269[Stream 2]

- a. Form 35 affixed inside box and one form 35 found inside box
- b. 3 used booklets, 2 not used. Total ballot papers used 300.
- c. 193 names crossed on the register.

WABUKHONYI PRIMARY SCHOOL (024) BOX S/NO. 056270 STREAM 1

- a) Form 35 found inside box.
- b) 4 used booklets, 1 partially used. 473 ballot papers used.
- c) 286 names crossed on the register.
- d) Hand written names found inside the marked register on separate sheet.

The POs comments for Stream 1 on the Form 35 found in the ballot box were:

“There were many voter assisted voters and we also had a problem with influx from stream 2”.

Those by the same PO on the Form 35 produced by IEBC were;

“There was a problem with the BVID in stream 2 that brought us a problem of influx to stream 1”

Looking further, the POs comments for Stream 2 were that;

‘‘The voting was conducted successfully, elections were held peacefully’’.

Note there was a hand written list of names inside the marked register which was never explained. The record of the assisted voters is not there to account for the ballot papers which were correctly issued. What about stream 2 where there is no claim of assisted voters? After all, the PO for stream 2 did not record any adverse happening or influx from his stream to the other. There was a serious malpractice.

[96] In cases where there were two marked identical registers with some names being marked in both registers, the final results entered in the respective Form 35 for those stations was equal to the number of all marked names. Why should the IEBC officers mark two identical registers for one stream, mark some names twice and then post results equal to all crossed names? The irregularity was included in the final results. I do not wish to speculate on the possible explanation for that but it is a serious electoral irregularity which impeached the integrity of the election.

OTHER ALLEGED MASSIVE ELECTORAL MALPRACTICES AND IRREGULARITIES

Failure to provide agents with Form 35

[97] **PW12 Evans Mumbwani Wosula** stated in his affidavit that at Kamasielo Polling Station, party agents were not allowed to verify the ballot papers and sorting process for they were kept at a distance of about 4 meters from the sorting table. They were also not given copies of forms 35 and 36 by the Presiding Officer who told them that he had a shortage of those forms.

[98] **PW14 Jacob Opicho Mirikwa** also stated in his affidavit on 8.4.13 that he was a domestic observer attached to Torch Africa, a Community Based Organization operating in The County of Bungoma. He was deployed to observe elections in selected stations including Luahokhe Primary School, Milima Primary Scholl, Maliki Market, Masinde Cattle Dip, Makuyuni Primary School, Makunga Market and Bilibili Primary School among others. At Masinde Cattle Dip on 4th March 2013, he observed that election observers and candidates’ agents were kept about 5 meters from the counting table. The distance made it impossible to verify the correctness or authenticity of the sorting and vote counting process. The agents were also told to sign Form 35 by the Presiding Officer without verification and that a copy of the Form 35 was pinned on a tree which made it impossible to see the entries at the back.

Agents were also denied copies of Form 35 even after they requested for the same. He said he witnessed this in several other stations including Mukuyuni Primary School Makunga Market and Lukohoke FYM Primary School.

[99] On cross-examination, PW13 said he did not know the connection between Torch Africa and one Nyukuri and that he knows Torch Africa is accredited to IEBC. He observed what was going on during the process and prepared a report which he sent to Torch Africa. He did not rely on what others said or told him but on what he observed.

[100] The witnesses were not agents and so they could not have demanded to be issued with Form 35. They cannot speak for the agents for whom they allege were denied the Forms or were kept at a distance which did not allow proper scrutiny of the counting of votes. I agree with the submissions by the Respondent and specifically the 1st Respondent that the Petitioner ought to have called the particular agents who were denied Form 35 as witnesses. Accordingly, the evidence of PW12 and PW13 would have been more useful in corroboration to the evidence by the actual persons who were offended by the alleged irregularity-the agents. Their evidence is at very high level of generalization and does not attain the standard required which is above the balance of probabilities but not as high as beyond reasonable doubt. The allegation fails.

Lamps put off and introduction of foreign ballot boxes

[101] The Petitioner testified that the 1st Respondent was known to causing power blackout during elections. He testified that in some stations lamps went off during counting of votes. The allegation was that during the black out foreign ballots were introduced. He called witnesses to support his claim. **PW 13 David Wabili Simiyu** stated in his affidavit dated 8/4/13 that he is a registered voter. He was also engaged as a driver by IEBC to carry election materials from Naitiri High School to Machakha Primary School (096), Tabani RC Primary (082) and Banambo FYM primary (084) polling stations in Tongaren Constituency on the night of 3/3/13. On 4/3/13, after casting his votes at Machakha Primary School, he stayed on until the counting process began. While waiting in his car at about 11.00pm he saw 2 vehicles with 4 people enter the station and thereafter the gas lamp went off. He saw the four people talk to the election officials and then 2 of the four people came out of the station, went to the vehicle and took 3 ballot boxes from the car. They took the ballot boxes inside the station. After about 30 minutes, the two people came out with 3 ballot boxes, put them in the big car and drove off. He made an attempt to inquire from the security officer at the station on the matter but the officer told him to mind his own business.

After the counting process was over, PW12 transported the election materials to Naitiri High School. Later, he went to Bunambo FYM Primary School where he saw the two vehicles that had carried the three ballot boxes with the same occupants.

[102] He was cross-examined and he could not provide details of the vehicle involved or the colour of the ballot boxes.

[103] The matter raised is very grave; it alleges introduction of foreign ballot boxes. The alleged power blackout was intended to aid the introduction of the foreign ballot boxes. There was need to supply the court with much succinct details of the persons who were involved and other information which would designate the transaction as one of rigging. Mere transportation of ballot boxes is not enough because even the witness herein had been contracted to transport ballot boxes before and after voting. Evidence must show on the standard set in law that the two persons introduced foreign ballot boxes into the election. That evidence is not there and I agree with the submissions by the Respondents that the allegation should fail. It is so held.

Denial of Right to Vote

[104] **PW8 Wycliffe Wakoli Simiyu** who was a farmer and a voter in Bungoma North Tongaren Constituency, stated in his affidavit sworn on 8/4/13 that he had been duly nominated to vie for the Milima Ward County Assembly Representative on Mwangaza party. That when he went to vote on 4/3/2013 at Mukuyuni Polling Station, he found that his name was not on the voters register and all efforts to find his name proved futile. He stated that he was denied his right to vote for his preferred candidate for the Senate seat.

[105] PW8 also stated that when voters in Milima Ward heard what had happened to him, many were disappointed and discouraged from participating in the election. He believed most of his supporters were also the Petitioner's supporters. He stated further that, later the same day, the Returning Officer called and told him that his name was appearing on the computer list but was not on the printed register. The RO told him that he suspected the printed register was manipulated to remove not only his name but also names of other eligible voters.

[106] On cross-examination, PW8 said he was surprised when he was told his name was not in the voters register yet he had verified his registration during the verification period provided by IEBC. He did not, however, annex any evidence in his witness affidavit to show he was a registered voter. He believed the fact that he was duly nominated to contest for the County Representative seat for Milima Ward showed that he was a registered voter. He emphasized that incident negatively affected him and other supporters of Hon. Musikari Kombo. Many went away and did not vote. The disappointment affected the entire Milima Ward and not just Mukuyuni

Polling Station where PW8 was to vote. He restated that Mr Rono the Returning Officer confirmed that his name was on the IEBC computer register.

[107] Right to vote is sacrosanct for it is the only tool a citizen can use to elect the leadership of the nation. The political leadership constitutes the trustees for the enterprise called public trust in the Constitution; held for and on behalf of the citizens. A voter is the holder of the sovereign power which he delegates to be exercised by the elected political leadership on his behalf. So when that power is taken away unlawfully, it is not only very painful but a total crush of legitimate expectation that the citizen shall decide those who will exercise the sovereign power on their behalf. I should sympathize truly with any citizen who may be denied the right to vote unlawfully. But the only question I should determine is whether the Petitioner has proved the allegation and that it affected the results. The witness did not produce evidence that he was registered. That aside, he did not show that his name had been unlawfully removed or the register had been manipulated to disenfranchise him, or to favour a particular candidate. Before, I foreclose this issue, the court agrees with the submissions of the 1st Respondent that Mr Ndambiri has misstated the true position regarding Mr Rono's confirmation that the name of PW8 was in the register of IEBC. The true position is that PW8 is the one who alleged that Mr Rono had told him that his name was in the computer register held by IEBC. Mr Rono did not confirm that allegation. The allegation is not proved and it fails.

IEBC staff not properly trained

[108] Properly trained polling staff is part of the process of establishing credible and reliable electoral process. The Petitioner alleged that polling clerks engaged in the election held on 4th March, 2013, were not properly trained and others had not been trained at all. The court carefully listened to **ALFRED RONO** on the matter. He clearly explained why there was a decrease in the number of clerks who were eventually hired and how those who were hired were trained. He said that he recruited 1290 officers for elections after interviews had been conducted. He had put up the list in the public domain in the notice boards of all the wards. By 20.2.2013 they already knew the people who were to be employed. But on 27.2.2013 they reduced the number to 748 and informed all the 1290 candidates who were successful. He was personally aware of the content of the training programme and the polling clerks were properly instructed. The 748 who were eventually hired are the ones who took oath of secrecy and were deployed to the field. The 748 were the only ones who participated in the elections. He was not aware that any clerk did not participate in the elections. He was also sure that no person who did not take oath of secrecy participated in the elections.

[109] The court is satisfied that the polling clerks were properly trained on how to handle the elections. The error the officers fell into was either human errors or culpable negligent error on their part for which they are to be held personally accountable. There was no concrete evidence to show that the the clerks were not properly or not trained at all as to affect the credibility and skills of the personnel entrusted with the electoral process. The allegation has not been proved to the standard required.

Alleged Violence on RO for Kanduyi Constituency

[110] The Petitioner alleged that tallying at Bungoma High School was marred with irregularities. He called **PW3 LEONARD SAKWA MUKWANA** as the witness to that fact. **PW3** in his affidavit stated that he was at Bungoma High School Tallying Centre on 5th March 2013 where the tallying of results for Kanduyi Constituency was going on. At about 5.40p.m., one of the candidates for National Assembly seat Wafula Wamunyinyi entered the tallying centre followed immediately by Hon. Wetang'ula. Hon. Wetang'ula told Hon. Wamunyinyi to remind the CRO that he was delaying announcement of the Senatorial Elections. Then, Hon. Wamunyinyi grabbed the Kanduyi Constituency Returning Officer and led him to an adjacent room where unannounced ballot boxes from different polling stations were stored. They were demanding immediate announcement of the Kanduyi Senator results. There was commotion which

temporarily stopped the tallying process. Tallying resumed after Dr. Reginald Wanyonyi who was a candidate for the the County of Bungoma Women Representative arrived and demanded for an explanation on what Hon. Wamunyinyi and the 1st Respondent were doing there. Tallying process proceeded but under the Deputy Returning Officer. PW3 sought to know why the Ford Kenya agents were being allowed to go through Forms 35 and 36 before they had been handed over to the Deputy Returning Officer but in vain. He then wrote a report on his mobile phone and sent it via sums to George Kombo-a member of his team. PW3 believed the tallying process at Bungoma High School was not free and fair and that the results were doctored before they were announced

[111] On cross-examination PW3 said that he was duly appointed agent for New Ford Kenya but his appointment letter had been destroyed when he washed his trouser with the letter in the pocket.

[112] The 1st Respondent denied the allegations by the Petitioner about the occurrences at Bungoma High School. The 1st Respondent's witness, **EDITH WERE SHITANDI** told the court that she was part of the secretariat for Hon. Wetangula. She did not know the names of the members of the secretariat. On 5.3.2013 she was at the tallying centre. She was not required to produce a badge as many people who were there had not been asked to do so. Hon. Wetangula and Wamunyinyi only requested to be told of the 3 lids which had been sighted. They met with the R.O in the adjacent room. She did not witness any ugly scene as suggested by Leonard Sakwa. The RO, Hon. Wetangula and Wamunyinyi went to the adjacent room. The ballot boxes were in the adjacent room. But she did not have access to the room. She then left the tallying hall at 5am.

[113] The other witness called by the 1st Respondent was **ISAAC BIUKHA WANGORO** who testified that he was a UDF member No.119731 for UDF. He was engaged as County Chief Agent for UDF. His appointment letter was read and it did not allow him to control the agents for other parties. He, however, said that Leonard Sakwa Mukhwana was under him and was giving him instructions. He maintained he was the overall boss and Leonard was reporting to him in spite of being reminded that Khaoya was the boss of Leonard Sakwa. He said Hon. Wetangula and Wamunyinyi came to the tallying centre and he saw 3 lids for Senator ballot boxes and called upon the R.O to explain. R.O explained that the lids belonged to spoil ballot boxes. R.O said he will attend to them. R.O left to run the exercise of tallying. They went into a room with the R.O then they came out. Nobody harassed the R.O. Hon. Wetangula and Hon. Wamunyinyi then left without saying anything to anybody. In cross-examination, he confirmed he saw Leonard at Bungoma High School Tallying Centre. He stayed until the winner was announced. He did not witness any confrontation between Mr Wamunyinyi and Orwa (P.O). Tallying was not stopped at all.

[114] **ERUSTUS OTIENO ORWA** also testified that he was R.O for Kanduyi Constituency. He was familiar with electoral laws and regulations. He also understood his duties and obligations. He met 1st Respondent at 4.00pm at the tallying centre i.e. Bungoma High School. The 1st Respondent was accompanied by Hon. Wamunyinyi and few others. Wamunyinyi signalled the RO and expressed the need to talk to him. He told them to wait. After 15 minutes Wamunyinyi told him that he had kept them for too long. The witness later gave them audience and retreated into the annex hall- another partitioned hall within the main hall. They raised two issues; a) that the RO was taking too long to announce results; and b) that there were rumours that people would storm the hall and take away the boxes. They then left.

[115] After one hour the Petitioner came and held a meeting at the Tallying Hall. But after being cautioned by the RO he obliged. He later wanted to know what the 1st Respondent had come to see him over, and whether there were ballots which had been stuffed into the ballot boxes. The visit by the 1st Respondent took about one hour. The table was T -shaped and all were watching what was happening. He informed the public that tallying would go up to 4.00am in the morning but it lasted until 5am in the morning. He then announced results at 10am the following day. He said that tallying of results was done properly according to the law. He had, however, to delegate 2-3 times to his deputy including the time of visitation by the candidates. His deputy did not tell

him there was any commotion in his absence, although he had heard some noise outside during the visitation by the candidates. He received results from all 159 streams and ascertained the correctness of the entries in Form 35. There were no complaints on Form 35 except few errors as; at Mupeli DEB (029) – no statutory comments by P.O. and had alterations that were not countersigned; Pamus Teachers (043) – there were unsigned alterations. No reason was given for the alterations. Samoya Primary School (047) – Bungoma GK Prison was canceled. No reason that was given for it.

[116] He denied he was manhandled or beaten up by any person. Hon. Wamunyinyi did not grab him as alleged by Leonard Sakwa. He did not announce falsified or doctored results. The T-arrangement for the table was to allow all to sit at the table to verify the results. The screen reflected all the entries he made. It was an open process. He told the court that there were several ballot boxes that were defective but were replaced before the elections. There were some which were damaged but nobody raised any complaint on damaged boxes.

[117] There is no doubt that the RO, 1st Respondent and Hon. Wamunyinyi entered into a room where ballot boxes were stored. Such a move by the RO is inappropriate especially when he enters there alone with candidates. That would fuel speculation and should be discouraged. There is, however, no evidence to prove the claims of ballot stuffing or any other form of impropriety. That said, there was also no evidence to prove the alleged manhandling of the RO by Hon. Wamunyinyi. But I should state here that the 1st Respondent's witnesses were not truthful and their demeanour suggested it loud enough. That does not, nonetheless, affect the decision of the court on the matter.

Dead voters

[118] The Petitioner alleged that dead voters voted during the election in dispute. He produced a letter from the Assistant Chief for Irakaru Sub-location which stated that some three individuals died in unspecified dates in February, 2013-which was before the elections. The letter is not dated. That aside, it is not a legal proof of death. A Certificate of Death issued by the Registrar of Deaths and Births under the relevant law is what legally should be proof of death unless there is an order on presumption of death. Even if a death certificate had not been issued, there are other ancillary documents which could have been produced, say, Burial Permit, a properly dated and signed letter from the Administration, evidence of submission of application for Certificate of Death etc. None of these documents is present. The Respondents therefore, rightly submitted that the allegation has not been proved at all.

THE STATUTORY FORMS QUESTIONED

Form 35 questioned by Petitioner

[119] This is where the Petitioner raised numerous queries with regard to the validity of a good number of Form 35. According to the Petitioner, some of the documents had alterations that were not countersigned; contained different results and information; had no statutory comments; were missing; had no results whatsoever; were numerous and different; and so on and so forth. He also restated that the IEBC Form 35s had serious problems and they were in multiplicities.

The Petitioner listed the particular stations with irregularities on Form 35 as below:

a. In Webuye East Constituency;

- i. Presiding Officers did not make the statutory comments as provided under the election regulations in Nabung'ole FYM Primary School (002), Murumba Primary School (003), St. John's savannah RC (006), Sipala (FYM Primary School (007), Mihuu Primary School (008), Siyila DEB Primary School (009), Mikuya FYM Primary School (011), Mulachi SA Primary School (012), Bakisa DEB Primary School (016), Magemo FYM Primary School (021), Misikhu Girls Sec School (023,

- Misemwa Primary School (025), Misimo Primary School (015), Wabukhoyi Primary School (024) Misemwa Primary School (025), Sinoko Polytechnic (034), Khamoto Primary School (050), Makemo RC Primary School (028), Makusehwa Primary School (027), Ndivisi Primary School (031), Namwathoko Market (032), Sinoko FYM Primary School (033), Sinoko Polytechnic (034), Lutacho FYM Primary School (037), Manafwa Primary School (040), Katumi Primary School (042), Musa FYM Primary School (043), Njata Nursery (047), Khamoto FYM primary School (050), St. Joseph FYM Primary School (051), Mukhungu FYM Primary School (055), Muji FYM Primary School (056), Lufwindiri DEB Primary School (060), and Nzoia Pefa (061). Alterations and/or corrections made on Form 35s at Misimo Primary School (015), Wabukhoyi Primary School (024), Misemwa Primary School (025), Sinoko Polytechnic (034) and Khamoto Primary School (050) were not countersigned by the Presiding Officer or any other officer.
- ii. The Presiding Officer Manafwa Primary School (040) admitted that there was a possibility of stray ballots into the boxes yet to be counted since the ballots could not add up.

b. In Webuye West Constituency;

- i. Presiding Officers at Webuye DEB Primary School (033), Webuye S.A. Primary School (034), Wamangoli Primary School (038), Maramu Centre (039) Matisi Primary School (042) and Ben Kapten FYM Primary School (047) did not make the statutory comments as provided under the election regulations.
- ii. Form 35 for Misikhu Mixed Primary School (011) was not signed by the Presiding Officer, the Deputy presiding Officer or any of the candidates' agents yet the results were included in the final tally.

c. In Kabuchai Constituency;

- i. Form 35 for Mukuyuni Cattle Dip (084) was not signed by the Deputy Presiding Officer
- ii. Alterations/corrections/amendments on Form 35 for Chwele Youth Polytechnic (002), Nalondo Primary School (016), Sichei RC Primary School (058), Baraki Primary School (069) Milembe Primary School (071) were not countersigned by the Presiding Officer or any of the candidate's agents.
- iii. Presiding Officers for Busakala Primary School (001), Kabuchai SA Primary School (023) and Sichei RC Primary School (058) did not provide the statutory comments as required under the election regulations.
- iv. There are two different copies of form 35 for Chwele Youth Polytechnic with different entries and statutory comments by the Presiding Officer (see attachment marked **MNK-2a**),
- v. There are two different copies of form 35 for Sikata Primary School (029) with different entries and statutory comments (see annexure marked **MNK-2b**)
- vi. There are two different copies of form 35 for Kiboochi Primary School (051) with different entries, candidates' agents' names and signatures and statutory comments. (see annexure marked **MNK-2c**)
- vii. There are two different sets of form 35 for Luuya Primary School (053) with different entries, candidates' agents' names and statutory comments (see annexure **MNK-2d**).
- viii. There are two sets of form 35 for Bwake Primary School (057) with different entries; different candidate's names and different statutory comments (see annexure **MNK-2e**).
- ix. Two sets of form 35 for Ngalasia Primary School (062) with different entries in relation to number of valid votes cast, names of candidates or candidates agents Deputy Presiding Officers signature and statutory comments (see annexure **MNK-2f**).
- x. Two sets of form 35 for Chebukaka Boys Primary School (066) with different entries on total number of votes cast, dates, candidates agent's names and statutory comments (see annexure **MNK-2g**).
- xi. Two sets of form 35 for Milembe Primary School (071) with different entries on total number of votes cast, names of candidates agents and statutory comments (see annexure marked **MNK-2h**).
- xii. Two sets of form 35 for Lukhome Market (072) with different entries on number of votes rejected, names of candidates agents and Presiding Officer's statutory comments (see annexure marked **MNK-2i**).

- xiii. Two sets of form 35 for Kuywa Primary School (085) with different entries on number of rejected votes, dates, names of candidates agents and Presiding Officer's statutory comments. (See annexure marked **MNK-2j**).
- xiv. Two sets of form 35 for Baraki Polytechnic (086) with different entries on total number of votes cast and Presiding Officers statutory comments (see annexure marked **MNK-2k**).

d. In Tongaren Constituency;

- i. Presiding Officers in Mbakalo DEB primary School (001), Nabiswa primary School (002), Kibisi FYM Primary School (009), Namawanga RGC Primary School (010), Shiner Nzoia Academy (012), Mukomari Primary School (017), Nandorobo Primary School (022), Sango SA Primary School (025), Ndengelwa SA Primary School (026), Pwani FYM Primary School (027, Siumbwa RC Primary School (028), Lungai Primary School (032), Nyange DEB Primary School (034), Naitiri Market Matatu Stage (039), Sango Dispensary (041), Walumoli Cattle Dip (045), Pwani Cattle Dip (047), Martha Academy (051), Mukuyuni FYM Primary School (055), Maliki FYM Primary School (056), Bilibili FYM Primary School (057), Nabinga'ng'e Primary School (059), Namboko RC Primary School (060), Luuya D.E.B. Primary School (061), Halfland Primary School (066), Maliki Market (067), Tabani FYM primary School (073), Sawa D.E.B. Primary School (075), Sinoko RC Primary School (077), Shikuku FYM Primary School (078), Nzoia Primary School (079), Bunambo FYM Primary School (084), Bituyu primary School (085), Milele FYM Primary School (086), Lukhuna FYM Primary School (089), Tongaren DEB Primary School (093), Makolowe PAG Primary School (097), Samland Academy (099), Mufunje ADC Primary School (100), Namatore FPE Primary School (102), Soysambu DEB Primary School (104), Kapchonge DEB Primary School (106), Lunao DEB Primary School (107), Chuma PAG Primary School (108), Narati RC Primary School (111), Maresi Market (116), and James Mwei Secondary School (117) did not provide the statutory comments as required under the election regulations.
- ii. The alteration of results on form 35 for Ushudi Primary school (018), Sango FYM Nursery School 9024), Pwani FYM Primary School (027), Milima FYM Primary School (053), Makunga Market (062), Tongaren Youth Polytechnic (098) and Lunao DEB Primary School (107) were not countersigned by the Presiding Officer or any of the candidate's agents.
- iii. Form 35s for Makunga SA Primary school (008), Pwani Cattle Dip (047), Makhonge DEB Primary School (048), Mukuyuni FYM Primary School (055), Luunya DEB Primary School (061) Lumuma FYM Primary School (089), Mwambu PAG Primary School (103), Kapchango DEB Primary School (106) and Kananachi FYM Primary School (109) were not signed by the candidates or any of their agents.
- iv. Form 35 for Kananachi FYM Primary School was not signed by the Deputy Presiding Officer as required under the election regulations.
- v. The rejected votes at Mfupi Market (065) were not deducted from the votes cast.
- vi. Spoilt ballot papers for Kibisi FYM Primary School (009), Miyuke SA Primary School (015), Kibisi Cattle Dip (016), Mukomari Primary school (017), Namboko RC Primary School (060) and Luuya DEB Primary School (061) were not deducted from votes cast as required under the election regulations.
- vii. Mitoto Cattle Dip (004) has two form 35's with different entries on total number of votes cast (see annexure marked **MNK-3a**)
- viii. There are two different forms 35 for Karima RC Primary School (007) with different entries, different Presiding Officer's signatures and different presiding Officer's statutory comments (See annexure marked **MNK-3b**).
- ix. There are two different copies of Form 35 for Makunga SA Primary School (008) each with different entries (see annexure marked **MNK-3c**)
- x. Two different Forms 35s for Kibisi Cattle Dip (016) are signed by different agents (see annexure **MNK-3d**)
- xi. Form 35 for Mukomari Primary School (017) is not dated as required under the election regulations.(see annexure **MNK-3dii**)
- xii. There are different forms 35 for Lusokho Primary School (020) with different entries (see Annexure **MNK-3e**)

- xiii. Two different Forms 35 for Mitua Education centre (029) that are signed by different Candidates or their agents (See annexure marked **MNK-3f**)
- xiv. Two different Forms 35 for Lungai Primary School (032) with different entries on votes cast (see annexure marked **MNK-3g**)
- xv. Two different Forms 35 for Nyange DEB Primary School (034) with different candidates or agents' names and signatures (see annexure marked **MNK-3h**).
- xvi. Two different Forms 35 for Makumu Primary School (046) with different agents' names and signatures (see annexure marked **MNK-3i**).
- xvii. Three different Forms 35 for Martha Academy (051) each having different names and signatures of candidates or their agents (see annexure marked **MNK-3j**).
- xviii. Two different forms 35 for Nabing'ng'e Primary School (059) with different entries on valid votes cast for the different candidates (see annexure marked **MNK-3k and 3l**)
- xix. Two different forms 35 for Luuya DEB Primary school (061) with different entries on deputy Presiding Officer's signature (see annexure marked **MNK-3m**)
- xx. Three different Forms 35 for Maliki Market (067) with different entries on valid votes (see annexure **MNK-3n**)
- xxi. Two different Forms 35 for Shikuku FYM Primary School (078) with different entries and names of candidates' agents. (see annexure **MNK-3o**)
- xxii. Two different forms 35 for Milele FYM Primary School (086) with different entries on the candidates or candidate agents (see annexure marked **MNK-3p**)
- xxiii. Two different forms 35 for Binyenya RC Primary School (095) with different entries on the candidates agents (see annexure **MNK-3q**)
- xxiv. Two different form 35s for Kapchonge DEB Primary School with different entries on Deputy Presiding Officer's name and candidates agents' names and signatures. (see annexure marked **MNK-3r**).
- xxv. Two different forms 35 for Chuma PAG Primary School (108) with different entries on Presiding Officer's comments (see annexure marked **MNK-3s**)
- xxvi. Two different forms 35 for Naratiri RC Primary School (111) with different entries on number of registered voters and number of valid votes cast (see annexure marked **MNK-3t**)
- xxvii. Two different forms 35 for Maresi FYM Primary School (112) with different entries on Presiding Officer's statutory comments (see annexure **MNK-3u**).
- xxviii. Two different forms 35 for Namunyiri RCEA Primary School (114) with names of different candidates' agents (see annexure marked **MNK-3v**).
- xxix. Two different forms 35 for Matisi PAG Primary School (118) with entries made by different people (see annexure **MNK-3w**).
- xxx. Two different forms 35 for Brigadia Makutano Dispensary (119) with different dates and Presiding Officer's comments (see annexure marked **MNK-3x**)
- xxxi. Several copies of form 35 annexed to the 1st Respondent's Reply to the Petition are materially different from the copies filed by the 2nd Respondent with the material difference relating to entries on valid votes cast, candidates or candidates' agents names and signature and the Presiding Officer's statutory comments. (see pages **102 to 104** of the 1st Respondent's Response to the Petition).

e. In Kimilili Constituency;

- i. Forms 35 for Namwanga Market (001), Kibunde Primary School (009), Khamulati Coffee Factory (022), Matili FYM Primary School (024), Kimilili Bus Park (025) and Kimilili Old Market (030) were not signed by the candidates or their agents and not reasons are given.
- ii. The Presiding Officer for Kamusinga Primary School (004), Khwiroro Primary School (005), Kibingei RC Primary School (007), Kibunde Primary School (009), Siuna SA Primary School (011), Friends School Kamusinga (014), Kimilili Slaughterhouse (017) Kimilili DEB primary School (018), Sitabicha Youth Polytechnic (021), Khamulati Coffee Factory (022), Chelekei Bahai Primary school (023), Kimilili Bus Park (025), Kimilili R.C. Girls primary School (026), Namawanga Primary School (028), Matili RC Primary School (029), Kimilili Old Market (030), Buko RC Primary School (031), Nasioya SA Primary School (032), Namboani FYM Primary school (033), Kamasielo FYM Primary School (038), Kimingichi AC Primary school (039),

- Maeni Primary School (040), Kamukuywa DO's Office (041), Mwangale D.E.B. Primary school (045) Sibakala R.C. Primary School (047), Makhonge FYM Primary School (050), Sosio RC Primary School (051), Nakalira RC Primary School (052), Kamukuwya FYM Primary School (053), Chesamisi FYM Primary School (054), Kamukuywa Jua Kali Shades (056 and Musembe Primary School (059) did not provide the statutory comments as required under the election regulations.
- iii. Alterations/corrections made in several stations including Kimilili Bus Park (025), Buko RC Primary School (031), Kamusinde FYM Primary School (035), Maeni Primary School (040), Kamukuywa Central Academy (042), Sibakala RC Primary School (047), Lukhome Baptist Primary School (049) and Musembe Primary School (059) were not countersigned by the Presiding Officer or any other official.
 - iv. Form 35 for Maeni Primary School (040) was not signed by the Deputy Presiding Officer.
 - v. Form 35 for Kibunde Primary School (009) was not signed by the Deputy Presiding Officer.

f. In Mt. Elgon Constituency;

- i. Presiding Officers at Kamosong Primary School (001), Chebwek S.A. Primary School (002), Cheredyo SDA Primary school (015), Chemuses Primary (017), Nalondo SA Primary School (018), Toroso Primary School (019), Kaptoboi Primary School (020), Kamarang Primary School (021), Mulatiwa Primary School (022), Chesikaki Primary School (023), Mulukhu FYM Primary School (033), Chepyuk Primary School (038), Chepkurkur Primary School (041), Banana Tegaa Primary School (042), Kebee Primary School (043), Kopsiro Primary School (045), Yowondet Primary School (060), Kapkateny Primary School (064), Kipsabula Primary School (068), Kipteka Primary School (069), Kipsoen Primary School (072), Kongit Primary School (078), Kibei Primary School (080), Kaptalelio Primary School (081), Kapchabon Primary School (088), Kapkeke ECD Nursery School (096), Labot Primary School (097), Sendera SA Primary School (102), Koshok Primary School (104), Kibyeto Primary School (121) did not make the statutory comments as provided under the election regulations.
- ii. Forms 35 for Walanga FYM Primary School (011), Chesikaki RC primary School (023), Kimabole FYM Primary School (027), Bukonoi Primary School (028), Chesikaki FYM Primary School (031), Mulukhu FYM Primary School (033), Cheptortor Primary school (039), Chepkurkur Primary (041), Chebich Primary School (061) Chepchabai Primary School (071), Chesinende Primary School (092), Labot Primary School (097), and Kibyeto Primary School (121) were not signed by the candidates or any of their agents.
- iii. Form 35s for Mulatiwa Primary School (022) and for Chebich Primary School (061) were not signed by the Deputy Presiding Officers as required under the election regulations.
- iv. Form 35 for Mulukhu FYM Primary Scholl (033) was not signed by the Presiding Officer as required under the election regulations.
- v. Corrections/amendments on forms 35 for Kipsis Primary School (004), Cheptais SA Primary School (005), Walanga FYM Primary School (011), Nalondo SA Primary School (018), Chebitch Primary School (061), Kipteka Primary School (069) Chebin Primary School (075) and Chepkoya Primary School (082) were not countersigned by the Presiding Officers or any of the candidates' agents.
- vi. Form 35 for Kipsis primary School (004) shows the votes cast for Moses Wetang'ula as 165 but Form 36 for the same station shows that the candidate scored 65 votes. (See annexure marked **MNK-4a**).

g) In Bumula Constituency;

- i. The Presiding Officers for Tulumbo Primary School (001), Mateka primary School (004), Muanda Primary School (006), Bilision Primary School (007), Tabuti Primary School (008), Lumboka Primary School (009), Wandigwa Primary School (010), Bullosi Primary School (011), Mulukoba Primary School (012), Khayo Primary School (014), Kimatuni Primary School (016), Lunao Primary School (017), Sikinga Primary School (018), Bumula Primary School (020), Chiliba Primary School (022), Bunambabi Primary School (023), Syemukhulka Primary School (024), Lunao Primary FYM (026), Lubunda Primary School (028), Khasoko Primary (033), Kabula

- Primary (036), Malinda Primary (038), Remwa Primary (041), Mukhuma Primary (042), Wamumali Primary (043), Mwiruti Primary (046), Mwiya Primary (048), Nakwana Primary (051), Leleke Primary (053), Nakalila Primary (054), Sihilila Primary (055), Kibatisi Primary (056), Napara Primary (059), Siloba Market (060), Kimaeti Primary (063), Syombe Primary (064), Bukirimo Primary (065), Kisioyo Primary (066), Machwele Primary (067), Ng'oli Primary (068), Lwanja Primary (069), St. Jude Nabuyeyeywe Primary (071), Mayanja Primary (073), Nangeni Primary (077), Kikwechi ECD (084), Netima Primary (086), Napara ECD ACK School (087), Nasimbo SA Primary (088), Siboti RC Primary School (095), Khabusi ECD (096) and Lurare ECD (097) did not make the statutory comments as required under the election regulations.
- ii. Form 35 for Namdika SA Primary (094) was signed a day after the counting of the votes i.e. 5th March 2013.
 - iii. Alterations/corrections on Forms 35 for Masunno Primary (015), Mikokwe ACK Primary (025), Lunao Primary FYM Primary (026), Napara Primary (059), Nakhwana Primary (051), Mukhuma Primary (042), Syoya Primary (040), Malinda Primary (038) were not countersigned by the Presiding officer or any of the candidate's agents.
 - iv. Forms 35 for Namaika Primary School (013), Namanza Primary School (032), Kitabisi Primary (056) have no candidates names and/or signatures.
 - v. Form 35 for Khasolo Primary (0580) does not have the name of the Presiding Officer.

h. In Kanduyi Constituency;

- i. The Presiding Officers for Tembele Primary School (024), Mupeti DEB Primary School (029), Lubinda Secondary School (038), Kanduyi DEB primary school (039), Pamus Teachers College (043), did not give any statutory comments as required under the election regulations.
- ii. The Presiding Officer for West Kenya College (044) did not sign Form 35 as required under the election regulations.
- iii. Alterations/corrections on form 35 for Sibembe ECDE Primary School (058) were not countersigned by the Presiding Officer or any other officer.
- iv. Form 35 for Bungoma GK Prison was used in entering the data collected from Samoya Primary School (047)

I) In Sirisia Constituency;

- i. Presiding Officers for Namutokholo Primary School (014), Chongoyi Primary (029), Sirisia Township Primary (032), Kibeu Primary School (036), Bukhokolo Primary School (037), Ndakaru Primary School (041), Chebukutumi Primary School (042), Malakisi Jua Kali Shade (048), Tembelea ECD (049), Tulienge Primary (049), Sitabicha Primary School (054), Tamlenga Primary School (058), Tororo Primary School (063), Karosiiandet Primary School (068), Mayekwe Primary School (072), Lwandanyi Primary School (073) and Komiriai Primary School (086) did not provide the statutory comments on Form 35 as required under the election regulations.
- ii. Forms 35 for Chwele Boys Primary (006) and Namudi Primary School (083) do not have the candidates' agents' signature.
- iii. Alterations/corrections on Form 35 for Sengeteti Primary School (003) was not countersigned by the Presiding Officer or any other officer.
- iv. The entry for Hon Moses Wetang'ula in Form 35 for Muyanganyi Primary School (007) does not tally with the entry in made Form 36 for Sirisia Constituency.
- v. Entry of form 35 for Namwela Coffee Demonstration Plot (017) was made on 5th March 2013.
- vi. Alterations/corrections on form 35 for Malinda FYM Primary School (0220) were not countersigned by the Presiding Officer or a candidates' agents.
- vii. Form 35 for Malinda SA Primary School (023) is not dated as provided under the election regulations.

Form 35: what the 1st Respondent said

[120] In cross-examination, the 1st Respondent told the court that ordinarily a copy of Form 35

should be the same as the original. The Form 35 for Lunyu market (003) Tongaren which he had annexed to his reply at page 125 shows 561 while that by IEBC talks of 547 as valid votes cast. There was an alteration (minor) on IEBC form. Those alterations had not been countersigned or stamped. For Mitoto cattle deep – the Form at page 126 shows number of valid votes cast as 243 while the IEBC copy talks of 246. Form 35 for Namawanga (010) Tongaren provided by the IEBC and that annexed by the 1st Respondent are different; one has a date and the other does not; the parties' agents who signed are different – one was signed by 8 and the other by 9. One has statutory comments, the other does not. Forms 35 for Naitiri RC (023) and Mitua Centre (029) which were provided by IEBC and those annexed by the 1st Respondent are different on the number of votes the 1st Respondent received. The statutory comments are slightly different in the words used but it means the same thing. Further comparison between Form 35 provided by IEBC and those annexed by the 1st Respondent in respect of Brigadia Makutano (119) at page 145 of 1st Respondent's response does not indicate the number of cast votes while that at page 339 of IEBC documents does. Form 35 for Shikuku FYM (078), Ndalul RC (072), Naitiri Mkt Milk Cooler (064), Makhonge DEB (048), Maliki FYM (056), Pwani Cattle Dip, Naitiri Mkt Matatu (039), and Luuya DEB (061), revealed differences. But the 1st Respondent was of the view that the forms did not represent all stations for Tongaren Constituency.

[121] The 1st Respondent submitted that according to Regulation 79 of the Elections (General) Regulations, 2012 the failure for a candidate or agents to sign Form 35 or 36 does not invalidate the election results. In any case, all the Forms 35 produced in court had been signed by the Presiding Officers. He further submitted that the scrutiny revealed just normal errors and no alterations that were found at all. Ochieng Oduol, advocate for the 1st Respondent submitted the petitioner had missed one fundamental point; that elections is a process from registration of voters, nomination of candidates, use of technology, voting day, recording of votes, human resources and statutory returns made. The Petitioner did not reject the statutory returns and transmission of the results. The Petitioner did not show that any of the Form 35 did not contain results for each candidate or any result was omitted. In 9 constituencies and 822 polling stations not a single Form 36 was challenged. The will of the people is manifested in Form 35. For an election to be declared null and void, there should be shown that there was no legal basis for the process, the same was contrary to the law and therefore of no legal effect. Nyukuri's evidence was based on his analysis. He was an expert to assist the court but he was not an independent expert as was presented. His evidence should be treated with caution for the following reasons:

- 1) He was partisan and aligned to the Petitioner
- 2) He was appointed for scrutiny purposes until there was an objection.
- 3) His expertise is questionable.
- 4) Nyukuri could not give direct evidence on matters he was talking about. His analysis was after the fact and was based on wrong register. The analysis does not impinge the primary document i.e. Form 35. His were mere observations on the statutory returns in Form 35 and 36 which was just one of the components of the process.

[122] Forms 35 were never challenged by the petitioner. There were few errors that were admitted but on the whole the 1st Respondent was ahead by over 17,000 votes. He posed; would minor alterations on voter turn out, spoilt votes vitiate the entire process of election? There cannot be an election without errors and the ones in this case are errors which do not vitiate the election. The petitioner must show that the malpractices vitiated the election and to what extent. See dictum by Lord Deming on the matter. So the election cannot be vitiated by the minor irregularities. The petition should be dismissed with costs.

For 35: what the 2nd and 3rd Respondents said

[123] The 2nd and 3rd Respondents called witnesses who essentially spoke to the statutory Forms, gave an account on how the elections were conducted and the results were declared. The first witness was **GEOFFREY GITOBU MUTIINA** who had worked for IEBC since January 2010. He swore an affidavit on 22.4.2013. He was the Returning Officer (R.O) for Mt Elgon Constituency. As the RO he entered results from Form 35 to Form 36. He did not say much about the anomalies in Form 35. He talked more about Form 36 which is treated separately below.

[124] **ERUSTUS OTIENO ORWA** was the R.O for Kanduyi Constituency and testified on this issue. He was familiar with electoral laws and regulations. He told the court that Kanduyi Constituency had 116 polling stations with 159 streams. He received results from the 159 streams and he ascertained the correctness of the entries in Form 35. But Form 35 for Tembelela Primary (024) had no comments while for Mupeli DEB (029) and Pamus Teachers (043), had alterations that were not countersigned and about which he made no inquiries. As the R.O for Kanduyi, he did not receive any complaints which warranted reporting to his superiors. The statutory Forms were verified and so were all the results he announced. He said that signing of the Form 35 authenticates all corrections.

[125] Another witness **BENARD ARGWINGS ODUL**, the RO for Webuye West Constituency said that after tallying and verification of Form 35 by the Presiding Officers and the agents, he would transfer the information in Form 35 to Form 36. Verification included entries, signatures of P.Os, agents' signatures, number of registered voters etc. He was satisfied that all Form 35 met the requirement of the law. But he noted Form 35 for Webuye DEB Primary School (033) stream 3 – did not have statutory comments and that of Webuye S.A Primary School (034) did not have P.O's statutory comments and there were alterations which had not been countersigned in respect of Form 35 for Stream 2

[126] **ALFRE K. RONO** the RO for Tongaren Constituency also identified several Forms 35 that were different. For instance; Lunyu Market ECDE Centre (003) at page 125 of 1st Respondent's documents and at page 261 of IEBC documents; Mitoto Cattle Dip (004) also had two different Forms in Item No.7. Namawanga RUC (010) (page 127 on 1st Respondent and 268 of IEBC Forms; Naitiri RCC (023) and Mitua Education Centre (136 and 287 – 1st Respondent's and IEBC documents respectively) only to mention but a few. He denied that in Tongaren there were at least 62 sets of Form 35 that were used in the elections as suggested by Mr Ndambiri. He confirmed that the results he announced were the votes in Form 35 as he did not have the power to alter any result. Further, no Form 35 was a duplicate of the other; all copies were filled up separately. And the results in all the Form 35 were clear.

Form 36: multiplicity and incorrectness

[127] On 3rd May 2013, the court ordered the 2nd and 3rd Respondent to supply all the parties with copies of all forms 35 and 36 they hold in relation to the election in dispute by 7/5/2013. The 2nd and 3rd Respondent supplied the court and the parties with only Forms 35. They did not supply Forms 36 as ordered by the court. But it was clear that Form 36s which were used to tally and declare results for the Constituencies and the County herein were seriously contested by the Petitioner.

[128] The Petitioner alleges that the results in the various Form 36 for the respective Constituencies of the County of Bungoma were illegal; for they were not prepared in accordance with the law; they were multiple forms; the entries therein were incorrect and contradictory; they had not been accordingly signed; they were not a reflection of the results of the election in the particular Constituency; they did not correspond with the Form 35 from which information in the Form 36 ought to have been derived. In sum, it is not possible to say which result was announced.

[129] The Petitioner annexed **Form 36** marked as **MNK2** which was used to announce results for the Senate seat for The County of Bungoma. He testified that the errors and discrepancies were

not only in the Form 36 prepared by County Returning Officer but also in Form 36s prepared by Returning Officers at Constituency level, including insertion of different figures on the results for Webuye East and existence of three sets of Senate results for the said Constituency. The first result at page 68-74 of the Petition show that the Petitioner had 11,768 votes, the 2nd set shows he had 12,478 and the third set talks of Twenty One Thousand Two Hundred and Forty Eight.

[130] For Mt. Elgon Constituency, the Petitioner stated that the Form 36 used by the CRO for tallying did not have results for Terem SA Primary (062). Further, that the Petitioner's agents were not given results at Naitiri Tallying Centre. He said the information he received was that there were altered records of Form 35's at the said centre.

[131] The Petitioner stated that he filed this Petition after receiving **Form 36 (MNK2)** from the CRO which upon analysing, he noted numerous discrepancies, irregularities and incorrectness. He noted that under column 5 of the entries, the total sum given of the votes he garnered was 125,853 votes yet simple addition of the entries, gives a total of 139,639. When he added the figures on the valid votes row, his total sum was 344,088 yet the figures on the said row was given as 344,188. His analysis on the totals given for Kanduyi Constituencies showed that the CRO's addition was wrong in that it indicated the sum total was 63,920 whereas his addition was 62,603 votes. For Webuye West Constituency, the figure indicated on the Form by the CRO was 31,913 while the Petitioner's addition showed the total votes was 31,566. The total for Tongaren Constituency for valid votes cast according to the CRO's Form 36 was 44,190 but the Petitioner's additions gave a total of 43,858.

[132] The Petitioner's evidence was that these errors raised his curiosity on the Form 36 and he noted that the said form was not dated and did not have the names of any of the candidates' agents or their signatures. The Form did not have information on the total number of the votes cast and did not have an aggregate column.

[133] The copies of documents particularly Form 35 filed by IEBC was different from those that his agents had been given at some of the polling stations. He gave examples of polling stations like Sibanga which had two numbers i.e. 047 and 043. He also stated that according to the statutory Form 36 for Sirisia Constituency, there were 88 polling stations yet the copies of Form 35 filed by IEBC in court show that the Constituency had 86 polling stations.

[134] His evidence was that, based on the information, documents and records presented by the 2nd Respondent, it was not possible to know who won the County of Bungoma Senate elections; that there were massive malpractices including in polling stations like Chwele Polytechnic where different Form 35's showed different results.

Form 36: What 2nd and 3rd Respondents said

[135] The evidence by the Petitioner was an indictment of IEBC officers. They needed to make a robust rejoinder. They called **GEOFREY GITOBU MUTIINA** who had worked for IEBC since January 2010 and was the Returning Officer (R.O) for Mt Elgon Constituency. As the RO he ensured that results for Mt Elgon were entered in Form 36. He also signed the Form 36 on 6.3.2013. He confirmed that the copy in the petition at page 187 is a copy of what appears in his affidavit. But the Form in the Petition does not have his signature; does not show the number of registered voters; does not indicate the voters turn out; whereas the copy in his affidavit has indicated all those essentials. The simple reason he gave was that perhaps he omitted to fill up the copy that was given to the petitioner. He again changed his earlier position and said that he filled only one copy. Terem S.A Primary School Station No.62 was not entered in Form 36 although Paragraph 8 of his affidavit states that the results for station No 062 were included in Form 36. He was not sure whether the Form 36 for Mt. Elgon Constituency was filled up using the information he had released to the officer who was making the entries. Eventually he admitted there was a problem with his affidavit. It was emphasized that his duty was to ensure all results were correctly entered in Form 36. He explained the omission of the results for station 062 as a typing error

whereby the last row was left out during printing process. But the totals are alright.

[136] Another witness **BENARD ARGWINGS ODUL**, the RO for Webuye West Constituency said that after tallying and verification of Form 35 by the Presiding Officers and the agents, he would transfer the information in Form 35 to Form 36. Verification included entries, signatures of P.Os, agents' signatures, number of registered voters etc. He was satisfied that all Form 35 met the requirement of the law. But he noted Form 35 for Webuye DEB Primary School (033) stream 3 – did not have statutory comments and that of Webuye S.A Primary School (034) did not have P.O's statutory comments and there were alterations which had not been countersigned in respect of Form 35 for Stream 2. After all entries had been made in Form 36 he declared the results. He was aware that Form 36 should contain all the information in Form 35 provided in the Schedule. He, however, formatted Form 36 himself on A3 printing paper using an excel sheet given by IEBC (hereafter His Form 36). He also confirmed that all Form 36 should be the same. He conceded that what he had annexed in his affidavit was not Form 36. He had not annexed the Form 36 that he filled up. The court noted his demeanour; evasive, contradictory and confused. His reason for not annexing Form 36 was that the petition did not raise issues on Form 36. He believed the results for Webuye West Constituency were being challenged on bribery claims only. He confirmed that Form 36 at page 75-76 of petition is the Form 36 that he filled and signed. The Form conforms to the template given to him by IEBC. But the witness agreed with counsel for the Petitioner that his Form 36 did not have a column for aggregate results for the entire Constituency as required by the Regulations. His Form 36 also did not have the part for signatures by agents and candidates as required. He forwarded his Form 36 to County Tallying Officer on which the results for the Senator in Webuye West Constituency were declared. He later did an analysis of his own and the figures in the analysis and his Form 36 differed. The analysis reveals the errors in his Form 36. He was quick to add though; that the errors were not considered in the final results. The court, however, notes that is not correct as the figures in the Form 36 at County level and annexed to the petition were recorded as had been rendered in Form 36 he says he prepared and later discovered had errors. To him, his Form 36 was not defective or incorrect. It has all the components set out in law.

[137] **ALFRED .K. RONO**, was not only the Constituency Coordinator but also the RO for Tongaren Constituency. He had a vast experience in electoral matters since 2002. He was also properly trained on electoral matters as an R.O particularly on Elections Act and Regulations, registration of voters, management and conducting of elections. He told the court that he announced the results on the evening of 5th March, 2013. On Form 36, he said that results were keyed-in as he announced them from Form 35. The computer had an automatic formula installed which would add the totals as they are entered. He filled Form 36 for Tongaren Constituency on Senate seat and sent it to the Head Office. He did not, however, have the said Form 36 in court, although he said he also provided the said Form 36 to the advocate. But he did not know whether the advocate annexed the said Form 36 to his affidavit. He recognized the signature on the document at page 78 of the petition to be his. Yet he told the court that the Form 36 at page 78 of the petition which he signed is not the Form 36 that he filled and send to IEBC. He was shown the document at page 197 of the petition which he said although it bore IEBC stamp and was in respect of Tongaren Constituency Senate Results, it was not the one that he prepared and send to the IEBC. He was then shown the Form 36 at page 148 in the 1st Respondent's bundle which he said was the official or correct Form which he prepared. At that point, counsel for the Petitioner wanted to know from the witness, which Form 36, therefore, did he prepare and announce the results on. He testified further and said that the 1st Respondent received around 20,000 votes but he hesitated and said that he was not sure about the figure. Once more, counsel for the Petitioner suggested to the witness that the reason why he could not remember the figures and details in Form 36 for Tongaren Constituency is because he did not fill in the Form 36 as required by the law. All that he could say was that he did not have the copy of Form 36 which he filled on that day.

[138] **MBAYAH MADAHANNAH** also testified. He was employed by IEBC as the Count Returning Officer (CRO) for The County of Bungoma for the general election held on 4.3.2013.

He was trained as such CRO. His duties included receiving results from, tallying and announcing results for the nine (9) Constituencies that make up the County of Bungoma and then declare the duly elected candidates for seats of Governor, Senator and County representative. He was also charged with the duty to submit the results to IEBC. Nine R.Os presented results to him at different times. The first to make his returns of results was Mr Odul for Webuye-West Constituency. He also received results from the other constituencies. But he did not annex to his affidavit any of the results he received. He, however, acknowledged that he received the document at page 75 of the petition from the R.O, and he confirmed that the Form 36 conformed to the requirements of the law. Although the said Form 36 did not have an aggregate results' column, he believed the aggregate results for each candidate was the aggregate the law talks about in Regulation 82(2). He noted further that the said Form 36 did not have the part for party agents and their candidates to sign. According to him, no complaints were raised on the results for Webuye-West Constituency. He then transferred the information in Form 36 from the Constituencies to the aggregate Form 36 for the County. He did not annex the aggregate Form 36 in his affidavit. It is then that counsel for the Petitioner put to the witness that the reason he did not annex the relevant Form 36 for the County was because he never prepared the aggregate Form 36. Of course he denied that.

[139] He also received the results for Webuye-East Constituency in the document from page 67-74 of the petition which had been signed by the R.O at page 67. He first said that he was satisfied the figures entered in Form 36 for Webuye-East Constituency were in compliance with the law and that the 1st Respondent received 11,487 votes. But he took an abrupt turn and said that when he added the figures he discovered the additions were wrong. He, however, announced the results based on the wrong figures because the law does not allow him to change any figures brought by R.O. He told the court that he was aware there were arithmetic errors in, and that is why the agents did not sign the results for Webuye-East Constituency. There were other omissions on the Form by the R.O. But he still insisted it was in compliance with the law. In Webuye-East Constituency he insisted he received the document at page 67 of petition and not the one at page 185 or 186. He confessed that he had never seen the documents at pages 185 and 186 in the petition. The two documents have different figures in words and numerals. The Forms were strange Forms. He had seen the document at page 185 when he was preparing his affidavit and that is why he referred to it in paragraph 13 of his affidavit. He confirmed the correct figure of votes received by the Petitioner in Webuye-East Constituency was 12,478. He did not use the correct figure to announce the results which he knew were the correct figure. He used the wrong figure.

[140] The CRO also received results for Kanduyi Constituency in Form 36 which he annexed to his affidavit. The Form 36 containing the results for Kanduyi Constituency and which he received is the one appearing at page 62-65 of the petition. The said Form 36 is not, however, dated and the agents did not sign it. It does not also show the voter turn-out. But he insisted the Form complied with the law.

[141] He also received results for Kabuchai Constituency which he did not annexe to his affidavit. The results he received for Kabuchai Constituency are the ones in Form 36 appearing at page 66 of the petition. The figures in the Forms 36 are the ones he used to announce results and declare the winner.

[142] He also received results for Kimilili Constituency in Form 36 which he did not annexe to his affidavit. He was told by counsel for the Petitioner that there was no Form 36 for Kimilili Constituency. But he insisted that he could not have announced results without Form 36.

[143] He also received results for Bumula Constituency in Form 36 prepared by the R.O. Results for Sirisia Constituency were submitted to him on 6.3.2013 in Form 36 which he did not annex to his affidavit. The results he received for Sirisia Constituency are the ones in the Form 36 appearing at page 58-59 of the petition. Those are the results that he announced and used to declare the winner. The Form is not signed by the agents and it has no aggregate column. He relied on the figure of registered voters i.e. 29,979.

[144] He also received results for Mount Elgon Constituency in Form 36 that appear at page 187 of the petition. He confirmed that is the document he received which he insisted complied with the law. He continued to inform the court that the Form 36 for Mount Elgon Constituency did not show the number of registered voters, voter turn-out. Although it had been signed by R.O, it was not dated as required in law. Results for Station No.62 in Mount Elgon Constituency were omitted in the Form 36.

[145] The results from Tongaren Constituency were revisited. When the CRO was referred to the document at page 197 of petition, he said that the R.O for Tongaren Constituency presented to him a document like that one but not that particular Form. He used the information in the Form R.O gave him although he did not have the Form at the time of giving his testimony in court. He, nonetheless, said that the Form contained all requirements. But he could not remember the exact information in the Form 36 he was talking about. He was sure that the R.O for Tongaren Constituency did not give him the document at page 77-78 of the petition. He did not use this information in the aggregate results.

[146] According to him, the Form 36 marked as MNK2 in his affidavit did not show results for Webuye-West or any other Constituency for The County of Bungoma. He reiterated that he announced results on the basis of Form 36 which he used. He told the court that he declared results on 6.3.2013 although he did not state that fact in his affidavit. MNK2 annexed to his affidavit was not signed, or stamped, and had no information on registered voters. Counsel for the Petitioner suggested to the witness that those results were invalid. He confirmed that Form 36 at page 31 of the petition is what he used to announce the elections in accordance with the law. He said that Form had arithmetic errors but the agents did not object to the results. The said document was not dated but it is the one he used to announce the results on 6.3.2013. He discovered the Form 36 had indicated that the Petitioner garnered 125,853 votes but he later discovered he garnered 139,639 votes. The discovery of the errors was after he had announced the results. He then said that the Form 36 he presented to IEBC had been corrected. According to him only tallies had a problem. Despite all these, he insisted the results were correct save the arithmetic error. The total sum of 344,188 is not the correct figure. The additions for Kabuchai are also wrong. And so is for Kanduyi, Webuye-West. He had transported information from Form 36 for Kanduyi. The Form was similar to the one at page 62-65 of the petition which had some discrepancies. He also used the information in Form 36 at pages 67-74 of the petition for Webuye East. He denied that he received a multiple Form 36 for the results for Senate seat for The County of Bungoma. He conceded that he did not indicate in the Form 36 the total number of registered voters which to him was just an oversight. He was the only person who signed the Form 36. He refuted the suggestion by counsel for the Petitioner that the result he announced for Senator, The County of Bungoma was invalid, not based on any valid source, violated the principles of the constitution and electoral laws.

[147] On cross-examination by **Ochieng Oduol** he explained away all the shortcomings in the manner the results were tallied and entered in the relevant Form 36 including Form 36 by which he tallied and announced the results for the Senate seat for The County of Bungoma. He simply said that; Forms 35 were the primary documents and had been produced in court; he believed the R.O would announce results in Form 35 and then tally them; RO would then aggregate totals for each candidate and declare the winner at Constituency level. The final leg was at County Tallying Centre where the CRO would announce the results for each Constituency, then tally and add up all the results for each candidate. As CRO he announced all the results that were announced at Constituency level. He did not doctor any results as the process was all inclusive and it was difficult to doctor results. The source of the data in that Form 36 was the Form 36 in respect of each Constituency in the County of Bungoma. He beamed the results of each Constituency on the wall and announced all the results for each candidate. He tallied and announced the winner. He claimed that all Forms 36 which he received had been signed and were with IEBC. The arithmetic error does not affect the votes garnered by each candidate. He was not shown errors for all other candidates apart from the 1st Respondent and the petitioner. There were 13,000 votes for Musikari Kombo that were not taken into account. This would not change the final results. Wetangula

would still have won even after the 13,000 votes were included.

[148] In re-examination, the CRO admitted that there was a problem with Webuye-East Constituency. He, however, said it was the only one. He detected the errors and indicated them by hand. But he could not have used the correct figures as he had no power to do so. The variation for Musikari Kombo in Webuye-East Constituency was 991 votes which when added will give a total is 14,777 as votes that Kombo was denied. Even then, there will still be a difference of 17,839 votes between the 1st Respondent and Petitioner by which margin the 1st Respondent would still win the elections.

[149] Before I embark on assessment of the evidence on the issues raised on Form 35 and 36, I wish to put to rest the question on the status and evidence by **BARASA KUNDU NYUKURI**. This witness was admitted by the court as an expert witness. In his introduction he laid out splendid academic qualifications, hands-on skills, expertise and experience in matters of governance where electoral issues fall. For what they are worth I reproduce the relevant parts of his evidence to that end.

‘I went to Luanda Primary, Misikhu Secondary School (Webuye), then Karanganya High School for my ‘A’ level... I got 15 points and proceeded to Law school. I then chose another career at Kikuyu Campus. I got second upper and was admitted for post graduate degree and completed my master degree in 1994 on Developmental History and Foreign Development and Political Science. I went as an assistant lecturer at Kikuyu Campus. I went to university of Cape Town for further studies. I will graduate my PHD later this year. I did fixed research at Nakuru. I am now a researcher and a consultant. My main areas of interest have been governance and elections is one of them, gender analysis, constitution making and I was in the committee of experts. I am also in youth matters, civil education for NGOs, Government. I run a programme called “Elewa Katiba” in the radio. I am not partisan with individuals but with issues. I have authored books e.g. “Towards democracy in Kenya”. The book has one major chapter in Electoral matters. There is another on “The Monster Called Corruption”. UNDP also engages my services on free and fair elections where IEBC and political parties were involved. I carried research for World Bank, Danida. I have worked in the Electoral Commission, IIEC and IEBC as a consultant even up to now. I was involved in trainings by IEBC for elections for 4/3/2013. I was covering North Rift, Mandera, Garrissa, Machakos, Kitui and Nairobi. I was not covering Bungoma. I work for CMD for capacity building for political parties. I have worked with Ford-Kenya on drafting their instruments. Also I was in the CORD Manifesto. I am a life member of ODM. I have also worked with Jubilee e.g training recently elected MPs. I have also worked with UDF, Narc (Kenya), DP etc. I am here as a Kenyan. I also drafted, with others, the IEBC Act. I have worked in public domain in Western Provisions including Bungoma. I have also worked in conflict management and peace building under USAID (Kenya) and my research is documented in internet. It is in relation to Sudan issue. I also did a programme for Youth and Women participation in free electoral environment which is a training manual. I was born in a family of only males. Then I needed to understand gender. I have published books following my research in India, Kenya, Nigeria and Sudan. I have a book. I am a political analyst through writing of experience and practice’.

[150] His skills, expertise and experience in the area he professes are not in doubt whatsoever. The only question that lingers for purposes of these proceedings is; whether he kept within the bounds of an expert witness. The 1st Respondent cast the first salvo that the witness, given his evidence and demeanour, drifted away from the position he was admitted in by the court-expert witness-into a partisan witness for the Petitioner. According to the submissions by the 1st Respondent, an expert witness must be independent, dispassionate and non-partisan if the integrity of the proceedings is to be maintained. I cannot agree more. I should also be guided by the beautiful words of Lord Saville of Newdigate, in ***The Expert in Litigation and Arbitration, 1999: LLP Professional Publishing, London. Ed D. Mark Cato*** that:

“The expert witness is not an advocate employed on behalf of a party. The job of experts in litigation or arbitration is to give their independent, objective and unbiased opinions on the matter referred to them and falling within their area of expertise.... If an expert tries to adopt the advocate’s role under the guise of giving expert evidence, then that expert will necessarily not be giving an independent, objective and unbiased opinion. In truth, such an expert will be attempting to deceive the court or tribunal”.

[151] During the course of proceedings, it was clear in his evidence and demeanour that he was visibly inclined towards arguing the Petitioner’s case rather than helping the court to analyse the electoral process that was employed in the election in question. The court is aware that he had been nominated to represent the Petitioner in the scrutiny and recount exercise but that was resisted by the Respondents. He, therefore, removed himself from the privileged position of being an expert witness. His evidence will, therefore, be treated as such with the usual caution attending other witnesses.

[152] A major part of his analysis was based on provisional documents and not much assistance may be drawn from them. But there were some useful areas of his analysis; on Form 35 by POs, Form 36s by ROs, and Form 36 by CRO which is found at page 31 of the Petition. According to him, there were massive irregularities in the data entered in Form 35 and 36. He gave an example of Kipsis Primary School which showed deviation on Moses Wetangula. The original raw material is Form 35 contained different results. He termed that as a sign of irregularity. Kipsis Primary School (004) – Form 35 shows 1st Respondent got 165 but Form 36 at page 187 of the petition gave him 65. Form 35 for Industrial Primary School has erasures which are visible and one is not able to tell which the correct figure is. His conclusions were that, given the discrepancies from the data, he would not be able to say who won the elections. There were inconsistencies revealed in the analysis. He had not, however, done the mathematics on the overall cumulative effect of the discrepancies on the elections as per Section 83 of the Elections Act.

[153] He said he had looked at all the Forms 35 and which he either confirmed or showed where discrepancy existed. He said, Form 35 by IEBC came much later after the analysis and he had, therefore, used the available material then. They had received very few Form 35s from the agents which he used. Luuya DEB Primary School (061) is indicated as having two streams but even then, before the court there were two different sets of Form 35 with different results on Luuya (MNK 3 in further affidavit).

[154] In re-examination, he said for Brigadia Makutano Dispensary (119) in Tongaren, the Forms 35 by IEBC and that in 1st Respondent’s affidavit were different. That filed by the 1st Respondent had missing items. The two Forms were contradictory and cannot be used for any analysis.

[155] Form 36 for Webuye-East Constituency at Page 72 of the petition, has handwritten entries which could have been entered by the IEBC. He had problems with the entries in that Form 36; their accuracy in additions. He concluded that was a manifestation of irregularities. Form 36 for Sirisia Constituency says 046 is Namunyu Primary School. IEBC bundle has Tembwa Market as 046. Form 36 at page 59 of the Petition lists that polling stations were 88 while that in IEBC bundle indicates the stations as 086. Sirisia had problems also at page 38 – posting of the figures was erroneous. There was a trend of posting wrong results. These discrepancies of missing or additional polling stations could not be a basis for an objective analysis. Mount Elgon entries are different page 34. In Webuye East there were 3 different Form 36 with three sets of different results. There was material difference in the Form he received from the same IEBC. The elections violated the constitution.

COURT’S ANALYSIS OF FORMS 35 & 36 AND ARGUMENTS BY PARTIES ON THE MATTER

[156] The following statement by **BERNARD ARGWINGS ODUL** the witness called by

IEBC needs an instant settlement. He said that:

“Statutory comments were to be made on things that which in his opinion are useful for IEBC eg a fight that caused delay. If there was nothing he had no compulsion to write anything”.

[157] The witness was referring to the necessity of statutory comments in those Forms. The court had occasion to say something about lack of statutory comments in Form 35 in **BGM HC EP NO 4 OF 2013** thus:

[123] ...Form 35 is the statutory tool through which the results of the election for the seats of Member of National Assembly, Women Representative, Senator, County Governor, and Member of County Assembly are declared at the polling station as required under Regulation 79 (2) (b) of the Elections (General) Regulations. The prescribed Form 35 is provided for in the SCHEDULE to the Elections (General) Regulations. Doubtless, the Form 35 carries the requisite legal force and so the part in the Form requiring Statutory Comments by the Presiding Officer embodies a statutory requirement. In my own view, those comments serve useful purposes. The major purposes, broadly stated include; 1) to give information on the general conduct of elections in the particular Polling Station; 2) helps IEBC, the court and the public to observe from the recorded comments what transpired in that election in the particular Polling Station; 3) enables the court, IEBC and the public to assess the impact of any impropriety recorded therein, especially when questions on the integrity of the electoral process are raised. Some may argue that where there are no adverse happenings worth recording, the Presiding Officer need not record any comment. That kind of argument is simplistic. It should be noted that any positive comments should be recorded as part of the assessment of the integrity of the process and also as a way of eliminating unnecessary speculations that there were adverse happenings but were not recorded. It is most desirable, therefore, that the statutory Comments are not only stated but accurately stated by the Presiding Officer.

[124] Scarcely will lack of Statutory Comments, by itself, invalidate an election per se. Nevertheless, failure to make the statutory comments in Form 35 would, in a properly argued case, derive some factual benefit to the Petitioner. First, the court will take judicial notice of the fact that the comments were absent in Form 35. Secondly, it is not untrue that the absence of statutory comments on the Form does not necessarily mean there were no irregularities or malpractices in the election. That advantage is, however, ephemeral unless it is coupled with concrete evidence of malpractices or irregularities. That is why, it will forever be incumbent upon the Petitioner to identify and give particulars of all such adverse incidents which occurred but were never recorded. And of course, the Petitioner should prove those incidents which impugn the election. Eventually, what really determines the petition is the court's findings based on a proper analysis of the allegations in the petition and the evidence tendered in support of the allegations or of evidence that may become available to the court through other legal processes, say, scrutiny and re-count. I repeat, that the advantage accruing from failure to record statutory comments would only be of value where there is evidence adduced in support of the insidious irregularities in the election or ineptitude or improprieties on the part of the IEBC Officials.

[158] The 2nd and 3rd Respondents made a very bold statement in their response that the elections held on 4th of March, 2013 for the Senate seat for the County of Bungoma were precise and concise and devoid of any deliberate discrepancies. Except, the 2nd Respondent then averred that any discrepancies in Forms 35 and 36 were as a result of inadvertent clerical and typographical errors; were not deliberate and/or aimed at giving any advantage to any candidate

whatsoever. And that the discrepancies did not alter the results for the Senate elections. The Petitioner places preponderant weight on the discrepancies which he termed as massive, widespread and fundamentally affected the integrity of the election in toto.

[159] I have perused Form 35s which were produced in court by IEBC, the Petitioner, the 1st Respondent and those that were found in the ballot boxes whose contents were the subject of the scrutiny and re-count which the court ordered. The anomalies with regard to the Form 35s which have been identified in this petition are multiple. Pick some few like; Industrial Primary School; Luuya DEB Primary School (061)-two different sets of Form 35 with different results; Brigadia Makutano Dispensary (119) in Tongaren, the Forms 35 by IEBC and that in 1st Respondent's affidavit were different; Lunyu Market ECDE Centre (003) at page 125 of 1st Respondent's documents and at page 261 of IEBC documents; Mitoto Cattle Dip (004) also had two different Forms in Item No.7. Namawanga RUC (010) (page 127 on 1st Respondent and at page 268 of IEBC Forms; Naitiri RCC (023) and Mitua Education Centre; Shikuku FYM (078), Ndaluru RC (072), Naitiri Mkt Milk Cooler (064), Makhonge DEB (048), Maliki FYM (056), Pwani Cattle Dip, Naitiri Mkt Matatu (039); Chwele Polytechnic; Webuye DEB Primary School (033) stream 3 – did not have statutory comments; Webuye S.A Primary School (034)-there were alterations which had not been countersigned in respect of Form 35 for Stream 2; Pamus teachers (043) did not have P.O's statutory comments and there were alterations which had not been countersigned. Sibakala R.C. Primary School (047) had two Forms-one with alterations and so was Kipsis p sc (004) and had not been countersigned. Other alterations were found at Misimo Primary School (015), Wabukhoyi Primary School (024), Misemwa Primary School (025), Sinoko Polytechnic (034) and Khamoto Primary School (050) were not countersigned by the Presiding Officer or any other officer. Mfupui Market (065) had two Forms with different votes.

[160] The irregularities included; lack of statutory comments; lack of official signature; erasures which have not been countersigned as good practice would demand; there were Form 35s for the same polling station containing different information; some Form 35 found in the ballot box were blank yet those with IEBC contained results, for instance in **LUKHOME MARKET (072) BOX S/No. 056399**; some Form 35 were missing; in some Forms the votes allocated to each candidate differ from the total votes cast eg Kibisi FYM Primary School (009), Naitiri R.C. Primary School, Mitua Education Centre, Milele FYM Primary School, Karima R.C. Primary School, Narati R.C. Primary School, Lungai R.C. Primary School; other Form 35 included results for double marked voters; see report on scrutiny on this. The Report revealed surprising state of affairs, in some instances, names were crossed in both the exception list and the marked register or in the two identical registers found inside the ballot boxes for the particular stream/polling station. The results entered in the respective Form 35 for the affected stations, on votes cast clearly shows these people voted and the votes they cast were included in the results. Where the number of names crossed in both register differs with votes cast, the difference is accounted for in the rejected and spoilt votes. Such malpractice completely vitiates the results in the concerned Form 35. And as I stated earlier, it is a malpractice that strikes at the heart of the entire electoral process and certainly cast doubt on the credibility of the election. The Form 35s are the primary source of information on the expression of the people and when they are tainted with multiple and widespread anomalies; they fail to serve their cardinal purpose as the expression of the will of the people in a free and fair elections; and serve a different purpose all together-vitiating the election. The incidents of errors herein are not simple errors as the Respondents want the court to believe. These are errors which fundamentally go to the root of the election and would impeach the integrity of the process and the validity of the results.

[161] Article 86(c) of the Constitution demands that:

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

(a)...;

(b)...;

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

(d)...

[162] Open and accurate collation of results by the RO and CRO is an integral part of the electoral process, and its purpose is to ensure the election was free and fair, and the results were credible. The collation is what the Elections Act terms as tallying and section 84 of the said Act places tallying at Constituency and County levels. Form 36 is equally important for it must reflect the results in Form 35 and is prepared after tallying has been done on Form 35 to ensure the results are accurate. It, therefore, serves as a safe design for accountability of what the Presiding Officers have returned as results announced at the polling station. It is worthy repeating, that tallying makes sure the results are accurate. It is also the tool which provides verified information to the County Returning Officer particularly in respect of Senate results-which encompasses the entire County results. Filling of Form 36 is, therefore, not just another step in the electoral process or a superfluous exercise which could be done or could be omitted. With the irregularities and error identified in Form 35, the collation of results and filling in Form 36 needed to be done openly, correctly and accurately. How was the collation of results and preparation of Form 36 done?

[163] The Forms 36 that were purportedly used by the CRO to prepare the Form 36 on which he declared results herein have been seriously contested by the Petitioner. That is why the court on 3rd May 2013, ordered the 2nd and 3rd Respondent to supply to the parties and the court, copies of Forms 35 and 36 in relation to the election in dispute. The 2nd and 3rd Respondent supplied the court and the parties with only Forms 35. They did not supply Forms 36 as ordered by the court. No doubt by the order of the court, there was a legal obligation on the part of IEBC to provide Form 36 as well. They did not discharge that obligation.

[164] In some cases like Webuye-East, it not clear whether there was any tallying of results that was done by the RO. It is not clear whether Form 36 was ever prepared as required in law. Further confusion! Look at the evidence of ALFRED RONO, the RO for Tongaren Constituency. On Form 36, he said that results were keyed-in as he announced them from Form 35. The computer had an automatic formula installed which would add the totals as they are entered. He recognized the signature on the document at page 78 of the petition to be his. Yet he told the court that the Form 36 at page 78 of the petition which he signed is not the Form 36 that he filled and send to IEBC. He was then shown the document at page 197 of the petition which he said although it bore IEBC stamp and was in respect of Tongaren Constituency Senate Results, it was not the one that he prepared and send to the IEBC. But when he was then shown the Form 36 at page 148 in the 1st Respondent's bundle, he said that was the official or correct Form 36 which he prepared. At that point, it was not clear at all whether he prepared any Form 36 for Senate Results for Tongaren Constituency. What is surprising was that he did not have the Form 36 he claimed to have prepared and send to the head office. He also claimed that he had provided the said Form 36 to the advocate. But he did not know whether the advocate annexed the said Form 36 to his affidavit. The CRO was also shown Form 36 at page 197 of the Petition and his response was that the R.O for Tongaren Constituency presented to him a document like that one but not that particular Form. I pose: these are the officers of IEBC at Constituency and County levels to whom great responsibility of conducting the elections was bestowed. The RO was running away from the various Form 36 annexed to the petition in order to avoid the conclusion that there were multiple Forms 36 for his Constituency. Little did he know that the Form 36 at page 148 of the 1st Respondent's response and the one at page 197 of the petition is an exact photocopy from the same source-they were the same in everything as well as entries? Again the one at page 77-78 of the petition bore his signature and he did acknowledge the signature. Therefore, he is the author of the document. But the most striking similarity is that the contents of the Form is exactly the same

as the other two Forms i.e. the one at page 148 of the 1st Respondent's response and at page 197 of the petition. The entries therein differ from the entries in the Form 36 prepared by the CRO. It is then that one understands why the two officers were running away from those Forms despite every indication that those Forms emanated from their offices or were prepared by them. Other than the obligation which the order of the court placed on the shoulders of the 2nd and 3rd Respondents to supply Form 36, the Petitioner has adduced *prima facie* evidence before the court on the discrepancies in Form 36 by ROs and CRO, which then raises evidential burden on IEBC to prove the contrary. The initial rebuttable common law presumption that *all acts by public bodies are presumed to be done rightly and regularly -Omnia praesumuntur rite et solemniter asse acta*-is unravelled and IEBC should prove the contrary. IEBC and the 3rd Respondent did not produce the original Form 36 which its officers claims they filled in, used to announce the results for the election of the Senate seat for The County of Bungoma and send to the head office, lest they should fail on their quest to explain away the huge discrepancies in the Forms 35 and 36. The court succinctly treated the incidence of evidential burden in **BGM HC EP NO 2 OF 2013** and I quote in part the relevant excerpt that:

*[106] ...The evidential burden initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence....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 SUPREME 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:

...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.

[165] In a situation such as the one we are confronted with; it is not a question of numbers; it is not a question of whether the Petitioner would have won or the 1st Respondent would have lost; it is a question of whether the non-compliance with the law affected the validity of the results such that the victory of the 1st Respondent is put to doubt. The qualitative measure on the process is in this case most appropriate. I am guided by the case of **WILLIAM KABOGO GITAU V GEORGE THUO & 2 OTHERS [2010] eKLR**, where Kimaru J set out the principles on which qualitative approach operates; that the court should look 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, for it is the integrity of the process which has been fundamentally dented by the electoral malpractices. And any malpractices which seriously impeach the process so also impeach the results coming from that process. The centrality of qualitative method in the resolution of election petitions is a matter of democratic policy and the case of **HARRIS V RYAN (1997) 44 MPLR (29) 194 (Nfld.SD)** put it most aptly that:-

When interpreting legislation relating to elections, one may reasonably conclude that the primary policy is to ensure that we have free, open and properly conducted democratic elections. If there have been irregularities, these should be exposed to the view of the general public through the returning officer; and through the candidates, and their

agents involved in the recounts.

[166] See also the decision by Helen Omondi J in **BGM HC EP NO 5 OF 2013** adopting the decision by Warsame J, in the **Karaba case** that:

...the QUALITATIVE test is relevant where the quality or standard of election is in issue.

[167] The original margin dwindled by over 14,000 votes when the simple arithmetic error in the County Form 36 was factored in. There were other discrepancies in Form 36 for Webuye-East Constituency. The CRO admitted that he entered the results for Webuye-East as rendered together with all the arithmetic and other errors which he had been aware. Those errors were carried over to the County Form 36 which further diminished and put the victory of the 1st Respondent into doubt. Indeed, the finding of the court is that it is not clear whether tallying of results entered in Form 36 for Webuye-East Constituency was ever done. The CRO told the court that is why the agents did not sign the results for Webuye-East Constituency. With the finding of the court that the entire results that the CRO announced has been put to doubt, the purported margin of the win is completely unravelled in the eyes of the law thus putting the victory of the 1st Respondent to serious doubt. Section 83 of the Elections Act is the measure on this matter. The section 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 results of the election”

[168] In **BGM HC EP NO 2 OF 2013** the court rendered itself as follows:

*The expression “non-compliance affected the results of the election” has received sufficient interpretation by courts of law. Contemporary jurisprudence from Uganda in the case of **BISIGYE V MUSEVENI ELECTION PETITION NO 1 OF 2001** offered guidance and was adopted with approval by election courts in Kenya. In the Uganda case the Supreme Court of Uganda held that:*

“...the expression “non-compliance affected the results of the election in a substantial manner”...can only mean that the votes candidate 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 his winning majority would have been reduced. Such reduction however would have to be such as would have put the victory in doubt”.

[169] See also the case of **MBOWE V ELIUFOO (1967) EA 240** on that subject. Accordingly, the irregularities herein were of the kind of non-compliance that would affect the validity of the results which in turn puts the victory of the 1st Respondent in doubt. Such are not errors which can be excused as ordinary errors which human being are naturally fallible to in any activity they may engage in. The persuasion, by the decision by Maraga J (as he then was) in the case of **JOHO V NYANGE (2008) 3KLR (EP) 500** on negligent errors is most apt. The overarching approach which guides this court is summarized in the words of Lord Denning in **MORGAN VS SIMPSON [1974] 3ALL ER 722** where he said 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.”

[170] From the evidence available and the account given by the various ROs, and the CRO, there is doubt whether proper tallying of results presented in Form 35 was done in all the Constituencies with the exception of Kabuchai Constituency. The several Form 36 exhibited by the Petitioner were obtained from IEBC and the multiplicity of those Forms was not explained at all by IEBC or the ROs who were responsible for their preparation. In the absence of the so called official and original Form 36 which would give us the tallied results, it is difficult to say that the results for the Senate seat for The County of Bungoma were collated and announced in accordance with the constitutional principles on electoral system and other electoral laws in Kenya. The presence of different Forms 35 and 36 which bear different results and information only adds to the already sore situation.

COURT’S FINDINGS AND ORDERS

[171] Accordingly, the court makes the following findings in respect of each issue that was framed for determination and the ultimate decision on the petition. For the sake of coherence, I will not answer the issues in the order in which they had been framed. I will start with Issue No 3.

WHETHER OR NOT THE 1ST, 2ND AND 3RD RESPONDENTS COMMITTED WIDESPREAD ELECTORAL MALPRACTICES AND OFFENCES BEFORE AND DURING VOTING, TALLYING AND ANNOUNCEMENT OF RESULTS IN THE ELECTIONS OF THE SENATOR FOR THE COUNTY OF BUNGOMA AS WOULD SUBSTANTIALLY ALTER OR INTERFERE WITH THE RESULTS OF THE SAID ELECTION.

[172] The court makes a finding that the 1st Respondent and Hon Alfred Khang’ati engaged in Treating of Voters and Bribery of Voters contrary to sections 62 and 64 of the Elections Act. It also makes a finding that Hon Khang’ati was not a party in the proceedings and was not afforded any opportunity to call evidence to show-cause why he should not be reported to the DPP. The offences were committed on 22.2.2013 at Red Cross, Kanduyi. It was established beyond reasonable doubt that the two gave a sum of Kshs 260,000 to Bishops, Pastors and other participants in that meeting held at Red Cross, Kanduyi. The corrupt intention of giving the money was to influence and induce voters to vote for the 1st Respondent as Senator for the County of Bungoma, and the other CORD Coalition candidates in the other elective seats including Hon Khang’ati, during the election held on 4th March, 2013. Further, the intention of the bribery and treating of voters was to influence and induce voters to refrain from voting for particular candidates or political parties during the election held on 4th March, 2013.

[173] The court takes the position that where the candidate is the one who has been found to have committed an election offence of Bribery of Voters and Treating of Voters, his election becomes void. In that case, a single incident of commission of these offences by the candidate is sufficient to invalidate an election and it will not be necessary to prove a series of bribery and treating of voters for such an election to be declared void. See ***Hurlsbury’s Laws of England, Vol 15 paras 113 and 114.*** My own view is that, the rationale for that position of the law is, on one hand, drawn from the fact that electoral process is quite sensitive process, and bribery and treating of voters, by their very nature, attacks the very integrity of the electoral process as a democratic process, and the process is thus, completely unravelled by such illegal acts. On the other hand, the rationale is drawn from the fact that the offences of bribery and treating of voters compromises the integrity of the offending candidate to claim any victory in the election obtained in those circumstances. The law is so designed to prevent a person from reaping leadership procured through illegal means. The Constitution has sculptured political leadership into a Public Trust under Article 73, and so leadership must be procured in accordance with the Constitution; to wit by observing the national values and principles of Governance (Chapter One), principles of leadership and integrity (Chapter Six), respect for Human Rights (Chapter Four) only to mention

but a few. The use by the Constitution of the enterprise of Public Trust in relation to leadership was deliberate; it was to emphasize integrity in the development of leaders who will shoulder responsibility to serve the people; the beneficial owners of the trust. Thus, as I stated earlier, elections are sensitive to electoral malpractices and offences, and more so, when they are committed by those who are aspiring or claim to be the leaders of the people.

[174] But in cases where the offence of bribery and treating of voters is committed by the agents of the candidate, the law affords the affected candidate an opportunity to claim exoneration from the acts of his agents. Equally, a claim based on bribery and treating of voters by agents or other persons, may require to be shown that the acts of bribery and treating of voters were so extensive that they affected the results.

[175] In sum, the commission of the electoral offences of bribery and treating of voters by the Respondent completely alters and affects the results to the extent that the election is void.

WHETHER OR NOT THE ELECTION OF THE SENATOR OF THE COUNTY OF BUNGOMA AS CONDUCTED BY THE 2ND RESPONDENT HAD SUCH MASSIVE AND WIDESPREAD IRREGULARITIES THAT IT WOULD RENDER THE SAID ELECTION NULL AND VOID

[176] There were extensive irregularities which impeached the electoral process and affected the validity of the results. Forms 35 were questioned and the results therein may not be said to reflect the will of the people of the County of Bungoma. They contained serious negligent errors. The errors missed the opportunity for reconciliation when the Returning Officers for the Constituencies failed to carry out a proper collation and tallying of the results in Forms 35 from the polling stations. A further apex opportunity was also lost when the County Returning Officer did not collate and tally results from the constituencies before announcing the final results for Senator for the County of Bungoma. These malpractices obscured the results thereby putting the victory of the 1st Respondent to doubt. Those malpractices were so fundamental to the process and the results that they materially affected the results of the election in dispute. Collation and tallying of results is an integral link in the electoral chain, and if it is removed the whole chain snaps and collapses; it can no longer fasten the democratic-electoral process it is intended to bind together for free and fair elections. The court is guided by the cases of **JOHN KIARIE WAWERU V BETH WAMBOI MUGO 7 2 OTHERS [2008] EP** and **JOHO V NYANGE & ANOTHER (2008) 3 KLR (EP) 500**. In the former case the court stated that the Petitioner:

“...must establish that the said electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the elections held on 27th December, 2007”.

In the latter case, Maraga J (as he then was), stated that:

“In either case, however, serious consideration should be given to what effect, if any that those errors, whether innocent or deliberate, have on an election before the same is vitiated”.

[177] The forgoing narrative also answers issue No 4: **Whether or not the tally of the votes in the election of the Senator for The County of Bungoma was manipulated or consisted of such malpractices and irregularities as would substantially affect the integrity of the said results.**

WHETHER A SUFFICIENT LEGAL BASIS FOR AN ORDER OF SCRUTINY AND/OR RECOUNT OF THE VOTES HAS BEEN MADE AND DEMONSTRATED BY THE PETITIONER IN THE ELECTION OF THE SENATOR OF THE COUNTY OF BUNGOMA.

[178] This issue is now moot. It was decided when the court heard an application for scrutiny

and recount and ordered a partial scrutiny and recount on 15th July, 2013. The Report thereof has been analysed by the court and it revealed major electoral malpractices and irregularities on the part of electoral officers. Some of the electoral evils that the Report showed included; cases of names being crossed twice in two identical registers for the same stream or station; people who were not entitled to vote were provided with ballot papers and voted; results of the names which had been crossed twice were included in the final results; a marked register was found in possession of the RO and was only availed at the time of scrutiny; it was not clear how ballot papers were issued as the laid down procedure was not followed. These malpractices affected the results. There is real possibility that electoral offences prescribed under section 59 of the Elections Act were committed by the IEBC officers who manned the respective polling stations where electoral mishaps were detected by the Report.

WHETHER OR NOT THE ELECTION OF THE SENATOR OF THE COUNTY OF BUNGOMA AS CONDUCTED BY THE 2ND RESPONDENT HEREIN WAS SUBSTANTIALLY IN ACCORDANCE WITH THE CONSTITUTION AND ALL THE RELEVANT LAWS INCLUDING THE ELECTIONS ACT AND THE ELECTIONS (GENERAL) REGULATIONS, 2012

[179] This is the ultimate question. But let me pose one more question from the decision of the Supreme Court in **RAILA ODINGA V IEBC & 3 OTHERS SEPREME COURT OF KENYA ELECTION PETITION NO 5 OF 2013: “*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?*”** From the foregoing findings by the court, the Petitioner proved to the required standard that the election for Member of the Senate for the County of Bungoma was not conducted in accordance with the Constitution and the Elections Act. Article 81(e) of the Constitution was violated as the election was not conducted in an accurate, accountable and verifiable manner, it was not free of improper influence or corruption, it was not transparent, it was tincture with bribery and treating of voters and the results were not verified or verifiable. There were multiple malpractices and irregularities which substantially affected the validity of the results for the election in dispute.

ORDERS

[180] Accordingly, the 1st Respondent was not validly elected. His election as the Senator for the County of Bungoma is hereby declared null and void. I allow the petition.

Costs

[181] Costs follow the event. The court awards costs to the Petitioner. The court is empowered under rule 36(1) (a) of the Elections Rules 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 counsel for the Petitioner travelled from Nairobi and also was required to attend during the scrutiny exercise. The court, therefore, holds that costs to the Petitioner, to be paid jointly and severally by the Respondents, should not exceed Kshs 4,000,000. The security placed in court by the Petitioner shall be released to him forthwith. It is so ordered.

Quite exhilarating proceedings

[182] I would have failed and reneged to a thankless court if I did not recognize the splendid work by counsels involved in the matter. I feel I should indicate their names for their worth; Ochieng Oduol, Masinde, Wasilwa, Ndambiri, Ouma, Makokha, Ngaira and the late Wanyonyi Wanyama. I should state that these proceedings were characterized by innumerable objections and applications by counsel for the Petitioner and Respondents. Those objections and applications were forcefully argued and supported by ample judicial decisions. Some arguments were a deliberate effort by counsels to push the law from where it is currently ending; leap-frog development of the law as envisaged in Article 259 of the Constitution. The objections related to a

variety of areas in law, some were emergent and others were quite nascent, which I must admit granted the court an occasion to ascertain the law on the various subjects of the objections. It was a splendid experience where eminent legal arguments were urged before the court; it was a memorable listening. The legal fraternity will not lack persons to always occupy the chairs of great legal practitioners.

**DATED AND SIGNED IN OPEN COURT AT MUNGOMA THIS 30TH DAY OF
SEPTEMBER, 2013**

F. GIKONYO

JUDGE

30/9/2013

Before: Hon. F. Gikonyo, Judge

Khisa: CA

APPEARANCES

Petition represented by Ndambiri

Respondents represented by Makokha and Miss Wakoli for 1st Respondent. Gumbo for 2nd and 3rd Respondents. Masinde is indisposed and Ochieng engaged in Dubai.

COURT: Judgment read in open court.

F. GIKONYO

JUDGE

MAKOKHA: I pray for certified copies of proceedings urgently.

COURT: Certified copies of proceedings to be supplied on payment of requisite fee.

F. GIKONYO

JUDGE