



**Zuma & another v Independent Electoral and Boundaries Commission & 2 others
(Election Petition E002 of 2022) [2023] KEHC 353 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 353 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ELECTION PETITION E002 OF 2022
F GIKONYO, J
JANUARY 26, 2023**

BETWEEN

DZIWE PALA ZUMA 1ST PETITIONER

SULEIMAN ALI MWANGUKU 2ND PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

KWALE COUNTY RETURNING OFFICER 2ND RESPONDENT

ACHANI FATUMA MOHAMED 3RD RESPONDENT

JUDGMENT

Election times is strange times

1. Election times is strange times. Emotions, disagreements and arguments soar to fever-pitch; sometimes, in ugly situations, to conflict and war. Acts which seem ordinary attain ominous connotation. You also hear people talking at cross-purposes, and slogans and catchphrases are in vogue, except they may be coded to convey or bear particular, and sometimes dangerous meaning or message. Such slogans and catchphrases, or acts, if dispassionately examined in ordinary times may mean nothing worrisome. But, the time when, and context in which they are uttered, or done occupy central place in determining whether the utterances or acts constitute anything untoward. Such time but election time.
2. With the declaration of results comes another tumultuous period; election disputes. The focus now shifts to the courts to settle these tedious but important political controversies on elections.
3. They now raise all manner of electoral malpractices, or of criminal nature, irregularities and illegalities; some on the process; others on the numbers; whilst others on technicalities.



4. Theatrics and drama also have its place; it becomes the headache of the judge; which, if not handled well, may confuse the court processes or derail expeditious disposal of the electoral disputes.
5. But, in the eye of the storm, also lie tranquility. The national and constitutional action plan commands that electoral disputes must be determined within 6 months of filing of the petition (art 105(2) of the *Constitution*). With this realization, election courts are properly trained and grounded to deal with the disputes; and armed with the action plan, competence and training, courts take control of the petitions; and, through clear, targeted and realizable directions, and management of time, get down to work. Each election court develops techniques suited to its own situation. Ultimately, the absurd is averted through employ of varied but consistent approaches by the election courts; only careful not to diminish the will of the people which was explained in sheer simplicity, thus: -

“At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper—no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of that point.” Sir Winston Churchill

Brief background

6. On August 9, 2022, the voters of Kwale County participated in the third General Elections under the *Constitution of Kenya, 2010*. They were to exercise their right in choosing their preferred candidates for the six distinct elective posts; President, Member of the National Assembly, Member of the Senate, Women Representative, Governor, and Member of the County Assembly.
7. For the Kwale County Governor’s post, the contestants were; Achani Fatuma Mohamed (the 3rd Respondent), Boga Hamadi Iddi, Dena James Daniel Gereza, Mangale Lunganzi Chai, Mwakwere Chirau Ali, and Ruwa Sammy Nyamawi.
8. Kwale County has 742 polling stations spread over 4 constituencies.
9. On August 12, 2022, the county returning officer of IEBC (2nd respondent) declared the 3rd Respondent, Achani Fatuma Mohammed to be the duly elected Governor for the County of Kwale after garnering 59,674 votes. The runners up Boga Hamadi Iddi garnered 53,972 votes, Mangale Lunganzi Chai garnered 47,301 votes, Mwakwere Chirau Ali garnered 9,639 votes, Ruwa Sammy Nyamawi votes garnered 5,562 votes and Dena James Daniel Gereza 2,310 votes.
10. Aggrieved by the declaration of results, the petitioners filed this petition challenging the election of the 3rd respondent as Governor for Kwale County.

The Petition

11. The Petitioners filed this petition on September 9, 2022, paid the requisite court fees, and deposited the security for costs as required under the *Elections Act* and the *Elections (Parliamentary and County Elections) Petition Rules, 2017* (hereafter Elections Rules).

Relief sought

12. The Petitioners prayed for the following reliefs:
 - a) A declaration do issue that the 3rd respondent is not and was not eligible to contest in the 9th August 2022 Kwale County gubernatorial election having knowingly aided in contravention of Section 15(1) of the *Election Offences Act*;



- b) A declaration do issue that the non-compliance, irregularities, and improprieties in the Kwale County gubernatorial election were substantial and significantly affected the final results thereof;
- c) A declaration do issue that the Kwale County gubernatorial election was not conducted in accordance with the constitutional principles of electoral systems under Article 81 of the Constitution rendering the election void;
- d) A declaration do issue that the 3rd respondent was not validly declared as the governor of Kwale County and that the declaration thereof is invalid, null, and void;
- e) A declaration that Hamadi Iddi Boga was validly elected as the governor of Kwale County in the August 9, 2022 election;
- f) In the alternative to e) above, an order do issue directing the 1st Respondent to organize and conduct fresh gubernatorial election for Kwale county in strict conformity with the Constitution and the Elections Act;
- g) A determination as to whether or not electoral malpractice of a criminal nature may have occurred;
- h) Costs of the petition; and
- i) Any other orders that the honourable court may deem just and fit to grant.

Grounds of the petition

13. The Petitioners 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. They filed Supporting Affidavits. They also filed witness affidavits that would speak to the various allegations of the commission of electoral offences and malpractices, irregularities and improprieties. The allegations they made broadly put relate to:
 - i. Violations of the principles set out in the Constitution and the Elections laws;
 - ii. Substantial non-compliance, irregularities, and improprieties in the conduct of the gubernatorial election.
 - iii. Election offences and malpractices of criminal nature committed during the gubernatorial election.
14. However, the specific allegations set out in the petition are as follows:
 - a. That the impugned Kwale County gubernatorial elections contravened the principles of free and fair elections under Article 81 (e) of the Constitution.
 - b. That there was manifest, glaring, willful, deliberate, fraudulent, and corrupt non-compliance with the provisions of the Election Act and Election Offences Act.
 - c. That there was an unjustified delay in opening the polling stations and failure to extend the closing time in several polling stations within Kwale county contrary to regulations 64(3) and 66(1) and (2) of the Election (General) Regulations 2012 largely contributed to voter suppression. At Mbuluni primary school polling station in Kinango sub-county, the polling station was not opened until 9.00 am.



- d. That there was an unreasonable delay in transporting the forms 37 As from the polling stations to the tallying centers contrary to Article 86(c) of the Constitution that requires IEBC to employ mechanisms to ensure prompt transmission of the polling station results to the tallying center. Particularly the results from Mazola primary school polling station which is 4km from the tallying center were transported to the tallying center 2 days after the announcement of the results.
- e. That in several polling stations across Kwale County the ODM agents representing Hamadi Iddi Boga; despite being accredited by the 1st respondent and issued with letters of appointment by ODM which they properly displayed, were denied access and/or chased away by the 1st respondent's presiding officers' contrary to regulation 62 of the Election (General) Regulations 2012. It was impossible for the agents to witness and inspect the opening of ballot boxes, the actual voting, counting, declaration of results, and sealing of election materials at the polling station as is required under regulations 68(5), 72(2) and 73 of the Election (General) Regulations 2012. Therefore, there was a breach of the process from its commencement to its completion and completely undermines the principles of accuracy, accountability, simplicity, verifiability, and transparency as set out in Article 81(e) as read with Article 86 of the Constitution.
- f. That during the voting process, the ODM agents were barred from witnessing the assistance of illiterate voters in manifest violation of the provisions of regulation 72(2) of the Elections (General) Regulations, 2012. The 1st respondent's presiding officers single-handedly assisted voters who applied for assistance in the absence of the candidates' agents, specifically ODM agents. As such the petitioners cannot determine whether the 1st respondent's presiding officers duly recorded in the polling station register against the name of the voters the fact that the voters were assisted and the reason for the assistance as required under regulations 72(6) of the Elections (General) Regulations, 2012. The 1st respondent's presiding officers unduly influenced assisted voters at various polling stations to vote for the 3rd respondent contrary to Section 10 of the Election Offences Act. the 1st respondent's presiding officers at the various polling stations in a clear and coordinated manner colluded and connived with the 3rd respondent's agents to influence the choices of the assisted voters in regard to the parliamentary election.
- g. That the 1st respondent failed to provide a complementary voter identification system where the KIEMS kit failed. In areas where the 1st respondent provided a complementary voter identification system, the same was availed too late in the day. As a result, there was substantive voter suppression in the affected polling stations since many voters were unable to indefinitely wait at the polling station for the manual register to be utilized as a complementary voter identification system in violation of article 38 of the Constitution. Therefore, the Kwale gubernatorial election fell short of the constitutional requirement of simplicity.
- h. That after the close of the poll, the 1st respondent recklessly handled the election materials including the ballot boxes and the KIEMS kit. Such actions by the 1st respondent exposed the results to manipulation and possible alteration of the results. contrary to article 86(d) of the Constitution and regulation 73 of the Election (General) Regulations 2012, there were various incidents where the electoral materials were handled in a manner that compromised the transparency, security, accountability, and verifiability of the Kwale gubernatorial elections. There is adequate audiovisual evidence showing instances where unsealed ballot papers were delivered at the tallying Centre and through unapproved means of transport.



- i. That alterations made to form 37A, and not countersigned by the presiding officers must render the results thereof invalid. The results declared by the said form must therefore be disregarded from the final count. In a significant number of polling stations, the votes cast as captured in forms 37A differ from the results as captured in the 1st respondent's forms 37B and 37C. Furthermore, the results as displayed in the 1st respondent's forms 37B and 37C are inaccurate in mathematical additions in favour of the 3rd respondent. The results from Pungu Nursery School polling station were omitted from the collated form 37C despite voting having been conducted at the said polling station. Based on the following, therefore, the purported results tabulated in forms 37B and 37C were not and could not have been accurate rendering the election and electoral process fundamentally flawed and invalid and not in accordance with the principles enshrined under article 81(e) of the Constitution.
- j. The petitioners provided particulars of polling stations where the 3rd respondent's votes were increased at the expense of the votes for Hamadi Iddi Boga.

Lunga Lunga Constituency



Index	Polling Station	Achani Votes In Form 37c	Boga Votes In 37c
1	Mwazaro Nursery School [1/1]	121	172
2	Vitsangawaleni Primary School [1/2]	59	17
3.	Vitsangawaleni Primary School [2/2]	34	22
4.	Bengo Primary School [1/2]	130	34
5.	Bengo Primary School [2/2]	137	33
6.	Dzombo Primary School [1/2]	53	8
7.	Dzombo Primary School [2/2]	48	10
8.	Kikonde Primary School [1/ 2]	88	56
9.	Kikonde Primary School [2/2]	68	63
10.	TOTAL NUMBER OF AFFECTED VOTES	735	415

- k. That the 3rd respondent as a candidate in the August 9, 2022 elections knowingly aided the public officers working for the Kwale county government, in her capacity as the outgoing deputy governor of Kwale County, to mobilize and campaign for her in the said August 9, 2022 election in contravention of section 15(1) of the *Election Offences Act*. Therefore, she is and was not eligible to contest in the said election pursuant to section 15(3) of the *election offences act*. Additionally, several county officials actively campaigned for the 3rd respondent through public rallies as well as soliciting votes for the 3rd respondent through social media accounts. Rodgers Chimega who was chief of staff at the office of the then governor and Benjamin Kutto the then sub-county administrator for Kinango were notorious for posting videos and images



promoting the 3rd respondent's campaign slogan, 'HATUACHANI NA ACHANI' in a bid to garner more supporters for the 3rd respondent.

- l. That the Kwale county gubernatorial election was marred and significantly compromised by intimidation and improper influence or corruption contrary to article 81(e) (ii) of the Constitution as read with the *Elections Act*, *Election Offences Act* and Regulation 3 of the Electoral Code of Conduct. There is credible evidence that the 3rd respondent deliberately, through the ward and village administrators bribed and intimidated voters in a bid to secure her election as the governor of Kwale County. The 3rd respondent exploited the advantage of having served as the deputy governor for Kwale county to mobilize the ward administrators to support her bid to become the governor for Kwale County additionally, the 3rd respondent in a meeting held on 15/08/2022 christened a party as a farewell party for the governor Hon. Salim Mvurya and in the presence of Sylvia Chidodo who was the acting secretary, the 3rd respondent urged the attendees a majority of whom were Kwale county government employees to support her gubernatorial bid while promising the county employees a bonus package if they supported her bid. The county employees received Kshs 4,000/= depending on their respective job groups before and after election day. The said amount was paid to all employees including the early childhood development education (ECDE) teachers who were recruited by the 1st respondent as presiding officers. The bonus package promised and delivered to the county employees amounts to the use of public resources for the purposes of campaigning during an election contrary to section 14 of the *Election Offences Act*. Therefore, the gubernatorial election was flooded with impunity in contravention of the rule of law and the constitutional principles of a free and fair election.
 - m. That there is credible evidence that the 3rd respondent bribed voters to influence them into voting for her in a bid to secure her election as governor of Kwale county contrary to section 9 of the *Election Offences Act*.
 - n. That the ward administrators visited voters at their homes and unduly influenced them by instilling fear, to support the 3rd respondent's gubernatorial bid.
15. By reason of the foregoing, the petitioners averred and asserted that the Kwale gubernatorial elections and the resultant declaration of the 3rd respondent as the winner of the gubernatorial election subverted the will and intentions of the people of Kwale county; is unconstitutional, invalid and a nullity and should be declared as such.
 16. They have called 8 witnesses to testify in support of the petition. The testimonies of these witnesses is recorded and transcribed, and is part of record.
 17. The petitioners submitted that at length on how the election fell below par in both the qualitative and quantitative scales of measure.
 18. The petitioners have invited this court to invalidate the outcome of the gubernatorial election.

Respondent's Response

19. The Respondents filed their respective responses and filed affidavits in reply to the allegations by the Petitioners. 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 responses by the Respondents. The Respondent made a specific rejoinder on the errors pointed out by the Petitioners to which they answered that such minor human errors that may be identified in select instances are inevitable in an election. The errors are not sufficient to void the gubernatorial election.



20. They also called witnesses in rebuttal of the allegations by the Petitioners. The testimonies of the witnesses are recorded and transcribed, and is part of record.
21. In broad terms, they argued that the Petitioners had not pleaded their 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 Petitioners did not prove the allegations to the standard required in law; the Petitioners dwelt on generalized allegation of voter suppression and denial or barring of Boga's agents from polling stations which 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 Kwale; the 3rd Respondent was validly elected; and the petition should be dismissed with costs.

Analysis Of Evidence And Determination.

The burden of proof; legal and evidential burden.

22. There is a rebuttable presumption of the validity of election results as declared by the Returning Officer. Nevertheless, the body conducting elections has constitutional as well as statutory obligations which it must discharge. That notwithstanding, the legal burden of proof of allegations in the petition rests with the petitioner being the person alleging (Presidential Election Petition No E005 of 2022 (Consolidated): Raila Odinga & 6 Others v William Ruto & 10 Others)
23. The evidential burden also initially rests with the petitioner, but as evidence is adduced that the other party will fail without further evidence, evidential burden shifts to the party who will fail without further evidence. If such party does not rebut the evidence adduced, judgment will be entered in favour of the other party if the evidence adduced attains the required standard of proof. In other jurisdiction, they refer to evidential burden as reverse burden of proof- a terminology, which, in my view, misrepresents or distorts the understanding of, the concept and nature of evidential burden.

Standard of proof

24. I wish to correct the submission by the 1st and 2nd respondents which suggested that; whereas it is upon the court to determine the standard of proof in election disputes, they urged this court to be persuaded by the holding at Para 203 Raila Odinga & 5 Others V Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR Neutral Citation: [2013] KESC 6 KLR, Petition No 1 Of 2017- Raila Amolo Odinga & Another V Independent Electoral and Boundaries Commission & 4 Others & Attorney General & Another Para 151 & 152, Khatib Abdalla Mwashetani V Geideon Mwangangi Wambua & 3 Others.
25. The correct position of the law is that, this court is bound by the decisions of the Supreme Court (article 163(7) of the Constitution) which has set the standard of proof in an election petition to be higher than the balance of probabilities but lower than beyond reasonable doubt- commonly known as intermediate standard of proof (Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR Neutral Citation: [2013] KESC 6 KLR).
26. Except, however, where allegations of electoral malpractices of criminal nature are made, the standard of proof is beyond reasonable doubt (Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR Neutral Citation: [2013] KESC 6 KLR).



27. But, there is a debate on-going on; whether the amendment to section 87 of the *Elections Act* affects this standard of proof- beyond reasonable doubt- which was formulated before the amendment. The debate is discussed in detail elsewhere in this judgment.

Issues

28. Upon consideration of the petitioners and the 3rd respondent's list of issues and upon perusal of the pleadings, this court on 26/10/2022 framed the following to be the issues for determination in this election petition:
- I. Whether the Kwale county gubernatorial election held on the 9th August 2022 was conducted in accordance with the principles set out in the Constitution and election laws.
 - II. Whether there was substantial non-compliance, irregularities, and improprieties in the conduct of the impugned Kwale gubernatorial election that substantially affected the result of the election.
 - III. Whether there were election offences and malpractices of criminal nature committed during the Kwale gubernatorial elections which would invalidate the election.
 - IV. Whether the 3rd respondent was eligible to contest in the 9th August 2022 Kwale county gubernatorial election.
 - V. Whether failure to enjoin the deputy governor of Kwale county as a party to this petition renders this petition incurably defective.
 - VI. Whether the 3rd respondent was validly elected and declared the governor of Kwale county.
 - VII. What reliefs and orders can the court grant.
 - VIII. Who should bear costs of the petition.

Mode of proceeding

29. Issues for determination were settled prior to trial. Parties adduced evidence to prove or disprove the issues in controversy. The evidence was duly recorded by the court and also transcribed. It is therefore part of record. Parties also submitted on each issue.
30. I will therefore, analyze the evidence (oral, documentary or electronic) adduced towards proof or disproof of the particular allegations made under the relevant specific issue; and upon consideration of the parties' respective submissions, and applying the relevant law to the facts, determine the issue accordingly.

As a matter of coherence

31. I will determine the issues not in the order they appear for good reasons. I know not of any rule of law requiring the issues to be determined in the order they appear in settled issues. In any event, some issues are of preliminary nature and significance and should be determined as such; in limine; others feed to others; whilst others are the overall impression of the entire analysis of the issues. The ordering scheme proposed draws upon the need for coherence and good order in the determination of the issues.
32. Some issues of preliminary importance arose during trial and in the submissions by the parties. These are; i) authority to swear affidavit; ii) failure to call deponents of affidavits filed.



33. There are others which had been filed as preliminary objections or in an interlocutory application about which the court directed during pre-trial conference that they be determined within the trial. These are; i) non-joinder of the Deputy Governor; ii) admissibility of electronic evidence. I will deal with these issues in limine.

Preliminary Issues

Objection 1: of authority to swear affidavit on behalf of another

34. The 3rd respondent submitted that the 1st petitioner contravened Oaths and Statutory Declarations, Act Chapter 15 Laws of Kenya. During the hearing of the Petition, it transpired that, the 1st Petitioner (Dziwe Pala Zuma) has not exhibited written authority from the 2nd Petitioner (Suleiman Ali Mwanguku) to swear the Affidavit in support of the Petition on his behalf. He alleges authority in paragraph 1 of the Supporting Affidavit. The 1st Petitioner claims to have authority but none is attached or annexed.
35. What does the law say?
36. According to rule 12(1) of the Elections Rules: -
1. A petition shall be supported by an affidavit which shall-
 - a. set out facts and grounds relied on in the petition; and
 - b. be sworn personally by the petitioner or by at least one of the petitioners, if there is more than one petitioner
37. My reading of rule 12(1)(b) of the Election Rules reveals that, a petition may be supported by an affidavit ‘...sworn personally by... at least one of the petitioners, if there is more than one petitioner’. Except, I wish to understand the interface- if at all- between this rule and rule 12(8) of the Election Rules; whether petitioners who have not filed affidavits in support of the petition may require the leave of the election court or the rule constitutes exception or sufficient cause, for such petitioner to give evidence.
38. Nevertheless, I should think that, a petitioner who claims to be swearing the affidavit on behalf of or with the authority of a joint petitioner should have express authority to do so by the joint petitioner. The authority must be in writing but need not take a particular form; it may be in form of an affidavit or duly signed letter of authority.
39. This does not however, permit or mean joint affidavits.
40. Be that as it may, an affidavit filed on behalf of or with authority of joint petitioners, is governed by the law on affidavits; the deponent must swear only to matters he may lawfully be examined upon or be called upon to give in evidence.
41. Therefore, to the extent that the 1st petitioner has sworn to matters he may lawfully be examined upon or be called upon to give in evidence, merely stating that he had authority from his co-petitioner to swear the affidavit, does not make the affidavit defective (section 17 of the [Oaths and Statutory Declarations Act](#)). I dismiss the objection.



Objection 2; Failure to call witnesses

42. The petitioners submitted that they testified and called witnesses and were subjected to cross-examination. Their testimony and that of their witnesses was corroborated by the respondents' witnesses effectively shifting the evidential burden of proof to the respondents.
43. The petitioners argued that; whereas the 1st and 2nd respondents filed 15 witness affidavits in support of their case but elected to call 3 witnesses who were duly cross-examined.
44. Similarly, the argued that; whereas the 3rd respondent filed a total of 25 witness affidavits and only called one witness cross-examination.
45. According to the petitioners, there was no consent of the parties not to cross-examine the respondent's dependents who were not called to testify.
46. The petitioners, therefore, urged this court to draw an adverse inference by failure of the respondents to call their witnesses and in particular the 3rd respondent. To them, the 3rd respondent's election was complained of and failure to testify renders her replying affidavit worthless and of no probative value.
47. The petitioners relied on;
 - i. Rule 12 Of the Elections (Parliamentary and County Elections) Petition Rules 2017.
 - ii. Jacinta Wanjala Mwatela V Iebc & 3 Others (2013) eKLR.
 - iii. Halsbury Laws Of England 3rd Edition Vol. 15
 - iv. Moses Wanjala Lukoye V Benard Alfred Wekesa (Supra).
 - v. Ramadhan Seif Kajembe V Returning Officer, Jomvu Constituency Nd 3 Others 92013) eKLR.
 - vi. Raila 2017,
 - vii. Black's Law Dictionary, Tenth Edition, Thomson Reuters, St Paul 2004,
 - viii. Igbine v the State [1997] 9 NWLR (Pt. 519) 101(A)
 - ix. 108 and Section 112 of the *Evidence Act*.
48. I will not re-invent the wheel. Affidavit by a witness who does not appear in court for cross-examination of their affidavits, unless parties agree by consent to admit the affidavit without calling the deponent, the affidavit remains part of record but a dead appendage without any probative value or if any weight is to be attached to it, it is very little. I will so proceed.

Objection: non-joinder of deputy governor

49. The issue here is; Whether failure to join the deputy governor of Kwale County as a party renders this petition incurably defective.
50. The Deputy Governor is not a party in these proceedings.
51. The 3rd respondent and the 1st and 2nd respondents filed preliminary objections dated 20/09/2022 and 21/9/2022 respectively to the effect that; failure to join the deputy governor of Kwale County as a respondent in the petition within 28 days of declaration of results rendered the whole petition



incompetent and fatally defective as it was a violation of the deputy governor's rights to fair hearing under article 50 of the constitution.

52. Determination of these objections in the final judgment is pursuant to the directions by the court issued during the pre-trial direction on 14th October 2022.

Submissions by 1st and 2nd respondent

53. The 1st and 2nd respondents submitted that the outcome of the petition especially if it is adverse would have a direct impact on the deputy governor. They took the view that, a successful petition would remove him from an elective office without according him an opportunity to be heard. He would have been denied the right to be heard which is guaranteed under article 50(1).
54. They argued further that rule 2(a) of the election (Parliamentary and County Elections) Petitions Rules 2017 defines a respondent to mean 'the person whose election is complained of'. To them, 'the person whose election is complained of' is not only the governor but also the deputy governor. According to the respondents, rule 2 (a) should be read alongside article 180 (5) of the Constitution.
55. The 1st and 2nd respondents thus urged the court to strike out the petition with costs on account of failing to comply with rule 2(a) of the Election (Parliamentary and County Elections) Petitions Rules 2017. They submitted that the omission cannot be cured by Article 159(2) (d) of the Constitution
56. In support the 1st and 2nd respondents have relied on the cases of Josiah Taraiya Kipelian Ole Kores V David Ole Nkedeinye & 3 Others [2013] eKLR, Imanyara V Independent Electoral and Boundaries Commission; Orange Democratic Movement (Interested Party) (Constitutional Petition E297 of 2022) [2022] KEHC 13341(KLR) (Civ) (30 September 2022).

The 3rd respondent's submissions

57. The 3rd respondent were also of a similar opinion as the other respondents. More specifically, the 3rd respondent posit that failure to join the duly elected deputy county governor as a party to the petition as required under Article 87(2) of the constitution renders the whole petition incurably defective. The deputy county governor has a constitutional right to hold office protected by Article 38(3)(c) of the constitution. That this court cannot nullify the election of a deputy governor who is not a party to the Petition.
58. Moreover, she argued, the Petitioners did not make an application within 28 days from the date of result declaration, to cure this major defect in the Petition. The Petitioner did not make any application during the pre-trial directions to seek leave of the court to remedy the defect. The deputy governor and the governor are like conjoined twins. They are elected under one ticket. According to them, there is no separate election for the deputy governor. The deputy governor is nominated by the governor. At the polling station, where the sovereign power of the people is exercised, the voter is given a ballot containing both names and proceeds to select based on the said ballot papers. They exercise their constitutional mandate as provided for in the constitution and law.
59. If there is a vacancy in the office of governor, the deputy governor ascends to the office as governor without a fresh election being conducted. There can be no separate litigation for each position. Irregularities and illegalities in the conduct of elections, when proved, can lead to a nullification of the election of both persons in the joint ticket.
60. In support the 3rd respondent cited the following cases; Mugambi Imanyara v Independent Electoral and Boundaries Commission; Orange Democratic Movement (Interested Party) (Constitutional Petition E297 of 2022) [2022] KEHC 13341 (KLR), Article 87(2), 88 (4), 159 (2) (d) and 180 (5)



(6)of the Constitution of Kenya 2010, Josiah TaraiyaKipelian Ole Kores -v dr. David Ole Nkediemye & 3 others (2013) ,Mbaki & others V Macharia & Another (2005) at page 4

Petitioners' submissions

61. The petitioners argued that the deputy governor is not a necessary party since there is no legal provision mandating his inclusion in the petition. Furthermore, there is no reasonable cause of action sustainable against him and therefore he is not a necessary party. They further argue that the deputy governor if at all aggrieved by failure to be included in the matter was at liberty to move the court on his own otherwise, he is simply collateral damage.
62. The petitioners submitted that the respondents use of the word 'enjoin' refers to barring the deputy governor who is not a party in the first place. Alternatively, if the intention of the respondents was to ask this court to dismiss the petition for failure to 'join' the deputy governor, the said ground is not a pure point of law. That there is no law that provides for 'joinder' of deputy governor as a party to such proceedings. The proper person whose election is complained of is the governor not the deputy governor as there is no separate election for the deputy governor. Further there is no complaint with regard to the conduct of the deputy governor in the impugned election. Therefore, deputy governor is not a necessary and or mandatory party to these proceedings. Further that nothing stopped deputy governor from applying to join & participate in the proceedings to safe guard his rights from being violated.
63. The petitioners submitted that the deputy governor is neither a person whose election is complained of nor a person whose conduct is complained of in relation to the impugned election as provided in rule 2 of the Election (Parliamentary and County Elections) Petition Rules 2017. The proper person whose election is complained of is Fatuma Achani. Therefore, there is absolutely no legal basis to have the said deputy governor as a party in these proceedings on this account. Rule 2 refers to the person whose election is complained of in singular terms.
64. The petitioners pointed out the distinction between the word 'enjoin' and 'enjoinder' vis- a- vis 'join' and 'joinder'.
65. The petitioners relied on the following cases in support of their submission on this issue.
 - i. Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd [1969] E.A. 696.
 - ii. John Musakali V Speaker County of Bungoma & 4 Others [2015] eKLR.
 - iii. Oraro V Mbaja [2005] KLR 141.
 - iv. David Nyekorach Matsanga & Another V Philip Waki & 3 Others [2017] eKLR.
 - v. The black's law dictionary, Tenth Edition Thomson Reuters, St Paul 2004.
 - vi. The Concise Oxford English Dictionary, Twelfth Edition, Oxford University Press, New York 2011.
 - vii. In re estate of Barasa Kanenjo Many (deceased) [2020] eKLR.
 - viii. Rule 2 of Election (Parliamentary and County Elections) Petition Rules, 2017.
 - ix. Lesrima Simeon Saimanga V Independent and Electoral Boundaries Commission & 2 Others [2017] eKLR.
 - x. Moses Wanjala Lukoye v Benard Alfred Wekesa Sambu & 3 Others [2013] eKLR.



- xi. Articles 180 of the Constitution
- xii. Wavinya Ndeti & Another V Independent Electoral and Boundaries Commission (IEBC) & 2 others [2017] eKLR.
- xiii. Bashir Haji Abdullahi V Adan Mohammed Noor & 3 Others [2004] eKLR.

Joinder of Deputy Governor: Court's view and determination

66. It has emerged from arguments presented that I should decide on:
- i. Whether the Preliminary Objection raises pure points of law; and
 - ii. Whether the deputy governor is a necessary party or mandatory party

A small issue though...

67. The respondents have fastened a quarrel with the petitioners' use of the words 'enjoin' or 'joinder' instead of 'join' or 'joinder'.
68. The word 'enjoin' means: -
- i. To legally prohibit; or restrain by injunction;
 - ii. To prescribe, mandate, or strongly encourage (Black's Law Dictionary, Tenth Edition, Ed. Bryan A. Garner).
69. The word 'join' or 'joinder' refers to: -
- The uniting of parties or claims in a single lawsuit (Black's Law Dictionary, *ibid*).
70. Accordingly, the sense in which the terms 'enjoin' or 'joinder' have been used by the petitioners in reference to the uniting of parties in a lawsuit is not appropriate. I do not, however, think the petitioners intended 'enjoin' in its correct sense i.e. prohibit or restrain by injunction. Care should, nonetheless, be taken to use appropriate terms especially those with technical or legal meaning lest you should convey an altogether different meaning than the one intended. And, remedy may be elusive on account of wrong use of words. Let me go back to the main.

Does the Preliminary Objection raise pure points of law?

71. In the opinion of the respondents, failure to join the deputy governor in the Petition; i) renders the Petition fatally defective; and ii) is a violation of the deputy governor's rights.
72. The Petitioners takes the view that, the preliminary objection does not raise pure points of law and therefore does not meet the threshold set in the Mukisa Biscuit case.
73. As it shall soar from the final determination of the objection, non-joinder of an indispensable or mandatory party is a jurisdictional question, as presence of such party is a *sine qua non* for the exercise of judicial power and jurisdiction. The great elephant, however, is whether the deputy governor is an indispensable or mandatory party whose presence is *sine qua non* exercise of judicial power and jurisdiction in these proceedings in the sense of the Mukhisa biscuit case test.

Whether non-joinder renders petition fatally defective

74. Of great importance in the objection is whether the non-joinder of the deputy governor in the proceedings renders the petition fatally defective. The discussion on, and determination of this issue



should be understood within the special procedure and practice specially prescribed pursuant to section 96 of the *Elections Act* to regulate election proceedings.

75. The petitioners have argued that the DG is neither a necessary nor mandatory party and as such non-joinder thereof does not renders the petition fatally defective. The respondents seem to suggest the DG is an indispensable or mandatory party, thus, non-joinder is fatal to the petition.
76. These arguments take the court back to class 101 on joinder of parties; classification of parties; permissive or mandatory or compulsory joinder of parties.

Joinder of Parties

77. The general rule in the impleading of parties requires, the joinder of all necessary parties where possible, and the joinder of all indispensable or mandatory parties under any and all conditions- the presence of the latter being a sine qua non for the exercise of judicial power and jurisdiction. Thus, when an indispensable or mandatory party is not before the court, the action should be dismissed. Accordingly, it is not an over-statement that joinder of parties is an important consideration in the institution and resolution of disputes between the parties- and so it shall become in this decision.

Understanding classification of parties

78. Under the general civil practice¹, and under sui generis² procedures, parties are classified as: formal, proper, necessary, and indispensable or mandatory. These classifications perform important roles in procedural as well as substantive resolution of disputes. For instance, the classifications provide basis for rules on compulsory joinder, determination of applications for joinder of parties or objections based on non-joinder or misjoinder of parties, determination of rights between the parties and provision of appropriate remedy in a dispute.
79. I do note, however, that some courts see little point in drawing a clear line of demarcation between the different categories of parties, thus, making the function of these classification often blurred and obscured- something that has deprived of workable and predictable jurisprudence on permissive, and mandatory or compulsory joinder of parties which now seems to be a real headache in election petitions.
80. In the circumstances of this case, and the arguments flowing through, it is necessary that I should discuss these classifications, and joinder of parties, for they are important in this decision; to wit: (1) formal parties (2) proper parties; (3) necessary parties; and (4) indispensable or mandatory parties.

Formal party

81. Formal parties are purely nominal ones and are procedural vehicles who have no real interest in the controversy, such as the next friend who brings a suit to enforce the rights of an infant. See Civil Procedure Rules on suits by minors.

Proper party

82. Proper parties are ones whose interest may be affected by the judgment, but whose presence is not essential in order for the court to adjudicate the rights of others. Interested parties are also treated under this category where it is shown such party has an identifiable stake or legal interest or duty in

¹ 1 Civil procedure and Rules

² 2 Mutunga Rules, JR procedures, Election petition Rules etc



the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.

83. Proper parties may be added to a lawsuit through a permissive joinder either upon their application or that of a party in the suit.
84. For example: In an action for negligence where two defendants are jointly and severally liable, each defendant is a proper party. The plaintiff has a right to sue either of the defendants, but only one of the defendants is required.

Necessary party

85. Necessary parties are those whose interests in the subject matter of the controversy are separable, and whose absence would not prevent the granting of the proper relief to the parties actually joined; but who should be made parties, if their joinder is feasible, to avoid a multiplicity of actions and to effect a complete adjudication of the controversy³. In many jurisdictions, the failure to join a necessary party to an action is a directory omission.

Indispensable or mandatory party

86. Indispensable parties are those whose interests in the subject matter are so interrelated that the court cannot proceed in their absence, since a complete, effective and equitable adjudication of the controversy may not be made unless they are before the court. Further, an indispensable party is a party that must be included in a lawsuit in order for the court to render and execute a final judgment. Indispensable parties are also referred to as Mandatory parties especially where the statute specifies a party to be mandatory party or parties in a proceeding, e.g. IEBC and the person whose election is complained of in the petition- a concept incorporated in the corpus of the election law and rules.
87. Indispensable parties are also recognized in the Constitution, for example the Attorney General shall be party in every proceeding-except criminal proceedings- where the national government is a party. See article 156(4)(b) of the Constitution that: -

156(4) The Attorney-General—

- (b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings

88. With the advantage of the foregoing, it bears repeating that, the general rule in the impleading of parties requires, the joinder of all necessary parties where possible, and the joinder of all indispensable parties under any and all conditions- the presence of the latter being a sine qua non for the exercise of judicial power and jurisdiction. Thus, quite a departure from the general rule that, proceedings are not defeated merely because of misjoinder or non-joinder of parties:it is precisely when an indispensable or mandatory party is not before the court, the action should be dismissed. The absence of an indispensable or mandatory party renders all subsequent actions of the court null and void for want of authority to act, not only as to the absent parties but even as to those present.
89. Is the DG an indispensable or mandatory party in the election proceedings?
90. A "respondent" in relation to a petition, means-
 - a. the person whose election is complained of;

³ 3 Henry G. McMahon, *The Joinder of Parties in Louisiana*, Louisiana Law Review, Volume 1/Number 1, Legislative Symposium: The 1958 Regular Session, December 1958



- b. the returning officer;
 - c. the Commission; and
 - d. any other person whose conduct is complained of in relation to an election. (Rule 2 of the Election (Parliamentary and County Elections) Petition Rules 2017)
91. Rule 9(a) of the Election (Parliamentary and County Elections) Petition Rules 2017 provides that:
- ‘The Commission shall- be a respondent in every petition filed under these Rules’.
93. This rule specifically proclaims IEBC to be mandatory or indispensable party in an election proceeding.
94. Other than providing the persons who must be joined as respondents, rule 2 of the Election (Parliamentary and County Elections) Petition Rules 2017 also provides the test of determining a mandatory or indispensable respondent in an election petition, to wit: -
- a) the person whose election is complained of; and
 - b) any other person whose conduct is complained of in relation to an election
95. Applying the test, is the deputy governor a person whose election is complained of, or whose conduct is complained of?
96. Upon meticulous perusal- although it has not been claimed- the Deputy Governor is not a person whose conduct is complained of in the petition, for there is absolutely no complaint that has been levelled against the Deputy Governor.
97. The dichotomy in opinion is, however, on whether the Deputy Governor is a person whose election is complained of?
98. The petitioner urged that the election complained of is that of governor and not deputy governor.
99. The respondents argued that the election of governor and of deputy governor is joined in the hip for two reasons; i) they are a package in the ballot, elected in same election and their names appear in the ballot paper; and ii) the deputy governor has rights which should be protected from arbitrary erasure in a proceeding he is not a party.
100. I take the following view of this issue. The election of governor is in accordance with article 180(1) of the Constitution, thus:
- 1. The county governor shall be directly elected by the voters registered in the county, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year’.
101. The election of the deputy governor is in accordance with article 180(6) of the Constitution, thus: -
- (6) The Independent Electoral and Boundaries Commission shall not conduct a separate election for the deputy governor but shall declare the candidate nominated by the person who is elected county governor to have been elected as the deputy governor
102. According to the [Elections Act](#) in Section 2: -
- ‘election’ means a presidential, parliamentary or county election and includes a by-election
- “county election” means the election of a county governor or a member of a county assembly



103. I do note also that the [Elections Act](#) and Regulations make provision for issuance of certificate of elected county governor only.
104. Therefore, contrary to the submissions by the respondents, in light of article 108(1) and (6) of the Constitution, and the nature of the petition before the court, the election complained of is not the election of the deputy governor.
105. The ultimate test of the law, nevertheless, is whether the Deputy Governor is a party who has such an interest in the controversy or subject matter that a final adjudication cannot be made, in his absence. Put in another way, whether his absence, makes it impossible for an effective, complete or equitable determination of the controversy between the parties already before the court.
106. Many jurisdictions have struggled⁴; but the law on joinder of parties has seen a leapfrog development in making a distinction between necessary party and indispensable party. Our law has also incorporated this development. For instance, section 2 and 9 of the [Elections Act](#).
107. In law, therefore, the absence of an indispensable or mandatory party renders all subsequent actions of the court null and void, for want of authority to act, not only as to the absent parties but even as to those present⁵.
108. I am aware that the DG has a legitimate interest in the election petition which makes him a necessary party. It may also be desirable that he is made a party, if he applies. However, under the applicable election law, his absence does not render the proceeding incapable of effective, complete or equitable determination by the court between the parties before it, except where he brings himself to the test of rule 2 of the Election Rules.
109. Before I close, one more important aspect of the debate: compulsory and permissive joinder of parties.

Compulsory joinder

110. Compulsory joinder is in respect of indispensable or mandatory parties; such party must be joined under any and all conditions, for their presence is sine qua non the exercise of judicial power.

Does [Elections Act](#) require compulsory joinder of DG?

111. The special procedural regime ordained of the Election law and Rules provides for compulsory joinder of parties, for instance, IEBC, Returning Officer, a person whose election is complained of or whose conduct is complained of in relation to the election under contestation. As I have found, the elections law does not specifically require compulsory joinder of the deputy governor in an election petition, unless, the DG is the person whose conduct or election is complained of.
112. But, the greater value here is that, neither the parties nor the court may waive the joinder of an indispensable or mandatory party. I should think that the court may, on its own motion, take notice of the omission to join an indispensable or mandatory party as that would affect taking of jurisdiction over the matter. For instance, where a petition does not name IEBC as a respondent, an objection or noting of, the absence of such indispensable party in an election proceeding should be a peremptory, rather than a directory, command; and unless joinder of an indispensable party is sought and granted, the petition should be dismissed. And, it bears repeating that the express recognition in the Election

⁴ 4 HOWARD P. FINKt, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, The Yale Law Journal, (1965) Vol. 74 Number 3

⁵ 5 ibid



rules of, engenders category of indispensable or mandatory parties in election law, which also is an indication and acknowledgement of the importance of classifications of parties in dispute resolution; which is also central in determining the objection before me.

113. The overall impression of the matters raised is that; under the Election Rules, there is no specific requirement that a Deputy Governor must be impleaded as an indispensable party in a petition against the election of the Governor. This does not however, mean that a DG cannot be or declared to be an indispensable party especially where he is the architect of the major electoral ills complained of, nor a dearth of precise rules, or connotation of any practical imperfection of procedure in the election rules in relation to impleading of the deputy governor in an election petition. Except, it leaves a wide field to the judicial discretion, which may see varying positions being taken by the courts on this matter.
114. As far as I am aware, at the moment, there are three views of this matter.
115. Some courts have found that the Deputy Governor ought to be joined, and that failure to do so would render the petition defective. This is the view that was advanced by the respondents. It was also adopted in the case of *Mwamlole Tchappu Bwana v IEBC & 4 Others Mombasa High Court Election Petition 5 of 2017*
116. Others argue that Deputy Governor is a necessary party in an election Petition in light of the rights accrued upon being declared elected by IEBC. Their argument is right-based; that the deputy governor once declared elected has rights which should be protected from arbitrary rapture by a proceeding where he is not a party. According to them, any such proceeding or the non-joinder of the deputy governor will result in violation of the right to fair trial enshrined in Article 50 of the Constitution. I have heard a counter argument; that the deputy governor is at liberty to apply to be joined as a party herein, or in the alternative may file a separate constitutional petition to protect his rights.
117. The other school of thought submit to the view that the deputy governor is a necessary but not a mandatory party like IEBC is. Thus, non-joinder of the DG is not fatal to the petition. They bolster their position through the argument that, unlike the Governor, the DG is only a nominee of the governor, and his or her election is declared by the IEBC upon the election of the Governor. Whether this latter argument is indomitable in showing such interest is not sufficient to make the DG an indispensable party is a debate for another day.
118. The important thing in this school of thought is that a deputy governor is not a mandatory party and failure to join him in the petition was therefore, not fatal. See *Wavinya Ndeti & Another v. Independent Electoral & Boundaries Commission & 2 Others Machakos High Court Election Petition No 1 of 2017*.
119. Be that as it may, in the final analysis, the express recognition in the Election rules, of the classification of parties and specifically compulsory impleading of indispensable parties inter alia, IEBC and the person whose election is being challenged, really helps in resolving this objection. It bears repeating that the election rules of procedure do not provide the DG is an indispensable party in an election petition challenging the election of the Governor. In the circumstances of this case, impleading of the Governor alone in an election petition suffers not any deficiency in law as to require the impleading of a deputy governor for purposes of resolving the controversy in the election of governor.
120. I do note also that, other than the usual complaints on the management of elections, the petitioners have levelled specific allegations against the Governor personally and none against the DG. In the circumstances, I see not anything upon which to declare the DG herein as an indispensable or mandatory party. I say these things not in contempt of the fact that it matters, the constitutional design



on the election and rights of the DG. I also do not foreclose further debate on, and as far as I am aware, I wish a final determination of this issue by the highest court in the land- unless there is one already.

121. In the upshot, I dismiss the objection by the 1st and 2nd respondents and the application by the 3rd respondent.

Objection 4: Late service of annexures to affidavit

122. The 3rd Respondent filed a Notice of Motion dated 29/09/ 2022 seeking orders to strike out annexure marked: - (a) BSM1 annexed to the Supporting Affidavit of Bijuma Saphati Mwandoto sworn on 9th September 2022; (b) WDO1 annexed to the Supporting Affidavit of Willies David Odheche sworn on 8th September 2022; and (c) BM1 annexed to the Supporting of Bujura Mohamed sworn on 8th September 2022.
123. During the pre-trial directions this court directed that the application be heard together with the main Petition.

Petitioners' submissions

124. The petitioners admit that the service was late, but they lay blame on the e-filing portal system. They stated that the court's e- filing platform does not have an option of uploading annexures that are in video format The explanation appears persuasive because the delay in making the videos available to the respondent is shifted to the court and makes it beyond the control of the petitioners who say they tried their best to deposit the annexures in the court registry. The petitioners even go further to tell the court that there was no format prescribed for presenting the annexures.
125. The petitioners submitted that the 3rd respondent was at liberty to request for further particulars with respect to the impugned annexures at the pretrial conference. That the impugned annexures were filed within time. The petitioners relied on rule 15 and 19 of the Elections (Parliamentary and County Elections) Petitions Rules.

Respondents' arguments

126. The respondents submitted that the petitioners failed to comment on the correspondences from the 3rd respondent requesting for the annexures. The petitioners did not explain why the alternative format was only arrived at after their responses were filed. The petitioners do not explain to the court that there are other formats compatible to the e filing portal such as hyperlink which they eventually used when they served the videos via email. Further there is no explanation why the videos are not accompanied by transcripts. Other than failing to offer explanation for their actions and inactions, the petitioners also failed to seek the leave of court to have the annexures admitted to the court record out of time during the pre-trial session on 14/10/22. They simply advance to the hearing under the pretext that since the respondent now have the videos production, cross examination and admissibility tests at the later stages of the proceedings should be sufficient for the respondent.
127. The 1st and 2nd respondent submitted that the said annexures were not supplied to court or respondent until after the respondents had filed their responses. That therefore they should be disregarded. They supported that position with the case of Jeremiah Nyangwara Matoke V Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR, Idris Abdi Abdullahi V Ahamed Bashane & 2 Others [2018] eKLR.
128. The 1st and 2nd respondent submitted that the court is not functus officio on the question of production of the videos during hearing "the substance of the application and preliminary objection shall be determined in the hearing and in the final decision in this matter.'



129. That election process and election disputes are time bound proceedings. A period of 28 days is provided for filing the petition and 7 days thereafter to effect service. The results were declared on 12/8/2022. The petition was filed on 9/9/2022 and served on 15/9/2022. The petitioners admit that the video annexures were not available to the respondents until 27/9/2022. By this time all the respondents had filed their responses which were supposed to have been filed on or before 22/9/22.
130. The 1st and 2nd respondent submitted that the respondent were denied sufficient opportunity to respond to the contents of the videos because the statutory time to file any response had already run out.
131. The 3rd respondent submitted that the results for the Kwale gubernatorial election was declared on 12th August 2022. Accordingly, the last date for filing a “complete” Petition was 9th September 2022. The Petition was filed on 9th September 2022 and served on 15th September 2022 via substituted service directing the Respondents to obtain copies of the Petition from the High Court registry in Mombasa. Pursuant to the advertisement, the 3rd Respondent advocates proceeded to the said registry on 19th September 2022 and was given the Petition and which Petition did not have the impugned annexures.
132. The Petitioner later deposited the annexures at the High Court Registry in Mombasa on the 27th of September 2022, which is 18 days after the mandatory Constitutional timelines and after the 3rd Respondent had already filed a response to the Petition. within the limited 7 days’ timelines allowed by the Rules. The 3rd Respondent filed her response on 22nd September 2022 (within the mandatory period of 7 days required by the rules). She never had the benefit of reviewing the impugned annexures to know the full case against her-when preparing her response. Therefore, the 3rd Respondent submitted that this Court should strike out the impugned annexures and does not refer to them. Consequently, the evidence adduced by the Petitioners during the trial pursuant to the said annexures should be disregarded.
133. Late filing of the impugned annexures occasioned major prejudice to the 3rd Respondent. allowing late filing of the impugned annexures has a bearing on the question of constitutional timelines for filing of an election Petition, which this court has no jurisdiction to extend, time being of the essence in such matters.
134. Failure to file and serve the impugned annexures to the cited affidavits within the mandatory twenty-eight (28) days’ timeline of filing of election Petition for Governor, deprived the 3rd Respondent of this important component of the right to be heard. Article 159(2)(d) of the Constitution cannot cure this.
135. The 3rd Respondent urged this court to take judicial notice of the policy reasons regarding the existence of mandatory timelines in the Constitution and Election Act regarding the filing of the election Petition. She further urged the court to allow the 3rd Respondent’s Application dated 29th September 2022.
136. The 3rd respondent relied on the following cases;
- a. The Supreme Court of Kenya in the case of *Nathif Jama Adam v Abdikhaim Osman Mohammed & 3 Others* [2014] eKLR,
 - b. Article 50(1) of the Constitution
 - c. *Jaldesa Tuke Dabelo v IEBC & Another* [2015] eKLR;
 - d. *Raila Odinga and 5 Others v IEBC & 3 Others* [2013] eKLR;
 - e. *Lemanken Arata v Harum Meita Mei Lempaka & 2 Others* [2014] eKLR; and



f. Patricia Cherotich Sawe v IEBC & 4 Others [2015]eKLR.

Courts decision on objection to annexures

137. In reference to the application and objection to annexures in question it was directed that “the substance of the application and preliminary objection shall be determined in the hearing and in the final decision in this matter.’
138. During trial, the respondents objected vehemently to the tendering in evidence of the said annexures by the petitioners’ witnesses. The objection was overruled in a ruling delivered on 22/11/2022 on the basis that the respondents would have every opportunity to respond substantively to the said annexures by way of filing further affidavits if they deem it necessary. This was an apt way of curing any prejudice the respondents may have suffered on account of late service of the videos in issue. Towards this end, the court ordered an adjournment of the hearing to the following day to allow the respondents time to respond to the annexures. However, the respondents did not deem it necessary to file further affidavits. Accordingly, this issue was put to rest.
139. In respect of the alleged annexure WDO1, the court found that it was not referred to in the affidavit of PW8 and was therefore not part of the record. It was consequently disregarded by the court. By that finding of the court, the attempt by PW8 to produce annexure WDO1 through the back door was thwarted and the issue was spent.
140. BSM1 and BM1 were referred to as annexures to the affidavit of PW7 and PW6 respectively. The court allowed production of this videos. The outstanding issue now is whether they meet the admissibility tests?

Admissibility of the video evidence.

141. The petitioners called 2 witnesses who are said to have made the videos in question. The purpose and intention of calling the said 2 witnesses was to persuade the court that the videos were admissible in evidence, pursuant to the provisions of the *Evidence Act*.
142. PW6 is a P1 teacher trained at Islamic Teachers Training College. He signed a certificate on 8/9/2022, indicating that the videos in question were downloaded by him. PW 6 also provided the particulars of the phone which he used to download the videos. The video was produced as P Exh. 1 and was played in court.
143. PW6 has no training and competence in videography. In cross examination it emerged that PW6’s ID number is 29843875 as it appeared in his affidavit, but the ID number in attached certificate of electronic evidence for the video was different. Although PW6 did not admit that he had altered the video, he admitted that he trimmed it. The video does not also contain the transcript of what is being said, or details on where, when and by whom it was taken.
144. PW7 was a super-agent for azimio/ODM. She took the video with her phone. She produced the videos as P EXH 2 AND 3. She could be heard in the video but there was no transcript of what was said. She did not even provide details of any or some of the participants in the video. The forms allegedly found in the bag of the PO was not visible in the video. Other than what she was saying, there is hardly any meaningful discernment that could be made out of the video.
145. Be that as it may, it is crucial to bear in mind the fact that electronic evidence can be easily manipulated, using computers or other electronic gadgets or instruments. Thus, the reliability and integrity of the electronic evidence from its generation, processing, communication through to maintenance and



custody to eventual production in court must be ascertained before the court can determine that electronic evidence is admissible or the weight to attach to it.

146. According to Section 78 A (3) (a) of the *Evidence Act*;

“In estimating the weight, if any, to be attached to electronic and digital evidence under subsection (1) regard shall be had to –

- a) the reliability of the manner in which the electronic and digital evidence was generated, stored and communicated;
- b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;
- c) the manner in which the originator of the electronic and digital evidence was identified;
- d) any other relevant factor”.

147. The court cannot assume that electronic videos herein were securely downloaded, maintained and stored. The maker or the person producing the videos must guarantee the reliability and integrity of electronic evidence through provision of such reliable information and or relevant documentation so certifying. The evidence show that the videos were part of a longer version but was trimmed to the portion produced in court. Although the makers denied altering the videos, there is absolutely no information as to what trimming entailed or what was trimmed and what it portended. Sanctification of reliability and integrity of the video in issue cannot be attained as there is no such succinct evidence upon which such verification may be premised. The witnesses merely threw the videos to the court leaving much room speculation on the reliability and integrity of the evidence.

148. I am alive to the fact that the probative value of evidence arises after consideration of the evidence in question. But, it all depends on the foundations of the evidence which is largely factual and draw upon the tenor of the evidence itself or evidence backing or sanctifying it.

149. Section 106 B (2) of the *Evidence Act* lays down the conditions which must be met before electronic records can be declared admissible.

150. The first condition was that the computer output containing the information;

- “a) ...was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
- b) During the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
- c) throughout the material part of the said period, the computer was operating properly, or, if not, then in respect of any period in which it was not operating properly or was out of operation during that period, was not such as to affect the electronic record or the accuracy of its content; and



- d) the information contained in the electronic record reproduces or is derived from information fed into the computer in the ordinary course of the said activities”.

151. Upon careful consideration of the evidence, the petitioners have failed to show that the videos they produced in evidence were reproduced or were derived from information fed into the phones used in the ordinary course of activities by the person who downloaded them. The manner the videos were downloaded, produced and stored was lacking completely. Note that PW6 stated that his phone did not have the relevant option or applications for uploading the video.
152. In addition, although PW6 and PW7 stated that they used their phones to take the video, they did not demonstrate that the equipment used to record the original videos were in good working condition, or that it had any nexus with whatever equipment that was used to upload the original content. Therefore, the petitioners were unable to show that there was integrity in the processes used to produce and to maintain the contents of the videos which they produced.
153. Another notable omission; there is nothing to show when and where the videos were taken as to relate it to the particular allegedly offensive events. It is not possible to relate with certainty the videos and the incidents complained of. See evidence by PW6.
154. In addition, I do note the anomaly in the certificate of the video allegedly made by PW6 carried a different ID card from his.
155. In the circumstances, the court holds the view that the videos fail admissibility test.

Substantive Issues

Applicable test

156. The petitioners submitted that in determining this election petition this court should espouse the provisions, values rights, and principles in the constitution; Articles 10, 38, 81, 86, 87, 159 and primarily apply the qualitative test being the most suitable test where quality of the entire election process is questioned.
157. The petitioners have relied on the following authorities;
- i. Evans Odhiambo Kidero & 4 Others V Ferdinand Ndung’u Waititu & 4 Others, Supreme Court Petition No 18 Of 2014.
 - ii. O’Brien Kaaba ‘The Challenges of Adjudicating Presidential Election Dispute In Domestic Courts In Africa’ 15 Africa Human Rights Law Journal (2015) 329-354 Citing SF Huefner ‘Remedying Election Wrong’ 44 Harvard Journal On Legislation (2007) 265-326.
 - iii. Articles 22 (3) (b), 159(2) (d) (e), 86(a), 87 (1), 160(1) ,38 of the Constitution.
 - iv. Kiluwa Limited & Another V Commissioner of Lands & 3 Others [2015] Eklr
 - v. Peter Gatirau Munya V Independent Electoral and Boundaries Commission & 2 Others, Supreme Court Petition No 2b of 2014.
 - vi. Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 6 Others, Civil Appeal (Nairobi) No 228 Of 2013.
 - vii. Raila V IEBC(2017)



- viii. Hassan Abdalla Albeity v Abu Mohammed Abu Chiaba & Another [2013] eKLR.
 - ix. Rozaah Akinyi Buyu V Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR.
 - x. Manson Nyamweya V James Magara & 2 Others (2009) eKLR.
 - xi. Dickson Mwenda Githinji Vgaturau Peter Munya 7 2 Others [2014] eKLR.
 - xii. Winnie Babihuga V Masiko Winnie Komuhangi &Others HCT -00-CV-EP-0004-2001.
158. The petitioners submitted that the interpretation of section 83 of the Election Act maintains its disjunctive nature as held by the supreme court in Raila 2017 decision.
- i. Section 83 of the [Elections Act](#) 2011.
 - ii. Morgan v Simpson.
 - iii. Joho V Nyange Case
 - iv. Moses Masika Wetangula V Musikari Nazi Kombo.
 - v. Abdikhaim Osman Mohammed V Independent Electoral and Boundaries Commission.
 - vi. Article 81(e) And 86 Of The Constitution
 - vii. Raila Petition (2017)
 - viii. Gatirau Peter Munya V Dickson Mwenda Githinji and 2 Others [2014] eKLR.
 - ix. Constitutional Petition No 548 Of 2017; Katiba Institute & 3 Others v Attorney General & 2 Others [2018] eKLR.
159. Accordingly, this court will be guided by the provisions, principles and values on elections set out in the Constitution whilst engaging the test provided in section 83 of the [Elections Act](#).
160. Let me start my analysis and determination of the main issues.

I. Whether there were election offences and malpractices of criminal nature committed during the Kwale gubernatorial elections which would invalidate the election.

161. The standard of proof on allegation of election offences or malpractices of criminal nature in an election petition is stated by the Supreme Court to be ‘beyond reasonable doubt’ (Raila Odinga & 6 others v William Samoei Ruto & 10 others).
162. There is however, a debate raging on as to whether the amendment of section 87 of the [Elections Act](#) has any effect on this standard of proof which was formulated on the basis of the previous section 87.
163. The current Section 87 of the [Elections Act](#) provides as follows: -

Report of Court on electoral malpractices

- 1. An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred.



2. Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions
 3. Upon receipt of the order under subsection (2), the Director of Public Prosecutions shall —
 - a. direct an investigation to be carried out by such State agency as it considers appropriate; and
 - b. based on the outcome of the investigations, commence prosecution or close the matter
164. Unlike the previous section 87 which mandated the election court to make a finding that a person is guilty of an election offence, the new section requires that; ‘...the election court determines that an electoral malpractice of a criminal nature may have occurred...’
165. Some argue that the determination by an election court is that an electoral malpractice of a criminal nature may have occurred, and not a finding of guilt for, or commission of an election offence. This argument focuses on giving meaning to the terms used in the Act; i) electoral malpractice of a criminal nature and ii) may have occurred.
166. But, I will add another twist to the debate.
167. Intermediate standard of proof has been used in civil cases where the cause of action is based on a criminal malpractice or conduct, say, fraud. The intermediate standard of proof is not therefore strange to our jurisprudence as many claim it to be. The honest question, therefore, is why the intermediate standard of proof is not sufficient proof of an electoral malpractice of a criminal nature in an election petition.
168. Be that as it may, the standard of proof in respect of claims of election offences in an election petition as decreed by the Supreme Court is beyond reasonable doubt (*Raila Odinga & 6 Others v William Ruto & 10 Others* (supra))
169. . I will so proceed.

Applying the test...

170. 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.
171. At paragraphs 93,94,95,96,97,98,99,100,101, 102, 103, 104, 105, 106,107, 108, and 109 of the Petition, the Petitioners made allegations about elections offences, voter bribery, intimidation and undue influence by the 3rd Respondent.
172. The petitioners submitted that they had led uncontroverted evidence which was corroborated by the respondents’ witnesses that there was a wide spread commission of election offences before and on the election day by the 3rd respondent and / or her agents. Further that the influence of the ward administrators, the bribery and undue influence of the county employee electorate during the meeting held on August 5, 2022 and the bribery of voters on the polling day to the extent that one was forced to share a photo of gubernatorial ballot paper to confirm they indeed voted for the 3rd respondent in order to receive 600/= are adequate proof that the free and true will of the people of Kwale county was



subverted and as a result the results declared by the 1st and 2nd respondent did not emanate from free and fair election. The petitioners relied on the following cases; Frederick Otieno Outa V Jared Odoyo Okello & 4 Others eKLR, Section 14 Of *Election Offences Act*, Independent Electoral And Boundaries Commisiion v Langaberg Municipality (Cct 49/00) [2001] ZACC 23; 2001(3) SA 925(CC) : 2001 (9) BCLR 883 (CC) 7 June 2001)and Moses Masika case.

173. The 1st respondent averred that the allegations against the 3rd respondent were not brought to their attention at any time prior to the filing of the petition. They stated that they did not observe the alleged intimidation, improper influence, corruption or compromise of the election process. In contrast they averred that the elections held in Kwale county (not limited to the gubernatorial election) were free of malpractices and irregularities and have resulted in only one dispute- this petition.
174. The 1st and 2nd respondents further stated that the 1st respondent employees are persons of integrity who undergo rigorous vetting prior to conducting the election process as presiding officers.
175. The 1st and 2nd respondent submitted that the standard of proof of beyond reasonable doubt has not been achieved by the petitioners. They placed reliance on the cases of Petition No 1 Of 2017- Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commisiion & 4 Others & Attorney General & Another, And Khatib Abdalla Mwashetani v Gideon Mwangangi Wambui & 3 Others.
176. The 3rd respondent submitted that the Petitioners have not discharged their burden of proof. They pointed paragraphs 93-108 of the Petition, where the Petitioners have narrated allegations about commission of elections offences which were not proven at all by their witnesses during the trial. According to them, these allegations were not proved to the Standard of proof in elections offences as set out in the Supreme Court in Raila Odinga & 6 Others v William Ruto & 10 Others (supra)
177. The 3rd respondent denied in her response ever having been a party to the commission of election offences as alleged in the petition. She denied involvement in the commission of any election offences. That at all material times (campaign period) she did not use any public resources or public officials in a manner whatsoever for the purpose of the political campaigns. According to the 3rd respondent, the allegations raised in the petition contain hearsay information and false information so as to mislead this court.
178. She further stated that she was duly qualified to contest in the Kwale gubernatorial election on August 9, 2022 as she met all the requirements stipulated under article 80 of the Constitution in respect to election of county governor. Moreover, she was duly cleared by the 1st respondent to contest in the gubernatorial election for Kwale county.
179. The 3rd respondent submitted that Rodgers Chimenga described by PW6 as a county employee, was actually a Chief of Staff of the former Governor Salim Mvurya. In law, a Chief of Staff is employed by the Governor to manage his/her personal aspects. The Petitioners didn't adduce evidence of the nexus between the meeting the Chief of Staff allegedly attended and the 3rd Respondent. There is no evidence that what was said in the meeting was done under the instruction of the 3rd Respondent. There is no evidence that persons who attended the meeting voted for the 3rd Respondent or were influenced to vote for the 3rd Respondent. The Court cannot make any firm conclusion what transpired. The Petitioner was obligated to discharge the burden of proof; the witness did not. In fact, the admission by the witness that he trimmed the video to suit his testimony is telling of evidence that is completely unreliable.



180. The 3rd respondent submitted that PW6's testimony on election offences is weak, uncorroborated, and totally unreliable. He admitted that the video recording he produced in was trimmed to suit his evidence. This admission is telling; a clear illustration of the unreliability of the recording.
181. The 3rd respondent submitted that the evidence of PW5 regarding allegations of bribery attributed to the 3rd Respondent- is the most unreliable. The evidence comprises supposing, hearsay allegations, and assumptions. The witness does not give particulars of who was bribed, the amount involved in the bribery and at which polling stations where this happened. Moreover, during cross-examination the witness confirmed that he did not make any report to any police station in respect of the offenses he allegedly witnessed. Clearly, the evidence does not meet the threshold of proof that is required by law for the court to consider and make an adverse finding against the 3rd Respondent. The Petitioners severely failed to shift the burden of proof to the 3rd Respondent.

Court's analysis of evidence on this issue

182. What does the evidence portend in relation to alleged electoral malpractices of criminal nature or election offences?
183. First and foremost, the petitioners' witnesses confirmed that no report / complaint was formally made to the 1st and 2nd respondent before or during the election.
184. The petitioners led evidence that the 3rd respondent in a meeting held on August 5, 2022 christened as a farewell party for the then governor Hon Salim Mvurya and in the presence of Sylvia Chidodo (RWW1) who was the acting county secretary urged the attendees a majority of whom were Kwale county government employees being public officers to support her gubernatorial bid while promising the county employees a bonus package for supporting her bid.
185. RWW1 testified that there was an official county meeting attended by county staff and media on August 5, 2022. It was the commissioning of Kwale Headquarters. She stated that the said meeting took place and that the attendees were facilitated to attend the said meeting. She stated that facilitation was an allowance. She confirmed that county employees were paid an allowance depending on their respective job groups. Her justification for payment of facilitative allowance to the county employees was because they were out of their duty stations. The purpose of the meeting was to commission county headquarter at Tsimber Matuga Sub county. Employees came from all over the county of Kwale. She stated that no politics was discussed at the function. It is a new building they were commissioning. It was her evidence that, the governor Hon. Mvurya Salim was the Chief guest. He did not ask attendees to vote in any particular manner. It was also her testimony that, the deputy governor Ms Achani did not ask anyone to vote in any particular manner. She stated that the attendees were not voters but County employee.
186. When I put the evidence by the petitioner on scale especially in respect of the meeting to commission the county headquarters, I find no specific and tangible evidence showing that the 3rd respondent asked or implored the attendees to vote for her or in any particular manner. The petitioners' witnesses merely made allegations against county secretary. They also made allegations that the attendees were given a bonus of Kshs 4000 to influence them to vote for the 3rd respondent. These allegations required specific and targeted evidence to prove that the money given was meant to influence the person receiving the money to vote for the 3rd respondent or to vote in a particular manner. This element was lacking. The allegations remained at very high level of generalization. In any case, RWW1 explained that the meeting was for commissioning of the county headquarter and drew attendees from all corners of the county to who an allowance was paid for being out of station. The petitioners' legal counsel attempted



- to show that the allowance was illegal payment, but to no avail. RWW1 explained the payment and made reference to the specific head of allowance authorized by the circular advice by the Salaries and Remuneration Commission(SRC) under which the allowance was paid.
187. Accordingly, the allegations on campaigning and influencing county employees to vote for the 3rd respondent or in a particular manner was unproved. The evidence tendered was weak and falls short of the required standard of beyond reasonable doubt. I reject the allegations.
188. PW5 made allegations of bribery of voters and illegal campaign. He was Azimio’s chief agent in charge of 6 polling stations St Joseph Primary, Kinango Primary School, Gwadu Primary School, Arukoni ECD, Bandi Primary School, and Mwangani Primary School. He told the court that he received information that there were problems at Kinango and Gwadu Primary School.at kinango primary school polling station. He met Kimanzi who was a known supporter of the governor whom he claimed was bribing voters. He reported the matter to police officer in the polling station. He stated that, although he was not satisfied with the way the police officer took the issue, he did not escalate it to the PO or RO or police station.
189. He testified on allegations of voter bribery at Kinango primary school and Gwadu Primary School. PW5 did not indicate the source of his information or names of agents or voters from any polling station at Kinango Primary School and Gwadu Primary School where the incidents took place; that voters were told to take photos of the vote to show the person for whom they voted, and were paid Kshs 600. On cross -examination, he confessed that only agents inside the polling station may have witnessed such acts. He mentions one Mr Kimanzi who he alleges to be a supporter of the 3rd Respondent.
190. However, PW5 did not adduce any evidence of bribery, the police station where he made a report or the report made thereto, the nexus between the so-called Mr Kimanzi and the 3rd Respondent. He also does not give the full name and identity of Mr Kimanzi.
191. I therefore find evidence by PW5 that Mr Kimanzi is a supporter of 3rd Respondent to lack in material respects especially on his specific role in the campaigns for the 3rd respondent; it was speculative and an unsubstantiated. I also reach the same conclusion about PW5’s testimony on a Mr Muturi who is allegedly connected to a Mr Richard Itambo who is an MCA of significance is that PW5 testified that he has no quarrel with the results from Kinango and Gwadu Primary School polling station.
192. PW6’s testimony is about an alleged meeting that took place at a social hall. at the said meeting, PW6 alleged that one Rodgers Chimenga, a county employee allegedly campaigned for the 3rd Respondent.
193. PW6 also made allegations about alleged bribery of Ksh 4000 by the County Government of Kwale to employees to induce them to vote for the 3rd Respondent.
194. The evidence is superficial and cannot sustain the allegations on the scale of beyond reasonable doubt. It fails.
195. I therefore find that it was not proved that there were election offences and malpractices of criminal nature committed during the Kwale gubernatorial elections which would invalidate the election.

II. Whether the 3rd Respondent was eligible to contest in the 9th August 2022, Kwale County gubernatorial election.

196. At paragraphs 93,94,95,96,97, and 98, of the Petition, the Petitioners have alleged the ineligibility of the 3rd Respondent to contest in the 9th August 2022 election. The ineligibility is alleged to arise under section 15(3) of the *Elections Act*. Thus, particulars supporting this allegation are about commission of election offenses by the 3rd Respondent.



197. The petitioners submitted that the 3rd respondent knowingly aided the public officers working for Kwale county government in her capacity as the outgoing deputy governor of Kwale county to mobilize and campaign for her in August 9, 2022 elections in contravention of section 15(1) (a) of the [Election Offences Act](#). Therefore, she was not eligible to contest in the said elections pursuant to section 15(3) of the [Election Offences Act](#). The petitioners cited section 15(2) and (3) of the [Election Offences Act](#).
198. The petitioners argued that several county officials being public officers actively campaigned for the 3rd respondent through public rallies as well as soliciting votes for 3rd respondent through social media accounts. That in particular, Rodgers Chimega who was a chief of staff at the office of the then governor and currently works for Kwale county government and Benjami Kuto then sub county administrator for Kinango were notorious for posting videos and images promoting the 3rd respondent campaign slogan” HATUACHANI NA ACHANI” in a bid to garner more supporters for the 3rd respondent.
199. The 1st petitioner (PW1) and Bujra Mohammed (PW6) testified that the 3rd respondent knowingly, deliberately and intentionally deployed several public officers working as officials of Kwale county government to actively campaign for her in public rallies. Pw6 produced a video (P Exh1) showing the said Rodgers Chimega actively campaigning for the 3rd respondent.
200. The petitioners submitted that the video is sufficient proof of the involvement of county public officers in the campaigns of the 3rd respondent with her knowledge and approval and thus proving her ineligibility to contest in the impugned election.
201. The 1st and 2nd respondent submitted that the 3rd respondent attained the requisite qualifications to vie for the position of governor and on that basis, the 1st respondent published her name in the Kenya Gazette and included her in the ballot paper. They added that there was no complaint that would have barred the 1st respondent from accepting the 3rd respondent’s candidature and limiting her political rights under article 38. They placed reliance in the case of Mohamed Abdi Mohammed v Ahmed Abdulai & 3 Others [2019] eKLR.
202. They stated that the 3rd respondent did not call the said Rodgers Chimega to testify despite having deposed a witness affidavit. They argued that the 1st and 2nd respondent did not present any evidence in disproof. The petitioners relied on Frederick Otieno Outa v Jared Odoyo Okella & 4 Others [2014] eKLR
203. The 3rd respondent submitted that there is no allegation whatsoever regarding the ineligibility of the 3rd Respondent to contest the elections. In any event, it is now settled law that questions about ineligibility of a candidate to contest for any elective position is a pre-election dispute which is outside the province of an election court. The Supreme Court in Mohamed Abdi Mohammad v Ahmed Abdulai & 3 Others [2019] eKLR
204. Section 15(3) of the [Elections Act](#) disqualifies a candidate who knowingly aids contravention of subsection (1) which prohibits participation of public officers in political campaigns. It provides: -
- A candidate who knowingly aids in contravention of subsection (1) shall not be eligible to contest in the election.
205. I should think that a petitioner should prove that the 3rd respondent knowingly aided contravention of section 15(1) of the [Elections Act](#) which prohibits public officers from engaging in political activities, campaigns or support for a particular candidate or political party.



206. The petitioners stated that in particular Rodgers Chimega who was a chief of staff at the office of the then governor and currently works for Kwale county government and Benjami Kuto then sub county administrator for Kinango were notorious for posting videos and images promoting the 3rd respondent campaign slogan” HATUACHANI NA ACHANI” in a bid to garner more supporters for the 3rd respondent.
207. The 1st petitioner (PW1) and Bujra Mohammed (PW6) testified that the 3rd respondent knowingly deliberately and intentionally deployed several public officers working as officials of Kwale county government to actively campaign for her in public rallies. Pw6 produced a video (P Exh1) to show the said Rodgers Chimega actively campaigning for the 3rd respondent.
208. I have already ruled on the video that it lacked the requisites for reliability and integrity for electronic evidence, and therefore inadmissible. Minus the video, other than merely stating that the 3rd respondent knowingly, deliberately and intentionally deployed several public officers to actively campaign for the 3rd respondent, there was no specific or such succinct evidence to show that the 3rd respondent, in full awareness or consciousness, deliberately aided or encouraged or commissioned the officers in question to contravene the prohibition in section 15(1) of the *Elections Act*. Use of her slogan ‘HATUACHANI NA ACHANI’ – but which was not proved-by the said officers alone is not sufficient to prove beyond reasonable doubt that the 3rd respondent knowingly aided the said officer to contravene section 15(1) of the *Elections Act*.
209. Accordingly, nothing shows that the 3rd respondent knowingly aided contravention of section 15(1) of the *Elections Act* so as to make her not eligible to contest in the election in issue.
210. In any event, eligibility questions are pre-election disputes which should be dealt with through the pre-election dispute mechanism set out in article 88(4)(e) of the Constitution. PW6 took the video and he is categorical that he was sure the video will be used in court one day. He was aware, therefore, that these were election offences. However, he did not report the offences to IEBC or the police. There is nothing he has shown which prevented him from reporting these matters to IEBC or police for prompt resolution as they are eligibility questions under section 15 of the *Elections Act*. The threshold in the Waitty case is not met.
211. I dismiss the claim of non-eligibility of the 3rd respondent to contest the election in question.

III. Whether there was substantial non- compliance, irregularities and improprieties in the conduct of the impugned Kwale gubernatorial election that substantially affected the result of the election.

212. The petitioners submitted that there was substantial non- compliance, irregularities in the conduct of the impugned Kwale gubernatorial election that substantially affected the result of the election; failure to provide a complementary voter identification system to complement the recurrent failure of the KIEMS kit resulted in several voters leaving the polling stations without electing their preferred governor and that the 1st respondent’s officials subverted the will of voters who were unable to vote on their own.
213. The 1st and 2nd respondents submitted that the election process had several steps of verification and confirmation to ensure there could be no manipulation. The steps include;
- a. Opening of the polling station when all agents, candidates, observers and officials are present at the polling station to confirm that the election materials intended for use in the election were in the expected condition.



- b. Voting was conducted by way of secret ballot- none of the witnesses alleged that this was compromised when they cast their vote.
 - c. After voting, the polling station would close and the time of closure was recorded. Polling stations that opened late would compensate for the time lost.
 - d. Counting of the results would follow the closure of the polling station and it would be conducted in the presence of the candidates' agents. The gubernatorial votes were counted last after the other five elective posts.
 - e. After counting the results were filled into form 37A. the agents confirmed and verified the contents of form 37A and appended their signatures thereafter.
 - f. The agents were at liberty to retain a copy and take pictures of that form 37A of their records
 - g. The presiding officer would then transport the form 37A to the constituency tallying center for verification by the constituency returning officer. The rest of the election materials were sealed in the ballot box.
 - h. The contents of the form 37A would be verified by the constituency returning officer and the candidates agents at the constituency tallying center. The constituency returning officer would populate and generate the form 37B.
 - i. Finally, the forms would be transported to the tallying center where the results would once again be confirmed and verified by the county returning officer and candidates agents prior to populating and generating form 37C. it is at this point that the county returning officer would declare the results of the election.
214. The 1st and 2nd respondent submitted that the petition is not founded on an error in the election process but on the displeasure with the outcome. They further submitted that the petitioners have not attained the requisite standard of proof for the grant of any of the prayers sought. They argued that IEBC prepared for, conducted and managed an election process in a fair, independent, transparent, simple and verifiable in a manner that is lawful. The operational system relied on and the procedures established and adopted by the 1st respondent ensured that the election process could not be compromised and the outcome is unimpeachable.
215. The circumstances under which an election court may invalidate an election are set out in section 83 of the *Elections Act* 2011. See *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others Presidential Election Petition No 1 Of 2017* [2017] eKLR, *Gatirau Peter Munya v Dickson Mwenda Kithinji And 2 Other SCK Petition No 2B Of 2014* [2014] eKLR.
216. The 1st and 2nd respondent submitted that the result declared by the 2nd respondent remains verifiable and reflects the will of the electorate of Kwale county.
217. The 3rd respondent submitted that to nullify an election, the Petitioners should have led evidence impugning/disputing Polling Stations results. In this case, the witnesses confirmed that they do not have a problem with the outcome of a Polling station activity (Forms 37A). They further confirmed that these Forms 37A are signed by agents including agents of Azimio/ODM. Finally, the witnesses confirmed that they don't dispute the results as announced at the Polling Station. She relied on centrality of the doctrine of finality of results as announced in the Polling Stations as emphasized by the Court of Appeal in the *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR.



218. The 3rd respondent submitted that the Petitioners have not discharged their burden of proof to the required standards. The Petitioners' 'strongest' evidence appears to be two-fold. First, the Petitioners have made allegations about alleged irregularities at Mbuluni Primary School polling station 2 of 2 where their witnesses (PW2, PW3 and PW4) claimed that there was failure of KIEMs kit that disenfranchised voters. Specifically, they claimed that 57 voters were denied opportunity to vote. The Petitioners did not adduce cogent, clear and credible evidence to prove the allegations. Secondly, the Petitioners have made heavy weather about two incidences that happened at Matuga tallying center which led to the police being involved. From the cross-examinations of PW7 and PW8 it was evident that the two incidences were blown out of proportion. In fact, PW7 admitted being part of the crowd that harassed the Presiding Officer for no good reasons. They clearly refused to listen to the explanation and call to order by the Constituency Returning Officer from Matuga Constituency (Mwarua Chikophe Abdallah- RW2) who pleaded with them in vain. RW2 testimony in this matter is clear, credible, unequivocal and believable. His testimony was not shaken in cross-examination. n Singh v Mota Singh & Another, (2008) 1 Klr (Ep) 558, Jeet Mohinder Singh v Harminder Singh Jassi, Air 2000 Sc 256, Bernard Shinali Masaka v Bony Khalwale & 2 Others, (2011) Eklr, Ponnala Lakshmaiah Vkommuri Pratap Reddy & Ors [Civil Appeal No 4993 Of 2012 And Raila Odinga v Iebc & Others Sc Petition No 5 Of 2013],Presidential Election Petition No E005 Of 2022 (Consolidated): Raila Odinga & 6 Others v William Ruto & 10 Others
219. The 3rd respondent submitted that as admitted by the Petitioners witnesses, that matters that happened after declarations of results, especially if they are minor administrative breaches of procedures, incidences emanating from fatigue by the elections officials and matters occurring out of nature like a Presiding Officer of Vuga Primary school polling station 2 of 3 who was in a long queue waiting to hand over ballot boxes and results from his polling station, left a bag containing the results in a chair and proceeded to attend to a call of nature, only to return and be accused of an election irregularity to the point where he was roughed up and nearly lynched . what happened at Matuga Tallying Center did not affect the results. The election was conducted in substantial compliance with the Constitution and election laws. Morgan v Simpson [1974] 3 All Er 722, Gitirau Peter Munya v Dickson Mwenda Githinji & 2 Others [2014] eKLR
220. The 3rd respondent submitted by conjecturing that probably the Presiding Officer for Vuga Primary School Polling Station 2 of 3 should have done better but he committed no election offence. Actually, it is the crowd led by PW7 that should have been arrested for illegally and without authority accessing election materials and breach of peace.
221. She argued that, during the trial, it emerged that the Petitioners do not have cogent evidence of the allegations they list in the Petition. As explained above, the two incidences that arose from Matuga Tallying Center did not affect the results. They occurred largely because of misunderstanding.
223. The 1st and 2nd respondents averred that no peculiar and persuasive evidence has been presented to demonstrate that it was marred with irregularities that would render it void and warranting of this court's intervention.
224. The 3rd respondent denies that there was non-compliance with the constitution, election laws, and underlying regulatory framework in the August 9, 2022 gubernatorial election.
225. The 3rd Respondent submitted that there were no irregularities, non-compliance with the election's laws, and improprieties that affected the outcome of the gubernatorial election. Gitirau Peter Munya v Dickson Mwenda Githinji & 2 Others [2014] eKLR Nathif Jama Adam (supra),



226. The 3rd respondent submitted that according to Regulation 83 (1) (a) of Elections(General) Regulations, 2012 the County Returning Officer's decision to disregard the results of Pungu Nursery School Polling Station in the declaration of the Kwale gubernatorial results because the total number of valid votes-(124) that is a summation of the votes garnered by all the candidates in the Polling station exceeded the number of registered voters (43)-was legally sound. Therefore, the 3rd respondent urged the court to make a finding that the Petitioners have been unable to prove any substantive, procedural, and administrative irregularities that affected the results.
227. I will now focus on the specific complaints.

a. unjustified delay in opening the polling station and failure to extend the closing time

228. At paragraphs 60,61,62,63 and 64 of the Petition, the Petitioners alleged that there was delay in opening polling stations which disenfranchised voters and affected their right to elect leader of their choice.
229. The 1st and 2nd respondents denied the vague and generalized allegation of voter suppression. They stated that they executed their functions in compliance with the law relating to the time of opening of polling stations save for exceptional circumstances in which the provisions of regulations 64 of the Elections (General) Regulations, 2012 were complied with time of voting was extended. That Mbuluni primary school polling station was one of the exceptional circumstances.
230. Pursuant to regulation 64(3) as read together with regulation 66(1) and (2) of the Election (General) Regulations, 2012, voting ought to commence at 6 o'clock in the morning and end at 5 o'clock in the afternoon on the polling day provided that all persons on the queue are allowed to vote despite the time extending to after 5 o'clock. The presiding officers are mandated in consultation with the returning officer to extend the hours of polling by the amount of time lost in the event of interruption or delay on account of riots, violence, natural disasters or any other such reported occurrence delaying the process.
231. The 1st respondent admitted that there are a few polling stations that delayed in opening. They stated that the stations are in remote areas and the 1st respondent's officials encountered delays in accessing them. However, they stated that in those polling stations the voting time was extended in accordance with the provisions of regulations 64 (3) and 66(2) of the Elections (General) Regulations 2012.
232. PW1, PW2, PW3 and PW4 led evidence on alleged unjustifiable late opening of polling stations within Kwale county during the impugned August 9, 2022 elections.
233. PW2 was a polling station agent for Azimio at Mbuluni Primary School Polling station 2 of 2. He testified that there was a delay in opening of the said polling station. He arrived at polling station at 5:00 am. According to him, IEBC officials arrived at 9:45 am. with sealed election materials. They confirmed all serial numbers and the state of all the materials. He also signed the polling diary. As an agent he was among the people who voted first. He also testified that lost time was added after 5 PM. as law required. He further testified that he was satisfied with the result and he signed the form 37A and took a photo for his record which he confirmed was the same form brought to court by the 1st respondent. Contrary to his averments in paragraph 14 of his affidavit which states that he was not allowed to vote, he confirmed he voted except he said that 57 people were refused to vote. He did not however list or give their names. His evidence does not prove that 57 people were in the queue and did not vote.
234. PW3 testified that KIEMS Kit failed and about 57 persons who were in the queue were denied the right to vote at Mbuluni primary school stream 2 of 2. On cross-examination, he stated that he arrived at the polling station at 5 am on August 9, 2022. IEBC officials came at 9:30 am. They found him there. However, he did not vote, because: -KIEMS Kit had problems and older people were allowed to vote first or people from far.



235. He testified that KIEMS kit was slow but eventually failed completely. He said that the Presiding Officer came out and told them KIEMs Kit was not working. He however did not state the time this happened.
236. He stated that the polling station was closed at 9:00 pm. He also stated that no voting took place from 7:00pm. – 9:00 pm. although there were flurry of activities there. He did not state the exact nature of the flurry of activities that were taking place between 7:00 to 9:00pm when he alleged that no voting was taking place. He did not and no report was ever made of such grave matter to the County Returning Officer or IEBC. None of the 57 people filed affidavits or complaints on the matter.
237. He claims to have been at number 150 on the queue but never voted. According to the KIEMS KIT returns and Form 37A of Mbuluni Primary School 2of 2, 244 voters were identified using the KIEMS Kit and valid votes were 240. When the evidence of PW3 is looked in light of that of PW2 and the election materials filed in court, it is indefensible to claim that the KIEMS Kit failed completely or that it was extremely slow. IEBC official explained that the KIEMS Kit did not fail and the speed was reasonable, and that all those in the queue voted.
238. PW3 also indicated the he knows the names of some of the 57 voters who allegedly did not vote but failed to indicate their names in his affidavit or mention them in court. Absent such details completely detracts from the substance of the evidence, leaving the allegation hollow and empty.
239. PW4 was a voter at Mbuluni primary school stream 2/2 stream 2. He testified that he arrived there at 5:00 am. He was among the first ones to arrive at the polling station. He told the court that the polling station was opened at 9:30 am. He stayed there until 9:00 pm. At paragraph 4 of his affidavit, he indicated he helped IEBC arrange the station. He helped to arrange people as people did not know what to do. He said that he did not vote as machines had some problem although he was within the school compound. He stated that they voted until noon when KIEMS Kit stalled. IEBC Presiding officer told them KIEMS Kit had stalled. It resumed after 30 minutes.
240. It is truly disturbing that PW4 was at the polling station at 5:00 am, claims he helped IEBC to arrange the station and the people, and stayed at the pooling station up to 9:00 pm., yet, he did not vote. One wonders how and why, not being IEBC official, he engaged in IEBC work instead of voting which was his work as a voter. Instead, he meddled-if at all- with IEBC operations which in itself is a violation of the rules and regulations governing elections. He was not even an agent. He also told the court that he was number 49 in the queue in the morning, but he did not vote, yet more than 240 voted. The reasons given by him which allegedly prevented him from voting, to wit; that KIEMS KIT failed and he gave way for older people and those from far to vote; to lack any foot on which to stand. At this juncture it is safe to state that his evidence is tainted, and only dramatized and choreographed to give this allegation power and punch. I find, his evidence quite shaky and founded on quick sand; and even PW2 and PW3 who were in the same station did not mention him as one of the 57 people who allegedly did not vote despite being in the queue.
241. PW4 stated that the station was closed before he had voted. About 30 people were in front of him at the time station closed. At 7:00 pm. he was still in the queue. He claims that the lost time for voting in stream 2 was not compensated. I am not able to reconcile that statement with the next; he said the polling station closed at 9:00 pm; they opened at 9:30 am. Contrary to his claims, PW2 and PW4 stated that time for voting at Mbuluni 2 of 2 was extended to recover lost time in the late opening of the polling station.
242. Despite the weak evidence, how does it augur in light of other evidence before court?
243. RW1 testified that he was not aware of people in the queue who did not vote.



244. RW3 testified that she received the election materials for Mbuluni polling station 2/2 on August 9, 2022 the election day at 8: 45 am, arrived at the polling station at 8: 55 am and voting started at around 9: 30 am. The polling station was closed at 8: 40 PM.
245. She received materials morning of August 9, 2022 at 8:45 am due to logistic challenges, she arrived at the station at 8:55 am. She opened the polling station at 9:30 am. She mentioned challenges with KIEMS Kit. KIEMS Kit was slow but it did not cause much delay. She recorded the challenges in the polling station diary at 8:42 pm in her assessment, it was not very slow. The frequency of the slow times was not much. It never stopped completely. They could reboot it and it comes back within a short time. Not many people were in the queue. She stated that the delay was not long as to cause anyone to leave the queue. Rebooting happened once. They shifted to a room with light when darkness set in. She informed the voters they are shifting to the room with light. She delivered the material the very same day. Voting continued smoothly even after moving to the other classroom with light. All voters in the queue cast their votes. At the time she closed station, nobody had not voted. No agent refused to sign the result on account of any anomaly.
246. Upon proper evaluation of evidence, I find that there was no proof that 57 people were in the queue but did not vote as claimed by the three petitioners' witnesses.
247. In the Petition, only one polling station is pleaded; which is Mbuluni primary school Polling station in Kinango Constituency. During the hearing, the Petitioners adduced evidence of Mbuluni Primary School Polling Station 2 of 2. However, on cross-examination, PW2 confirmed that the lost time was added after 5:00 pm as the law required. He further stated that he was satisfied with the result and signed the form 37A. The witness confirmed that IEBC complied with Regulation 64 (3) and 66 (2) of the Elections (General) Regulation, 2012
248. On the basis of the evidence adduced, I find that provisions of regulations 64 (3) and 66(2) of the Elections (General) Regulations 2012 were complied with. This allegation therefore fails

b. Allegation on delay in delivering election materials to the tallying center

249. At paragraphs 65, 66 and 67 of the Petition, the Petitioners alleged that there was unreasonable delay in transporting the Forms 37A from the Polling Stations to the tallying center. In the Petition, only one polling station is pleaded; which is Mazola Primary School Polling Station in Kinango Constituency.
250. The Petitioners did not call any witness to testify about Mazola Primary School Polling Station.
251. On this matter, the 1st and 2nd respondent had averred that all election materials were delivered to the tallying center within reasonable time after the counting process was completed at the polling stations. They employed the use of technology in the transmission of the results and this method was prompt as it relayed the results from the polling stations to the tallying center as soon as counting was complete. In the case of Mazola primary school polling station, the results were transmitted on 10/8/2022 as soon as counting was completed.
252. But RW1 seems to correct this submission on transmission of results by testifying that the results of governor are not transmitted but are physically delivered. RW1 further stated that only presidential results were transmitted electronically.
253. I admit the use of the phrase transmission of results is not issue; the issue was delivery of the original statutory result forms and election materials to the tallying centre.
254. Back to the substantive controversy. RW3 testified that she delivered the election materials the very same day. There was no evidence to the contrary or to prove otherwise.



255. In totality of evidence adduced before the court, I find that the petitioners did not prove that any election materials were delivered to the tallying center late. They were delivered within reasonable time given the usual logistical problems. The ground fails.

c. denial and barring of agents of Hamadi Iddi Boga from accessing Polling Station

256. At paragraphs 68, 69, 70, 71 and 72 of the Petition, the Petitioners alleged that ODM agents representing Hamadi Iddi Boga were denied access to Polling stations across Kwale County thereby undermining the general principles of electoral system under Article 81 (e) of the Constitution.

257. The 1st and 2nd respondents refuted claims that agents of any candidate were denied access to any of the polling stations or chased away by the presiding officers from any of the polling stations during the Kwale county gubernatorial elections. They averred that the presiding officers acted in accordance with the provisions of regulation 62. All agents with the requisite identification and accreditation documents were allowed access to the polling stations. They further averred that the allegations that agents were denied access to the polling station are not only unsubstantiated but they lack specificity. Further, if any agents were denied access from the polling station, they would have raised that complaint with the constituency returning officer.

258. PW1 testified that ODM agents were chased away from the polling station on the basis that there were too many agents. He stated that at Mwalugaje polling station there was no single agent for ODM/ Azimio. PW1 did not indicate the names of the agents allegedly chased away from polling stations.

259. That notwithstanding, PW1 was referred to the polling station diaries filed by IEBC which showed agents for Azimio signed the results form. Moyani Polling Station polling diary at page 12 shows agents were present and signed. 3 agents by ODM/ Azimio party signed, Mazola Primary School polling station shows agents signed, 3 agents signed, Mazola 02 also agents signed 3 signed for ODM and Vuga Primary School also shows agents signed; 4 agents of ODM/ Azimio signed. He also confirmed that in the polling station he voted in, agents for all parties were present. He was an agent for Azimio and so he remained in the polling station. He was trained as an agent that he should not sign anything he does not agree with.

260. PW1 confirmed and was aware that IEBC could only admit into a polling station an agent who had an appointment letter from his party. PW1 was not an agent. It is also worth repeating that he did not name any agent who was allegedly turned away.

261. PW2 testified that he signed the polling station diary, voted first and at the end of the day he signed form 37A and took a photo of it.

262. PW7 stated no agent complained that they were prevented to witness the voting process or that they did not receive form 37A.

263. PW5 testified that when he identified himself as an agent he was granted instant access to the polling station. I should state that his earlier undercover operation was contrary to the law, and he cannot claim he was refused entry when he had not revealed his identity and provided his accreditation documents as an agent. The law provides who, when and for what purpose a person should enter a polling station or tallying centre.

264. PW2 and PW7 who testified that they were polling station agents or performed polling station agent duties- disapproved the Petitioners allegations about the denial of access. They confirmed that they were allowed access to the polling station. During the trial, counsels for the 3rd Respondent showed



Form 37As to all witnesses to confirm that agents of Azimio/ODM or Hamadi Iddi Boga actually signed the Form 37As which is evidence of access to the polling stations

265. RW1 testified that he did not receive any complaint of any agent having been chased away from or refused entry to the polling station.
266. The Petitioners have not pleaded any Polling Station where agents of Hamadi Iddi Boga were allegedly denied access.
267. The overall impression arising from the evidence on this complaint is, and I so find that, no agents were denied entry or barred from accessing or chased away from the polling stations. The allegation fails.

d. Irregular and unsupervised assisted voting

268. At paragraph 73,74,75,76,77,78 and 79 of the Petition, the Petitioners have made allegations about irregular and unsupervised assisted voting. In addition, they have complained that ODM agents were barred by the Presiding Officers from witnessing the assistance of voters who could not read or write with the intention of unduly influencing the said voters in favour of the 3rd Respondent.
269. The petitioners argued that the ODM party agents were unfairly barred and / or precluded from witnessing the assistance of voters who could neither read nor write thereby violating the dictates of regulation 72(2) of the Elections (General) Regulations 2012. Further, they argued, that 1st and 2nd respondent who are custodians of form 32 on assisted voters failed to produce the same before this court to disprove the irregularity.
270. PW1 testified that in the course of voting process illiterate voters who needed assistance to vote were duped and the presiding officers imposed their choices on them. He nevertheless, confirmed that none of the assisted voters filed an affidavit of complaint that they were duped or cheated. He stated that this was because they are illiterate and fear to come and testify.
271. The petitioners submitted that the 1st respondent's presiding officers unduly influenced voters who applied for assisted voting at various polling stations to vote for the 3rd respondent by trick or deception contrary to section 10 of the *Election Offences Act*. That the 1st respondent's presiding officers in a clear and coordinated manner colluded and connived with 3rd respondent and her agents to influence the choices of the assisted voters specifically with regard to the gubernatorial elections.
272. The petitioners stated claimed that ODM agents representing Hamadi Boga were locked out in some polling stations while in others they were not allowed to access the voting booth when illiterate voters were being assisted by presiding officers. They also claimed that ECDE teachers most of whom were recruited by the 1st respondent as presiding officers were also in attendance and benefitted from monetary inducement given to all attendees and as such their impartiality was compromised right from the outset. These claims were not substantiated or backed by a shred of evidence.
273. The petitioners contend that a vast of Kwale county in Lungalunga and Kinango constituencies which are largely rural comprised of voters who needed assistance to vote due to illiteracy. The aggregate registered voters in these two constituencies amount to 166,977 voters. A total of 87407 voters from those two constituencies voted during the impugned election. Therefore, the margin of 5700 votes could have been from those two constituencies.
274. The petitioners relied on regulation 72(5) (a) (6) of the Elections (General) Regulations 2012 and David Ouma Ochieng V Independent Electoral and Boundaries Commission, Isaiah Nabwayo (The Returning Officer Ugenya Constituency) & Christopher Odhiambo Karani (2018) eKLR.



275. The 1st and 2nd respondent averred that voters who needed assistance in casting their votes appeared at the polling station with their chosen representatives who could not be agents of the contesting candidates. In instances that a voter required the assistance of the presiding officer, the voter received such assistance while the agents witnessed without necessarily compromising the secrecy of the voter's ballot.
276. The 1st and 2nd respondents averred that to orchestrate such an elaborate scheme of using assisted voters to manipulate the outcome of the election the 1st respondent would have to have prior knowledge of the number of those voters, the number that would in fact turn out to vote and the number that would be accompanied by an assistant of choice. The same is impractical.
277. They stated that there was no collusion between the 1st respondent and the 3rd respondent. Despite the allegation that assisted voters were influenced to specifically manipulate the outcome of the parliamentary election, there has been no dispute in respect of that election, in any of the constituencies within Kwale county.
278. The 1st and 2nd respondents averred that the presiding officers executed their functions in compliance with the requirements of the constitution and the law specifically regulation 72.
279. The 1st and 2nd respondents submitted that the petitioners have shifted their dispute on this issue from Matuga and Kinango constituency in their submissions to Lungalunga constituency.
280. RW2 testified on the process that was followed in the event that an assisted voter came to a polling station to vote.
281. 1st and 2nd respondents submitted that the case of David Ouma Ochieng V Independent Electoral and Boundaries Commisiion, Isaiah Nabwayo (The Returning Officer Ugenya Constituency) & Christopher Odhiambo Karani [2018] eKLR is distinguishable from the current petition where the petitioners have not specified how assisted voters were disenfranchised of their right to elect their leader of choice; there is no admission that there were assisted voters.
282. RW1 elaborated the process in law that ought to be followed ensuring that the secrecy of the ballot is protected. RW2 stated that where the voters who need assistance turned up without a person to assist them, the presiding officer would assist them in presence of one agent and not all agents. That they randomly rotated party agents to witness assisted voting and, in some instances, assisted voters in absence of any agents where none was present.
283. RW1 testified that IEBC officials were properly trained and conducted the elections in accordance with the requirements of the Constitution, law and Regulations. Training was done for assisted voters. The voter chooses a person to assist the voter. P.O. is notified of the presence of such voter. Person assisting signs a declaration form. They mark then voter casts the votes. Second scenario – A voter may not have a person to assist. P.O. does it in the presence of 1 agent.
284. RW1 stated that he did not receive any concern on assisted voters. IEBC did not work a coordinates plan to steal votes for Achani.
285. The 3rd respondent submitted that, during the trial, the 1st Petitioner and his witnesses did not adduce any evidence on this allegation. Therefore, the allegation remains unproven and unsubstantiated.
286. To prove this allegation, you require such cogent evidence replete with specific details on the particular and nature of the incident. Merely stating that assisted voters were duped and that the presiding officers imposed their choice on the assisted voter is not enough. These words 'duped' and 'imposed their choice' are powerful in appearance but weak in substance especially where they are not backed with



evidence. I do not find any evidence that the 3rd respondent in collusion with the 1st respondent duped assisted voters to vote for the 3rd respondent. A claim that there was a well-choreographed scheme by the 3rd and 1st respondents to dupe assisted voters to vote for the 3rd respondent is a very serious allegation which must be properly grounded in evidence. The petitioners seem to have engaged a high-level contrivance in stating the areas where duping or cheating of assisted voters allegedly occurred- albeit without any supporting evidence- whose intention was to dupe the court to think that, because the number of registered voters and votes cast in the selected areas is quite high, and voters there are allegedly largely illiterate, the possibility of dwindling or blowing away the winning margin herein is high. No evidence that back their claims. Accordingly, I find that the petitioners did not substantiate their allegation that illiterate voters were influenced to vote in favour of the 3rd respondent. The claim fails.

e. failure to provide a complimentary voter identification system.

287. At paragraphs 80 and 82 of the Petition, the Petitioners alleged that IEBC did not provide a complimentary voter identification system where the KIEMs kit failed thereby disenfranchising voters.
288. The petitioners submitted that the 1st respondent grossly failed in conducting a simple, secure, accountable and transparent election in Kwale gubernatorial election.
289. The petitioners submitted that the Kwale gubernatorial election fell short of the constitutional requirement of simplicity. That it disenfranchised voters who turned out to vote but ended up not voting because 1st respondent failure and refusal to exercise its legal mandate under section 44 A of the election act and deploy complementary mechanism
290. The petitioners testified that there was a massive failure of the KIEMS kit deployed in polling stations within Kwale county during the impugned gubernatorial election and that such failure was not complemented by an alternative mechanism such as resulting in the use of manual system locking out registered voters from exercising their right to vote as enshrined under article 38 of the Constitution.
291. PW1, PW2, PW3 and PW4 led evidence on the failure of the KIEMS kit in several polling stations within Kwale county during August 9, 2022 elections. They all testified that at least 57 registered voters were denied the opportunity to cast their vote at Mbuluni primary school polling station 2 of 2.
292. Given the nature of the complaint herein, repetition of the evidence is necessary.
293. PW2, contrary to his averments in paragraph 11 which stated that KIEMS kit did not work whatsoever, stated that it worked slowly but in the evening it stalled completely. The witness was shown KIEMs KIT authenticated returns for Mbuluni 2 which shows registered voters 501, those who voted 244. Valid votes 240. PW2 confirmed that he signed form 37A. He stated that 57 people were locked out of voting after the KIEMS kit failed completely. He stated that despite him signing the form 37A there were irregularities.
294. PW3 and PW4 stated that they did not vote despite having been at the polling station the entire day.
295. PW3, a registered voter at Mbuluni primary school stream 2 of 2 stated that he arrived at the polling station at 5. am and left at 9 pm without having cast his vote. He explained that the KIEMS kit had problems and the elderly were given priority to vote. He testified that KIEMS kit was slow but eventually failed completely. The P. O. came out and told them KIEMs Kit is not working. That KIEMS Kit failed and he was among the 57 persons who were in the queue but were denied the right to vote at Mbuluni primary school stream 2 of 2. He was about 150th person in the queue. However, from IEBC form 240 voters voted.



296. PW4 was a voter in stream 2. The polling station was opened at 9:30 am. He arrived there at 5:00 am he was among the first ones to arrive at the polling station. He stayed there until 9:00 pm. He stated that he did not vote as machines had some problem. They voted until noon when IEBC Presiding officer told them KIEMS Kit had stalled. It resumed after 30 minutes. The station was closed before he had voted. About 30 people were in front of him at the time station closed. At 7:00 pm he was still in the queue. At 9:30 am about 57 people were in the queue and polling station was closed. He was among the 57 people who did not vote. He was No 49 in the line in the morning. But 240 people voted yet he did not vote.
297. The 1st respondent averred that pursuant to article 86 of the Constitution as read with section 4(m) of the IEBC act obligates the commission to ensure that the voting system used is simple, accurate, verifiable, secure, accountable, and transparent. This provision further imposes an obligation upon the commission to use appropriate technology and complementary mechanisms in the conduct of the elections. The *Elections Act* 2011 allows the electoral commission to use technology as it considers appropriate in the electoral process.
298. The 1st respondent employed the use of technology in Kwale county gubernatorial election through its ICT officers to resolve any reported issues of the KIEMS kits experienced by returning officers and the presiding officers. This was to ensure that by all possible means the election was conducted using technology as opposed to the manipulatable manual system. In instances where the KIEMS kit failed completely then the 1st respondent authorized the use of the alternative complementary system in accordance with the decision in the National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission & 2 Others.
299. That the systems and measures deployed by the 1st respondent were aimed at inclusivity as opposed to disenfranchising any of the voters.
300. Article 81 of the constitution requires the 1st respondent to set up a system and manage elections in accordance with the general principles set out in the constitution. The system must also comply with article 86. The 1st respondent has adopted and hybrid system. The courts have affirmed the constitutionality and lawfulness of this system. See National Super Alliance (Nasa) Kenya V Independent Electoral and Boundaries Commission And 2 Others [2017] eKLR.
301. Section 44 requires the commission to establish an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. The Elections (Technology) Regulations, Legal Notice No 68 Of 2017 were gazette on 21/04/2017.
302. RW1 testified that the 1st respondent had put in place measures to mitigate any effects occasioned by any hitches in technology. The measures included back up KIEMS kit and standby ICT officers at the constituency and county tallying centre. These officers would be dispatched to polling stations to attend to any KIEMS kit issues. The second measure was the alternative to use the manual register which was available at the polling stations in the event of complete failure of technology.
303. RW1 was aware some KIEMS Kit failed. He stated that there were some delays in KIEMS Kit but any delays were sorted out as they had back-up kits. As soon as it was reported to, the constituency RO dispatched ICT officer. If it is not resolved, they will report to him. He will, then dispatch his ICT who will report to him on the state of the KIEMS Kit. Based on that report, if it is not sorted, he would seek approval for alternative mode from IEBC. Kikonei Primary School, (Lungalunga) Selesoli Primary School, (Matuga) Matumbi Primary School (Kinango) had total failure and he sought for approval to use manual register which was used. The Form 37As of these polling stations were produced in court; agents signed the forms to authenticate the results KIEMS Kit in all other station ran fine. He stated



that failure of KIEMS Kit does not mean election will not be held. That is why complimentary method is provided in law.

304. RW1 stated that all Presiding officers had the manual register just in case authority to use manual register did come from IEBC.
305. RW3 a presiding officer at Mbuluni primary school polling station 2 of 2 confirmed that she encountered challenges of slowness with the KIEMS kit, but it did not fail. She rebooted it once and it resumed working. She did not, however, use a complementary voter identification mechanism as stipulated under section 44 A of the Election Act as KIEMS KIT did not fail. RW3 was firm in her testimony that there was no failure of KIEMS Kit. She explained that the kit was slow at some few times but it was able to identify all voters who were registered at the polling station and came to the polling station on the pooling day, and all voted. She further explained that there was no voter on the queue who did not vote at the close of polling as required in law.
306. RW3 and RW1 both testified that KIEMS Kit at Mbuluni Primary School 2/2 was slow at some few times but it was ok in most of the time. They told the court that, it successfully identified all voters who attended the polling and they voted. These voters were 244 and exercised their right to vote.
307. The 3rd respondent submitted that the KIEMS returns is evidence of the efficiency, simplicity, transparency, accuracy, verifiability, security, and accountability of the elections- which are important pillars for the conduct of elections outlined in Article 86 of the Constitution.
308. Upon careful analysis of the evidence adduced, the court makes the following conclusions and findings.
309. Although the Petitioners witnesses PW2, PW3 and PW4 made allegations about failure of KIEMs kit at Mbuluni Primary School Polling Station 2 of 2, the evidence by the Presiding Officer of this Polling Station-RW3- stood uncontroverted that KIEMS kit were only slow at some short moments; it did not fail as alleged.
310. The KIEMS Kit successfully identified all eligible voters who attended the polls- they were 244 voters, and all voted. Therefore, there was no need for complimentary identification mode- manual register- for Mbuluni Primary School 2/2 polling station.
311. Maina Kiai case settled the protocol of identification of voters. And, IEBC had put measures in place as to when a complimentary mechanism for identification of voters is deployed. In Kikonei Primary School, (Lungalunga) Selesoli Primary School, (Matuga) Matumbi Primary School (Kinango) where there was total failure of KIEMS Kit, RW1 sought and obtained approval to use, and manual register was used. See explanations by RW1
312. There is no evidence that 57 people or any voter did not vote due to the slowness of the KIEMS Kit. In fact, there were no details of, or a complaint that was recorded of the 57 people who allegedly did not vote.
313. Therefore, the petitioners' witnesses evidence analyzed elsewhere above is shaky and founded on quick sand. It is surprising that one of them who was an agent and knew that he should never append his signature on results he is disputing, yet he signed the forms produced before court. Their evidence is merely an afterthought intended to champion a cause they did not believe in.
314. Accordingly, the claim that voters at Mbuluni Primary School 2/2 were disenfranchised, or that the 1st respondent failed to provide a complementary voter identification system, are unsubstantiated or not proved. The allegation fails.



f. failure to seal ballot boxes and put appropriate structures and mechanisms for safe keeping of the election materials

315. At paragraphs 82, 83, 84, 85, and 86 of the Petition, the Petitioners made allegations on failure to seal ballot boxes and put appropriate structures for safe keeping of election materials.
316. Article 86(d) of the constitution mandates the 1st respondent to ensure that appropriate structures and mechanisms to eliminate electoral malpractice are put in place including the safe keeping of election materials.
317. Regulation 73 mandates the 1st respondent to guarantee the security of the ballot boxes by sealing the ballot boxes.
318. RW2 seems to have a wealth of experience in election having served the 1st respondent since 2010. He stated that not all election materials are sealed inside the ballot box after the counting and declaration of results at the polling stations. He also explained the modalities of reopening a ballot box in the event there is lawful need to retrieve a document from therein.
319. From the evidence, it is worth noting that at the polling station;
- a. The agents witness that the ballot boxes are empty before commencing the voting process. The boxes are then sealed in their presence for the voting to be carried out.
 - b. The boxes are opened in the presence of the agents for the counting process.
 - c. The boxes are resealed after the counting process but their contents do not include the KIEMS kit and the original results declaration forms. The reason being that these forms would be required at the constituency tallying centre and the kits could be required in a presidential election dispute.
 - d. The results declaration forms are sealed in a tamper proof envelop to be opened at the constituency tallying center.
 - e. In the unlikely event that a ballot box need to be opened thereafter, the agents who witnesses its sealing at the polling station had to be present. The reason is so that they verify that there has been no interference along the way.
320. PW1 and PW7 testified that presiding officers were arrested with election materials including forms that ordinarily would be in the ballot boxes.
321. PW7 a trained super-agent testified that presiding officer was almost lynched on a claim of being mischievous by carrying the result declaration form and the KIEMS kit in his bag. PW7 stated that she had an opportunity of fixing additional seals to the ballot boxes.
322. PW1 and PW8 gave evidence that the forms which were found in the possession of one of the arrested officers were put in the governor's ballot box and the agents were not shown what those bundles of documents were.
323. The petitioners submitted that the 1st respondent recklessly handled the election materials including the ballot boxes and the KIEMS kit exposing the results to manipulation and possible alteration of the results. They argued that there is adequate audio visual evidence showing instances where unsealed ballot papers were delivered at the tallying centre and through unapproved means of transport.



324. The 1st and 2nd respondent submitted that some of the petitioners' witnesses attempted to compromise the security of election material by instigating violence in an already charged environment and they ought to be condemned for those actions.
325. The Petitioners have not pleaded the particulars of the polling stations where ballot boxes were not sealed or elections materials were not secured. Petitioner seemed to be referring to two incidences at Matuga tallying center. At one point PW8 stated that he witnessed unsealed six ballot boxes being brought into the tallying centre and stuffed with documents. He did not state the nature of documents so stuffed. This claim was totally unsubstantiated by the witness or other evidence. At another time, he stated that the Returning Officer opened sealed boxes as original Form 37A had been misplaced. He however told the court that the form was found in the bag belonging to the PO. The opening was duly announced by the RO to all.
326. RW2 explained to the court that they are permitted in law to open a ballot box if original result is sealed inside the box by mistake. But, they do so in the presence of agents. He stated that this is what was done before the PO remembered the form was in, and they retrieved it from his bag. RW2 stated that the form was intact in a sealed tamperproof envelope. He also explained that there is nothing illegal when a PO locks or seals the original result in the ballot box.
327. When I put the two streams of evidence; of RW2 and PW8; I find no difficulties in stating that PW8 was not consistent in his evidence. There are matters of huge gravity he stated in his oral testimony which were not stated in his affidavit. and he kept on blaming his advocate for the omission. He stated that he read the affidavit but did not understand English, yet, he signed it. But, ultimately, he stated that he is satisfied with the contents of his affidavit. His demeanor portrayed him as a person who is unreliable, inconsistent and incapable of being believed. In his affidavit, he did not even state the candidate for whom he was an agent. It is not clear whether he was an agent- he claims he was asked to stand in for an agent who fell ill. It is also doubtful whether he witnessed the events he claims to have witnessed. At one point he talked of six ballot boxes being ushered in; at another time he talks of opening of the six boxes in a bid to find a form 37 which had been misplaced- he did not know which form was being looked for; and in other time, he talks of stuffing of documents in the governor's box. His evidence was complete obscurity and a bundle of conjectures.
328. But, RW2 was consistent and his evidence was corroborated by the official results produced in respect of Matuga Constituency. PW8 also admitted and confirmed that the ballot boxes were opened by the RO in the presence of the agents. The form was later retrieved from the PO's bag where he had placed it but had forgotten. It was part of the statutory forms produced in court. It was explained that such happenings occur due the fatigue these officers suffer during the long wait in the queue to deliver results. He was shown the form and he did not see any alterations in the results. In sum, I find that the petitioners did not prove the claims made by PW8.
329. Therefore, the petitioners did not provide evidence to prove any or particular ballot boxes were not sealed or election materials were not secured.
330. I should note here that the petitioners seemed to lay quite substantial premium on the incidents where some PO were arrested. I note that the affidavits by the presiding officers who were arrested were filed but the 1st and 2nd respondent did not call them. Therefore, although those affidavits remain part of the record, but only as dead appendages with no probative value.
331. Be that as it may, RW1 and RW2 who confirmed that indeed some presiding officers were arrested and held in custody for up to 3 days, explained the circumstances surrounding these incidents, and one was quite unfortunate because the presiding officer concerned went to answer the call of nature leaving



his bag which contained the KIEMS KIT and the original result forms on the queue. He had been in the queue for about three days. When he came back the curious onlookers had already spotted the bag, picked it and opened it. They then interfered with the contents. The petitioners' witnesses were amongst those who interfered with election material contrary to the law. The respondents' witnesses explained that it is the personal and statutory responsibility of the presiding officer to take custody of the results forms and the KIEMS KIT and deliver them to the returning tallying station. The evidence by RW1, RW2 and RW3 was that there was nothing wrong in carrying in a bag the original results in a sealed tamperproof envelop as the PO bore personal responsibility of securing as well as delivering the results to the tallying centre. Accordingly, the petitioners did not prove that the concerned PO's interfered with election materials.

332. I therefore, agree with the 3rd respondent submission that the Petitioners have not discharged their burden of proof to show interference with election material by the PO's concerned.
333. I find that there was no failure on the part of the 1st and 2nd respondent to secure election material or to seal ballot boxes.

g. Alterations in Forms 37A and discrepancies in Forms 37B and Form 37C

333. At paragraphs 87, 88, 89, 90, 91, and 92 of the Petition, the Petitioners made allegations about alteration in Forms 37A and discrepancies in Forms 37B and Form 37C.
334. At paragraph 87 of the petition PW1 indicated that some form 37A were changed but he however did not indicate the particular polling station this happened.
335. At paragraph 90 of the Petition, the Petitioners have alleged omission of results and have given the example of Pungu Nursery School Polling Station which has 43 registered voters.
336. At paragraph 92 of the petition is listed polling stations in which it is alleged that the 3rd respondent was added votes. PW1 was referred to page 730, 822 and 807 of IEBC bundle of documents – form 37As for Mwazaro, Visangwa Primary School, and Bengo polling stations respectively. He confirmed that the entries were consistent in form 37A, 37B and 37C.
337. PW1 a registered voter at Sembe primary school polling station, pointed out that in Matuga votes were added to the 3rd respondent. He however stated that he will call witnesses to speak to the allegation. His evidence here is not relevant.
338. PW1 also testified that when preparing the Petition, he did not have Form 37As from the polling stations in Kwale County- which were used to declare results for governor and given to agents of political parties or candidates present. It is therefore doubtful where he obtained the information in relation to these forms. Such specific allegation should draw upon a specific solid source or foundation. PW1 only made assumptions on some of the matters he swore to, especially the results recorded in named polling station; only promising to call witnesses who would speak to the allegation. His evidence therefore on the allegations on results was not founded on his personal knowledge or evidence.
339. Notably, PW2 who was an agent stated that he was satisfied with the result and he signed the Form 37A and took a photo of it. He confirmed the result in Form 37A brought by IEBC is what was in the form he photographed.
340. What does the respondents say about the results?
342. According to the 1st and 2nd respondents and the law, the results declared at the polling station are final and therefore form 37A at the polling station is the primary and final source of the results. They



- dismissed any allegation that the results would have been altered at some point in the transmission as unfounded.
342. The 1st respondent averred that the results as established at the polling stations were not exposed to manipulation or alteration especially since the forms had been signed by the agents present at the polling stations.
343. The 1st respondent averred that all election materials were secured immediately after the completion of counting and in the presence of the candidate's agents as well as observers at the polling station. The agents were supplied with the serial numbers of the seals of the ballot boxes. According to them, if the boxes were tampered with at any point between the polling station and the tallying Centre it would be easy to identify and query such a security breach.
344. The 1st and 2nd respondents averred that there was only one instance of discrepancy in one polling station- Pungu nursery school and the discrepancy was identified by the constituency returning officer at the tallying centre. Therefore, if any other discrepancy was manifest, they would have been identified.
345. The 1st and 2nd respondents averred that minor human errors that may be identified in select instances- this is inevitable in an election. But, in their assessment, the election was free, fair, and transparent and the results are verifiable. They hold the view that any errors that may be noted are not sufficient to void the gubernatorial election. The mathematical additions did not disenfranchise any of the candidates.
346. 1st and 2nd respondents asserted that the results declared by the 2nd respondent and contained in the form 37C in respect of Kwale county followed Article 86 of the constitution.
347. That the results tallied and collated at the tallying centre are in fact accurate in comparison to those established after the counting at the polling station.
348. The 3rd respondent in her response stated that she was not aware of any alteration in form 37A and discrepancies in form 37B and 37C.
349. The 3rd Respondent submitted that the Petitioners have not annexed to the Petition any Form 37A and Form 37B from Kwale County. The 1st Petitioner admitted that he did not have these forms while preparing the Petition. They have annexed only Form 37C.
350. The 3rd Respondent submitted that the gubernatorial elections of Kwale County of 9th August 2022 was conducted in compliance with the principles in the Constitution and election laws
351. The court notes that the evidence by RW1 is quite useful on the results of Pungu Nursery School Polling station- that the results had a problem and were not included in Form 37C. RW1 explained that the results were disregarded because the Presiding Officer made an error when recording the votes garnered by Hamadi Iddi Boga as 113 instead of 013. The Form is attached at page 142 of the IEBC bundle of documents. According to RW1 the law provides for exclusion of such results. He stated that the exclusion of the results affected all candidates, and because the error did not affect the margin of victory (which is 5, 702) he lawfully declared the final results.
352. The court finds that, actions by RW1 in relation to the results for Pungu Primary School were lawful pursuant to regulation 83(1) (b), and show diligence on his part. The exclusion of the results does not affect the victory margin. Accordingly, the error did not affect the results.
353. RW1 confirmed and collated all the results into Form 37C which now tells who garnered most votes in the election for governor for Kwale County. He explained situations where the valid votes and rejected votes did not add up to the number of voters identified by KIEMS Kit or persons who voted. He stated this was a case of stray ballots. Result declaration forms do not account for all scenarios such as stray



votes. Such discrepancies can be explained and accounted for. Polling station does accounts for the stray ballots.

354. From the witness' evidence, Form 37A has provision for comments on stray ballots. A stray ballot is a ballot cast in the wrong ballot box. Any stray ballot found in in wrong ballot box, say, the governor's ballot box is recorded. But any stray ballots for governor election will not be known from the governor's ballot box- it is in another ballot box and will be accounted for in that manner when doing the reconciliation of the ballots used. The difference between votes cast and number of persons who voted was explained by RW3. At page 23 of her affidavit – stray ballot for governor was recorded; it was in women rep box. So, if you add the stray ballot to valid votes to rejected votes you get 244. Agents signed for it including two from Azimio.
355. In sum, the following conclusion on the foregoing matters properly draw upon the evidence: -
356. Only in 3 stations did KIEMS KIT fail, and remedial action as per the law was undertaken especially on use of complimentary identification procedures. The results of these stations were recorded. Results were duly declared. Agents signed these forms.
357. In Mbuluni KIEMS Kit was reported to be slow. ICT officers addressed the issue and voting went on well.
358. The result for Pungu Nursery School was disregarded as votes cast exceeded registered voters. The error was inadvertent and was explained. The exclusion of those results did not affect the result. Agents signed the form.
359. The Returning Officer collated all forms 37A (except the disregarded one) and prepared Form 37C.
360. I do not find any failure on responsibilities imposed under Article 86 of the Constitution upon the 1st respondent in relation to safeguarding the will of the electorate. See the supreme court in Hassan Ali Joho & Another V Suleiman Said Shahbal & 2 Others Petition No 10 Of 2013 [2014] eKLR Para 72.
361. Form 37A is the primary source of results. Kwale had 742 polling station and all Form 37A were submitted to court. None of the form 37A is under any successful challenge. No substantial discrepancies were established in Form 37A, 37B and 37C in Kwale election. The error in the result for Pungu Primary was explained and did not affect the result.
362. During the hearing, Petitioners' witnesses were taken through the Forms 37A, Forms 37B and Form 37C and they unequivocally and expressly confirmed that the entries of the results in the nine Polling Stations cited at paragraph 92 are accurately captured in Forms 37A, Forms 37B and Form 37C. The witnesses for petitioners' case admitted they do not have a problem with the numbers they only referred to perceived irregularities.
363. Therefore, the petitioners have not demonstrated through evidence that there were any discrepancies between the result announced at the polling stations and the one verified and recorded in the form 37C at the tallying center.
364. The petitioners did not show that results were altered in any of the forms presented. None of the 8 witnesses adduced evidence of discrepancy between form 37A, 37B and 37C.
365. The petitioners did not adduce any evidence that the process was compromised at any of the stages of declaration.
366. The 1st and 2nd respondent witnesses explained stray ballots, and accounted for it through polling station diaries. (RW3).



367. The petitioners did not adduce evidence of allegation of inflation of votes as pleaded in para 92 of the petition.
368. The petition filed in court no single Form 37A as basis for the allegations they made. The Petitioners only attached Form 37C. They also did not attach Forms 37B. Thus, lacking any basis for comparison of entries in Forms 37A, Forms 37B, and Form 37C?
369. I find the allegation of alteration in Forms 37A and discrepancies in Forms 37B and Form 37C were not proved.

V. Whether the Kwale county gubernatorial election held on August 9, 2022 was conducted in accordance with the principles set out in the constitution and election laws.

370. The totality of the Petitioners allegations in paragraph 59-110 is that the Kwale gubernatorial election was not conducted in accordance with principles under Article 81(e) of the Constitution.
371. The 1st and 2nd respondents averred that Article 88(4) (a) mandates the 2nd respondent to register qualified persons as voters. As of August 9, 2022, the number of registered voters in Kwale County was 328,316. A total of 180, 304 voters turned to vote for their preferred candidate amongst the six (6) candidates who were validly nominated and cleared to contest for the gubernatorial seat of Kwale County, namely; Achani Fatuma Mohamed, Boga Hamadi Iddi, Dena James Daniel Gereza, Mwangale Lunganzi Chai, Mwakwere Chirau Ali and Ruwa Sammy Nyamawi.
372. According to the respondents, on 12/8/2022, following a free, fair, and transparent election, the tallying process confirmed that Achani Fatuma Mohammed, the 3rd respondent had garnered the greatest number of votes. In accordance with article 180(4) of the Constitution, the 2nd respondent declared the 3rd respondent as duly elected governor for Kwale County having garnered 59,674 votes.
373. The 1st and 2nd respondents averred that the Kwale gubernatorial election was conducted in accordance with the constitution, the *Independent Electoral and Boundaries Commission Act*, The *Elections Act*, The Regulations thereunder, and all other relevant provisions of the law. In their view, the 1st and 2nd respondent discharged their respective mandates in accordance with the constitution and the applicable laws and conducted a free, fair, credible, and transparent election.
374. The 1st and 2nd respondents refuted the claims that the Kwale county gubernatorial election results were affected by non-compliance to the extent of being declared invalid.
375. The petitioners submitted that on the basis of the electoral irregularities that are evident from the impugned election, the 1st respondent violated the constitutional principles set out in article 81 and 86 by failing to ensure that the conduct of the election was simple, accurate, transparent, verifiable, secure and accountable. They argued that they had demonstrated that the electoral irregularities that arose were not excusable mistakes but went to the root of the free and fair elections. That in the instance of Pungu nursery school polling station, results thereof were omitted from the collated form 37 c despite voting having been conducted at the said polling station. Therefore, the results contained in form 37 C in respect of Kwale gubernatorial election are not the results required under article 86.
376. The petitioners urged this court to find that the entire impugned election process was not conducted in accordance with the cardinal constitutional principles of free and fair elections. According to the petitioners the court should find that the election process right from the campaign period to the conduct of the voting process and subsequent declaration of results was conducted by the 1st respondent in utter disregard of the constitution and relevant election laws.



377. The petitioners relied on electoral management bodies as institutions of good governance focus on Lesotho Independent Electoral Commission' vol 13(1) review of south African studies 123-142 (2009) at pg 126
378. Based on the analysis of evidence in relation to the other issues, the petitioners have not established any serious non-compliance with the Constitution and the other election laws. The petitioners seem to place a very high price on the omission of the results for Pungu Nursery School polling station. According to them, as the results for Pungu Primary School are not included in the totals tallied and collated in Form 37C, those results are not the results envisaged in article 86 of the Constitution.
379. It bears repeating that, the error in the Pungu Results was explained as inadvertent. The PO inadvertently recorded 113 instead of 013 for Boga. But, the total was correct which show the error was inadvertent; there was no evidence it was intentional or contrived. And RW1, RW2 and RW3 explained that when such error occurs, they are required under the regulations to disregard the results as the law prohibits alteration of results in form 37A. They stated- and this is correct- that, the error did not affect the margin of victory which was over 5000 votes. Therefore, RW1 lawfully announced the results and declared the 3rd respondent as duly elected governor of Kwale having garnered the most votes. I find that the error did not affect or invalidate the results as declared by the 2nd Respondent.
380. Other than the error I have discussed above, the petitioners did not prove irregularities or illegalities or non-compliance with the Constitution and the relevant election laws in the conduct of the gubernatorial election for Kwale County held on 9th August, 2022 by the IEBC. I agree with the submission by the 1st and 2nd respondents that the allegations by the petitioners' lacked specificity and concrete evidence in support thereof. Therefore, the challenge on the election process was general and devoid of any tangible supporting evidence. The few instances stated in the petition where non-compliance with the Constitution and the law is alleged to have occurred, were not proved by evidence. In fact, the petitioners seemed to have no quarrel with the results as expressed in the statutory forms 37A. The evidence by the respondents completely blew away the allegations by the petitioner, and sanctifies a conclusion, and I so find that there was absolutely no proof that the election for governor of Kwale County held on the 9th August, 2022 was not free, transparent, and fair. The evidence adduced show, and I find and hold that the election complied with the requirements in Articles 81 and 86 of the Constitution, Election Act 2011, and Election (General) Regulation 2012 as amended.

VI Whether the 3rd Respondent was validly elected and declared Governor of Kwale County

381. The petitioners submitted that the 3rd respondent was not validly elected and declared the governor of Kwale county and therefore her election should be voided. According to the petitioners, the impugned Kwale county gubernatorial election of August 9, 2022 does not reflect the will of the people of Kwale. And, that the 1st respondent did not independently conduct the election and entire election process was flawed. They argued that the 1st respondent cannot accurately verify who won the election as there were irregularities substantially affecting the result and there was material non-compliance with electoral processes.
382. The 1st and 2nd respondent were of a different view; they prayed that it be determined that Achanji Fatuma Mohamed was duly elected and the election was valid.
383. The testimony of the County Returning Officer, RW1 (Obadiah Kariuki Gacoki), was not controverted especially on the process of election at the polling stations (identification of voters, voting, counting of votes, recording of the results in the statutory result Forms 37A, verification, and announcement of the results) was done in accordance with the Rules and Regulations. In addition, the



delivery of the results and the election materials to the Constituency Tallying Centers, the preparation of Form 37B and finally the preparation of Form 37C at the County Tallying Center and the declaration of the results- was done in compliance with the Election Laws and the Regulations. The 3rd Respondent garnered the greatest number of votes (59,674 votes) and was validly declared the winner in accordance with Article 180(4) of the Constitution.

384. I find nothing upon which the results for, and election of the 3rd respondent as governor for Kwale County herein should be impeached and nullified. I also find no evidence or justification to declare Boga as duly elected as governor.
385. Accordingly, I find that the 3rd respondent was validly elected as governor for Kwale County in the election held on August 9, 2022 having garnered 59674 votes against her closest competitor Boga who garnered 53972.

VII What reliefs and Orders can the Court grant?

386. The petitioners submitted that this court should grant the prayers sought in the petition.
387. The 1st and 2nd respondent submitted that the following orders should be issued upon determination of this petition; The Kwale county gubernatorial election held on August 9, 2022 was conducted in accordance with the constitution and the *elections act* and all other relevant statutes. The declaration of the outcome of the election made by the 2nd respondent on 12/8/2022 is valid, the petition lacks merit and should be dismissed; and the petitioners should bear the cost of the petition.
388. The 3rd respondent submitted that the Petitioners have failed to prove any of the allegations in their Petition to the required standard. The 3rd respondent further stated that the petitioners are approbating and reprobating in the reliefs sought in the petition. Accordingly, the 3rd Respondent prays that the Petition be dismissed with costs.
389. In the upshot, and as by law authorized I find, hold and make the following orders: -
1. That the election held on August 9, 22 for governor of Kwale County was conducted in accordance with the principles laid down in the Constitution and in that written law; and that any non-compliance observed did not substantially affect the result of the election.
 2. That the 3rd respondent was validly elected as governor of Kwale County; certificate of this determination to issue to the Commission and the relevant Speaker be accordingly notified under section 86 of the *Elections Act*.
 3. That the petition lacks merit and is hereby dismissed with costs.

VIII Who should bear the costs of the Petition?

390. Section 84 of the *Elections Act* provides: -

An election court shall award the costs of and incidental to a petition and such costs shall follow the cause

391. Rule 30 (1) of the Election Petition (Parliamentary and County Elections) Petition Rules, 2017 provides:

- 30 (1) The election court may, at the conclusion of a petition, make an order specifying—
- a. the total amount of costs payable;



- b. the maximum amount of costs payable;
- c. the person who shall pay the costs under paragraph (a) or (b); and
- d. the person whom the costs payable under paragraphs (a) and (b) shall be paid.

392. The petitioners submitted that they are not seasoned politicians, they were not candidates in the impugned Kwale County gubernatorial election. They did not have the benefit of the endless campaigns and county funds to enable them mount a glitzy legal campaign but they embodied the hopes and aspirations of the little man desirous of ensuring the will of the people of Kwale is not subverted and democratic ideals in our constitution and rule of law are achieved. That their bravery and heroic action should not be discouraged or penalized by costs of the petition instituted and pursued in public interest.
393. The petitioners submitted that conversely the 1st respondent is a seasoned institution in matters electoral processes and therefore failure to adhere to constitutional principles and laws cannot be casually excused/ ignored or irrelevant technicalities.
394. The petitioners submitted that the 3rd respondent is an experienced politician and lawyer is therefore knowledgeable on the dos and don'ts of the Kenyan electoral processes. Her misconduct cannot be overlooked or excused.
395. In the end the petitioners submitted that in exercise of the court's judicial discretion the circumstances of this case warrant that the 3rd respondent is condemned to pay costs.
396. The 1st and 2nd respondent submitted that the petitioners should bear the costs of the petition. They urged this court to take into consideration the time and intellectual industry employed in the litigation of this matter, the voluminous documents involved during the preparation and conduct of the matter.
397. The 3rd respondent submitted that the Petitioners should bear the cost of the Petition. She relied in the case of Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 others [2013] eKLR
398. The 3rd respondent urged this court to consider that the dispute involves the election of governor which is a state office, the allegations in the Petition cover many aspects of election in Kwale County which has 742 polling stations, hearing has entailed review of all the Forms 37A from these polling stations and analysis of the Forms 37B and 37 C together with the KIEMS Kit returns. Clearly, the 3rd Respondent has incurred legal costs to undertake this exercise which also involves substantial intellectual input, commitment and time. Therefore, the 3rd Respondent proposed the sum of Kshs 7,000,000/- as reasonable costs to borne by the Petitioners.
399. The 1st Petitioner confirmed that even though he filed the Petition as a private citizen and in the public interest, he was a chief agent for Azimio political party and represented the interest of Boga Hamadi Iddi in whose favor he wants the election of the 3rd Respondent nullified and the said Boga Hamadi Iddi declared the winner.
400. The court is guided by the law on costs. In accordance with section 84 of the *Elections Act*, costs follow the cause. The respondents are the successful parties in this petition. There is no conduct afoul on their party which would deny them costs. I award costs to the respondents. I do note however, that the petitioners seem to have fronted for Boga, one of the candidates in the election in controversy and even sought his declaration as governor. But, he is not a party in these proceedings. I only hope the petitioners believed in the cause they filed as one intended to vindicate the will of the people rather than to champion an individual's personal desire or ego to prove a political point. Costs shall be paid by the petitioners. The security deposited in court shall also be utilized towards part payment of costs.



Nevertheless, I agree with the petitioners that public litigation should not be stifled by award of huge amount of costs. I believe that is the foundation of the practice of capping of costs by the Court.

401. Thus, in the circumstances of this case, time spent in the prosecution of this case, and the number of witnesses who testified, I cap costs at a sum of Kshs 3,000,000 for all respondents; the exact prorated share to be determined upon taxation of costs by the taxing master. It is so ordered.

Tribute to legal counsel

402. I will be most miserable if I did not recognize and appreciate the exemplary and professional work done by the legal counsel for the respective parties. Each one of them served the court with distinction; observing all decorum and court processes; and engaging in deliberate own industry to contribute to the just determination of issues in controversy.

When the profession writes its final judgment, each one of them will occupy most deserved eminent chairs of prominent advocates.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION, THIS 26TH DAY OF JANUARY, 2023.

F. GIKONYO M.

JUDGE

In the Presence of:

1. Mwereru and Mikwa for the Petitioners
2. Biko Angwenyi for the 1st and 2nd Respondents
3. Wanyama and Mogaka for 3rd Respondent.
4. Pamela - CA

