



REPUBLIC OF KENYA



**Abdisalan v Abdi & 2 others (Election Petition E007 of 2022)
[2023] KEHC 1508 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1508 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
ELECTION PETITION E007 OF 2022
RN NYAKUNDI, J
FEBRUARY 28, 2023
N THE MATTER OF THE ELECTIONS ACT
AND
IN THE MATTER OF AN ELECTION PETITION FOR
THE MEMBER OF THE NATIONAL ASSEMBLY
WAJIR NORTH CONSTITUENCY**

BETWEEN

IBRAHIM AHMED ABDISALAN PETITIONER

AND

SANEY IBRAHIM ABDI 1ST RESPONDENT

**MATHEW THIGA THE RETURNING OFFICER WAJIR NORTH
CONSTITUENCY 2ND RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

JUDGMENT

Background

1. As tradition would have it, this was yet another eagerly awaited election cycle, where Kenyans not only in Wajir North Constituency, were keen on exercising their democratic rights and freedoms by electing their various representatives. That does not go without saying that in Kenya elections seem to be a matter of life and death with very high political stakes for the respective parties and candidates. One would wonder why, but that is a discussion saved for another day.



2. The Petitioner herein was one of the contestants vying for the position of Member of National Assembly for Wajir North Constituency in the elections held on 9th August, 2022. The 1st Respondent was the candidate that was duly declared the winner by the 2nd Respondents after garnering 6502 votes in the said election. The 2nd Respondent was the Returning Officer of Wajir North Constituency duly appointed by the 3rd Respondent as its official to conduct the said election in Wajir North Constituency.
3. The Petitioner is aggrieved by the declaration by the 2nd and 3rd Respondents and the manner in which the entire election for we Member of National Assembly for Wajir North Constituency was conducted. He filed this instant petition seeking the following orders: -
 - a. A declaration that the 1st Respondent contravened the Electoral Code of Conduct by instigating violence, which is an electoral offence and therefore not qualified to run for office;
 - b. A declaration that the 1st Respondent was non-declared and therefore not elected to the position of Member of National Assembly Wajir North Constituency on an undisclosed location, date and time;
 - c. A declaration that the non-declaration of the results as in (b) above was invalid, null and void and consequently of no effect;
 - d. A declaration that the non-compliance, irregularities and improprieties in the impugned election for Member of National Assembly Wajir North Constituency.
4. The petition is premised on the following grounds;
 - a. Well planned, prearranged and/or deliberate violence orchestrated by the 1st Respondent herein and his Agents and supporters at Bute Arid Zone Primary School Tallying Centre aimed at, meant and/or predestined to interfere, impede and/or hamper tallying.
 - b. Pre-filled Forms 35A by Presiding Officers given to the Agents of the 1st Respondent to fill at the Tallying Centre.
 - c. A Sample of votes cast exceeding the number of voters identified by the Kenya Integrated and Elections Management System (KIEMS) Kit in some polling stations / tampering with the number of registered voters.
 - d. Issuance of more than one ballot papers to one voter
 - e. Irregular, unprocedural and unlawful assisted voting
 - f. Inflated totals of valid votes cast on Original Forms 35A
 - g. Non-declaration of results
 - h. Issuance of certificate
5. At the onset of the Petition, the Petitioners filed interlocutory applications seeking various orders. The petitioners, vide the Notice of Motion dated 4th October 2022 sought orders for production of election materials that were used in the election conducted for the member of national Assembly for Wajir North Constituency which orders were granted and the materials secured. The application also sought to have the scrutiny of the election materials for the following polling stations;
 - a) Tuluroba Polling Station 1 of 2



- b) Malkagufu Dispensary Polling station 2 of 2
 - c) Cherate Mobile 1 of 1
 - d) Buna Sub county Hospital 1 of 1
 - e) Ajawa Primary School 2 of 2
6. The Court directed that the prayer for the order of scrutiny would be addressed at later stage being at the conclusion of the hearings.

The Petitioner's Case

7. The Petitioner availed six witnesses in support of his case. The first witness, Mr. Vincent Omambia, was the presiding officer for Tuluroba polling station on 9th August 2022. He adopted his witness affidavit dated 8th September 2022 as evidence in chief. In the affidavit he deposed that he reported for duty at 5am on 9th August 2022. Polling began at 6.52 am as there had been some issue with the KIEMS kit. He stated that at around 9am there was an incident at the polling station where a clerk was reportedly issuing more than one ballot paper to voters. He moved to the area and confiscated the paper then reported the issue to the returning officer, the 2nd respondent herein. He deposed that the process proceeded smoothly until 2pm when an individual purporting to be an agent attempted to gain access to the polling station. He checked the person's papers and denied him access as he was not qualified to gain access. However, the individual remained around the polling station and when he attempted to ask the security to remove him, he deposed that they spoke in their mother tongue and the individual was not removed. According to the witness, at 3pm, the voters who had earlier been given the excess ballot papers attracted his attention, claiming that the Orange Democratic Party Agent was a presiding officer at Malkagufu. PW1 called the 2nd respondent and it emerged that the agent had trained as a presiding officer but resigned.
8. He stated that voting continued until 6.35pm and upon closing the polls, a candidate from the United Democratic Alliance arrived with 25-30 people demanding to be allowed to vote. The witness denied them entry and directed the security to close the doors. The counting of votes then began. It was PW1s' sworn testimony that there was a mismatch of results between the people who had been identified by the KIEMS kit and the number of valid votes cast on form 35A, meaning 41 votes were not accounted for. He produced what he called a screenshot of the KIEMS kit as annexure VMO05 as evidence of this discrepancy.
9. Learned Counsel, Mr. Issa Mansur, for the 1st respondent objected to the production of this electronic evidence and submitted that the witness did not identify where he printed the same and what its source was. The objection, according to Counsel, was based on the provisions of section 106(b) of the [evidence act](#) and he cited three cases in support of his objection.
10. Learned counsel for the Petitioner, Mr. Omwanza, in rejoinder stated that this was an issue which should have been raised at the pre trial stage. He contended that this was an ambush and he was unable to respond with authorities to the same. he urged that there is no unanimity in how the High Court deals with the issue of electronic evidence, adding that Mr. Issa had not brought it to the attention of the court that the provisions of Section 78A of the [Evidence Act](#) amended section 106(b) and addressed the issue at hand conclusively.
11. Learned Counsel for the 3rd Respondent, Mr. Owuor, in supporting the objection, submitted that section 78A did not repeal section 106, to the extent that procedurally we need to have full compliance especially because evidence brought forth to this Court was extracted from material the presiding



- officer purported to have been in full control of. He urged that the learned counsel for the petitioner stated that what evidence was proposed to be adduced was extracted in the course of PW1's official duties and he had an issue with this as it was not within the normal course of a presiding officer to report material coming out of the KIEMS kit.
12. Upon considering the submissions of the advocates and the authorities tendered, sustained the objection on the probative value on the impugned evidence stating that it adopted a similar interpretation of section 76A as the counsel for the respondents.
 13. The import of the decision was that the annexure was of no probative value as it failed to meet the threshold for producing electronic evidence set out in the [evidence act](#).
 14. During cross examination, PW1 Mr. Vincent Omambia, told the Court that there were six polling clerks at his polling station but he did not recall the name of the polling clerk who issued the excess ballot papers. He stated that his duties as a presiding officer in a situation where the ballot papers were issued in excess was to confiscate the papers and report to the returning officer. He was then to find out why the clerk had done what he had done and take action. It was his testimony that he reported the incident to the security officers but no action was taken. He further stated that the ballot papers were for the position of Member of County Assembly.
 16. PW1 further testified that the Form 34A was in the ballot box and that he delivered a report to the Returning Officer asking him to nullify the election due to irregularities and malpractices. He would not directly answer whether he delivered the form 34A to the returning officer as required by procedure. He confirmed that it was his signature on the declaration form that was at page 96 and that he did not write any comments on said form. He claimed the signature was his but disowned all the contents that were contained in the form below his signature. He testified that he had recorded the initial incident in the polling station diary.
 17. PW2 Ms. Madina Ibrahim, was the Deputy Presiding Officer at Sirey Polling station and she adopted her witness affidavit dated 8th September 2022 as evidence in chief. She deposed that she arrived at the polling station with the presiding officer on the material date at 5am and voting took off at 6.29am. She stated that there were a number of incidences that arose at the station on the day of the elections. Initially there was an altercation as the voting did not begin at 6am but the same was resolved and voting continued. It is her evidence that at 11am the candidate for the position of senate, running on a UDA ticket stormed the polling station in the company of 5 people demanding to vote. She allowed him into the station and asked the rest to stay outside. He then slapped her and more people accessed the polling station. These people interfered with the ballot papers and threw the agents out of the station. The presiding officer reported the issue to the police officers at Korondille and they arrived at 11am after which the situation was contained. It was her evidence that at 10pm there were gunshots all over the place which disrupted the process. Further, that at 2am when counting resumed, it revealed that there were anomalies, one of them being the difference between the votes cast and the number of people identified by the KIEMS kit. The total number of votes cast was 286 whereas the KIEMS kit indicated that the voters were 270.
 18. During cross examination, she told the Court that she did not indicate the names of the five people who were involved in the altercation and neither did she record the incident in the polling station diary. She had reported the same to the presiding officer by phone. She confirmed that the results as recorded in the form 34A for Sirey Polling Station were correct and that she signed the declaratory form confirming the same.
 19. PW3, Abdihakim Abdirashid, adopted his witness affidavit dated 8th September 2022 as evidence in chief. He deposed that he arrived at Batalu Primary Poling station at 5.30 am but voting commenced



- at 12.30pm due to challenges with the KIEMS kits. In that afternoon some votes demanded to be let into the polling station without using the KIEMS kit for identification which resulted in an altercation but peace was restored at 11pm when security was called. The polls closed at 2.30 am but the number of voters who voted was higher than those identified by the KIEMS kits. It identified 284 voters but the number of votes cast were 320.
20. During cross-examination, PW3 told the Court that he had not recorded the serial numbers of the ballot papers. Further, that he knew how to use a KIEMS kit but only the returning officer could access it. It was his testimony that he looked at the kit at the end of the counting process. He had used his mind to count and record the people entering to vote and leaving the polling station. In the sense of PW3 the fairness of the vote was compromised
 21. PW4 Adan Abdullahi Omar, was an ODM agent on the date of the elections. He adopted his witness affidavit dated 8th September 2022 as evidence in chief. He deposed that he did not wait for the MNA results at Tuluroba as he had seen a lot of irregularities and decided to head to Bute Arid Zone Secondary School Tallying Center to await the results. He stated that on 11th August 2022 he saw one Mohammed Gabow try to access the backroom of the tallying center and try to force the returning officer to declare results. It was his evidence that the 1st respondent went to the tallying center and told his supporters that instead of losing, Ahmed Abdisalan must die after which they immediately started throwing chairs and petrol bottles. He helped the 2nd respondent escape to safety after the police threw teargas. He confirmed that the 2nd respondent was later evacuated by the RDU.
 22. During cross -examination he told the Court that the KIEMS kit was working but not all the voters passed through it. He raised this issue with the presiding officer and they were chased away but they later came back and returned on the line. He testified that there were people who voted in the morning and returned in the evening to vote and were allowed to vote. He stated that he also alerted the presiding officer about some voters who had been issued excess ballot papers for the position of MCA and they were then confiscated. When questioned about his signature on the form 34A for his polling station he claimed the same was forged and disowned it.
 23. PW5 was Yahya Bulle, who was the Jubilee Chief agent representing Dr. Hassan Adan Mohammed, the Jubilee Gubernatorial candidate. He adopted his witness affidavit dated 8th September 2022 where he had stated that things were going on smoothly at the tallying center on 11th August 2022. Further, that this was the period towards the end of the tallying and only four (4) Polling Stations had not remitted their results in regard to the Member of National Assembly Wajir North Constituency. The stations that remained were Beramu Primary School, Batalu Primary School, Karaduse Centre and Hote Centre Polling stations. It was his testimony that 1st Respondent and his Chief Agent started confronting the 2nd Respondent after sensing defeat in the elections. Soon after the confrontation, one Mohammed Gabow walked out of the tallying centre and addressed supporters outside the tallying centre; immediately after the address stones rained into the tallying centre and windows completely shattered and a strong smell of petrol rendered the air. There were gunshots everywhere and they scampered for safety. He contended that the member of parliament for Wajir North has never been declared.
 24. During cross-examination he told the Court that he could not remember the results of all the candidates who vied for MNA. He stated that he had calculated the difference in votes from the numbers on the screen. He reiterated that there were bullets flying all over and further, that the 2nd respondent was rushed to the backroom when the violence began.
 25. The final and last witness was PW6 Ibrahim Ahmed Abdisalan, who was the Petitioner himself. He tendered his affidavit in support of the petition dated 8th September 2022 as his evidence in chief. In the



affidavit he deposed that on the 9th of August 2022 arrived at Handaraka Primary School, Danaba, Wajir North at around 9.00 a.m. and cast his vote. At around 1.00 pm of the following day; - 10th August 2022, he proceeded to Bute Arid Zone Primary School Tallying Centre to join my Agents in waiting for the final tallying, announcement and declaration of the results. He was calculating the results on his laptop and was ahead by 6,368 as against the runners up, who was then the 1st Respondent at 6,141. He produced a copy of the printed recorded entries as annexure IAA-4.

26. It was his evidence that some Presiding Officers had pre signed Original Forms 35 A that they were dishing out to the agents of the 1st Respondent to fill the blank spaces for candidates scores at the Tallying Centre, he produced as IAA-5, an Original Form 35 A for Korondille Primary School Polling Station 1 of 1 that was picked at the Tallying Centre. He testified that at around 3,00 p.m. the 2nd Respondent was announcing results for Member of National Assembly and only Four (4) Polling Stations were left to go at which point the 1st Respondent and his Chief Agent one Ibrahim Abdi Saney caused a commotion in the at the Bute Arid Zone Primary School Tallying Centre in a well-executed plan and strategy initiated violence at the Bute Arid Zone Primary School Tallying Centre which not only disrupted and ended the tallying process prematurely but also turned the Tallying Centre into a battle ground. He produced as IAA6 photos and video footage capturing the said events.
27. He stated that after the 2nd respondent retreated into one of the rooms, the 1st respondent and his chief agent rallied their supporters and the police officers who were manning the at the Bute Arid Zone Primary School Tallying Centre appeared overwhelmed. Further, Bishar Gabane one of the 1st Respondent's supporters unleashed a heavy rungu on my head sending him to temporal unconsciousness as well as profuse bleeding. He annexed as IAA-7 photos of the extent of the injuries he sustained.
28. He was taken to Bute Nursing home then to the police station where he recorded his complaint vide OB number 06/30/8/2022. He also produced the P3 form and treatment notes for his injuries as IAA-8. At the police station he witnessed the 2nd respondent being airlifted.
29. The Petitioner deposed that he was seized of the facts that in Turuloba Polling Station 1 of 2 the number of votes cast exceeded the number of voters allowed to vote as identification by the KIEMS Kit in the polling station, and attached as IAA-9, a copy of the Form 35A from Tuluroba Polling Station. Further, that as at 19.41 p.m. after closing of polling the number of voters that had been authenticated by the KIEMS Kit were 225 whereas Form 35A indicates that the total number of valid votes cast to be at 266 therefore exceeding verifiability of the KIEMS Kit by 41 votes. He produced as IAA-10 a copy of the screenshot of the KIEMS kit.
30. It was his evidence in chief that he had sampled polling stations where the total valid votes cast exceeds the number of votes garnered by each candidate in the polling station as follows;



Polling Station	Registered Voters	Total valid Votes Cast as indicated in from 35A	Actual No. of votes cast on physical addition	Ghost/Padded Votes detected
Ajawa Primary 2 of 2	394	159	149	10
Sirey Primary School 1 of 1	542	286	270	16
Korondile Boys Secondary 1 of 1	459	266	267	1
Nyata Primary School 1 of 1	93	86	84	2
Total No. of ghost voters	-	-	-	29

31. The Petitioner stated that efforts to reach the 2nd Respondent through the County Returning Officer Mr Mohamed Adan, were futile as he also stated that the 2nd Respondent's phone was switched off and he was not informed of his whereabouts since his disappearance. It was therefore astonishing when he stumbled upon a picture doing rounds on social media of the 2nd Respondent for Wajir North Constituency unceremoniously handing the 1st Respondent what appeared like a certificate in an undisclosed place the background of which seemed like the backroom of a hotel room. He annexed the same as IAA-12. It was his case that the 2nd Respondent was biased, influenced and prejudiced against him for on the 13th August 2022 he publicly lined up the Wajir North Constituency Members of County Assembly elect declared and issued them with the relevant certificates at the Independent Electoral and Boundaries Commission (IEBC) Offices at the District Commissioner's Headquarters' in Wajir. He only got to know who the Member of National Assembly elect for Wajir North Constituency was through the endorsement of the 1st Respondent in the Kenya Gazette Vol. CXXIV - No. 169 dated 23rd August 2022 which he annexed as IAA-14. He urged the court to allow the petition.
32. During cross-examination he told the Court that his agents for the five impugned polling stations did not testify. He stated that he had a chief agent known as Hussein Ali Abdulrahim who received all form 34As on his behalf from the agents but confirmed that he was not called as a witness. He delegated the functions to his agents and sat down with them to obtain information on all the polling stations when they reported to him. With regard to Batalu polling station it was his testimony that there were irregularities with assisted voting. He testified that he was aware of a plan to disrupt the elections two weeks before the voting process began and he had reported the same to the third respondent and the county. It was his evidence that he saw the 1st Respondent address a crowd outside the tallying center before the violence broke out. He also confirmed that the 2nd Respondent was evacuated by the rapid deployment unit once the violence broke out. When he was evacuated from the station he never came back to check the results as the returning officer had also been evacuated.
33. The Petitioner conceded that his agent had left Tuluroba polling station before counting was completed. He further stated that there were no results for Tuluroba polling station that were



submitted to the returning officer. He told the court that Yahya Bulle was not his agent and did not tally any results for him during the election.

34. The Petitioner maintained that there was no declaration for the position of Member of National Assembly for Wajir North despite all the other positions having their winners declared and issued with candidates at Wajir Tallying Center on 13th August 2022. He testified that he saw people making changes to the form 34As and on further questioning, stated that the presiding officer indicated in the pre filled form for Korondille was not the actual presiding officer for that polling station. He testified that on the issue of assisted voting, the evidence was given to him by his agents that he had assigned to the polling stations.

The 2nd & 3rd Respondents' Case

35. The 2nd and 3rd Respondents' came before the 1st Respondent's case. Learned Counsel for the 2nd and 3rd Respondents, Mr. Owuor, appeared alongside Mr. Orina and called three witnesses including the 2nd Respondent himself.
36. The first witness was RW1 Abdinoor Ibrahim Hassan, was the Presiding Officer at Batalu Primary polling station. He admitted his witness affidavit as evidence in chief. In the affidavit he deposed that there was a delay in starting of the voting as the KIEMS kits had a problem but calm was restored and the voting proceeded. He stated that the allegations of one Mr Abdirashid were false and further, that if more people voted as alleged he would not have signed the form 35A as an agent. He stated that there was no evidence to demonstrate that there was a difference between the numbers identified by the KIEMS kit and the total valid votes cast. It was his testimony that if there were any irregularities at Batalu, the same did not have an effect on the outcome of the election.
37. During cross-examination RW1 was referred to the results of Batalu Polling station as recorded in form 35A which was on page 51 of Mr. Omwanza's affidavit. He confirmed that all the agents wilfully signed the form. He confirmed that there were interruptions as per the comments on the form 35A and the situation was managed, after which the counting continued. He refuted claims that there were people with guns forcing the agents to sign, specifically Abdihakim. It was his testimony that all the voters were identified by KIEMS kits and that all ballot papers were accounted for during the counting. He denied having been slapped by a disgruntled voter when learned counsel, Mr. Omwanza, alleged that that he had been slapped three times.
38. Learned Counsel for the 2nd and 3rd respondent, Mr. Orina, re-examined the witness and he explained the process on how many from 35As they were issued with. He stated that they were ordinarily given one original with five carbons, the original would be given back to the returning officer and the other four would be given to candidates. If the candidates were more than four, the rest would take photos of the forms. One carbon paper, preferably the second one, would be placed at the entrance for people to access and the third one would go in the box. He also testified that there were some incidences as voters were scrambling to vote but he called reinforcements and the same was dealt with. He explained the process they used to count the ballot papers and the process of assisting voters, refuting claims that there was any incident where he marked a voter's ballot resulting in agents complaining.
39. The witness testified that he heard the Returning officer read out the result for his polling station on 11th August and there was no protest to his result. After his result was read out he left the tallying centre.
40. Learned Counsel for the 2nd and 3rd Respondent, Mr. Owuor, also re-examined the witness and he testified as to the process of assisted voting, and that there were no protests when he, took over the role of assisting voters. He reiterated his testimony on the process of counting and the returning of election materials to the tallying center.



41. The 2nd and 3rd respondents called their 2nd witness, RW2 Mr Samon Abdullahi Abdirahman, who adopted his witness affidavit where he confirmed that he was the Deputy Presiding Officer for Tuluroba School polling station 1 of 1 within Wajir North Constituency in the general election held on 9th August 2022. He disputed the allegations that there were incidents of insecurity or that there was a voter issued with excess ballot papers. It was his testimony that the OB produced by Mr. Vincent Omambia, was false as it lacked specificity. He contended that if there were any irregularities the same did not affect the outcome of the election. In his testimony, he noted that the agents present signed the form 35A for Tuluroba primary school.
42. Learned Counsel, for the 1st Respondent, Mr. Issa Mansur, cross examined the witness. He stated that he recalled the incident of issuance of excess ballot papers but that the same were ballot papers for the position of MCA. He stated that there was security at the polling station and refuted the claims that there was any threat to the presiding officer. He also denied the allegations that there were voters who were allowed to vote twice during the elections or that there was a person who came in to be allowed to access the polling station as an agent. He reiterated that there was no incident of people with runguns and pangas who stormed the polling station. He confirmed the results of the polling station as entered in the form 35A and that he signed the form alongside PW1 as the returning officers, and the agents also signed in his presence. He stated categorically that he did not remember the PW1 writing the report he submitted and neither did he accompany him to the police station to make the report.
43. Counsel for the Petitioner, Mr. Omwanza, further cross-examined the witness who told the Court that he went to Bute to hand over the voting materials once the exercise was completed. He assisted the presiding officer to deliver the materials and the ballot boxes were sealed. He remembered that when delivering the materials, the presiding officer told him the original form 35A was in his bag when he made an enquiry on the same. he also clarified that they were issued with an original from 35A and carbon copies. He reiterated his earlier explanation on how the forms are distributed upon completion of tallying and stated that agents were allowed to take photos of the forms. He also confirmed that the excess ballot papers that were issued were for the position of member of county assembly and the same were confiscated.
44. RW3 Mr. Mathew Kamau Thiga, the 2nd Respondent herein adopted his witness affidavit dated 19th September 2022 in support of the response to the petition as his evidence in chief. He also confirmed that he filed a supplementary affidavit dated 29th September 2022 and an affidavit for production of result declaration forms on 19th October 2022. Further, he stated that he filed a further affidavit sworn on 7th November 2022. The witness accepted to have the affidavits adopted as witness statements.
45. In his witness affidavit, he deposed that he was the constituency returning officer for Wajir North Constituency for the election that was conducted on 9th August 2022. It was his evidence that the form that was marked as IAA 5 was a copy of an original form 35A that was in his possession and therefore could not have been picked as alleged by the petitioner. Further, that form 35A for Korondille Primary School Polling Station 1 of 1 was duly filled at the polling station before being forwarded to the constituency tallying center. Mr. Thiga went on to state that at the time that the tallying of the results was suspended, five polling stations were remaining. He confirmed that violence broke out but he could not tell who started the same. he narrated how he took refuge in a room at the tallying center amidst gunshots and throwing of stones. He was later evacuated by the border patrol unit and he informed the candidates and their agents that he would complete the tallying process at the Bomas of Kenya.
46. The witness denied any instances of pre-filled form 35As being handed over and clarified the results for Tuluroba polling station, producing a copy of the form 35A for said station as MKT1. He also produced an extract of the polling station diary for the said polling station as evidence that there were



- no issues with Tuluroba polling station. He annexed a copy of form 35A for Batalu Primary School polling station 1 of 1 and testified that Mr. Abdihakim Abdirashid had signed the form as an agent therefore he was satisfied with the results. Further, he refuted the claims that there was unprocedural assisted voting as the forms for the stations were all signed by the agents in agreement.
47. The 2nd Respondent denied switching off his phone or receiving calls from the county returning officer summoning him on 30th August 2022. He stated that the certificate was issued in a boardroom at Bomas of Kenya in public and that the fact that the petitioner shared photos he saw on social media is proof that the same was not done in private. He refuted the claims made by the witnesses who testified on behalf of the petitioner and reiterated that the election was conducted in accordance with the law.
48. During cross-examination by Counsel, Mr. Issa Mansur, the witness testified that PW1 called him concerning an incident of insecurity but he did not give him the details of the occurrence. He denied that he was handed any ballot papers by PW1 in response to a question about the issuance of more than one ballot paper to a voter. On Malkagufu polling station, it was his testimony that he was informed about a security incident and his follow up was to call the security agencies to beef up the security. On the report that there were more voters for the MCA seat than the registered voters, he denied having received any such report from PW1. It was his testimony that such incidents are recorded in the polling station diary yet the letter he was shown in court was written on a normal writing paper. Further, that the report did not refer to anything, about voters for the position of Member of National Assembly. He categorically denied any conversation with PW1 concerning the annulling of results.
49. In response to questions on Sirey polling station he denied having any conversation about gunshots. He stated that he only received calls about security which he beefed up. He denied receiving any calls about election materials being snatched. He also denied being briefed on any pre-planned violence or any complaints by the petitioner on the election date. He reiterated that there was no way that a presiding officer would have come into contact with original form 35As and that the allegation on prefilled forms was untrue.
50. Mr. Thiga clarified that as at 11th August he had received all the results from the 101 polling stations and violence erupted at 3pm, interrupting the process and resulting in his evacuation by the RDU. He stated that he issued the certificates for the position of MCA at Wajir North Constituency Tallying Center as there were no issues pertaining to those positions. He maintained that he announced the results in Bomas of Kenya in one of the boardrooms.
51. The witness clarified on the statutory forms and confirmed that form 35A, once signed by the presiding officer cannot have its result changed. Further, that he is allowed to verify and correct any typographical errors on form 35B.
52. Mr. Omwanza, Counsel for the Petitioner, further cross examined the witness. He told Court that this was his first election as a returning officer. He confirmed that the regulations require the tallying, announcement and declaration of results is to be done at a gazetted center at the constituency level. He stated that they had tallied the results and all that remained was announcement by the time they left the tallying center. It was his testimony that he communicated the results to a specific agent, being the agent of the eventual winner and not to the other candidates or their agents.
53. In reference to form 35B that was attached to his affidavit dated 29th September 2022 he confirmed the results therein and that it was prepared on 13th August 2022. He also confirmed that he declared the winner of the election on 20th August 2022. Further, that the date on the form 35C was 16th August 2022. He reiterated that he declared the winner publicly on 20th August at Bomas of Kenya as there



was tight security on the 16th of August and the 1st respondent could not access the same. He stated that in hindsight, he should have given the candidate form 35B to sign.

54. The witness was questioned on why he prepared two form 35Bs that resulted in a difference of 200 votes in the petitioner's results. He testified that he made the amendment as there was an issue with the results for two polling stations and he was allowed by law to make such amendments. He further stated that he was able to establish that the number of voters does not exceed the registered voters as he had data on the numbers as a returning officer.
55. He clarified that the presiding officer for Tuluroba did not deliver the original and he explained himself. Learned counsel took him through the sample polling stations and highlighted that there was a mathematical error in terms of the total votes cast which the witness stated that he corrected while filling the form 35B.
56. When presented with the alleged pre filled form 35A that was produced as IAA-5, the witness stated that he disowned the form as it was not amongst the documents he has in custody as the official result for that polling station. With regard to the screenshot of the KIEMS kit that was alleged to show the voters who voted at Tuluroba, he testified that Tuluroba had two streams and as such, it was not possible to tell which one the form referred to. Each station has a 15-digit code which did not appear on the evidence.
57. During re-examination by Counsel for the 2nd and 3rd Respondents, Mr. Orina, the witness clarified on the details of his answers in cross examination. He testified that he delayed in announcing the results as he had to consult with the legal department on how to issue notice and get information to the candidates, on declaration and on issuance of the certificate. He also reiterated that the correction in form 35B as a result of erroneous entry with regard to Malkagufu polling station was the reason there were two form 35Bs.
58. Learned Counsel, Mr. Owuor, intimated to the court that their last witness who was Mr Ismail Maalim was an invigilator and as such was unable to attend the hearing.

The 1st Respondent's Case

59. The 1st Respondent's witness, RW4 Mr. Ahmed Adan Hefow, adopted his witness affidavit dated 19th September 2022 as evidence in chief. He was the United Democratic Alliance Chief Agent for the 1st Respondent in the election for Member of National Assembly in the Wajir North Constituency elections. He testified that on 9th August 2022, he went to Tuluroba polling station where he was able to vote after being identified by the KIEMS kit. He visited various polling stations and spoke to various agents and the process was running smoothly. When he visited Tuluroba polling station he was able to obtain a copy of form 35A which he produced as evidence. He also produced form 35As for Batalu Primary School Polling Station and stated that the petitioner's agent had signed the same confirming the validity of the results.
60. He stated that he was aware that there were assisted voters and that they were assisted according to the required procedure and that there was no incidence of vote inflation. He stated that there was a disagreement with regards to the results announced for Sala Centre polling station and the petitioner demanded that the erroneous results be affirmed. This led to violence and disruption and there 5 polling stations whose results were yet to be announced namely Malkagufu Dispensary polling station 2 of 2, Cherate Mobile 1 of 1, Tuluroba Polling station 1 of 2, Buna Sub County hospital 1 of 1 and Ajawa primary school 2 of 2. He stated that the RO was evacuated from the tallying center and he notified them that he would announce the results at Bomas.



61. During cross-examination he told the Court that the party had 101 agents in all the polling stations and they sent him the copies of form 34A for all the stations. He reiterated that the assisted voters were assisted to vote according to the required procedure and in full glare of agents. He testified that he received a form 35A for Korondille Primary School polling station from his agent. When asked about the annexure produced as IAA5 being an alleged pre marked form 35A for Korondille primary school polling station, he pointed out that the name of the presiding officer was different from that of the actual presiding officer for the polling station. The presiding officer was Ismael Abdikadir Maalim yet the form indicated that it was Hussein Abdikadir Mohammed. Further, that the form was for Garse Sale village which is in Gurar ward and Korondille is in Korondille ward.
62. It was his testimony that they were conducting a parallel tally and when the returning officer erroneously announced the results for the KANU candidate as those for the petitioner he arose to correct him. The petitioner also arose to insist that the result remain as announced. This resulted in a scuffle and violence broke out.
63. Upon being cross-examined by Mr. Omwanza, RW4 told the Court that the returning officer had stated that he would announce the results at Bomas as he was being evacuated in the midst of the violence and gunfire. Further, that the returning officer called him on 16th August to tell him to call the 1st respondent as he was unreachable, and tell him he had finished everything. He clarified that he had been called to be told that the results were ready, not that the tallying had been completed.
64. The 1st Respondent, Hon. Saney Ibrahim Abdi, testified as RW5. He adopted his affidavit sworn in support of the response to the petition on 19th September 2022. In said affidavit he stated that on 9th August 2022 he was able to vote at Handaraka primary school after being identified by the KIEMS kit. That he was duly elected the member of national assembly for Wajir North Constituency having garnered 6,502 votes. The 2nd respondent announced the results and issued him with a certificate at the national tallying center. He disputed the authenticity of the alleged pre filled form 35A produced by the petitioner and stated that he did not engineer a plot to institute violence at Bute rid Zone Primary School tallying center.
65. The witness stated that the violence began when the returning officer erroneously attributed the votes for the KANU candidate for Sale Centre to the petitioner which resulted in a dispute between agents and candidates. As a result of the violence the 2nd respondent was evacuated.
66. He stated that there were no disparities in the number if ballots cast as measured against the voters identified in the KIEMS kits. He urged that the presiding officer for Tuluroba signed the form 35A and did not make any observations regarding the alleged issuance of excess ballot papers. It was his evidence that the 2nd respondent informed the candidates that the announcement would be done at the national tallying center.
67. During cross-examination by Mr. Owuor, RW5 confirmed that he had voted after being identified by the KIEMS kit and he reiterated that the violence arose when the returning officer mistakenly read the wrong results for Sale center. As a result of the violence the returning officer was evacuated but he notified them that the announcement would take place at Sale Center.
68. Counsel for the Petitioner, Mr. Omwanza, further cross examined the witness. In his testimony he stated that his results remained constant throughout the issues that arose. He confirmed that he was the one in the video that was played, giving a press conference, but he stated that it was given on 11th August and not on 14th August 2022. It was over the delay of ballot boxes which was later resolved. The witness denied addressing supporters outside the tallying center before the violence broke out. While acknowledging that there were errors, he stated that there were no glaring errors to warrant annulling



of the entire process. It was his testimony that he was called to go to Bomas on 16th August by the 2nd respondent but due to the heavy security presence he was only able to access the returning officer on 20th August 2022. He met the returning officer who publicly declared him the winner and gave him his election certificate. They then took a picture in a boardroom at Bomas of Kenya. He maintained that there were 5 stations whose results had not been announced at the time the violence broke out.

69. Upon being re-examined, he denied having caused the violence and stated that it was as a result of the misreading of results of Sala Center by the 2nd Respondent. He maintained that the election was free and fair and was conducted in accordance with the law.

Scrutiny Report

70. At the close of the respondents' case the court rendered itself on the application for scrutiny that was made by the vide an order given on 10th January 2023. The scrutiny was ordered to be conducted in the following terms;

- i. There shall be a scrutiny of the Form 35As, Form 35B and Form 35C used in the Wajir North Member of National Assembly held on 9th August 2022 limited to the following polling stations;
 - a. Tuluroba Polling Station 1 of 2
 - b. Malkagufu Dispensary Polling station 2 of 2
 - c. Cherate Mobile 1 of 1
 - d. Buna Sub county Hospital 1 of 1
 - e. Ajawa Primary School 2 of 2
- ii. The Deputy Registrar shall preside over the opening of the ballot boxes used in the Wajir North Member of National Assembly Election held on 9th August 2022.
- iii. The Deputy Registrar shall carry out the scrutiny as follows:
 - a. Confirm is the entries in the original Form 35As for the polling stations in the select polling stations are similar to the entries in the original Form 35B supplied by the 2nd and 3rd Respondents.
 - b. Tally the number of votes garnered by each candidate in Form 35B including the tallies from the select polling stations.

71. Pursuant to the orders of the court, the scrutiny exercise was led by the Hon. Tessy Marienga, Deputy Registrar with the support of the judicial staff in the presence of the Advocates, the Parties themselves and their agents. The findings, in summary, were as follows;

Tuluroba Polling Station 1 of 2 –

- a. The original Form 35A for Tuluroba Polling Station 1 of 2 was inside the ballot box. IEBC produced the original Form 35B for comparison.
- b. The entries in the original Form 35A is similar to those in Form 35B.
- c. The entries on the number of rejected ballots in Form 35A differed from the number of rejected ballots in Form 35B.



- d. Form 35A indicated that there was one (1) rejected ballot while Form 35B indicated zero (0).

Malkagufu Dispensary Polling Station 2 of 2

- a. The Ballot Box was covered with a pink lid for women rep and not the green lid which indicates member for national assembly
- b. The carbon copy of Form 35A for Malkagufu Dispensary Polling Station 2 of 2 was NOT inside the ballot box.
- c. The original Form 35A was supplied by the IEBC during the scrutiny exercise
- d. IEBC produced the original Form 35B for comparison with the original Form 35A supplied by the IEBC
- e. The entries in the original Form 35A produced by IEBC were similar to those in Form 35B.
- f. The entry for the total number of valid votes cast in Form 35A was not indicated after the Number of Votes cast in favour of each candidate but was indicated in the same Form 35A under the polling station counts as 426.

Cherate mobile polling Station 1 of 1

- a. The carbon copy of Form 35A for Cherate Mobile Polling Station 1of 1 was not inside the ballot box.
- b. The original Form 35A was supplied by the IEBC during the scrutiny exercise
- c. IEBC produced the original Form 35B for comparison with the original Form 35A supplied by the IEBC
- d. The entries in the original Form 35A is similar to those in Form 35B.
- e. The entries for polling station counts in Form 35A were blank.

Buna Sub County Hospital Polling Station 1 of 1

- a. The original Form 35A for Buna Sub- county Hospital Polling Station 1of 1 was not inside the ballot box.
- b. The Carbon copy of the Form 35A was found inside the Ballot Box.
- c. IEBC supplied the original Form 35A during the scrutiny exercise.
- d. IEBC produced the original Form 35B for comparison with the carbon copy of Form 35A and the original copy of the Form 35A supplied by the IEBC during the scrutiny exercise.
- e. The serial numbers of the carbon copy Form 35A and the original Form 35A are similar.
- f. The entries in the carbon copy Form 35A and the original Form 35A are similar to those in Form 35B SAVE for the entry on the total number of votes cast in the original Form 35A states 083 and in the polling station counts its 081.
- g. The total number of valid votes cast in carbon copy of the Form 35A is blank



Ajawa Primary School Polling Station;

- a. A carbon copy of the original Form 35A for Ajawa Primary School Polling Station 2 of 2 was inside the ballot box.
- b. The original Form 35A was not supplied by the IEBC during the scrutiny exercise.
- c. A photocopy of the Form 35A was instead supplied by the IEBC during the scrutiny exercise.
- d. IEBC produced the original Form 35B for comparison with the carbon copy Form 35A supplied by the IEBC
- e. The entries in the carbon copy Form 35A is similar to those in Form 35B SAVE for the entry of the total number of valid votes cast in Form 35A indicates 159 while Form 35B indicates 149.

72. The results of the tally conducted pursuant to the orders were tabulated as follows;



	Serial Number of The Result Form 35B	Page 1 - GE2022008033FORM35B18 Page 2 - GE2022008033FORM35B19	
		Total Votes Garnered by each candidate as tally during the scrutiny exercise	Total votes Garnered by each candidate as per the original form 35B
	Name of Candidate	No.	No.
-	Gulied Daud Ibrahim	1186	1186
-	Ibrahim Ahmed Abdisalan	6237	6237
-	Madey Abdinasir Hussein	1188	1188
-	Mohammed Amin Hassan	585	585
-	Osman Abdikadir Noor	1686	1686
-	Osman Abdullahi Hassan	481	481
-	Saney Ibrahim Abdi	6502	6502
-	Shabelo Abdikadir Mohamed	4743	4743

73. The report was concluded by the comments that it should be noted that the Form 35B (in its original form) used during the tally exercise of the total votes garnered by each candidate was supplied by the IEBC. Further, that the scrutiny process proceeded without any negative incidences. All the parties through their Advocates and agents cooperated with the Deputy Registrar and her team.



Parties' Comments on the Scrutiny Report

74. The parties made brief comments on the scrutiny report in their submissions. Learned Counsel for the Petitioner, Mr. Omwanza submitted that considering that this election was too close to call; the difference between the Petitioner and the 1st Respondent having been just 65 votes; the Honourable Court is called to apply both qualitative and quantitative tests to reach a just and fair determination. He cited the case of Winnie Babihuga -Vs- Masiko Winnie Komuhangi And Others Hct-00-Cv-Ep-0004-2001 and Wabuge vs Limo & Anor [2008] 1 KLR (EP) in support of these submissions. Further, that the compliance with the provisions of the Constitution and the relevant statutes are core in an election and the Petitioner has demonstrated that there was noncompliance with the law that affected the result of the Wajir North Constituency Parliamentary election.
75. Learned Counsel, Mr. Issa Mansur, on his part, contended that the Scrutiny Exercise report, did not reveal any discrepancies with the total number of valid votes recorded in the Form 35 A's and the Form 35 B for the above named five (5) polling stations. It in fact proved that the 2nd Respondent did properly collate, verify and tally the results from all the 101 Polling Stations in Wajir North Constituency before announcing and declaring the results for Member of National Assembly for Wajir North Constituency.
76. Learned Counsel for the 2nd and 3rd respondents, Mr. Owuor, submitted that the scrutiny report buttresses the 2nd and 3rd Respondents' case that the election for Member of the National Assembly for Wajir North was free and fair, and the outcome reflected the sovereign will of the people. On specific issues noted during the scrutiny, he stated that in regard to the pink lid used for the ballot box for Malkagufu Dispensary Polling Station, it is normal that in case of damage the election officials utilize available materials and it does not affect validity of the polling exercise. The box was sealed as per the procedures and the election materials were intact. The result in Statutory Declaration Form 35A which the court directed scrutiny into was not contested and was as per the transposition onto Statutory Declaration Form 35B. He urged that this would amount to a trivial irregularity that has no bearing on the election in this Polling Station whose results have not been contested by the Petitioner.
77. He submitted that the lack of carbon copies in some ballot boxes can be explained by Presiding Officers at times being under pressure to hand remaining copies to election agents. Form 35As are filed in a booklet of five (5) original carbonated copies. The top one is required to be sealed and handed over to the Returning Officer. The remaining copies are dealt with as follows: a copy is stuck at the door or the polling station, a copy placed in the ballot box and copies handed over to the candidates' agents present. He stated that it is not unusual that the Presiding Officers may be under pressure to hand copies to the agents at the Polling Station and only left with the original copy which is handed over to the Returning Officer and a carbon copy to stick at the door of the Polling Station. It is therefore not unforeseeable that a carbon copy may in certain cases not be in the ballot box. He stated that the scrutiny on the originals as ordered by the Court confirmed accuracy of the results and declarations at the polling stations.
78. Counsel submitted that in regard to Ajawa Primary School Polling Station 2 of 2, the original Form 35A was not in its possession. The original carbon copy of the Form was found inside the Box and the entries were consistent with the results in the certified copy of the form produced by the 2nd Respondent. The entries were also consistent and are accurately captured in Form 35B for all the candidates. The Form 35A for Ajawa Primary School is duly signed by the Presiding Officer and three Agents including the Agent for the Petitioner.



Analysis & Determination

79. This petition is about Democracy and the Individual Will. Professor Hieronim Kubiak Adam Michnik, Szare jest piekne/ The Gray is Beautiful/Gazeta Wyboreza 4-5 January 1997. “On reflection observed as follows: “Democracy is neither black or white nor red. It is the emporium of passions and interests the blend of outrage with virtue sacredness with villainy. Its value and taste is especially recognisable when it’s already losing the game under the pressure of fundamentalist ideas. This may be the most important message of the 21st Century” (underlined emphasis mine). It is sometimes difficult to understand the state of democracy in Kenya, though unique with universal principles but is far from perfect. However, when it comes to the sovereignty of the people to elect their own representatives it must encompass both procedural and substantive rules and regulations. That functional democracy is at heart of this petition.
80. The Kenyan Citizen in accordance with this prism expect the courts to be more exacting in their analysis of the features of the electoral system at various levels which diminish the importance of the vote or dilute the accountability of the IEBC or representatives. The net result is that the courts have a valuable opportunity to deliberate over the basis of the political rights and full democratization of our country. Democracy is inseparable from fundamental Human Rights and Freedoms prominently captured in chapter 4 – Bill of Rights of the 2010 Constitution. The right to participate in government includes the right to take part in Public and Judicial Service, to stand for elective office from the highest tier of the Presidency down to the Member of the County Assembly, the right of citizens to elect their representatives by universal secret ballot under arrangements that meet the constitutional threshold and are free and fair according to International standards.
81. In the succeeding analysis I hope I will acquit myself relying on the works by other superior courts justices, the constitution and Electoral Laws which provides a vantage point for a consideration of the questions raised by the petitioner.
82. Specific Provisions of the Constitution and Statute Law on Electoral Justice:
- It is apposite to outline the general principles that guide the determination of an election petition before delving into the issues. The laws that exist in the backdrop of an Election entitle the electorate to a properly conducted election. The main purpose of all the laws is to give life to the constitutional rights of an electorate to free and fair elections, all based on universal suffrage as enshrined under article 38 of the Constitution.
83. Article 38 introduces the political rights of all citizens when deciding who to represent their interests. The Article provides:
- (3)) Every adult citizen has the right, without unreasonable restrictions-
- (a) to be registered as a voter
- (b) to vote by secret ballot in any election or referendum ; or
- (c) to be a candidate for public office or office within a political party of which the citizen is a member and, if elected, to hold office.....
84. Article 81 of the Constitution provides the general principles which guide the election system with a view to ensuring that the rights in Article 38 area achieved. It states;
81. General principles for the electoral system.



The electoral system shall comply with the following principles;.....

- (a) freedom of citizens to under Article 38:
- (e) free and fair elections which are-
 - (i) by secret ballot
 - (ii) free from violence, intimidation, improper influence of corruption
 - (iii) conducted by an independent body;
 - (iv) transparent; and
 - (v) administered in an impartial, neutral, efficient, accurate and accountable manner.

82. The provisions of article 86 of *the constitution* exist to ensure the votes' sanctity is protected as it makes demands of the 3rd respondent to impose standards of a certain level at an each and every election. It states;

At every election, the Independent Electoral and Boundaries Commission shall ensure that-

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

The Import of Case Law

83. The aforementioned provisions were fortified as the basis for the principles of an electoral system by the apex court in the celebrated case of *Gatirau Peter Munya –vs- Dickson Mwenda Kithinji And Others*, [2014] eKLR where the Supreme Court held:

‘the *Elections Act* and the Regulations thereunder are normative derivatives of the principles embodied in Articles 81 and 86 of *the Constitution* and that in interfering them, a court of law cannot disengage from *the Constitution*. That, Article 81 and 86 establish the constitutional threshold against which the conduct of elections is to be measured to determine whether it meets established standards of democratic franchise.’

84. Parliament was tasked with the duty of enacting legislation governing elections by Article 82 of *the Constitution* and consequently, they formulated, as far as this petition is concerned, the *Elections Act*, 2011, the Elections (General) Regulations, 2012, the *Election Offences Act*, 2016, the *Independent Electoral and Boundaries Commission Act*, 2011 and the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

85. The *elections act* specifies when an election court can nullify the results of an election. It provides that;

83. Non – compliance with the law



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

86. This is an important principle as once there is establishment that there has been any non-compliance with the law, it is imperative that the extent of the non-compliance on the overall outcome of the result be established before making a declaration on the same. The Supreme Court gave its guidance on this issue in *Gatirau Peter Munya –vs- Dickson Mwenda Kithinji And Others* (supra) case, where it held:

‘If it should be shown that an election was conducted substantially in accordance with the principles of *the Constitution* and the *Elections Act*, then such election is not to be invalidated only on ground of irregularities.’

87. In an Election Petition, the burden is on the Petitioner to prove, not only non-compliance with the electoral law, but also that the non-compliance affected the results of the election. In *Raila Odinga – Vs- IEBC & 3 Others*, Election Petition No.5 of 2013, the Supreme Court held that: -

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

88. In the case of *Moses Masika Wetang’ula v Musikari Nazi Kombo & 2 others* [2014] eKLR the court held that;

“It is an accepted fact that no human activity can be perfect. The conduct of an election is therefore no exception. That notwithstanding, however, for an election to be valid, substantial compliance with the law governing that election is mandatory. For instance, no election can be valid if it is not based on the principle of universal suffrage; if it is not by secret ballot; if it is not transparent and free from violence, intimidation, improper influence or corruption; and if it is not conducted by an independent body and administered in an impartial, neutral, efficient, accurate and accountable manner. No election can be valid if, whatever method of voting is employed, it is not “simple, accurate, verifiable, secure, accountable and transparent”; as well as if “appropriate structures and mechanisms to eliminate electoral malpractice are [not] put in place”; and the counting and collation of votes and announcement of the results are not open and accurate.

89. Apart from establishing the general principles guiding elections and election disputes, the burden and standard of proof must be set down at the onset as in a court of law, evidence is key in corroborating any allegations. The requisite burden and standard of proof required in election disputes was set out in the *Raila Odinga –Vs- IEBC & 3 Others*, Election Petition No.5 of 2013, (supra) where it was held that:

“.....a Petitioner is under the obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden. The threshold of proof should be in principle be above the balance of probability though not as high as beyond reasonable



doubt save that this would not affect the normal standards where criminal charges linked to an election are in question.”

90. In the sense of evidential burden the burden of proof as alluded to by the Supreme Court refers to the obligation by the petitioner to lead evidence to demonstrate that in the strict legal parlance there was non-compliance with *the constitution* and *Elections Act* to declare the impugned elections to be free and fair. The notion on the burden and standard of proof is one of the most elusive terms in the Law of Evidence for the fact finder in establishing that there is sufficient evidence to raise an issue as to the existence or non-existence of fact in issue to give judgement as to any legal right or liability. (See 107)(1) of the *Evidence Act*.) The long standing maxim is that who alleges must prove. The obligation therefore in this petition rests with the petitioner to convince the court as to the truthfulness of his side of the story as it evolved on the 9th of August, 2022.
91. This is the fulcrum of the statement by the learned author Dennis I.H Dennis (2002). The Law of Evidence 2nd Ed, (Reprinted, 2004) thus that “ When a judge is deciding whether and evidential burden has been discharged, he looks only at the evidence favouring the party who bears the evidential burden. The question for decision is whether the favourable evidence is sufficient by itself to raise an issue for the court to consider, the fact that there may be substantial other evidence contradiction the favourable evidence is immaterial at this stage. When a fact- finder (Judge, jury or bench of magistrates) is deciding whether a legal burden has been discharged, the fact-finder looks at all the evidence adduced in the case. Thus the fact-finder will take into account the evidence which tends to discharge the evidential burden plus any other evidence which tends to confirm or rebut it. The discharge of an evidential burden does not involve a decision that any fact has been proved. All it signifies is that a question has been validly raised about the possible existence of a material fact. The decision is only that enough evidence has been adduced to justify a possible finding in favour of the party bearing the burden. The discharge of the legal burden occur at a later stage in trial, when the fact-finder is required to decide on the existence or no- existence of facts whose possible existence of facts whose possible existence is in issue (Emphasis added)”
92. The balancing of these principles and the consequent line drawn by the Supreme Court in Odinga and Another v Independent Electoral and Boundaries Commission and Others, (2017) (Supra) at page 148. The following observation was made on the standard of proof in Election Disputes: “ The purpose of election laws is to obtain a correct expression of the will of the voters. Where the allegation of commission of acts requiring proof of a criminal intent, such as fraud, corruption, violence, intimidation and bribery, the standard of proof remains that of a balance of probabilities. In allegations that relate to commission of acts that require proof of criminal intent, the criminal standard of proof beyond reasonable doubt apply. There is no basis for departing from settled principles of standard of proof to hold a petitioner to a higher standard of proof in electoral petition cases simply by reasons of their sui generis nature. In the view of the Court, there is no justification for an “Intermediate standard of proof” to be applied in election petition “
93. The foregoing chronicle leads me to the inference of the essence of standard of proof on the aspect of Election Petitions as conceived by the Malawi in Supreme Court in Gondwe and Another vs Gatni Nyahara 2005 MLR 121 (SCA) at P. 131 “ The law in this country with regard to disputed elections is simple. It goes like this, An election will be invalidated if the irregularity, mistake or error complained of did affect the result of the election”
94. These consequences stem from what I respectively consider to be our interpretation of *the constitution* and the law on Election Disputes. These safeguards are meant to ensure that Election Petition Court



do not overlook certain aspects relevant in Interpretation of the law when drawing inferences towards the decision making to nullify or sustain the filed petition

Issues For Determination

95. Having appreciated the petition, the responses thereto, the attendant pleadings, the burden and standard of proof thereto and submissions, the following issues stood out for determination;
1. Whether there was pre-planned violence/chaos at Bute Arid Zone Primary School Polling Station
 2. What was the impact of the violence at Bute Arid Zone Tallying Centre?
 3. Whether there were pre-filled form 35As issued by the presiding officers to the 1st Respondent's agents.
 4. Whether there was Issuance of more than one ballot paper to voters.
 5. Whether there was irregular, unprocedural and unlawful assisted voting.
 6. Whether there were inflated totals of valid votes on original form 35As.
 7. Whether the election was non-compliance with the law and if so, whether such non-compliance affected the results.

Whether there was pre-planned violence/chaos at Bute Arid Zone Primary School Polling Station

96. Lead Counsel for the Petitioner, Mr. Omwanza, submitted that it is common cause between all the parties that chaos and violence descended on the Constituency Tallying Centre on 11th August 2022 causing the tallying process to be halted and ultimately, the RO to be airlifted to Wajir Town. That there were threats of actual arson and the smell of petrol was prevalent at the tallying Centre. Further, that the petitioner and his witness confirmed that the 1st Respondent and Hon. Gabow addressed his supporters who had been ferried from various parts of the constituency to cause violence. They also testified that there were petrol bombs at the Tallying Centre, yet the petrol station was 250 kms away from the Tallying Centre. This fact, in itself, shows that the violence was not spontaneous but premeditated or pre-planned, with civilians being transported to the Tallying Centre. Counsel urged that the petitioner testified how he was targeted and assaulted, which evidence was uncontroverted.
97. He urged that the violence affected the tallying process as it ground to a halt and the RO was airlifted to Wajir town. That the returning officer agreed that the tallying process was interrupted and he went to Nairobi where he completed the tallying on his own. It appears to me that the Tallying Centre has already indicated by the Returning Officer (RO) was turned into a battleground ground of some sort.
96. Learned Counsel for the 2nd and 3rd Respondents, Mr. Owuor submitted that no evidence has been tendered to show any premeditation, plan, conspiracy to violence by one camp or with the involvement of the 2nd and 3rd Respondents. Such conspiracy, plan and execution of violence to deliberately interfere with the process of tallying would be criminal conduct and would inevitably require proof beyond reasonable doubt. He relied on the case of Independent Electoral and Boundaries Commission &



another v Pauline Akai Lokuruka and another [2018] eKLR para 90, where the Court observed as follows;

“The conclusions were neither perverse nor unreasonable, as proof of election malpractices of a criminal nature required a higher standard of proof that could not be attained through hearsay evidence, generalized allegations or evidence lacking probative value.”

97. He also cited the case of Alfred Nganga Mutua & 20 others v Wavinya Ndeti & Another, Supreme Court Petitions 11 and 14 of 2018, where the Court stated;

“It is now settled law in this Country, (see Raila 2013 and many authorities following it as well as section 107(1) of the *Evidence Act*), that the burden of Proof lies upon the party alleging a fact to prove it to the required standard. It is also settled law, (see Raila 2017) that the standard of proof of any election offence or quasi-criminal conduct is that of beyond reasonable doubt.”

98. This issue in my considered view is twofold; Whether there was violence and whether it was pre-planned. The evidence presented by the petitioner to support this evidence was in the form of a short video clip that was played in court. From the contents of the video there was a lot of noise in the tallying center and there appeared to be some unrest but nothing close to the dramatic picture painted by the words of the petitioner and his witnesses. However, from the testimonies a sequence of events emerges that reveals that there was some disturbance that disrupted the activities at the tallying center. It was confirmed that the situation required the evacuation of the 2nd Respondent to the constituency tallying center, a decision which could not have been made if there was no emergency that required such action. In the premises, it is not in dispute that there was violence at Bute Arid Zone Primary School tallying Centre.

99. This therefore begs the question; Was this pre-planned? The Petitioner alleged that there was a conspiracy to rig the election. That he knew of the plan two weeks before the election was conducted but when tasked to produce evidence that he made a reports of these plans to the security agencies he was at pains to do so. From the evidence of the witnesses, specifically the 1st Respondents' chief agent, it was alleged that the cause of the disturbance was when the 2nd Respondent mistakenly read the results for Sala Center for the candidate for KANU, one Shabelo as the results for those of the petitioner. This then resulted in a scuffle as there were protests over whether the same should be changed or maintained. This is the position advanced by the 1st Respondent and corroborated by his witness. The Court finds that there was no cogent and credible evidence tendered to prove that the violence was pre-planned or premeditated that meets the burden of proof for culpability in Criminal Offences. I reiterate that the burden of proof lies on the party alleging it to prove it to the required standard which, in election petitions is higher than a balance of probabilities but slightly below that of beyond reasonable doubt. This was succinctly captured by Lenaola J as the then was Bernard Shinali Masaka –Vs- Bonny Khalwale & 2 Others [2011] eKLR where he held that:

“Further, I agree with the preposition grounded on the decision in Mbowe –Vs- Eliufoo [1967] EA 240 that any allegations made in an election petition have to be proved to the “satisfaction of the court”. Like Rawal J in Onalo, I am certain that the standard of proof, save in matters where electoral offences are alleged, cannot be generally beyond reasonable doubt, but because of the quasi-criminal nature of some election petitions, it almost certainly on a high degree than merely on a balance of probabilities, the latter being the standard in civil cases.”



100. In the case at bar as argued by the petitioner it was Incumbent upon him to show that certain individuals contemplated for a length of time or days to undertake to unleash violence and then subsequently did so and finally impacted the fairness of the vote. The premeditated and deliberate conduct allegations as against the evidential burden remained in the realm of unproven facts to classify the vote in Wajir North as Null and Void. Close analysis of the witness testimonies on this issue revealed some sporadic act of public disturbance, incidence of violence but the evidence never went far to impeach the results of the identifiable Polling Stations. For present purposes no probative evidence that a voter or voters were turned away due to the mischief of some pre-planned unlawful Acts by the 1st Respondent. It is considered that the investigations into this incidence shall have been conducted from the outset by the National Police Service under initiation by the IEBC representatives at the scene. Accordingly Mr. Omambia's evidence and Madina Ibrahim on this point was not responsive.

What was the impact of the violence at Bute Arid Zone Tallying Centre?

101. This is also a cross-cutting theme which embodied the context of the petitioner's case Whereas the violence was not pre-planned, we cannot escape the fact that it happened. The question arising therefrom is; what was the impact of the violence on the outcome of the election? It is undisputed that the returning officer was evacuated from the tallying center and airlifted to Wajir north Constituency tallying Centre. What is disputed is whether he had finished tallying the results for the remaining five polling stations, namely; Malkagufu Dispensary polling station 2 of 2, Cherate Mobile 1 of 1, Tuluroba Polling station 1 of 2, Buna Sub County hospital 1 of 1 and Ajawa primary school 2 of 2. The 2nd Respondent deposed that he had tallied the results for the five polling stations and what was remaining was the announcement of the same. The failure to announce the five polling stations was the basis of the application for scrutiny by the petitioners, which succeeded by virtue of the orders of 10th January 2023. The Scrutiny report revealed that the total votes that were announced in the form 35B by the 2nd and 3rd respondents were of no variance to those garnered during the tabulation on scrutiny. The parties were present when the form 35As from all the polling stations were produced and the results were tabulated to confirm whether there were any issues as a result of the five polling stations not being announced at the tallying center. It follows that, while the violence resulted in questionable decisions by the returning officer regarding the handling of the tail end of the process, there was no substantial impact of the violence on the outcome of the result.

Whether there were pre-filled form 35As issued by the presiding officers to the 1st Respondent's agents

102. Learned Counsel for the Petitioner, Mr. Omwanza, submitted that elections materials were not safeguarded and that this was demonstrated by tendering into evidence an original Form 35A for Korondile Polling Station 1 of 1 which he picked at the tallying Centre Grounds- Bute Arid Zone, during the chaos that erupted. He further argued that the Respondents were at pains to explain the origin of the alleged form. He stated that there was no attempt to interrogate the security features by the Respondents and that they did not call the PO to the witness box to give testimony on the whereabouts of the Form 35A that he used to declare the final results at Korondile Polling Station. He urged that prima facie evidence was laid by the Petitioner who produced an Original pre-filled Form 35A for Korondile Primary School 1 of 1 which bore all the security features similar to all the other Forms 35A tendered in Court by the 2nd and 3rd Respondents, thus shifting the evidential burden of proof to the 2nd and 3rd Respondents. In support of his submissions he relied on the Court of Appeal



case of Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 3 others [2018] eKLR, where it was held that the evidential burden had shifted and expressed itself as follows:

“However, the Petitioners having discharged their legal burden in proving that the results documents in their possession and those in the possession of the Respondents originated from the first Respondent [I.E.B.C] contrary to the suggestion that their (Petitioners') documents came from elsewhere or through criminal conduct, the evidential burden regarding the forms and the results contained therein lay with the first and second Respondents but, it was never discharged.”

103. He also cited the case of *Breland v. Mallet*, 527 So. 2d 629 (1988) where the Court sitting at Mississippi opined that;

“The election process must be kept untainted and unsoiled. It must be like Caesar’s wife, “beyond suspicion.” We are of the opinion that § 23-15-263 incorporates the prohibitions of § 23-15-217, and that both sections were enacted to maintain and preserve the integrity of elections and ballot boxes.”

104. It was his submission that the Petitioner succeeded in demonstrating that the election material (Form 35A) was not safeguarded- contrary to *the Constitution* and the *Elections Act/* Rules.

105. Learned Counsel, Mr. Issa Mansur, in rebuttal ably submitted that the said allegation was controverted by the 2nd and 3rd Respondent’s witness Mr. Matthew Thiga, who stated that the purported Form 35A produced by the Petitioner was not a genuine IEBC form as it lacked essential security features. Further, the form referred to two different polling stations and did not contain any results relating to any of the candidates. He confirmed that had produced in his affidavit sworn on 18th October 2022, the genuine Result Declaration Form 35 A for Korondille Primary School Polling Station 1 of I and it was impossible for anyone to be issued with a Form 35A at the Constituency Tallying Centre. He maintained that the allegation lacked merit and was not backed by any cogent and credible evidence.

106. The 2nd and 3rd Respondents Counsel, Mr. Owuor, in rebuttal also stated that by order of this Court, the 2nd Respondent produced by his affidavit dated 18th October 2022, certified copies of all Election Declaration Forms 35As which were used for the purposes of declaration of the results in the one hundred and one (101) Polling Station and the Collation, Tallying and Declaration Form 35B. He urged that no result from the Polling Stations contained in any of the Forms has been contested or any Form 35A produced in evidence to show that there were indeed foreign results which were not declared at the Polling Stations. Counsel invited the court to give effect to the finality of the Polling Station results as held in the case of *Maina Kiai vs IEBC* and *Raila Odinga vs IEBC* (2017) eKLR.

107. The Petitioner alleged that he picked a Form 35A on the floor at Bute Arid Zone Primary School Tallying Center. He presented it as evidence that the presiding officers were issuing the agents of the 1st Respondents with forms that they could pre fill and rig the election. I considered the evidence of the Petitioner against the standard of proof and it was clear that he was unable to establish the nexus between the said form and any of the presiding officers. He also failed to mention any specific presiding officer that he might have seen issuing the alleged form. There is no explanation as to how he came into possession of the said form. It is trite law that he who alleges must prove. As this was an allegation of a criminal nature, at the very least the Petitioner was tasked with proving beyond reasonable doubt, that there were actual presiding officers whom he could identify, participating in the alleged election malpractice.



108. I have given my careful consideration to this argument as well but I regret my inability to accept the same. As reflected elsewhere in this discourse it is a well settled rule repeatedly laid down by the Superior Court including the position taken in *Raila Amollo Odinga & Another –vs- IEBC* (supra). The foundational principles are that the allegations of a criminal nature in the cause of an election must be judged by the same standards as a criminal offence, and no rules of evidence in judging guilty in a criminal charge is more firmly rooted than no charge resting on circumstantial evidence with no iota of an investigation carried out to punish those found culpable can one use to secure Judgement in his or her favour. It is also trite that circumstantial evidence could be held to proof beyond reasonable doubt a fact in issue for a party to obtain judgement where the chain of circumstances is so complete and so connected with the allegations/ charge that it leaves no other reasonable hypothesis open for the court to adopt a different narrative save of a guilty verdict (See *Om Praha jain v Charan Das AIR1975 SC 1417 at P 1426*).
109. It is my firm appreciation of the summary of the evidence from both in examination in chief, further cross examination and re-examination on matters arising are there circumstances with a conclusive effect for this court pronounce existence of substantial, non-compliance with the law to invalidate the election of Wajir North Constituency.
110. In Election Petition 5 of 2013 John Lokitane Lodinyo –VS- Mark Lemnokol and 2 others (2013) eKLR, the High Court sitting at Kitale, rendered itself as follows;
- “An election dispute is regarded as a special category of a civil dispute and for a petitioner to successfully prosecute such dispute, he must adduce credible and sufficient evidence to support the allegations in his petition on a standard higher than is applicable in ordinary civil suits, but lower than the standard of proof required in ordinary criminal cases. However, with regard to statistical facts or facts intended to establish election offences thereby imputing criminal offences, the standard of proof must be beyond reasonable doubt because such offences attract serious sanctions.”
111. It is worth noting that the 2nd Respondent herein produced copies of forms for all the 101 polling stations and the Petitioner was unable to prove that the impugned form was used to alter the outcome of the results or that there was a conspiracy to do so. It is my strong view that such grave allegations require a proper basis, in terms of evidence, which the Petitioner failed to lay. In the premises, this allegation is moot for lack of cogent and credible evidence to support the allegation. It is my view that the alleged form could have as well been generated and or doctored from anywhere. This Court cannot establish its origin with certainty. Unsurprisingly the petitioner sort to vindicate the veracity of the impugned form 35(A) as a ground to render the exercise as compromised. “On the strength of the evidence, the case of *Foodco UK LLP v Henry Boot Developments Ltd (2010) EWHC 358 (ch)* is instructive. In this case, Lewison J explained that although the standard of proof is the same in every civil case, where fraud is alleged cogent evidence is needed to prove it, because the evidence must overcome the inherent improbability that people act dishonestly rather than carelessly.”
112. Yes, let us admit for a moment a form 35(A) existed in the process of voting in the aforementioned polling stations but the question is how did it affect the quality of the vote cast in Wajir North Constituency. The form in question was not even prefilled or pre-ticked for it to raise suspicions as to the fairness and credibility of the election for the Member of the National Assembly. The weight to be attached to this form is for the petitioner to show that irregularity in it affected the final quantum of the votes cast on that material day. The controversy on the availability of this form as alluded to by the petitioner falls short of a legal instrument meant to fix an irregularity in that particular election.



Generally the picking of the form by the petitioner and the tallying of the votes are at variance in many explainable ways by the 2nd and 3rd Respondent for the court to draw an adverse inference.

Whether there was Issuance of more than one ballot paper to voters

113. Regarding this issue, Learned Counsel, Mr. Omwanza submitted that the Petitioner was able to demonstrate to this Honourable Court that there were in excess of 41 votes cast in Tuluroba Polling Station 1 of 1 which could not be accounted for. He further submitted that that PW1 Mr. Omambia testified before this Court that he sent a report to the 2nd Respondent, explaining that the elections as held at his polling station would not be termed as free and fair and therefore recommended that the said elections be nullified. He produced the polling station diary that confirmed the claims from the witness and the Petitioner that there was a variance of 41 voters who cast their vote in excess of the voters identified by the KIEMS KIT at the Polling Station. Further, that the witness testified as to the threats to his life and declared the results null and void after locking them in the ballot box.
114. Learned Counsel, Mr. Issa Mansur, submitted that by PW1 admitting that he did not make any comment of any of the alleged irregularities in the voting and declaration of results at the said polling station, he negated the Petitioner's allegations and affirmed the credibility and accuracy of the results announced and declared at the polling station. He stated that PW1 Mr. Omambia confirmed to the court that the incident regarding issuance of more than one ballot paper related to the election of the Member of County Assembly and not the election of Member of National Assembly. Counsel further submitted, that Mr. Adan Abdullahi Omar, also testified as one of the Petitioner's agents and confirmed that he duly signed the Form 35 A for Tuluroba Polling Station 1 of 2 accepting and confirming the validity of the results. It was his submission that as the Petitioner's agent did not tender any evidence of this alleged variance at the Polling Station, and did not mention any alleged discrepancy in his witness affidavit.
115. Learned Counsel for the 2nd and 3rd Respondents, Mr. Owuor, contended that PW1 was the Presiding Officer at the said Polling Station yet on cross-examination he could not confirm whether the said anomaly was advertent or inadvertent. Counsel further argued that PW1 had confirmed that it was an isolated incident which he had dealt with upon receiving complaints from the political party agents present. He told the Court that he did this by allocating the affected clerk different roles at the Polling Station and that incident did not affect issuance of ballots to voters in respect to the Member of National Assembly. The more serious allegation and its consequences calls for stronger evidence to be presented before the court to enable it to decide in favour of the petition. As regards this issue the court in *Dickson Elia Nsamba Shapwata & Another V. The Republic (Criminal Appeal No 92 of 2007)*, the court of Appeal of Tanzania addressed the same issue of discrepancies and stated

“In evaluating discrepancies, contradictions and omission, it is undesirable for a court to pick out sentence and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter”

116. On scrutiny and evaluation of the evidence in support of the petition on this issue I am satisfied that the inconsistencies and contradiction create a doubt as to the transactional events slated for the 9th & 11th August 2022. I am also unable not to lose sight of what would have been the motive of PW1 and PW3 to consider to be witnesses for the petition in an election which they were the key leaders and managers on behalf of the IEBC. What were the particular circumstances of the petition for them to have moved the court to declare the vote as Null and Void was not accurate and reliable evidence. As a Presiding & Deputy Presiding Officer the law confers obligations for them to take



charge of the polling stations, supervise the poll clerks, maintain the secrecy of the ballot, collect and check the ballot box and its content, give the ballot box and content secure until each vote is counted and tallied, ensure voter identification, be aware of issues surrounding the integrity of the electoral process and if need be take remedial measures in compliance with the law. It is cardinal at this stage to mention that the commission has the weighty responsibility and duty under *the constitution* as read in conjunction with *elections Act* to ultimately ensure free and fair elections. In the instant petition PW1 & PW3 challenged the outcome of Wajir North Parliamentary constituency on account of various transgressions as captured elsewhere in this judgement. What this means therefore is whether their negligence Acts for purposes of determining the outcome of the election in that constituency was carried out substantially with non-compliance of the law at the close of the poll in any of the mentioned pooling stations. A few things must be observed the specific allegations of multiple voting and an assault against PW3 were never reported to the police station to commence investigation. So how does this court believe the witnesses as some of the assertions lack vital corroboration. The standard of ethical conduct of PW2 & PW3 may be in question but does not by itself render the petition proved on a balance of probabilities. In a nutshell there is no corroborative evidence which is said to be cumulative, suggestive of giving full weight to the case by the petitioner. Sometimes one wonders whether PW1 & PW3 are category of witnesses who apparently have a propensity to give contradictory evidence or a lie on the scheme of events that occurred between the 9th & 11th August 2022. Suffice here to outline that substantially and correctly saw the chronology of events subject of this petition would not have occurred without familiarity of other eye witnesses at the polling stations highlighted by the petitioner.

117. Appraising the evidence its totality it is clear that the complaints as seen by the Presiding Officer were not properly recorded and the kind of decision taken to avoid the Acts of Omission and Commission during the voting process. The Presiding Officer had a legal duty to stop the voting exercise in the interim until the issue of multiple voters intimidation to force themselves to the Polling booths has been fully secured. It was not sufficient for the Presiding Officer to state on oath that there were irregularities capable of nullifying the election without cogent evidence. The offence of multiple voting is provided under our law and the Presiding Officer under the dictates of that legislation is commanded to take the necessary action so as not to propagate criminality.
118. PW1 in his testimony conceded that there was in fact an incident of issuance of excess ballot papers. He however acknowledged that the same was with respect to the Member of County Assembly position. PW1 was clearly unable to substantiate all his allegations surrounding electoral malpractices in Tuluroba Polling Station. From the averments by PW1, one would likely wonder if he actually understood his role and duties as presiding officer. In the case of Wanguhu Nganga & Another Vs. George Owiti & Another, Election Petition No. 41 of 1993, the Court held that: -

“...election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are not the kind of evidence required to prove election petitions. As I said, they should be proved by cogent, credible and consistent evidence.”

Whether there were irregular, unprocedural and unlawful assisted voting

119. Learned Counsel for the Petitioner, Mr. Omwanza, submitted that this occurred in five polling stations, namely; Malkagufu Dispensary polling station 2 of 2, Cherate Mobile 1 of 1, Tuluroba Polling station 1 of 2, Buna Sub County hospital 1 of 1 and Ajawa primary school 2 of 2. He urged that despite the fact that the 2nd Respondent gave sworn testimony in this court that around 80% of the voters in Wajir North Constituency did not know how to read and write, and therefore were assisted to vote; the 2nd Respondent neither provided the relevant statutory Forms used in assisting voters in all the stated



polling stations nor line up Presiding Officers to testify from the four (4) particular polling stations that were adversely mentioned by the Petitioner. He cited the case of Mohamed Twaher Abdulkarim v Independent Electoral & Boundaries Commission (IEBC) & 2 others [2018] eKLR where the Court observed that:

“In the 8th August 2017 elections, there were two registers, electronic and hard copy register. Under regulation 72, it is a requirement that Form 32 be filled and that the presiding officer does mark the register in respect of the assisted voters whom he assists for a good reason. This is for purposes of fulfilling the constitutional requirement that an election should be transparent, accountable verifiable and credible and in the absence of Form 32, as is the case in this petition, the 1st and 2nd Respondents are not able to account for the assisted voters. No Form 32 was ever availed as evidence by the 1st and 2nd Respondent to this court. It is imperative that the register and Form 32 goes hand in hand, one assisting the other a supportive document for purposes of verifiability and accountability. In the circumstances, there was irregular and unprocedural and illegal assisted voters and voting which obviously compromises Article 86 of *the Constitution*.”

120. He urged that he had sufficiently identified the Polling Stations where his agents informed him about irregular, unprocedural and/or unlawful assisted voting but the 2nd and 3rd Respondents did not bother to bring any of the Presiding Officers of the relevant polling stations as witnesses in this Honourable Court to rebut the same prima facie case.
121. The 1st Respondent’s Counsel, Mr. Issa Mansur, in response to this allegation, submitted that the procedural law for assistance of voters in the polling station is found under Regulation 72 of the Elections (General) Regulations, 2012 and further, that all the instances of voter assistance within Wajir North Constituency were in accordance with Regulation 72 of the Election (General) Regulations, 2012. He brought it to the attention of the court that the Petitioner’s agent for Batalu Primary School signed the Form 35A confirming that he was satisfied with the results. He added the 2nd and 3rd Respondents witness evidence, Mr. Abdinoor Ibrahim Hassan, who was the Presiding Officer, Batalu Polling Station was corroborated by the 1st Respondent’s Chief Agent, Mr. Ahmed Hefow, who testified that he witnessed voter assistance which was done in compliance with the regulations.
122. Upon considering the testimonies of the witnesses, it is evident that the Petitioners’ allegations regarding irregular assisted voting was pegged on the testimony of witnesses. The Petitioner attempted to shift the burden of proof to the Respondents despite being the proponent of the allegation. There was no evidence adduced that any of the Petitioner’s agents witnessed a failure to adhere to these procedures. The law provides an avenue for agents who have any issues with the voting process, to indicate the same on the form 35As and upon considering the form 35As of the impugned polling stations, none of the candidates’ agents had an issue concerning unlawful assisted voting as they signed the declaratory forms in satisfaction with the results. In the premises I find that there was no evidence that there was unlawful, irregular and unprocedural assisted voting in the circumstance.

Whether there were inflated totals of valid votes on original form 35As

123. On this issue learned counsel for the petitioner Mr. Omwanza submitted that the total number of valid votes cast exceeded the number of votes garnered by each candidate in the same polling station in the following polling stations;
 - a. Ajawa Primary School station 2 of 2
 - b. Sirey Primary School 1 of 1



- c. Korondile Boys Secondary School 1 of 1
- d. Nyata Primary School 1 of 1
124. He urged that the 2nd and 3rd Respondents did not avail the Presiding Officers of the affected Polling Stations to testify on the same and disprove the Petitioner's claims. It was his case that in Sirey Primary School Polling Station, the Deputy Presiding Officer testified before this Honourable Court that tallying was incorrect and the number of votes on Form 35A exceeded the number of votes cast by sixteen votes.
125. Learned Counsel, Mr. Issa Mansur, in rebuttal submitted that that vote inflation could only have arisen if the total votes attributed to all candidates exceeds the total ballots cast or if the results for certain candidates were altered and changed after the Form 35A was filled. In the four polling stations Ajawa Primary School polling station 2 of 2, Sirey Primary School 1 of 1, Korondille Boys Secondary School 1 of 1 and Nyata Primary School 1 of 1, the total votes cast for all candidates does not exceed the ballots cast and there was no evidence of any alteration or changing of the results announced at the polling stations. Therefore, the allegation that the votes attributed to the candidates were inflated or doctored is false. He further argued that the discrepancy was as a result of arithmetic mistakes by the Presiding Officers. That Constituency Returning Officer testified and confirmed that the summary of arithmetic errors were corrected in the Form 35B, which was within his mandate. The error in computing the total votes cast is neither vote padding nor vote inflation as claimed by the Petitioner.
126. Learned Counsel, Mr. Owuor, in addition submitted that the Petitioner used the wrong entry in the sum of valid votes cast to draw a presumption of fraud or inflation of votes. Further, that it was clear from the entries in the Result Declaration Forms 35A that there are two instances for entry of valid votes cast. The first is by addition by the Presiding Officer after recording the count of the valid votes cast for each candidate. The second is in the table where the Polling Stations count report in relation to the number of registered votes is written. He explained that the total valid votes cast are confirmed by the returning officer because Regulation 83 of the Elections (General) Regulations empowers a Returning Officer to disregard results from Polling Stations where the total valid votes cast exceeds the turnout or the number of registered voters. Further, that for the purposes of incorrect summation of valid votes cast, the Returning Officer made correct summations and entries in Form 35B which were not contested either during tallying, or at all.
127. Regarding fidelity to the electoral process in Wajir North Constituency the petitioner and his witnesses echoed allegations on multiple voting by some of the voters. This to me is a felony punishable under the *Elections Act*. The burden and standard of proof particularly on such a serious allegation was vested with the petitioner and it never shifts to the respondents unless otherwise a prima facie case has been made out to warrant an answer in rebuttal. The dictum in *Onalo v Ludeki & 2 others* (No.3 of 2008) 3 KLR laid down the criterion in the following passage: "In my event, our court in Election Petition Case No 1 of 2005 between Hassan Ali Joho and Hotham Nyange has adopted the standard of proof held in the Tanzanian case of *Mbowe -vs- Eliafo* (1976) EA 240 to the effect that the election offence has to be proved to the satisfaction of the court and that the court cannot be said to be satisfied when it is in doubt. It went further to state on page 10 of the judgement and I quote:" where a reasonable doubt exists the it is impossible to say that the court is satisfied". The court in the said case also referred to the case of *Joseph Wafula Khaoya v Eliakim Ludeki & Lawrence Sifuna* (election petition No.12 of 1993) where it was held that a very high degree of proof is required. In short our courts have so far been reluctant to put in certain terms the standard of proof required in the election petition. However, it is certain that the standard of proof is not in any event, the balance of probability".



126. In totality an avalanche of criminality conduct during the voting process significantly at the polling stations presided over by PW1 one Omambia and secondly that of Sirey in which PW2 Madina happened to be the Deputy Presiding Officer. The approaches burden of proof in criminal cases shall apply affirmatively. The answer to these questions raised by the petitioner on those crimes recognisable under the *Elections Act* as a ground to invalidate the vote must be with certainty meet that fundamental value determination of our society. I am persuaded rightly so to borrow a leaf from Justice Harlan famous concurrence statement in *Re Winship* 397 U.S 358 (1070) in which he ordained as follows “In a judicial proceeding in which there is a dispute about the facts of some earlier event, the fact finder cannot acquire unassailably accurate knowledge of what happened, Instead all the fact finder can acquire a belief of what probably happened. The intensity of this belief – the degree to which a fact finder is convinced that a given act actually occurred- can of course vary. In this regard a standard of proof represents an attempt to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication, Although the phrases “Preponderance of the evidence” and “Proof beyond a reasonable doubt” are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of this factual conclusion”.
127. The most difficult approach on the allegation multiple voting was for the petitioner to align himself with the dicta in the case of *Ikpeazu v Otti* Wthe court held that to prove over-voting the petitioner must do the follows:
- a. Tender the voters’ register
 - b. Tender the statement of results in the appropriate forms which would show the number of accredited voters and number of actual votes
 - c. Relate each of the documents to the specific area of his case in respect of which the documents are tendered:
 - d. Show that the figure representing the over-voting, if removed, would result in victory for the petitioner.
128. When understood in this sense the requisite threshold on evaluation of allegations with the evidence, the petition as premised stands on a sinking sand. In no way can this court fill the gaps.
129. I appreciate that the witnesses laid down the process of tallying in order to provide an understanding of how the tallying process works, specifically with regards to form 35As which are filled by the presiding officers at the polling stations. It is clear that the forms contain a column for the candidates and for the valid votes obtained against it’s candidate. There is also a row for the total valid votes cast which are tabulated by the presiding officer. Once the forms are transported to the returning officer at the tallying centre, he transfers the results for each individual candidate into the form 35B and not the number of valid votes cast. Regulation 83(1)(e) of the Elections (General Regulations) states as follows;
83. Tallying and announcement of election results
- (1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates, or agents and observers, if present –
 - (a) tally the final results from each polling station in a constituency for the election of a member of National Assembly and members of the county assembly,
 - (b)



- (c) ...
- (d)
- (e) complete the relevant form 35B and 36B for the respective elective position set out in the schedule in which the returning officer shall declare as the case may be, the -
 - i) name of the respective electoral area
 - ii) total number of registered voters
 - iii) votes cast for each candidate or referendum side in each polling station
 - iv) number of rejected votes in each polling station
 - v) aggregate number of votes cast in the respective electoral area; and
 - vi) aggregate number of rejected votes
- (f) sign and date the relevant forms and publicly declare results for the position of
 - i) member of County Assembly
 - ii) member of national Assembly
- (g) issue certificates to persons elected in the county assembly and national Assembly elections in forms 36C and 35C respectively.

130. I conducted an assessment of the results from the polling stations that the Petitioner claimed had inflated totals and established that there were some errors apparent on the forms. Copies of the forms were produced pursuant to the orders of the court after the petitioner made an application for the election materials to be produced and stored for safe custody. for Ajawa Primary School Polling Station 2 of 2, the presiding officer recorded 159 valid votes cast instead of 149 which was the correct sum. However, the votes recorded for each candidate tally with the votes that were entered into the form 35B therefore the errors did not affect the results of the candidates for that station.
131. I assessed the results in form 35A for Sirey Primary School and the results for all the candidates correspond with the results in the form 35B prepared by the 2nd Respondent. However, in the form 35A, the presiding officer entered the sum of valid votes as 286 yet a tabulation of the results indicates that the sum was 270 votes. The error on valid votes cast was not consequential to the results of each candidates votes as they were correctly transferred to the form 35B.
132. I assessed the results for Korondile Boys Secondary School 1 of 1 and established that the it was plagued by the same error with regatds to the valid votes cast as calculated in the form 35A. the presiding officer entered 267 instead of 266. The 2nd Respondent transferred the actual results for the individual candidates and as a result cured this error.
133. The results of Nyata Primary School as per the form 34A had an error in terms of the tabulation of the total valid votes cast. The presiding officer made an error of entering 86 instead of 84 as the valid votes cast. However, upon cross checking with the entries in form 35B, it is clear that the 2nd Respondent transferred the results of the individual candidates curing the error on the valid votes cast tabulation in the form.
134. The upshot of the foregoing is that the Petitioner failed to prove that there were ‘inflated’ totals of valid votes cast. What was evident is that, like all humans, a number of the presiding officers erred in



their tabulation of the total valid votes cast. However, the reason that the regulations provide that the returning officer verifies is to ensure that there is certainty and clarity of said results.

135. At this juncture I associate myself with the holding of Majanja J. in *Wavinya Ndeti –vs- IEBC & 4 others* Machakos EP No. 4 of 2013 to be instructive where he stated thus:

“An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error. Indeed, the evidence is clear that the counting and tallying was being done..... in less than ideal conditions hence errors, which were admitted, were bound to occur particularly in the tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs.”

Whether the election was conducted in compliance with the law and if so, whether such non-compliance affected the results

136. Learned Counsel, Mr. Omwanza, queried whether the results were collated, tallied and announced in accordance with the law. He cited article 86 of *the Constitution* and referred the court to Chapter 6 of the Krieglger Commission Report which acknowledged that the counting, tallying and result announcement of the election was one of the contributing factors to the discord that arose after the declaration of the 2007 presidential election result. He emphasized that the report emphasized a raft of legislative changes to wit;

“IREC recommends that the ECK integrate the various descriptions of the entire counting and tallying procedure into one document - and one document only - which will then be the principal description and must be adhered to. The need. For such descriptive regulations does not depend on possible changes in the counting and tallying system.”

137. He urged that the Elections (General) Regulations, 2012 were enacted to govern the election processes and cited regulations 83 and 84 which refer to tallying and announcement of the results with emphasis on the provision that the Constituency Tallying Centre must be located at the Constituency or district headquarters which in the present case was Bute Arid Zone Primary School. He further submitted that the regulations require the tallying process to be done in the presence of candidates, agents or observers yet the 2nd Respondent secluded himself in a private venue in Nairobi to conclude the process and he did not tell the petitioner or his agents the venue of the resumption of the tallying process. Counsel urged that the production of two form 35Bs which indicated different results for the petitioner created an inference that the Returning officer prepared the second form 35B belatedly, once the 1st Respondent claimed, in his response, that the margin was bigger. Both forms were not witnessed by any candidate or their agents and form 35C was issued 3 days after the returning officer purportedly concluded the tally. He urged that the form was backdated to sanctify the illegal conduct of the 2nd Respondent.
138. On the issue of the gazetted tallying center, it was his case that the gazetting of designated polling stations and tallying centres is no mundane task in the election process and therefore it was not open for the Respondent to purport to ‘conclude’ his mandate in Nairobi; no matter how ‘scared’ he was of returning to Bute. He questioned why the 2nd respondent was able to announce the results for member of county assembly at Wajir Constituency Tallying Center, Women Representative to National Assembly, Senator & Governor elections and not that of Member of National Assembly.



In support of his submissions he relied on *Steven Kariuki v George Mike Wanjohi & 2 others* [2013] eKLR, where Kimondo J reiterated that:

“A tally is a mathematical addition and reconciliation of results from the various polling stations. I have dealt with the process of transposition or transfer of results from forms 35 into a computer spreadsheet that evolves into a form 36. I have opined that form 35 is the primary record of the election. The process involves tabulation of the aggregate votes of candidates against the total votes cast, rejected votes and registered voters. I hold that the returning officer can do a tally or tallies or even re-tally the results so long as the results in form 36 correspond with forms 35 verified by the presiding officers and agents of candidates where applicable. But there is a caveat: the whole exercise of tallying or re-tallying must take place at the gazetted constituency tallying centre.”

139. Counsel further submitted that the importance of announcement of results was emphasized by the Supreme Court in the case of *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014] eKLR, when it opined:

“It is clear from Regulation 83 that the tallying of votes and the public announcement of the total votes cast in favour of each candidate precede the declaration of election results. Tallying and public announcement are designed by *the Constitution* [Article 86 (b) & (c)] and the *Elections Act* [Section 39] to take place immediately after the close of polling. *The Constitution* specifically emphasises the promptness with which the collated and tabulated results ought to be announced. This is important because it signifies the urgency with which the public should be notified of the outcome of the election. Taking into account this requirement of efficiency, which runs through all the electoral provisions, this Court is of the opinion that the subsequent stage of declaration must take place immediately after the tallying and announcement of the election results.

140. He urged that the elaborate process was not followed for the 5 polling stations whose tallying had not been concluded as the returning officer took off and did not re-convene the tallying process, in the presence of the candidates/agents & observers. Therefore, the results from these stations were neither verified by agents nor announced by the RO. As for Declaration of results, on account of the 2nd & 3rd Respondents' non-compliance with Regulation 83 (1)(f) of the General Regulations, there cannot be deemed to be an announcement or a declaration of results for the Wajir North MNA Election. What the 2nd Respondent purported to constitute a Declaration was neither public, made in the presence of candidates/agents & observers nor at the gazetted tallying centre. It was an action unknown to law. He relied on *George Mike Wanjohi v Steven Kariuki & 2 others* [2014] eKLR in support of this submission.
141. Learned Counsel, Mr. Omwanza, also took issue with the two form 35Bs by stating that they were admittedly prepared by the 2nd Respondent. Noting that the point of divergence is on the Petitioner's total valid votes garnered, he stated that the 1st form put the Petitioner's individual tally at 6,437 votes, compared to the 1st Respondent's 6,502 votes- indicative of a margin of 65 votes. The 2nd Form however reduced the Petitioner's tally (by 200) to 6,237 votes, compared to the 1st Respondent's (unaffected) 6,502 votes- indicative of a new margin of 265 votes. He disputed the testimony of the 2nd respondent where he stated that he had spoken to the returning officer for Malkagufu dispensary and urged the court to consider such evidence as hearsay. He faulted the respondents for failing to



call the presiding officer and cited the case of Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 3 others [2018] eKLR where the Court of Appeal held that:

“When a person fails to call a relevant witness to prove or disprove a fact in issue, a trial court may draw an adverse inference from the failure to call such a witness.

142. He argued that the existence of the two different Forms 35B is, in of itself, a pointer of the 2nd Respondent’s deliberate misconduct, ignorance, negligence or disregard of the ambits of his mandate as a Returning Officer. He relied on the cases of Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014] eKLR and Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014] eKLR; in support of his contention as to the powers of the returning officer to alter anything in a declaration instrument. He urged that the final nail in the coffin was hammered in by the 3rd Respondent when he gazetted the 1st Respondent in the Kenya Gazette Notice No. 9950 of 2022 as the Wajir North Constituency Member of the National Assembly with 6,483 votes garnered.
143. Regarding the issue, learned Counsel, Mr. Owuor, submitted that the 2nd Respondent explained in detail the spontaneous nature of the violence, the level of risk to his life and the threat to the requirement to ensure safe keeping of election materials provided under Article 86(d) of *the Constitution*. Counsel submitted that the 2nd Respondent confirmed that at the time of the disruption he had completed the tallying process and was waiting to announce the last batch of Polling Stations and final results for the six (6) elections. Further, that he explained that given the circumstances at Bute Arid Zone Tallying Centre, it was not possible to re-convene the candidates for the purposes of announcing results and he consulted the County Returning Officer and the National Officials of the 3rd Respondent who organised for evacuation from the Tallying Centre. The 2nd respondent confirmed that issuance of the Certificate to the winning candidate at the National Tallying Centre did not affect the tallying process which was virtually complete save for announcement of the final results. This was confirmed by the Chief Agent of the 1st Respondent, one Ahmed Adan Hefow who testified on behalf of the 1st Respondent.
144. Learned Counsel, Mr. Owuor, further submitted that the 2nd Respondent explained through his Affidavit of 29th September 2022 that in the haste of preparing the response to the Petition, he had supplied the Advocates with a draft copy of Form 35B which was in draft and was changed upon verification. The draft that was initially produced in the Supporting Affidavit, annexed to the response contained all results with a single difference of Malkagufu Primary School Polling Station 1 of 2. In his Supplementary Affidavit dated 29th September 2022, the 2nd Respondent supplied the corrected Form after verification by agents which was the Form used for the purposes of Declaration of Results. He urged that during the scrutiny exercise held on 13th January 2023, the 2nd respondent produced the original Form 35B for the purposes of retallying in compliance with the Orders of the Court and it was not contested that the Form 35B produced accurately contained the Polling Station results declared in corresponding Form 35As in the 101 Polling Stations. This explanation is consistent with how Form 35Bs are filled.
145. Learned Counsel, Mr. Issa Mansur, submitted that from the onset that the 2nd and 3rd Respondents completed all the verification and tallying of the results reported in Form 35 A’S from Wajir North Constituency before the announcement and declaration that he was the duly elected Member of National Assembly on 20th August 2022. That it was only the announcement of the five stations that was pending at the time of the violence that disrupted the process. He urged that the 2nd Respondent fulfilled his roles and duties by completing and preparing the form 35B on arrival at Bomas. On the issue of determining whether the announcement of the election affected the result in the circumstances, he cited the case of John Kiarie Waweru vs. Beth Wambui Muso & 2 others; where



the court was faced with a similar issue and held that the petitioner was not prejudiced by the venue of announcement of results.

146. As stated under the general principles of the law that govern the process of elections in Kenya, there are various statutory provisions that are to be relied upon in this process. The most contentious issue on compliance with the law in the present petition is to do with the tallying, announcement and declaration of the results.
147. Regulation 83 of the Election (General) Regulations 2012 governs the tallying and announcement of results. The relevant sections are section 83(1)(a),(d),(e),(f) and (g) which have been stated above.
148. From the evidence on record, it is not in dispute that all save for five polling station results were announced at Bute Arid Zone Primary School tallying centre. The circumstances under which the results could not be announced were clearly laid out to the court; including the Petitioner unfortunately being a victim of the violence that arose on the material day. However, the question as to what amounts to declaration has been the subject of debate and has been discussed in various cases. The wording of regulation 83 states that “the returning officer shall, in the presence of candidates, or agents and observers, if present”. This therefore begs the question as to whether the presence of the candidate, agents and observers is mandatory when declaring the results. This is further compounded by the holding in certain cases on what can be defined as declaration. In Gideon Mwangangi Wambua v. IEBC & Others, Election Petition No. 4&9 of 2013(consolidated), Justice Odunga, stated that since Article 87(2) of *the Constitution* does not define what amounts to declaration of results, the Court had to resort to legislation enacted for the purpose of timely settlement of electoral disputes. He held that the insertion of the word ‘Gazette’ in Section 76(1)(a) of the *Elections Act* was meant to bring certainty to the computation of time for the purpose of filing an election petition. In M’Njiria Petkar Shen Miriti v. Ragwa Samuel & 3 Others, Election petition No.4 of 2013, Justice Lessit held that the word declaration as set out in Article 87(2) of *the Constitution*, meant the publication of the election results in the Gazette. While reflecting on these cases the Supreme Court in Petition No. 10 of 2013 - Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014]eKLR held as follows;

In all these cases, none of the learned judges took into account the salient features of the electoral process culminating in the issuance of the certificate in Form 38, as elaborated hereinbefore. However, we note with appreciation that Justice Fred Ochieng, in Suleiman Said Shahbal v. The Independent Electoral and Boundaries Commission & 3 Others, Election Petition No. 8 of 2013, rightly held as follows:

“If a declaration must be in a formal instrument, I find that the forms containing the results of the elections at every level constitute such formal instruments. When the forms 34, 35, 36, 37 or 38 have been duly signed by the authorized returning officer, [they become] instruments which cannot be challenged save through election petition.”

149. We are in agreement with the learned Judge, in his interpretation of the collective and interlocking provisions of the law relating to the entire electoral process.
150. Adopting this definition of declaration, one can say that there was declaration of results to a certain extent. However, recognizing that it is not mandatory that the agents and the candidates be present as per the provisions of regulation 83, it is apparent to this court that the elections belong to the electorate and to justify the failure of the 2nd respondent to declare the five polling stations in the circumstances would be a disservice to the duty of this court to ensure the political rights of the populace are protected. The court is alive to the purposes of declaration of results as set out in the Kriegler report and that the



owners of the process are the electorate as they exercise their constitutional political rights. However, our robust legislation is silent on the circumstances that arose in Bute Arid Zone Primary School Tallying Center, specifically the violence that culminated in the evacuation of the returning officer.

151. As it has emerged that there was a violation of the provisions of regulation 83 in failing to announce the results of the five polling stations, I call on the guidance of section 83 of the [Elections Act](#) which pronounces itself on the issue of non-compliance of the law as follows;

83. Non – compliance with the law

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

152. Therefore, the next determination is; whether the non-compliance of the 2nd Respondent affected the outcome of the election. The issue of non-compliance was addressed in Raila 2017 at paragraph 373 where the Supreme Court of Kenya held;

It is also against this background that we consider the impact of the irregularities that characterized the presidential election. At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.

153. The non-compliance to the law was the failure to announce the results of the five polling stations before declaring the winner. The conduct of the 2nd Respondent, was, to say the least, quite peculiar. It may be chalked down to human error, abundance of caution or inexperience as the 2nd Respondent had never been a returning officer in an election. The explanation on the two form 35Bs was aptly explained to the court. The purpose of verification of results before transferring the same from form 35A cannot be understated as it provides an extra level of qualitative analysis of the results. As the process is conducted by humans, the same was designed to have countermeasures to ensure that the process is smooth and among these is the power of the returning officer to correct any errors as to summation. Whereas on the form 35As the presiding officers are allowed to countersign when they make alterations, form 35Bs have a different modus operandi as the returning officers are issued with copies, which were used to make the correction in this case. Having said that I then move to determine what the impact of his non-compliance with regulation 83 by the 2nd respondent was on the outcome of the election. In fact, this conduct was among the reasons that the order for scrutiny of the election materials was granted and the scrutiny carried out. Rule 33(1) and (2) of the Elections (Parliamentary and County Elections) Petitions Rules (provides the purpose of scrutiny as follows:

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

It was also meant to ensure that the results that were tabled in the final form 35B were a reflection of the results in the form 35As which, notably, have no queries as to the results for the individual candidates.



154. The outcome of the scrutiny report was that the results recorded in the form 34As for all the polling stations including the five unannounced stations were in tandem with the results that the 2nd Respondent entered in the form 35B and used to declare the 1st respondent as the duly elected member of National Assembly for Wajir North Constituency. It is trite law the results recorded at the polling stations are always considered as the final result and when there is a dispute. The answer will always lie in the form 35As as that is how the election process was engineered in order to be verifiable in consonance with the provisions of *the Constitution*. This is further informed by the case of Independent Electoral Boundaries Commission v Maina Kiai & 5 others NRB CA Civil Appeal no. 105 of 2017 where the Court of Appeal expressed itself as follows;

It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion.

155. In *Morgan and others v. Simpson and another* [1974] 3 All ER the court held that:

“If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not....

(2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. ...

(3) But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated.”

156. Therefore, I find that there was non-compliance with the law but the non-compliance did not substantially affect the outcome of the election. All the doubts as to the veracity of the results of the five polling station were cured by the scrutiny report which revealed that the results that the 2nd respondent used to declare the winner of the election were the true results in the form 35As. The entire petition does question both the quantitative and qualitative test in electoral justice in a model that upon the court appreciating the evidence and the law would have to come to a logical conclusion of the Wajir North member of National Assembly not validly elected. In view of the fact that questions were raised regarding the authenticity and integrity of the vote the burden of proving that aspect rests primarily upon the petitioner. Elections are serious matters of state with its citizens who have a legitimate expectation that the winner announced by the IEBC was the one they voted for to serve them in the fullest of time. Can one say given the totality of evidence, *the constitution* and statute law is it crystal clear that the electorate of Wajir North Constituency were robbed of the opportunity to elect a member of parliament of their own free will and choice. Among the issues that saw their way into this petition were the violence against the presiding officers, tallying at Bute centre, his agents not endorsing the prescribed forms and announcing of the results without notice to self and the voters. Despite the allegations, the testimony by the petitioner and his witnesses there is still a dark cloud of satisfying the degree of proof above the balance of probabilities. The challenged election had questionable procedural issues some to do with non-compliance with electoral rules and regulations. Without significant breach can such an election be nullified. In answer to the question comparative jurisprudence in *Mbowe-vs- Eliufoo* (1967) EA 240 at page 242, in the court of Appeal of Tanzania



persuades me as follows: “ in my view in the phrase “affected the result” the word “results” means not only the results in the sense that a certain candidate won and another lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large tht even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the results of the election would be effected by any particular non-compliance of the rules.” In the same vein in Chabanga M.Hassan Dyamwale –vs- Alhaji Musa Sefu, 1982 Tanzania Law Report at 69 the Tanzania High Court observed that: “ Although a few irregularities had been proved, the could not be said to have affected the results of the election because even if the adversely affected votes were added to the petitioner, the first respondent would still have won the election by a big margin”

157. It would be remiss of the court not to consider the qualitative aspect of the petition. The revelations that arose from the petition painted a picture of a bungled election. It is clear that the petitioners’ case was pegged on the entire process and that it was fraught with so many irregularities that coloured the process as one seriously lacking integrity. The election process is one that strives to ensure that the rights of the populace, specifically their political rights, are protected. Despite all the allegations not a single voter was presented to this court to illustrate the disenfranchisement of voters in the process. It was not shown to this court that the votes of the constituents were not counted. One of the witnesses colourfully stated that he did not know who was elected as the member of parliament for Wajir North Constituency to this day. This was of course an untruthful statement as the publishing of the 1st Respondent as the duly elected winner in the Kenya Gazette Vol. CXXIV No. 169 dated 23rd August 2022 is considered a declaration as per the finding of the Supreme Court in Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others (supra) on declaration where it held;

However, we note with appreciation that Justice Fred Ochieng, in Suleiman Said Shahbal v. The Independent Electoral and Boundaries Commission & 3 Others, Election Petition No. 8 of 2013, rightly held as follows:

“If a declaration must be in a formal instrument, I find that the forms containing the results of the elections at every level constitute such formal instruments. When the forms 34, 35, 36, 37 or 38 have been duly signed by the authorized returning officer, [they become] instruments which cannot be challenged save through election petition.”

158. Interestingly, just like in the presidential election Petition, the Petitioner herein presented some of electoral officials as witnesses in this case. I must mention that every electoral official in Kenya, owes a reasonable duty of care towards the Kenya people who by participating in the polls firmly believe that the electoral officials will be able to conduct elections in a free, transparent, fair and lawful manner and at no point will their personal biases influence the outcome of the results that they would render. In the present petition we saw a Presiding officer together with a Deputy Presiding Officer, disowning the forms that they had duly signed and the results that they had declared in the name that had been a plethora of irregularities. In addressing a similar issue, the Supreme Court in Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) [2022] KESC 54 (KLR) held that

To nullify an election on the basis of a last-minute boardroom rapture between the chairperson of the Commission and some of its members in the absence of any evidence of violation of *the Constitution* and electoral laws; to upset an election in which the people had participated without hindrance, as they made their political choices pursuant to article 38 of *the Constitution* would be tantamount to subjecting the sovereign will of the Kenyan people to the quorum antics of the IEBC. The court was incapable of such action. The



dysfunctionality at the IEBC impugned the state of its corporate governance but did not affect the conduct of the election itself. Notwithstanding the divisions apparent between the chairperson and the 4 Commissioners, IEBC carried out the verification, tallying and declaration of results in accordance with article 138 (3)(c) and (10) of *the Constitution*.

159. Having been entrusted with the vote of the people, they carried out their duties only to table contradictory evidence that was unreliable and uncorroborated in an effort to subvert the will of the people as reflected at the polls. *The constitution* of the Republic in Articles 81 & 86 contemplates a free, transparent, accountable, verifiable and fair election which it vests comprehensive responsibilities of superintendence, direction and to control of the conduct of the elections in the watchdog of Independent Electoral Boundaries Commission (IEBC). In a nutshell it covers a cluster of powers, duties, obligations, mandate, functions, executive administrative decisions, leadership, management or any other as the case may be dependent on the circumstances. Fairness and Electoral justice as are expressly provided for in the various provisions of *the constitution* and the statutes governing elections does import a duty to the IEBC to see to it that no person, voter, or candidate guilty of wrong doing benefits from his own unlawful act or wrong. It is argued on behalf of the petitioner that the 2nd and 3rd Respondent are guilty of noncompliance as used in section 83 of the Election Act. That would suggest the idea of not acting according to any rule or command of the law. There was much argument by the petitioner's counsel on Articles 81 & 86 of *the Constitution* being applicable for an order for Wajir North constituency wide re poll based on the transgressions canvassed by the petitioner and his witnesses As Sri PP Rao observed "A whole re-poll is not a joke. It is almost an irreparable punishment to the constituency and the candidates. The sound and furry the mammoth campaigns and rallies, the whistle-stop speeches and frenzy of slogans, the white-heat of tantrums, the expansiveness of the human resources and a hundred other traumatic consequences must be remembered before an easy re-poll is directed.
160. In Article 1 1 & 2 the writ of our constitution states as follows:
1. All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.
 2. The people may exercise their sovereign power either directly or through their democratically elected representatives.
161. We the citizens of Kenya take pride that we are constitutional democracy. At this length the words of Said Adejumbi, in his article "Elections in Africa: A fading Shadow of Democracy? International Political Science Review, Vol. 21, No. 1 59 -73 at p 60. Inspire me in fashioning this petition thus
162. Conceptually, elections symbolize popular sovereignty and the expression of the "social pact" between the state and the people which defines the basis of political authority, legitimacy and citizens, obligations. It is the Kernel of political accountability and a means of ensuring reciprocity and exchange between the governor and the governed.....Further, elections typify the representation of popular demands and a basis for leadership recruitment and socialization....Renewal in democratic system usually occur via elections. Any political system which does not undergo such, will ultimately atrophies and suffer decay. In other words, elections constitute perhaps, the most important element in the conception and practice of liberal democracy"



163. Besides the above reliance is also placed in the statement by “Staffan Lindber, In his book “Democracy and Elections in Afric, The John Hopkins University Press, Baltimore, 2006 in which he stated as follows that:

While there are many views on what democracy is-or ought to be a common denominator among modern democracies is election...But elections are also and more importantly, an institutionalized attempt to actualize the essence of democracy: rule of the people by the people. Every modern definition of representative democracy includes participatory and contested elections perceived as the legitimate procedure for the translation of the rule by the people into workable executive and legislative power....”

164. The Kenyan Constitution as a supreme law of the land is a legal, social and political instrument which in its provisions marries power with justice. It represents a fundamental commitment by the state and every citizen to its norms and procedures which include customs, conventions, traditions, administrative structures, political systems, legislative system and judicial power which are integral to the practical workings of *the constitution*. One of the key canons is based on a representative government as a pathway enabling citizens to participate in the public affairs of government and hold them to account. Therefore, it belongs to all of us the 45, or so tribes of Kenya. The purity of our electoral process is at the heart of our governance and National Values as stipulated in Article 10 of *the Constitution*. You can't afford to violate or infringe the democratic set up to degenerate it into an injustice. I have clarified elsewhere in this petition that some blunders, Acts of omission and commission by the 3rd respondent did occur on receipt of results from the Five (5) questioned polling stations. In practical terms however, the pre-commitment of constitutionalism in the sense of participatory electoral process by the Wajir North voters did not culminate into an electoral fraud. In *Clement Kungu Waibara v Annie Wanjiku Kiben & another* (2019) eKLR. Chief justice Maraga re affirmed as follows: “ The conduct of an election takes many vital roles and inputs, on the part of a larger number of persons and agencies.so tht the co-ordinated initiative and outcome is the basis of the overall integrity that will convey the democratic, electoral intent. This is essentially an episode of administrative ethics, that depends upon the inputs of many, including the voters, by their integrity and conduct. Such a scenario, it is plan to us, would not lend itself to any specific formula of rectitude, and each case stands to be assessed on the basis of general standards of compliance and integrity”
165. Electoral justice in Kenya is an ever perfecting and perfectible goal, likely never to be attained, but always meritorious enough to be pursued by every citizen, IEBC, the Executive and the legislature and the National Assembly with commitment and good faith. It should be noted that the establishment of a fair, free and effective electoral processes by which government, governance and collective individual rights can be exercised upon internalization of *the Constitution* largely seems to be elusive in every electoral cycle. As M Hidayatullah in “Democracy in India and the Judicial process, Lajpat Rai Memorial Lecture stated “ Many incidental points were debated but we have ignored those micro questions and confined ourselves to macro-determinations. It is for the Election Court, not for us to rule on those variegated matters. Certain obvious questions will claim the Election Courts attention. Did the Commission violate the election rules or canons of fairness? Was the play, In short, according to the script or did the dramatic personae act defiantly, contrary to the text? After all, democratic elections may be likened to a drama with a solemn script and responsible actors, officials and popular, each playing his part, with roles for heroe but not for villains, save where the text is travestied and unscheduled antiheroes intervene turning the promising project for the smooth registration of the collective will of the people into a tragic plot against it. Every corrupt practice, partisan official action, basis breach of rules or deviance from the fundamental of electoral fair play is a danger signal for the nation's democratic destiny. We view this case with the seriousness of John Adam's warning.



“Remember” said John Adams remember democracy never lasts long. It soon wastes exhausts and murders itself. There never was a democracy that did not commit suicide.”

166. If democracy exercised in Wajir North was determined by the will of voters, it is this will and not only normative and institutional arrangements that should receive the analytical attention by this court. It seems obvious that if democracy has to preserve its capacity for selfdefence the majority of the political class must want to live under a political regime, observe the rules of democracy and trust in its institutions and officers unless and until proven they committed substantive sins against *the constitution* as prescribed in Article 81 & 86 on electoral justice. That prima facie is not the case here. Political electoral cycle system in Kenya come and go, but the exit of a given cycle from the historical scene does not automatically cancel out problems which that system was unable to overcome or had created itself. On the contrary, many such issues in our electoral management become apparent again in the next cycle. As a constitutional democracy, the executive, legislature and the Judiciary are tasked to satisfy the will of the majority without sacrificing the minorities, to ever equality without ignoring differences, to preserve the rights of individual without neglecting the general interest. This delicate balance, this difficult vigilance of the citizen, and the political class can lead to lassitude and certainty and disappointment. There is an irrefutable presumption that the electorate are expected to behave cautiously and in accordance with the rules as prescribed in our election laws, follow the rule of law remain informed on an ongoing basis, enjoy liberty without restrictions but not without limits, be daring without going overboard and choose wisely their representatives, whose actions must however be strictly overseen. The electoral Act and other enabling regulations and rules do not contemplate disenfranchisement of a legally registered voter at a scheduled election. It is also his or her right to be much more vigilant to exercise that right in post- election. Needless to say any irregularities, misconduct, Acts or omissions and malpractices which threaten, infringe or violate any of the electoral provisions or rules or to invalidate the vote.
167. Great stress was laid on the word non-compliance with Article 81 &86 of *the Constitution* of this election by learned counsel Mr. Omwanza for the petitioner. Broadly speaking, the petitioner had various heads of grievances as enumerated above. The implication was both on qualitative and quantitative test. I have taken up each one of the points for separate considerations and indeed many interrelated arguments in so far as this petition is concerned. Though from a far but with a shared common law heritage my understanding of the facts and evidence led me to invoke the principles in the cases of: Underson Kambela Mazoka and 3 Others v Levy Patrick Mwanawasa (Election Petition No. 1 of 2001 (Supreme Court of Uganda) It is important that court asks the question “given the national character of the exercise where all voters in the county formed a single constituency, can it be said that the proven defects so seriously affected the result that the result could no longer reasonably be said to present the true will of the majority of voters?” Further in Col (Rtd) Dr.Besigye Kizza v Museveni Yoweri Kaguta and /electoral Commission states that
168. The crucial point is that there must be cogent evidence direct or circumstantial to establish not only the effect of non-compliance or irregularities but to satisfy the court tht the effect on the result was substantial. In this petition, the petitioner has proved that there was non-compliance with the provisions and principles of the Act in quit a number of instances. There is no doubt that these irregularities and malpractices had some effect on the results one way or the other. If we take the result of the election as indicated on form B, there is no evidence adduced to show how the non-compliance with the provisions and principles of the Act affected the results of each candidate including the petitioner. No adjustment or calculations based on those irregularities were done even taking into account the factor of intimidation or absence of conditions of freedom and fairness in some instances.” (See also Raila Odinga & Another v Independent Electoral & Boundaries Commission & 2 Others” (Supra).



169. The cited comparative jurisprudence is consistent with our own outlook as it is domesticated by the Apex Court in the Raila Odinga case.
170. Before I put my pen down, I must emphasize that where the are laid out procedures then the same ought to be strictly adhered to. That does not go without saying that I find the 2nd Respondent's decision to announce the results without informing the Respondent herein very reckless and negligent. Strong arguments came through my learned counsel Mr.Omwanza for the petitioner that the 2nd Respondent ignored that Wajir had adequate alternative forum to satisfactory remedy the non-conveniens forum at Bute Tallying centre . Whose convenience was it at Bute Centre?. Obviously the voters who lined up and had a legitimate expectation to receive and celebrate the winner. The forum non conveniens at "Bomas" in Nairobi did not address the unanswered questions on the forum of declaring the results as demonstrated by the petitioner. That is the 2nd Respondent did not establish guidelines for notification of the other interested parties to accord them equal access to the "Bomas" forum. Further the 2nd Respondent did not include the other candidates by way of notification when settling on the alternative forum to announce the results of Wajir North Constituency.
171. On this issue having anxiously and compressively distilled the circumstances of the impugned election I am persuaded to rely on the principles of: Raila Odinga & Stephen Kalonzo Musyoka v Independent Electoral and Boundaries Commission Chairperson, Independent Electoral and Boundaries Commission. H. E Uhuru Muigai Kenyatta and Others, Godwe and Another v Gatani-Nyahara (supra), Amama Mbabazi v Yoweri Kaguta Museveni & Two Others (supra)
172. The reason for restrained is that frenzied movements on the day of the tallying are visible in this case. The scenario exits suspicion but did the electoral process answer to the will of people of Wajir North that there vote was free and fair. It is significant as of necessity the power and duties coffered upon the 2nd Respondent had to be exercised appropriately and promptly. It cannot be said that by the spirit of the law if a general situation arises whereby declaration of results may not be witnessed at the gazetted tallying centre the purity of the electoral process has been compromised. The fact of the matter that the 2nd Respondent may have taken certain decisions in a rush, apparently considered unlawfully or arbitrarily constitutes a cancellation of the Wajir North Ballot and call for a re-poll. I hold the view that it is not justifiable nor desirable when balancing the scales of electoral justice. It may be described as akin to the last minute rupture at the Bomas of Kenya during the presidential vote tallying.
173. In view of also of the facts that scrutiny had not revealed that the 2nd Respondent doctored the results and entered different results from those in form 35As, his fate would have been sealed. The scrutiny report established the validity of the votes cast in the undeclared polling stations and affirmed that the 2nd Respondent had tallied and verified the accurate results from all the polling stations.
174. What then is the effect of all these conversation canvased by the petitioner and the respondent with regard to the given complexity and challenges experienced on the 9th of August 2022 by the constituents of Wajir North Parliamentary Election. It is clear to me and undoubtedly so that election in question was conducted manifestly and substantially in accordance with the principles illustrated in Article 81 & 86 of *the Constitution*. However it is not lost to the court and there were administrative and procedural challenges traceable to the polling station managers and disruptions which erupted at Bute tallying centre. This court further observes that the petitioner took issue with existence of difference forms 35 (A's) which were loosely available for persons not positively identified ready to prefill and by that one Act it amounts to a fatal defect to nullify the election. This question was adequately answered by the 2nd and 3rd Respondent in rebuttal that there was no disenfranchisement and over-voting.



- A) The purport of this logical analysis is despite the aforementioned Acts of omission and commission I hold that the election in Wajir North Constituency was conducted in substantial compliance with the law and I find no reason to invalidate the win by the 1st Respondent.
- B) Given that position, Consonant to Section 27 of the *Civil Procedure Act*, Costs are hereby awarded to indemnify the Respondents expenses in the proceedings. The approach on award of cost to this petition is provided for under Rule 36(1) of the elections (Parliamentary and County Elections) Petition rules 2013, the court is empowered to cap the costs payable in an election. Taking into account the input, level of research and effort made by each of the parties in the course of the hearing as well as the number of days taken to conclude the hearing, the costs are capped at a maximum of Kshs 4 million. Kshs 2.5 million will be shared by the 2nd and 3rd respondent while the 1st respondent's costs will not exceed Kshs 1.5 million.
- C) The security deposit made by the petitioner will be retained by the court pending taxation of the bill of costs by the Deputy Registrar.
- D) The end result is that the petition for the member of National Assembly for Wajir North Constituency, is hereby dismissed with costs as the petitioner failed to discharge the burden and standard of proof as settled in our jurisprudential principles.
- E) It follows a certificate of determination of this petition shall issue in terms of Section 86 (i) of the Election Act 2011 to the speaker of the National Assembly.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF FEBRUARY 2023

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R. NYAKUNDI

JUDGE

In the Presence of:

Mr.Omwanza for the Petitioner

Mr. Issa for the Respondent

Moses Owuor for the 2nd and 3rd Respondent

