



**Getuba & another v Kibagendi & 2 others (Election Petition
E002 of 2022) [2023] KEHC 1495 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1495 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
ELECTION PETITION E002 OF 2022
M THANDE, J
FEBRUARY 28, 2023**

BETWEEN

GEOFFREY OMWENGA GETUBA 1ST PETITIONER

NATHAN ONKUNDI MOSIOMA 2ND PETITIONER

AND

HON. ANTONEY KIBAGENDI 1ST RESPONDENT

**RETURNING OFFICER, KITUTU CHACHE SOUTH CONSTITUENCY DAVID
KIPKEMOI CHEROP 2ND RESPONDENT**

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

JUDGMENT

1. General Elections in the Republic of Kenya are held every 5 years during which the country votes for the President, Members of the 2 Houses of Parliament Governors and Ward Representatives. During the electoral period, there is considerable excitement, anxiety, trepidation, suspicion, expectation and anticipation throughout the country. At the conclusion of the election, it is expected that some losing candidates, their supporters or just interested persons will challenge the results in Court. Indeed, the law provides for election disputes. The results of the election of the Member of the National Assembly for Kitutu Chache South Constituency in Kisii County has been challenged in Court by a Petition dated 6.9.22, which is the subject of this judgment.
2. The seat attracted a total of 10 candidates from various political parties including the 1st Respondent, of the Orange Democratic Movement (ODM). There were also independent candidates. Upon conclusion of the election, the 1st Respondent emerged as winner and was on 11.8.22 declared as the duly elected Member of the National Assembly for the said Constituency. The table below shows the candidates and the number of votes garnered.



	Candidate	Party	Votes
1.	Abuga Erick Osoro	United Progressive Alliance	4,131
2.	Bwonger Pius Abuki	Peoples Democratic Party	2,694
3.	Kibagendi Antoney	Orange Democratic Movement	14,478
4.	Maubi Andrew Mokaya	Wiper Democratic Movement	10,378
5.	Mochoge Justus Onsongo	Democratic Action Party-Kenya	235
6.	Nyaberi Erick Elikana	Kenya African national Union	409
7.	Nyagami Justine Omwenga	United Democratic Alliance	1,871
8.	Omwando Samwel Kenani	Independent	3,571
9.	Onkangi James Kegoro	Independent	112
10.	Toel Cynthia Kerubo	Jubilee party of Kenya	2,738

3. In the Petition, the Petitioners herein who describe themselves as registered voters in the Constituency, seek the following reliefs:
- a. An order does issue directing the immediate scrutiny and recount of votes casts in the polling stations listed below and to secure Digital Memory Cards (SD Cards) for each of the KIEMS kits used for the said polling stations and a report be forthwith filed before this Court by the Deputy Registrar of the Court.
 1. Kanyimbo Polling Station
 2. Daraja Mbili Primary School Polling Station
 3. Daraja Mbili Market Polling Station
 4. Daraja Mbili Secondary Polling Station
 5. St. Mary's Nyabururu Polling Station
 6. Nyankongo Polling Station



7. Raganga DOK Primary School Polling Station
 8. Boekabu Primary School Polling Station
 9. Nyamatuta DEB Primary School Polling Station
 10. Rera DOK Primary School Polling Station
 11. Ong'icha DOK Primary School Polling Station
 12. Nyamondo Primary School Polling Station
 13. Ititi Primary School Polling Station
 14. Nyanguru DOK Primary School Polling Station
 15. Riotero SDA Primary School Polling Station
 16. Botori Polling station
- b. A declaration do issue that the non-compliance with the law, irregularities and improprieties in the Kitutu Chache South Member of National Assembly elections were so substantial and significant and that they affected the result thereof.
 - c. An order does issue quashing and/or invalidating the 2nd Respondent's declaration of the 11th August 2022 and any subsequent gazettelement thereto by the 3rd Respondent declaring the 1st Respondent as the duly elected Member of National Assembly- Kitutu Chache South Constituency;
 - d. A declaration does hereby issue that the impugned declaration of the 1st Respondent as the duly elected Member of National Assembly for Kitutu Chache South Constituency is illegal, unconstitutional, invalid and inconsequential ab initio.
 - e. An order be issued ordering the 3rd Respondent to conduct a fresh election for Member of National Assembly Kitutu Chache South in strict conformity with *the Constitution* and the *Elections Act*;
 - f. Such election offences by the 2nd Respondent and the 3rd Respondent's Presiding officers as pleaded, disclosed, heard and determined by this Honourable Court be reported/forwarded to the Director of Public Prosecutions for appropriate action;
 - g. The Respondents be condemned to pay the Petitioners costs and incidentals to this Petition; and
 - h. Such further, other and consequential orders as this Honourable court may lawfully make.

The Petitioners' case

4. The Petitioners are dissatisfied with the election which they claim was marred by irregularities, improprieties and electoral fraud. According to the Petitioners, the declaration of the 1st Respondent as the winner of the election, by the 2nd Respondent was done in contravention of *the Constitution* and the *Elections Act*. They allege that there was manipulation/altering and varying of Forms 35A and the results; that there was lack of election materials; that there was voter exaggeration and manipulation of votes cast; that the declaration of the 1st Respondent as the winner was on the basis of incomplete tally with some results having been omitted in Form 35B; that there was unlawful campaigning after



the close of campaigns; that there was unlawful ejection of political party agents and candidates and finally, there was unlawful clearance of the 1st Respondent as a candidate.

5. The Petition is supported by the affidavits of Geoffrey Omwenga Getuba (PW1), Maubi Andrew Mokaya (PW2), Omwandu Samwel Kenani (PW3), Lewis M. Lianza (PW4), Simon Abuki Omboto (PW5), and Edmund Osoro Maubi (PW6), all sworn on 6.9.22.
6. In his supporting affidavit, Geoffrey Omwenga Getuba (PW1), deposed that the figure in Forms 35A were altered by the presiding officers without the involvement of the candidates/and or agents as hereunder:
 - a. In Raganga DOK Primary School Polling Station 1 of 2 Code 045269134100101 the votes of the 1st Respondent were increased from 058 to 078 voters. There were also alterations to the votes garnered by various candidates.
 - b. In Boekabu Primary School Polling Station 2 of 2 Code 045269134100402 the votes for Nyagami Justine Omwenga were reduced from 0112 to 007 and Omwando Samwel Kenani votes were cancelled and indicated as 012. The alterations were not countersigned.
 - c. In Nyamatuta DEB Primary School Polling Station 1 of 2 code 045269134100601 there were alterations of the votes garnered by the candidates which were not countersigned and the agents part appears to have been filled by one person with similar handwriting.
 - d. In Rera DOK Primary School Polling Station 1 of 1 code 045269134101001 the votes for Bwonger Pius Abuki were altered from 029 to 12; Maubi Andrew Mokaya's votes appear to be altered; Mochoge Justus Onsongo's votes were altered from 046 to 005; Nyaberi Erick Elkanah's votes were altered from 005 to 001. The alterations were not countersigned and the part for agents appears to have been filled by one person with similar handwriting.
 - e. In Ong'icha DOK Primary School Polling Station 1 of 3 Code 045269134101101, the number of votes obtained by the 1st Respondent is not clear and the alteration was not countersigned by the presiding officer.
 - f. In Nyamondo Primary School Polling Station 1 of 1 Code 045269134101301 there was an alteration of the votes garnered by Omwando Samwel Kenani and the same was not countersigned by the presiding officer.
 - g. In Ititi Primary School Polling Station 2 of 2 Code 045269134201602, the votes garnered by Maubi Andrew Mokaya were altered and the alteration was not countersigned by the presiding officer.
 - h. In St Mary's Mosoch Primary Boarding School Polling Station 1 of 2 Code 045269134201701 there was an alteration on the votes garnered by Bwonger Pius Abuki. The altered figure is not legible.
 - i. In Nyanguru DOK Primary School Polling Station 1 of 2 Code 045269134302501 on the total valid votes cast, there is an indication of two figures 401 and 412. The alterations are not countersigned.
 - j. In Nyanguru DOK Primary School Polling Station 2 of 2 Code 045269134302501 on the total valid votes cast, there is an indication of two figures 387 and 365. The figure 387 is cancelled. The alterations are not countersigned.



- k. In Daraja Mbili Primary School Polling Station 2 of 3 Code 045269134403802 there is an alteration of the votes garnered by the 1st Respondent. There is a figure that appears as 292 and an overwrite of 192. The alteration is not countersigned.
 - l. In Daraja Mbili Primary School Polling Station 3 of 3 Code 045269134403803 there is an alteration of the votes garnered by the 1st Respondent. There is a figure that appears as 186. The alteration was not countersigned.
 - m. In Daraja Mbili Secondary School Polling Station 1 of 3 Code 045269134403901 there is an alteration of the votes garnered by Mochoge Justus Onsongo, Nyaberi Erick Elkana, Nyagami Justus Omwenga and Omwando Samwel Kenani. There is also an alteration on the total valid votes cast.
 - n. In Kanyimbo DOK Primary School Polling Station 2 of 2 Code 045269134505102 there is an alteration of the votes garnered by the candidates.
7. PW1 further deposed that some Forms 35A were not stamped while others were neither signed nor dated by the presiding officer and some contained alterations. As such, the veracity of the forms cannot be ascertained. He stated that Form 35A in Kanunda Primary School Polling Station 1 of 3 Code 045269134302901 and Matieko DOK Primary School Polling Station 3 of 3 Code 045269134100903 did not bear the IEBC stamp and at St. Mary's Mosocho Primary School Boarding School Polling Station 2 of 2 and Nyamatuta DEB Primary School Polling Station 1 of 2, Form 35A was neither signed nor dated by the presiding officer nor his deputy presiding officer.
8. On unlawful conduct on the part the 3rd Respondent's officers, PW1 deposed that on the 10.8.22, an unaccompanied presiding officer from Kanyimbo polling station was nabbed with marked ballot papers concealed in a bag at St Mary's Mosocho Boys Primary Boarding School Tallying Center. Further a ballot box allegedly belonging to Nyanchwa polling station, which is not a gazetted polling station within the constituency, was found at the Tallying Centre. When the matter was brought to the attention of the 2nd Respondent, he only asked the candidates to file their complaints with the election court.
9. On voter exaggeration and manipulation of votes cast, PW1 claimed that the tallying of the results was marred with instances of voter exaggeration and manipulation of the will of the people where the votes cast were increased in Forms 35A as particularized below:
- a. In Riotero SDA Primary School Polling Station 2 of 2 Code 045269134202002 there is an indication of 2 figures on the valid votes cast; figures 325 and 319. There is a difference of 6 votes.
 - b. In Nyamagoma FCS Polling Station 1 of 1 Code-045269134101201 there is an indication of 2 figures on the valid votes cast; 193 and 188. There is a difference of 5 votes.
 - c. In Nyankongo DOK Primary School 7 of 7 Code-045269134404207 there is an indication of 2 figures on the valid votes cast; 411 and 400. There is a difference of 11 votes.
 - d. In Bototo Primary School Polling Station 1 of 1 Code-045269134100201 there is an indication of 2 figures on the valid votes cast; 411 and 400. There is a difference of 11 votes.
 - e. In Gesarara DEB Primary School Polling Station 2 of 2 Code045269134505302 there is an indication of 2 figures on the valid votes cast; 202 and 197. There is a difference of 5 votes.



- f. In Nyankongo Primary School Polling Station 1 of 7 Code045269134404201 there is an indication of 2 figures on the valid votes cast; 365 and 373. There is a difference of 7 votes.
- g. The total voter turnout on the elections held on the 9.8.22 as documented on the Form 35B is 40,602 out of the 66,908 registered voters in the Constituency while the total votes casts on the material day are accumulative of 41,230 votes which is a material departure from the voter turnout.
10. Regarding unlawful campaigning after the close of the official campaigns period, PW1 deposed that the official gazetted campaign period was from 29.5.22 to 6.8.22. In spite of this however and contrary to the guidelines and the *Elections Act*, the 1st Respondent unlawfully carried out his campaigns way after this period. Vide his Facebook page, the 1st Respondent, by the name Anthony Kibagendi, posted a video clip on 8.8.22 less than 24 hours to the election date in which he is seen campaigning and seeking votes in ekegusii language.
11. As regards the claim that the 1st Respondent was declared as winner prematurely, PW1 deposed that the 2nd Respondent made the declaration on the basis of incomplete tally and verification of results. There was deliberate omission of the results from Daraja Mbili Market Polling Station 3 and Nyankongo DOK Primary School Polling Station 7 in the Form 34B.
12. On unlawful ejection of candidates and political party agents PW1 asserted that duly accredited agents were forcibly and without cause, ejected from their assigned polling stations and tallying centre by presiding officers and the 1st Respondent's agents. This was part of a scheme of electoral fraud and happened in Riangoko, Kiogo Primary School, Nyankongo Primary School, Kianyabinge Primary School, Daraja Mbili Market, Getembe Primary School, Daraja Mbili Market, Nyamataro Market, Egesa Kiogaro, Iranda Primary and Nyamondo Primary School contrary to the provisions of Regulation 62 of the Elections (General) Regulations, 2012.
13. On the claim of violence against candidates and their agents, PW1 alleged that this was done by goons and agents of the 1st Respondent at the Tallying Centre and at Nyankongo Primary School, Ong'icha Primary School, Nyonsia Polling Station, and Riotero Primary School polling stations. Further that he witnessed one candidate Maubi Andrew Mokaya being physically assaulted and forcefully ejected from the Tallying Centre after he raised complaints of the introduction of illegal and unaccompanied ballot boxes. He urged the Court to nullify the election of the 1st Respondent and direct the 2nd and 3rd Respondents to undertake a fresh election in strict conformity with *the Constitution* and the *Elections Act*.
14. On cross examination by counsel for the Respondents, PW1 stated that he was the coordinator for Andrew Mokaya Maubi one of the candidates in the election. He received information from agents on violation of election rules and conveyed it to his candidate. He said that agents and candidates were ejected from polling centres. His candidate's agents did not sign Forms 35A which were signed by people who were not party agents. He could not remember the number of agents and did not have a list of agents he coordinated. He relied on calls, SMS and WhatsApp to receive information. He further stated that he does not have his own set of results. He had instructed the agents to send him results at conclusion of counting. The agents were denied access to the forms or to take photos. Some agents, they did not have smart phones to transmit results. He stated that he could not tell how many agents sent him forms nor did he have an analysis of which agents were denied access to the results and which did not have smart phones.
15. PW1 further stated that his bundle contains forms obtained from Andrew Maubi and the agents. He did not have time to check the 2nd and 3rd Respondents' forms. He further stated that is the errors in



Forms 35A were genuine than the presiding officers would have stated so. He stated that he was not at polling stations during counting and could not know if the presiding officers displayed each vote. He could also not know if agents signed against errors. He stated that he did not file affidavits by any of the agents on alteration of results or on the alleged ejection from polling stations. He did not also indicate the time the agents were ejected from the polling stations.

16. As regards the ballot box from Nyanchwa, he said that the same had a pink lid and that the words on the box were women member of national assembly. He did not accept the explanation by the 2nd Respondent. On the incident in Kanyimbo, PW1 stated that he was the gate and saw a commotion and from the video clip, he got to know that an individual was seized with a bag containing marked and unmarked ballot papers. He further stated that he understands that tallying is done in polling stations and did not know if the ballots in question affected the results. He insisted that this was at Kanyimbo polling center on 9.8.22 and disagreed with what Andrew Maubi stated. PW1 further stated that he could not tell the contents of bag. PW1 further stated that the results were declared without the results of 2 polling station. He stated that when he received the results of the 2 polling stations, he did his own computation but could not state the exact figures.
17. In his Affidavit of Maubi Andrew Mokaya, PW2 deposed that he was a candidate in the said election on a Wiper Democratic Movement-Kenya ticket and emerged second in the election. He was at the Tallying Centre when a presiding officer of the 3rd Respondent, from Kanyimbo polling station was nabbed with marked ballot papers concealed in a bag. He recorded the incident and also reported the same to the 2nd Respondent in the company of another candidate Samwel Omwando and his chief agent. He reiterated the averments of PW1 regarding the ballot box of Nyanchwa polling station that was found at the Tallying Centre. He also reiterated that the 1st Respondent campaigned outside the allowed timelines in breach of the guidelines, which unduly advantaged him. He further deposed that on 10.8.22, he was physically assaulted and forcefully ejected from the Tallying Centre after raising complaints of the introduction of illegal and unaccompanied ballot boxes and unmarked ballot papers from the Mosochi Market Polling Station. The Presiding Officer one Felix Nyamari was handcuffed briefly and released without explanation.
18. PW2 further deposed that contrary to Article 81 of *the Constitution* the election, and tallying was not free from violence, intimidation, improper influence and corruption. He claimed that on the 11.8.22, a man armed with a gun and teargas canisters entered the Tallying Centre and threatened candidates and their agents. The intention was to cause a scene so that the 2nd Respondent could declare the incomplete results. He subsequently made a report at Nyanchwa police station and was issued with a Police OB number 2/ 11/8/ 2022 and 37 /11/8/2022. In view of the cited irregularities and illegalities, PW2 urged the Court to nullify the election and direct the 2nd and 3rd Respondents to undertake a fresh election in strict conformity with *the Constitution* and the *Elections Act*.
19. On cross examination, PW2 stated that he had not stated the time when a man armed with a gun entered the Tallying Centre. He had also not attached a police abstract. He had also not attached a P3 form to show that he was assaulted. He stated that he was assaulted at St Marys Mosochi and reported at Nyanchwa police station. There were police stations from Nyanchwa Mosochi; Mosochi, Nyakoe. Nyanchwa was 10 km from Mosochi. The reason was that he had feared for his dear life and that of his children. They received his report but he did not pursue the matter. He was given an OB No. He received treatment but did not attach any documents. He was treated at Mosochi. He also did not have any evidence that the violence was meted out by the 1st Respondents' agents and goons.
20. On the complaint of illegal and unaccompanied ballot boxes, PW2 stated that this occurred at midnight of 11.8.22. He said that there were no wiper agents in many polling stations at the close



of counting. He stated that he had 126 agents and knew all of them by name. He further stated that Davine Omwenga was indicated as an agent from his party but denied appointing her. He stated that it was not in order for PW1 stated that Davine was their agent. PW1's mandate was to coordinate his agents and did not have all the names of the 126 agents. PW2 did not provide the Court with a list of his agents.

21. PW1 further stated that he did not annex a list of accredited agents by IEBC. He had not stated the names of political party agents ejected from polling stations. He stated that the arrest of presiding officer found with ballot papers happened at St. Mary's Mosochi Tallying Centre at about midnight of 10.8.22. At the time of the incident,
22. On ejection of agents, he stated that he did not file any police abstract because the police always dismissed them. He did not identify by name the person who ejected them. He also had not attached any affidavit from any agents ejected naming the presiding officers who ejected them.
23. Omwandu Samwel Kenani, PW3 deposed that he was an independent candidate in the election and garnered the fourth highest votes. He reiterated the averments of PW1. His claim is that at the commencement of voting on 9.8.22 his agents from Botori Polling Station, Daraja Mbili Polling Station, and Nyankongo polling station called him and informed him that they had been denied access to the polling stations for reasons that their letter did not have a coloured letter head of the IEBC. He contended that his agents had duly sworn original affidavits and their original appointment letters from him. He proceeded to the said polling stations and it was only upon his intervention and that of his chief agent, that his agents were allowed in. This was around midday, way after the voting process had commenced. Later in the day, he was informed that his agents had been sent away from Nyankongo and Daraja Mbili market polling stations for reasons that the rooms were not big enough to hold them.
24. PW3 further claimed that he moved around the polling stations and observed that in Botori polling station, Getembe Primary School and many other polling stations his agents had been locked out and were monitoring the counting from the window. Due to the distance between the agents and the presiding officer, it was not humanly possible to clearly see the ballot papers and the markings thereon. Further, that the presiding officer would read the ballot papers and the clerks would say aloud what the presiding officer had said. He stated that his agents were not allowed to counter check, verify or scrutinise the ballot papers before counting the same. He raised concern with the presiding officer who claimed that, that was the required sitting arrangement. PW3 later proceeded to Nyakoe market where he noticed that the parliamentary ballot box was broken and without a seal. On inquiry, the presiding officer stated that he would look into it but never addressed the issue again.
25. PW3 further averred that on 10.8.22, a presiding officer from Kanyimbo polling station had been found with ballot papers and books with IEBC stamps in his bag. PW3 reported the same to the 2nd Respondent who failed to act. He too noted the unmanned and stray ballot boxes from Nyankongo polling station the Tallying Centre and upon scrutiny one of the boxes was marked Nyanchwa polling station which is not within the Constituency. It was PW3's belief that the election process was not transparent and was not administered in an impartial and accountable manner. He urged the Court to nullify the election of the 1st Respondent and to direct the 2nd and 3rd Respondents to undertake fresh elections in strict conformity with *the Constitution* and the Elections laws.
26. On cross examination, PW3 stated that he had not attached a list of his accredited agents. He had not identified the said agents by name nor did he specify any particular station nor particular time his agents were denied access. He also stated that he had not named the person who denied his agents access. He further stated that all the presiding officers denied his agents access to countercheck the ballot papers. He lodged his complaint with the IEBC by physically presenting himself. He further stated that he



- received a call that an officer had been found with ballot boxes while he was at his command centre at Nyanchwa estate in Kisii Town.
27. He stated that he had 512 agents and had not attached a list of the said agents. He had like two per station but out of the 512 none filed an affidavit. He received about 30 Forms 35A from the said agents. In 96 polling stations he never received anything. PW3 further stated that his agents were not allowed to countercheck the ballots. He had not referred to any polling station in his affidavit and there was no evidence that any agent was sent out. He however stated that his agents were sent away by presiding officers of all polling stations. The returning officer said he was to follow with the presiding officers after registering his complaint but nothing changed.
 28. Lewis M. Lisanza PW4 an ICT practitioner and certified digital marketer deposed that on 6.9.22, the Petitioners and PW2 instructed him to document 3 video clips for usage in court. He proceeded to extract the video clip documenting the same and produced certificate in compliance to section 106(4) of the *Evidence Act*.
 29. On cross examination, he stated that none of the certificates had phone numbers because the information requested to be extracted was not stored in a phone number but the phone itself. He stated that the video clip was presented by individuals indicated in his certificate and it provided several videos to extract and document. He was not sure he had indicated the video in question. He had 3 certificates and each had 3 categories of videos to extract; phones and Facebook. They were different and separated in the preceding certification. He stated that he received and extracted one video from the gallery of a phone. The other one, Andrew Maubi Mokaya showed him a link to a Facebook page and pinpointed the video to him to extract. They were shared from a phone then he extracted them from phone and link. He stated that he had no copies of the certificates as to his credentials. He stated that he proceeded to the profile of Antoney Kibagendi. He further stated that it was not possible to know whether it was his or someone had created for him. He could not prove that it was Antoney Kibagendi who posted the content.
 30. On his part, Simon Abuki Omboto PW5, the Chief Agent of PW3 averred that he visited several polling stations on the date of the election. He observed in Daraja Mbili, Nyankongo, Moneke, Soko, Ongicha and Botori polling centres that his candidate's agents were being denied access to the stations for reasons that there was not enough room to accommodate them. On his intervention some agents were allowed in a but later told to move out minutes after he left the station. At the Tallying Centre, one Mr. Geoffrey Ogati of ID 27950525, a presiding officer from Kanyimbo Primary stream 2 had a black bag containing marked and unmarked ballot papers and ballot booklets bearing IEBC official stamp. He explained that he had forgotten to place the papers in the ballot box and that the returning officer was aware. Upon confronting the 2nd Respondent, he denied having such knowledge. They reported and called upon the security officers to take control for the safety of the IEBC Agent. He took a video and photos of the said incident to record the electoral malpractice. Still at the Tallying Centre, he came across unmanned ballot boxes that were allegedly coming from Nyankongo polling centre stream. Of concern was that one of the ballot boxes of serial number IEBC 2341515 was marked on top as "Nyanchwa" a station not in the Constituency. He reported the same to the 2nd Respondent who promised to follow up on the matter. PW5 believes that the election process was not transparent and was not administered in an impartial and accountable manner. He urged that the Court nullifies the election of the 1st Respondent and to direct the 2nd and 3rd Respondents to undertake a fresh election in strict conformity with *the Constitution* and the *Elections Act*.
 31. On cross examination, PW5 stated that he had not specified the polling stations but stated that agents were denied access to all polling stations in respect to a centre. He had not filed a list of IEBC accredited agents nor indicate the time they were denied access. He did not report issue to the police. in respect



- of denial of agents to access the polling stations. He recorded the events and given time he would produce them. He stated that he took the video of the presiding officer from Kanyimbo using his phone which he did not know the model. From the video he took it was not visible that a person watching the video could determine whether the person was holding marked and unmarked ballot papers but with zooming it was possible. As regards the stray ballot box, PW5 stated that the same read Women Member of National Assembly. He did not know the contents of the box.
32. PW5 further stated that the ballot boxes from the polling stations were guarded and escorted by agents and police officers and received by the constituency returning officer from the presiding officers. In his opinion the man in the video was as a presiding officer from Kanyimbo polling station. All ballot papers were to be enclosed in the ballot box at the polling stations. Not all the material should be in the ballot box and the materials that can be held by hand and taken to the returning officer were paper for clerical work received in an envelope. The incident occurred on 10.8.22. He sought clarification from the returning officer who told him that if he got any different observation on what happened he should go to court.
 33. He further stated that his candidate had about 500 agents. After his intervention, some of the agents who had been denied access to the polling station were allowed in but after he left, they were kicked out. He did not go back because he did not have the capacity to run around.
 34. In his affidavit Edmund Osoro Maubi PW6, stated that as the chief agent for PW2, he visited several polling stations on the date of the election and noted that the agents of the 2nd and 3rd Respondents unlawfully ejected his candidate's agents at the Riangoko Primary School, Kiogo Primary School, Nyankongo Primary School, Kianyabinge primary school, Daraja Mbili Market, Nyamorenyo Primary School, Moneke Primary School, Getembe Primary school, Daraja Mbili Market, Nyamataro Market and Nyamondo primary school polling stations. He was present at the Tallying Centre on 10.8.22 with PW2 when a presiding officer from Kanyimbo polling station was nabbed with marked ballot papers which were not secured in ballot boxes but concealed in a bag. The presiding officer was also not accompanied by any security officer or agents. They reported the incident to the 2nd Respondent. He further averred that he was aware of a ballot box allegedly belonging to Nyanchwa polling station found at the Tallying Centre. They brought it to the attention of the 2nd Respondent who asked the candidates to file their complaints with the election court. As they raised the issues with the 2nd Respondent, his candidate was physically assaulted and forcefully ejected from the Tallying Centre after he raised complaints of the introduction of illegal and unaccompanied ballot boxes from the Mosochi Market polling station. He believes that the election and tallying was not free from violence, intimidation, improper influence and corruption. The process was marred by violence, intimidation and improper influence of the 1st Respondent on the agents of the 2nd and 3rd Respondents. He urged the court to nullify the election of the 1st Respondent and to direct the 2nd and 3rd Respondents to undertake a fresh election in strict conformity with the Constitution and the Election Laws.
 35. On cross examination, PW6 stated that they had 126 agents for the Constituency but that he did not annex to his affidavit, the list of IEBC accredited Wiper party agents nor the list or names of the agents of ejected from polling stations. He did not have a record of the agents' names and contacts and only PW2 did. He had not stated the time they were ejected and had not identified the name of the person who ejected them. He too stated that he was not aware of a party agent by the name Davine Omwenga. He stated that if he saw a list of agents he would be able to tell his candidate's agents because he had trained them on the procedure of voting.



36. PW6 further stated that he voted at Nyatieko Primary School at around 11am. It took him less than ten minutes to vote. The election at the point of voting was done according to the law as far as time management.
37. He further stated that he was present at the Tallying Centre when someone was nabbed but had not specified the stream. He had not annexed a police abstract in respect of the incident. He further stated that illegal and unaccompanied boxes always raised issues on credibility and tampering along the way after counting done. Having not been accompanied, one could not tell how secure they were. He stated that he came across at the Tallying Centre, some results that were different from what was announced at the polling center, but he had not pleaded the same. He could not pick a centre where they were different but that there were several of them.

1st Respondent's case

38. In response to the Petition, the 1st Respondent Antony Kibagendy RW4 filed a response to Petition dated 20.9.22 and replying affidavit sworn on even date. He also filed a replying affidavit sworn by Walter Nyakundi Kiyondi RW3 sworn on 21.9.22.
39. It is RW4's case that the election was free, fair and transparent and held in accordance with the provisions of Articles 1, 3, 38,81, 82, 84 and 86 of *the Constitution* of Kenya, 2010, the *Elections Act*, 2011 as amended and the Elections (General) Regulations, 2012 (Legal Notice No. 128 of 2012). He averred that for purposes of oversight and in accordance with the law, the 3rd Respondent allowed accredited agents, observers and journalists unfettered entry in 126 polling centres and the Tallying Centre as per their level of accreditation. Further, the voting process started on time in all the polling stations and continued smoothly until it ended at the prescribed time.
40. According to RW4, the entire process from voting, to declaration of the results was conducted in accordance with the law and in a transparent manner. In particular, the election materials, including biometric voter verification kits and ballot papers, were received in all polling stations across the constituency; the biometric voter verification kits were successfully used in all polling stations; the voting process continued smoothly throughout the constituency, and voting closed on time in a vast majority of polling stations across the constituency. Where voters were still in queue past 5.00 pm, they were allowed to vote before polling was closed; and candidates and their agents were allowed at the polling stations to monitor the process of voting, counting of votes, recording results, and transmission of the results. At the end of the process, he was declared the duly elected member of the National Assembly having garnered 14, 478 votes with the 1st runner up garnering 10,378 votes. He further claimed that the transmission of votes from the polling stations to the Tallying Centre was properly done through verifiable primary documents as required by the electoral laws and/or regulations and the same is not disputed.
41. In response to the allegations challenging the validity, credibility and integrity of the result, RW4 averred that there is no specificity of infractions but blanket allegations not supported by any evidence. He averred that the 2nd Respondent announced the results after proper and lawful tallying and verification of the votes cast in all the 126 gazetted polling stations within the Constituency and that the Petitioners are not specific on what votes from which polling stations had not been tallied and/or verified. He further denied that there was any malicious alterations of forms 35A by the presiding officers and further averred that all those present at each, and every polling station fully participated in the electoral process on the polling day without any hindrance from the 2nd and 3rd Respondents.
42. With respect to the claim that there were alterations of form 35A which increased the 1st Respondent's votes from 058 to 078, at Raganga DOK Primary School Polling Station 1 of 2 Code-



- 045269134100101, he averred that the votes garnered by the first four candidates were simply slated in their proper spaces to have them aligned against their names on Form 35A. He stated that the presiding officer countersigned Form 35A and the political parties' agents who were present during the vote counting and tallying countersigned the form 35A without recording any reservations.
43. He denied that the votes for Nyagami Justin Omwenga were reduced from 0112 to 007 and that for Omwando Samwel Kebari were cancelled as alleged at Boekabu Primary School Polling Station 2 of 2 code 045269134100402. He stated that Form 35A properly captured the result and that it is not true that there were alterations on the votes garnered by two candidates, Nyagami Justin Omwenga who garnered 07 votes while Omwando Samwel Kenani garnered 12 votes and this swop of votes did not affect the correct votes that were received by each of the candidates at the polling station. With regard to Nyamatuta DEB Primary School Polling Station 1 of 2 Code 045269134100601, he averred that the Form 35A contains the exact number of votes that were garnered by each candidate and in the presence of some of their agents. For Rera DOK Primary School Polling Station 1 of 1 code 045269134101001, he averred that the correct number of votes the votes cast for Bwonger Pius Abuki, Maubi Andrew Mokaya, Mochoge Justus Onsongo, Nyaberi Eric Elkana and Nyagami Justin Omwenga was reflected. Similarly, in Ong'icha DOK Primary School Polling Station 1 of 3 code 045269134101101, Nyamondo Primary School Polling Station 1 of 1 code 045269134101301, Ititi Primary School Polling Station 2 of 2 code 045269134201602 and St. Mary's Mosocho Primary Boarding School Polling Station 1 of 2 code 045269134201701, Form 35A was properly signed by the presiding officers and their deputies, together with the political party agents who were present during the voting, close of voting, counting and tallying of the results at the polling stations.
 44. RW4 further averred that at Nyanguru DOK Primary School Polling Station 1 of 2 code 045269134302501 and Nyanguru DOK Primary School Polling Station 2 of 2, the total number of valid votes cast did not affect the number of votes garnered by each candidate. Also, in Daraja Mbili Primary School Polling Station 2 of 3 code 045269134403802; Daraja Mbili Primary School Polling Station 3 of 3 code 045269134403803; Daraja Mbili Secondary School Polling Station 1 of 4 code 045269134403901; and Kanyimbo DOK Primary School Polling Station 2 of 2 code 045269134505102, Forms 35A reflect the votes received by each candidate at the polling station. According to RW4, the Petitioners cannot claim not to know the results of Daraja Mbili Polling Station 3 and Nyankongo DOK Primary School Polling Station 7 but proceed to file the forms 35A from the said polling stations in their supporting documents. He averred that contrary to the Petitioners' assertions, Form 35A from St. Anne's Keore Primary School polling station 2 was signed by agents from ODM and Wiper Party and adduced as their supporting documents on page 152.
 45. RW4 further deposed that contrary to the assertions that Form 35A for Kanunda Primary School Polling Station 1 of 3 code 045269134302901 and Matieko DOK P4100903 Primary School Polling Station 3 of 3 code 04526913 did not bear the IEBC Stamp the said stamp is legible as found at the bottom of the document filed by the Petitioner. With regard to St. Mary's Mosocho Polling Station 2 of 2 and Nyamatuta DEB Primary School Polling Station 1 of 2 the electoral results are accurate and the political parties' agents duly signed Forms 35A in agreement with the validity of the votes obtained by each candidate.
 46. He also denied the allegations that agents of Wiper Party were ejected from the Tallying Center or from any of the polling stations and added that no evidence or affidavits of the said agents was produced.
 47. On the stray ballot box found at the Tallying Centre, RW4 contended that the Petitioners' admitted that the same belonged to a polling station that was not gazetted within the Constituency. Further, that they failed to show how the said ballot box affected the final tally of the election in question. Additionally, RW4 denied that there was failure to secure election material by the officers of the 2nd and



- 3rd Respondent and that the election exercise was carried out free of any incident of violence capable of compromising a free, fair and credible election
48. RW4 denied the allegations that he campaigned beyond the timelines set by the 3rd Respondent. He claimed that the purported evidence produced is edited and manipulated to show the clip was posted on the 8.8.22 whereas the last of such posts appear on the 6.8.22. He also denied allegations of violence and contended that the Tallying Centre was well secured by armed and uniformed police officers and entry was only accorded by the 2nd Respondent to well-documented and accredited agents and candidates. He alleged that PW2 attempted to disrupt the counting and tallying of results upon the realization that he was trailing by thousands of votes and that the 1st Respondent had attained an unassailable lead. But his unbecoming behaviour was contained by security officers. RW4 asserted that he is a well-cultured law-abiding citizen and denied ever orchestrating any violent acts not ever before and not in the election in question. He remained seated through the entire exercise until the 2nd Respondent declared him the winner.
49. It was RW4's case that where the nullification of an election is sought on the basis of non-compliance with any written law as is sought in prayer (c), (d), (e) then section 83 of the Election Act requires an applicant to not only demonstrate that there was non-compliance with the written law but also that the non-compliance affected the results of the election.
50. RW4 denied the generalities of the Petitioners' assertions and averred that the election was conducted in substantial compliance with the principles laid down in *the Constitution* and other relevant laws. That in the unlikely event that there were errors and irregularities which he maintains do not exist, then they were negligible, inconsequential and incapable of affecting the integrity, credibility, process or result of the election. He further denied that the results from the alleged alterations of form 35A would be in the excess of 4000 and stated that the same is a general unsubstantiated statement and with no probative value. He further contends that the Petitioners have not met the threshold to warrant the Court to consider and/or entertain the reliefs sought. He prayed that:
1. Petition dated 7th September 2022 be dismissed.
 2. A declaration that the election of 8th August 2022 for the National Assembly Kitutu Chache Constituency was conducted in a free, fair, and transparent manner.
 3. A declaration that the election of the 1st Respondent as valid.
 4. The 1st Respondent be awarded the cost of the Petition.
51. In his Replying Affidavit RW4 he reiterated the contents of the response to Petition and deposed that the Petitioners are puppets of Maubi Andrew Mokaya (PW2) and Omwando Samwel Kenani (PW3). He reiterated that after the 2nd Respondent tallied all the votes cast in the election of 9 August 2022 for the position of Member of National Assembly, Kitutu Chache South Constituency, the results were announced, declared and recorded in the form 35B. Further, he witnessed that the voting at the various polling stations in Kitutu Chache South Constituency took place on 9 August 2022 with no major incidents that interfered with voting, counting and tallying.
52. He stated that after voting, presiding officers declared the polling stations closed after which counting then commenced in the presence of candidates or their political party agents present with the presiding officer announcing in whose favour the votes were cast while displaying the votes to the agents for confirmation and then recording the results. At the conclusion of counting of the votes for the position of the Member of National Assembly for Kitutu Chache South Constituency, the presiding officer at



- a polling station would complete form 35A as required detailing the results of each candidate at the polling station.
53. He averred that the counting and tallying process confirmed that he garnered the largest number of valid votes cast totalling 14,478 and was distantly followed (by a margin of 4,100 votes) by Maubi Andrew Mokaya. Further that upon vote counting, the presiding officers would detach one self carbonated copy of form 35A and affix it at the public entrance to the polling station or at any place convenient and accessible to the public at the polling station, the original results form would be sealed in a tamperproof envelope and delivered to the Constituency Returning Officer and one self-carbonated result form would be sealed and left in the ballot box with the ballots. He received, through his agents, all the carbon copies of forms 35A from the presiding officers in all the polling stations.
 54. It was his case that before the self-carbonated copies of the form 35A were detached by the presiding officer, he would ensure that he has first allowed the political parties' agents the opportunity to confirm the correctness of the contents of the form by witnessing and signing and thereafter the presiding officer would also sign and stamp the form 35A with the 3rd Respondent's stamp impression. Thus, from the foregoing, it would be virtually impossible and unbelievable for a presiding officer to alter polling results in accordance with his own will and in the full glare of polling agents with onlooking security officers and observers and still make the agents sign the allegedly unilaterally altered results without instant repercussion of arrest. Nonetheless, if the above could have remotely and wildly occurred, which is not the case, then the agents would either have a different set of their own forms 35A before the alleged presiding officer's alterations that were purportedly made consistently in his favour. Conversely if the said alterations were made by the presiding officers before the agents signed the results forms being the forms 35A, then it is only and purely because they wholesomely agreed with the contents of the results forms with the minor errors they had.
 55. He further deposed that the election was conducted using an elaborate electoral management system supported by the laws on elections which included several layers of safeguard to ensure an open, transparent, participatory, and accountable system to guarantee free and fair elections pursuant to Article 81 as read together with Article 86 of *the Constitution*. That in light of the electoral management system that was employed by the 3rd Respondent, alterations as aforesaid by presiding officers could not have been possible when considering the role and presence of political parties' agents, observers, security officers and the functionality of the election process in Kenya. The tallying, verification, and declaration of the result is based on original Forms 35A, 35B and all are prepared in the presence of and signed by the candidates' agents.
 56. According to RW4, an elementary arithmetic exercise in addition brings the total votes allegedly manipulated to a total of 45 votes. Even working with the wild and unimaginable possibility that this was the case, he averred that, the 45 votes (1% of the margin between himself and the runner up) do not upset the threshold of substantial compliance with the principles laid down in law. He was not aware of any allegation of an offence committed by the 3rd Respondent's officer in respect to the concealment of marked ballot papers as alleged save for what is contained in the Petition, the ballot box belonging to Nyanchwa polling station found at the Tallying Center was of no consequence to the election.
 57. He asserted that at no point did he campaign beyond the stipulated timelines as set by the 3rd Respondent via Kenya Gazette Notice No. 434 Vol CXXIV- dated 14-20th January 2022. The videos produced in the affidavit of Lewis Musonge and all the incidental information had been orchestrated to be in concert with the falsehoods being peddled before this Honourable court. The account associated with the evidence presented before this Court is a parody.



58. It was RW4's case that there were no reported incidents on ejection of political parties' agents and candidates. None of the allegedly ejected agents has sworn any affidavit to that effect hence the allegations are founded on hearsay within hearsay upon hearsay. He deposed that the closest attempt at causing chaos was by Maubi Andrew Mokaya who had fully participated in the election without demurer attempted to disrupt the counting and tallying of results upon the realization that he was trailing by thousands of votes and that the 1st Respondent had attained an unassailable lead, but his unbecoming actions were contained by security officers. He remained seated through the entire exercise up until the 2nd Respondent declared the 1st Respondent as the winner.
59. In response to paragraph 36 of the Petition and paragraphs 20 and 21 of the affidavits of Maubi Andrew Mokaya, RW4 said that he found it interesting that Maubi sought to report the imaginary threat at Nyanchwa Police Station which is almost 10 Km away leaving Mosochi Police Post, Nyakoe Police Post, Nyatieko Police Station, and Ong'icha Police Post which are closer to the Tallying Center. He also hasn't produced the alleged and fictitious OB number and/or report. He deposed that he was validly cleared to vie for the seat after meeting all the legal requirements. The allegation is thus hypothetical and unsupported by evidence.
60. Concerning the supporting affidavit of Omwando Samwel Kenani of 6.9.22, particularly at paragraphs 5, 6, 7, 8, 9, 13, 14 and 15, RW4 asserted that the same is full of fabrications, hearsay and innuendos. What he deliberately doesn't state is that the voting process followed the law to the letter and that his agents signed Forms 35A from the stations he alleges they were locked out.
61. It was his case that the 2nd and 3rd Respondents carried out the election to the true letter of the law and the results declared were true and verifiable. Further, that this Petition is an attempt at usurping and negating the fundamental political rights of voters.
62. He urged the Court to:
- a. Find that the electoral process was conducted in accordance with *the Constitution* and the *Elections Act* and all other relevant statutes;
 - b. Dismiss the Petition;
 - c. Make a declaration that the outcome of the election for member of National Assembly, Kitutu Chache South was valid;
 - d. Find that the 1st Respondent was duly elected as the member of the National Assembly, Kitutu Chache South Constituency
 - e. Find that the people of Kitutu Chache South exercised their sovereign power of vote and their decision ought be respected
 - f. Find that the 1st Respondent did not commit any electoral offence
 - g. Find that the Petition lacks merit and should be dismissed with costs to be borne by the Petitioner.
63. On cross examination, RW4 denied the allegations made by the Petitioners. In particular, he denied that one of the Candidates in the election was beaten by his goons; that he was unlawfully cleared to run for elections; that he campaigned beyond the campaigning period. He asserted that he presented all documents required to run for Member of National Assembly and further that he did not have any social media account other than WhatsApp. He did not have a Facebook account or page but there were pseudo accounts in his name.



64. He stated that he had 132 agents and that his agents were chased out of the polling stations due to lack of IEBC tags. He was not aware of the agents being chased away on the premise of the rooms being too small.
65. He stated that the election conducted in open transparent participatory and accountable manner. The word participatory is that IEBC involved all the candidates in the process leading to the elections, during the elections, tallying, counting was done in a procedural way and relevant stakeholders involved.
66. RW4 denied campaigning on 8.8.22. He stated that he was aware that the law prohibited campaigning beyond 48 hours to the elections. He stated that in the video produced in Court, he introduced himself urging the voters to vote for him and reminded them that he had run since 2007 and they should they should not let him down. He further stated that he did the recording in the month of July. He further stated that the account associated with the video was a parody. The Facebook account in issue was written in his name. He withdrew from Facebook in 2017 when he defected from ODM to Jubilee. This was because of the aggressive bullying targeted at him and his family including his mother. There were about six accounts in his name. None of the six accounts was run by him. He interacted with the youthful following he had one on one.
67. RW4 stated that he was at the Tallying Center on 10.8.22. He hears Geoffrey Ogati in court and he was aware of the allegation that he abandoned electoral material. The said counterfoils and materials did not affect his results in anyway and he was surprised that they were left outside.
68. In his affidavit Walter Nyakundi Kiyondi RW3 the chief agent of the 1st Respondent, deposed that he was in charge of and supervised a team of 132 agents for the 1st Respondent. As required by the law and exercised by the 3rd Respondent through the 2nd Respondent, he signed form S. 55A being the oath of secrecy. He also served in the election as the ODM party agent, the party on which the 1st Respondent contested the election. RW3 averred that all political parties' agents for the candidates who participated in the election were present at the opening of the polling station, during the recording of ballot box serial numbers and seals issued at the beginning of polling to closure of the polling station and before counting, sealing of packets after ballot count and recording of the ballot box seals used at the end of counting in the polling station diary.
69. He averred that while counting the votes, the presiding officer would read and display each ballot paper to all the political parties' agents at the polling station for their confirmation of the candidate in whose favour the vote was cast. Further that after counting and tallying of votes, all the political parties' agents present witnessed the correctness of the votes garnered by all candidates as recorded in the results Form 35A by signing it. RW3 was at the Tallying Center on the night of 10.9.22 and did not witness any form of chaos and/or violence and/or disorder save for the time when the PW2 attempted to stop the tallying and verification exercise upon realization that the 1st Respondent had gained a huge unassailable lead. The 2nd Respondent acted promptly by engaging the assistance of the security personnel present, who contained PW2 who thereafter sat through the tallying, verification and declaration of the results. At no point was he or any other agent ejected from what, in his observation was largely a peaceful, credible, fair and verifiable exercise.
70. On cross examination, RW3 stated that his work was to supervise the 1st Respondent's team of 132 agents. The agents relayed information on the ground to the command centre which he relied on to understand the true picture on the happenings at the polling stations. On 10.8.22 while the tallying process was underway at the Tallying Andrew Mokaya Maubi cause a little commotion as he was



sensing defeat. The security came in and everything returned to normalcy. The 1st Respondent was declared winner at dawn on 11.8.22 and was presented with a certificate.

2nd & 3rd Respondents' case

71. The 2nd and 3rd Respondents opposed the Petition vide a response to petition dated 14.9.22 and a replying affidavit sworn by the 2nd Respondent David Kipkemoi Cherop (RW1) sworn on even date. They averred that for purposes of oversight and in accordance with the law, the 3rd Respondent accredited agents, observers and journalists who were allowed to be present in the polling stations and Tallying Centre depending on the level of accreditation. Further that the election was conducted in accordance with the Constitution, the Independent Electoral and Boundaries Commission Act, the Elections Act, the Regulations thereunder and all other relevant provisions of the law. They averred that the Constituency had 126 polling stations and that voting at the various polling stations took place with no major incidents recorded in the respective PSDs reported to the Constituency returning officer. That after voting the presiding officers declared the polling stations closed after which they filled part 3.2 of the polling station diary. Counting then commenced in the presence of candidates and/or political parties' agents present, with the presiding officer announcing in whose favour each vote was cast and displayed the vote for confirmation and recorded the results. At the conclusion of counting of the votes in each polling station, the presiding officer was required to complete Form 35A detailing the results of each candidate in the polling station.
72. They averred that the 1st Respondent was declared as duly elected having garnered 14,478 votes and that the said declaration was made after proper and lawful tallying and verification of the votes cast in all polling stations within the Constituency. They denied that there was any malicious alteration of forms 35A by the presiding officers and aver that all the agents present at each and every polling station fully participated in the electoral process on polling day without any hinderance from the 2nd and 3rd Respondents.
73. The 2nd and 3rd Respondents addressed the allegations by the Petitioners as with regard to the various polling stations as follows:
 - a. With respect to Raganga DOK Primary School Polling Station 1 of 2 Code-045269134199101, the votes garnered by the first four candidates were simply slated in their proper spaces to have them aligned against their names in Form 35A and the presiding officer countersigned the form which was also signed by the political parties' agents present, without recording any reservations.
 - b. They denied that the votes for Nyagami Justine Omwenga were reduced from 0112 to 007 and that for Omwando Samwel Kenani were cancelled as alleged at Bokeabu Primary School polling station 2 of 2 code 045269134100402. Form 35A captures the votes garnered by each candidate and it is not true that there were alterations on the votes garnered Nyagami Justine Omwenga who garnered 07 votes and Omwando Samwel Kenani who garnered 12 votes and the said swop did not affect the correct votes that were received by each candidate at the polling station
 - c. In Nyamatuta DEB Primary School Polling Station 1 of 2 Code 04526913400601, Form 35A contains the exact number of votes that were garnered by each candidate and in the presence of political party agents.
 - d. In Rera DOK Primary School Polling Station 1 of 1 code 045269134101001, the votes cast for Bwonger Pius Abuki reflect the correct number of votes that were garnered by him and the



same is applicable to Maubi Andrew Mokaya, Mochoge Justus Onsongo, Nyaberi Eric Elkana and Nyagami Justin Omwenga.

- e. In Ong'icha DOK Primary School Polling Station 1 of 3 0452691341011101, Form 35A was properly signed by the presiding officer and his deputy together with the political party agents present during the voting, close of voting, counting and tallying of the results at the polling station. There was no alteration to the results garnered by the candidates and the 1st Respondent garnered 198 votes as correctly captured in the form.
 - f. In Nyamondo Primary School Polling Station 1 of 1 Code 045269134101301, Form 35A was properly signed by the presiding officer and his deputy, together with the political agents who were present during the voting, close of voting, counting and tallying of the results at the polling station.
 - g. In Ititi Primary School Polling Station 2 of 2 code 045269134201602, Form 35A was properly signed by the presiding officer and his deputy together with the political party agents who were present during the voting, close of voting, counting and tallying of the results at the polling station.
 - h. In St. Mary's Mosoch Primary Boarding School Polling Station 1 of 2 code 045269134201701, Form 35A was properly signed by the presiding officer and his deputy together with the political party agents who were present during the voting, close of voting, counting and tallying of the results at the polling station.
 - i. In Nyanguru DOK Primary School Polling Station 1 of 2 code 045269134302501 the total number of valid votes cast did not affect the number of votes garnered by each candidate. The political parties' agents present signed the results form.
 - j. In Nyanguru DOK Primary School Polling Station 2 of 2, the total number of valid votes cast did not affect the number of votes garnered by each candidate. The presiding officer included rejected ballots in the total of the valid votes cast.
 - k. In Daraja Mbili Primary School Polling Station 2 of 3 code 045269134403802, Form 35A reflects the votes received by each candidate at the polling station. The Political parties' agents present signed the form.
 - l. In Daraja Mbili primary School Polling Station 3 of 3 code 045269134403803, Form 35A reflects the votes received by which candidate at the polling station. The political parties' agents present signed the form.
 - m. In Daraja Mbili secondary School polling station 1 of 4 code 045269134403901 Form 35A reflects the votes received by each candidate at the polling station. The political parties' agents present signed the form.
 - n. In Kanyimbo DOK Primary School polling 2 of 2 code 045269134505102, Form 35A reflects the votes received by each candidate at the polling station. The political parties' agents present signed the form
74. The 2nd and 3rd Respondents further averred that Petitioners have not demonstrated that alterations were made in the tallies of Forms 35A as a part of a wide scheme of electoral fraud for the benefit of the 1st Respondent. Further, that the results from the polling stations listed by the Petitioners on the matter of alleged alterations would not be in excess of 4000 votes as alleged. That in light of the electoral management system and process that was employed by the 3rd Respondent during the



- election, alterations by the presiding officers could not have been possible when considering the role and presence of political parties' agents, observers, security officers and the functionality of the election process in Kenya.
75. Contrary to the Petitioner's allegations, they stated that Form 35A for Kanunda Primary School Polling Station 1 of 3 code 045269134302901 the IEBC stamp impression is legible as found at the bottom of the document filed by the Petitioner. Further that Form 35A for Matieko DOK Primary School Polling Station 3 of 3 code 045269134100903 had the IEBC stamp, is legible and has the presiding officer's signature in the document filed by the Petitioner. With regard to St. Mary's Mosocho Primary school Polling Station 2 of 2 and Nyamatuta DEB Primary School Polling Station 1 of 2 the electoral results for these two polling stations are accurate and the political parties' agents duly signed Forms 35A in agreement with the validity of votes obtained by each candidate.
76. The 2nd and 3rd Respondents denied that there was any incident of failure to secure election material by their officers and further asserted that the election was free, fair and credible. They stated that all the ballot boxes that were used in the election were secured and none was found at the tallying centre as alleged. Further that the ballot box with the lid cover marked with a permanent marker "Nyanchwa Pry" was a ballot box for the seat of the County women Member of the National Assembly and did not concern the election for the Member of the National Assembly for Kitutu Chache South Constituency. They denied that the tallying of the results was marred by instances of voter exaggeration and manipulation of the will of the people. The Petitioners highlighted differences in only the total votes cast but did not contest the votes garnered by each candidate. This would not affect the outcome of the election.
77. The 2nd and 3rd Respondents stated that the presiding officers for Riotero SDA Primary School polling station 2 of 2, Nyamagoma FCS Polling Station 1 of 1, Nyankongo DOK Primary School polling station 7 of 7, Bototo Primary School polling station 1 of 1, Gesarara DEB Primary School polling station 2 of 2 and Nyankoni Primary School polling station 1 of 7 added rejected votes to the valid votes cast in the results Forms 35A but this did not confer any advantage or add any votes to any candidate. They further reiterated that the voter turnout was correctly and accurately captured in the Forms 35A of all the polling and that there was no voter exaggeration nor a deliberate action to inflate the voter turnout and the allegations in respect thereof are factually erroneous and unsupported.
78. They further denied that they declared the 1st Respondent as the winner of the election without results from Daraja Mbili Market polling station 3 and Nyankongo DOK Primary polling station 7. They stated that the Petitioners filed Forms 35A for the 2 polling stations. As such it is not true that the results for the 2 polling stations are unknown and missing. The 2nd and 3rd Respondents conceded that the results for Nyankongo DOK Primary School Polling Station 4 were listed twice on Form 35B while the results for Nyankongo DOK Primary School Polling Station 7 were omitted from the Form 35B. They however stated that the final tally considered these errors such that Form 35B has a true reflection of the votes garnered by each candidate in all the 126 polling stations.
79. As regards the allegation that the 1st Respondent campaigned after the allowed period, they denied having sight of the video clip relied on by the Petitioners nor were they aware of any alleged campaigns by the 1st Respondent in breach of the gazette notice number 434- Vol. CXXIV-No. 14 issue of 20.1.22.
80. The 2nd and 3rd Respondents further averred that they were strangers to the allegations of the unlawful ejection of political parties' agents. Additionally, none of those alleged instances of unlawful ejection of political parties' agents were brought to their attention. They are also not aware of the attack of candidates and political parties' agents by goons and agents of the 1st Respondent at the Tallying Centre. The alleged attack and ejection was of Maubi Andrew Mokaya who attempted to disrupt the



- counting and tallying exercise but was restrained by security officers and was not ejected from the tallying centre. He remained there as results from all the polling stations were announced till the very end when the final results declaring the 1st Respondent as the winner were announced by the 2nd Respondent.
81. The 2nd and 3rd Respondents denied the allegations of ballot stuffing in respect to Mosochi Market Polling Station 3 of 3 where Felix Nyamari was the presiding officer. Vote counting and tallying was done at the polling station and presiding officers delivered the results Forms 35A, ballot boxes which contained the votes cast, the rejected votes, unused and used ballot papers and their counterfoils such that by the time they were received at the constituency Tallying Centre, vote counting and tallying at the polling stations had concluded and any purported stuffing of ballot boxes could not change the results from a polling station.
 82. The 2nd and 3rd Respondents hold that the 1st Respondent was cleared to vie in the election after meeting all the legal requirements and the alleged complaint that he was not lawfully cleared, is in the nature of a pre-election dispute.
 83. The concluded by stating that granting prayers (b), (c), (d), (e), (f) and (g) of the Petition would be tantamount to usurping the power and the sovereign will of the people of Kitutu Chache South Constituency in contravention of Articles 1 and 38 of *the Constitution*.
 84. In his replying affidavit, the 2nd Respondent (RW1) reiterated the averments in their response to petition. In particular, he stated that he did not have a stake in the outcome of the election and remained neutral at all material times. That as the constituency returning officer, his duties included tallying, announcing and declaring the final results from each polling station in the Constituency for the election of the Member of National assembly. The presiding officers at each polling station appointed by the 3rd Respondent were in charge of the election process at their respective polling stations within the Constituency and were assisted by their deputy presiding officers, one at each polling station. He confirmed that after tallying all the votes cast in the election the results he announced declared and recorded in the Form 35B were, Abuga Eric Osoro 4,131; Bwongeri Pius Abuki 2,694; Antoney Kibagendi 14, 478; Maubi Andrew Mokaya 10, 378; Mochoge Justus Onsongo 235; Nyaberi Erick Elkanah 409; Nyagami Justine Omwenga 1,871; Omwando Samwel Kenani 3,571; Onkangi James Kegoro 112; and Toel Cynthia Kerubo 2, 378 making a total of 40,602 valid votes.
 85. RW1 further averred that there were no major incidents that could have interfered with the voting, counting and tallying recorded in the PSDs and reported to him as the returning officer. He stated that after voting, the presiding officers declared the polling stations closed after which they filled in the relevant part of the PSDs with the information including the number of ballot papers used and unused after polling and the number of rejected votes. Counting then commenced in the presence of candidates or their political party agents present with the presiding officer announcing in whose favour the votes were cast while displaying the votes to the agents for confirmation and then recorded the results. At the conclusion of counting of the votes, the presiding officer at a polling station completed Form 35A as required, detailing the results of each candidate at the polling station. The said counting and tallying process confirmed that the 1st Respondent garnered the highest number of valid votes cast totalling 14,478.
 86. RW1 further averred that upon vote counting, the presiding officers detached one self-carbonated copy of Form 35A and affixed it at the public entrance to the polling station or at any place convenient and accessible to the public at the polling station. The original results form was sealed in a tamper-proof envelope and delivered to the constituency returning officer and one self-carbonated result form would be sealed and left in the ballot box with the ballots. He asserted that he generated Form 35B from the



Forms 35A received from the presiding officers, which he used to declare the results. Further, where there were not more than three agents, the presiding officer would issue each agent with carbonated copies of Form 35A. He stated that before the self-carbonated copies of the Form 35A were detached by the presiding officer, he would ensure that he first allowed the political parties' agents the opportunity to confirm the correctness of the contents of the form by witnessing and signing and thereafter the presiding officer would also sign and stamp the Form 35A with the 3rd Respondent's stamp impression. Further, where there were more than three agents at the polling station, the presiding officer would allow the agent to take photographic images of the original Form 35A. Thus, from the foregoing, it would be virtually impossible and unbelievable for a presiding officer to alter the results in accordance with his own will and in the full glare of polling agents with onlooking security officers and observers and still make the agents sign the allegedly unilaterally altered results without instant repercussion of arrest. Indeed, if the above could have remotely and wildly occurred, which is not the case, then the agents would either have a different set of their own Forms 35A before the alleged presiding officers' alterations that were purportedly made consistently in favour of the 1st Respondent. Conversely if the said alterations were made by the presiding officers before the agents signed the Forms 35A, then it is only and purely because they wholesomely agreed with the correctness of the contents of the results forms with the minor errors they had.

87. RW1 further stated that the presiding officers must deliver to the constituency tallying centre the original Forms 35A, the PSDs and the ballot boxes. He accordingly confirmed that the election was conducted using the elaborate electoral management system supported by the laws on elections which included several layers of safeguards to ensure an open, transparent, participatory and accountable system to guarantee free and fair elections pursuant to Article 81 as read together with Article 86 of *the Constitution*. He reiterated that in light of the electoral management system that was employed by the 3rd Respondent, the alterations as aforesaid by presiding officers could not have been possible when considering the role and presence of political parties' agents, observers, security officers and the functionality of the election process in Kenya. He averred that he analysed the Forms 35A for Riadero SDA Primary School polling station 2 of 2, Nyamagoma FCS polling station 1 of 1, Nyankongo DOK Primary School polling station 7 of 7, Bototo Primary School polling station 1 of 1, Gesarara DEB Primary School polling station 2 of 2 and Nyankongo Primary School polling station 1 of 7 and found that the concerned presiding officers for these polling stations had added rejected ballots to the valid votes cast but this did not confer any advantage or add any votes to any candidate and therefore the alleged voter exaggeration and manipulation does not arise.
88. He deponed further that there was no loss of election materials that could have interfered with the electoral process and results of the election. He was also not aware of any alleged offence committed by the 3rd Respondent's officer in respect to the concealment of marked ballot papers as alleged save for what is contained in the Petition. Additionally, the presiding officers from all polling stations were in one queue at the Tallying Centre waiting to deliver to him as the returning officer, the results in Forms 35A, ballot boxes which contained the votes cast, the rejected votes, unused and used ballot papers and their counterfoils. He deposed that when he saw that the process was taking a long time which was the entire day on 10.8.22, he ordered all the presiding officers to enter the Tallying Centre hall for their own security and safety since it was almost nightfall. That is when the presiding officer for Kanyimbo Primary School Polling Station 2 of 2, one Mr. Ongati George Geoffrey discovered, upon reaching the desk that he had left the transparent tamper proof envelope for Forms 35A and the counterfoils packets where he was seated outside the Tallying Centre hall. The presiding officers were on the queue for more than 18 hours. The said presiding officer immediately noticed this and rushed back to collect the said packet only to be mistaken by members of the public that he was concealing electoral materials. He clarified to the security officers that Mr. Ongati George Geoffrey was one of his presiding officers whose



presence was duly sanctioned by law and was performing his duty of returning the electoral materials and results to him and since he was at the tallying centre, there was nothing unusual with him being in possession of the electoral materials.

89. RW1 further stated that the ballot box with the lid cover marked with a permanent marker "Nyanchwa Pry" was a ballot box for the seat of the County Woman Member of the National Assembly and did not concern the election for the Member of the National Assembly for Kitutu Chache South Constituency. Nonetheless the 3rd Respondent did re-use ballot boxes from previous election years and it was therefore not uncommon to find a ballot box marked in the name of a polling station that was not related to the polling station in which it was used for the election. However, the most important feature on a ballot box was its serial number and not the name and the lid did not bear a serial number.
90. He stated that the results Forms 35A for Daraja Mbili Market Polling Station 3 and Nyankongo DOK Primary School Polling Station 7 were available. The only inadvertent error was that results for Nyankongo DOK Primary School Polling Station 4 were listed twice on Form 35B while the results for Nyankongo DOK Primary School Polling Station 7 were omitted from the form. The final tally considered these errors such that Form 35B had a true reflection of the votes garnered by each candidate in all the 126 polling stations within the Constituency.
91. He denied knowing whether the 1st Respondent engaged in campaigns beyond the 48 hours campaign period. There were also no incidents reported in the PSDs on ejection of political parties' agents and candidates and the polling stations that were affected have not been specified to enable the 3rd Respondent call the presiding officers affected for them to give testimony.
92. According to him, there could not have been any incidents of ballot stuffing in respect to Mosochi Market Polling Station 3 of 3 where Felix Nyamari was the presiding officer since vote counting and tallying was done at the polling station and presiding officers would deliver the results forms 35A, ballot boxes which contained the votes cast, the rejected votes, unused and used ballot papers and their counterfoils such that by the time he received them at the constituency tallying centre vote counting and tallying at the polling stations had concluded and any purported stuffing of ballot boxes could not change the results from a polling station.
93. The 2nd Respondent further averred that the PSD that he received at the Tallying Centre from the presiding officer of Mosochi Market Polling Station 3 of 3 had a clear record of the full participation of Maubi Andrew Mokaya's agent one Davine Omwenga of ID No. 33371250 of the Wiper Democratic Movement Party at the opening of polling at 05:56 hours, at the time of closure of polling station before counting, at the time of sealing of packets and at the closure of counting. He denied that Maubi Andrew Mokaya was attacked and forcefully ejected from the Tallying Centre and stated that he found it unusual that the alleged complaint was lodged at Nyanchwa Police Station which is about 20 kilometres from the Tallying Centre while there is a police station barely a kilometre away. He stated that it was Maubi Andrew Mokaya who in a confrontational manner approached the returning officer's dais without authority. The security officers attached to RW1 stopped his progression towards him. There was no violent incident at all and he was not ejected from the Tallying Centre and remained throughout the announcement of results from various polling stations and till the very end when the 1st Respondent was declared as duly elected.
94. In response to the supporting affidavit of Omwando Samwel Kenani, the 2nd Respondent stated that the deponent had not specified the polling stations that would enable him to call the affected presiding officers to assist the Court by giving testimony. However, no such reports were made to him by the presiding officers through their PSDs. He deposed that he announced the results, completed Form



- 35B and validly declared the results of each candidate. The Petition is thus premised on falsehoods and urged that the same be dismissed with costs.
95. On cross examination, RW1 stated that at the end of voting, he expected that all ballot papers would have been utilized. In the event of low voter turnout, there would be a return of votes cast and the ballots unused. He further stated that in the election, only candidates, party agents of the political outfits would sign Form 35A. The presiding officers and deputy presiding officers also signed the form as they were required by law to do so. He admitted that Forms 35A were signed by agents whose parties did not fielded candidates in the election but said that it was not unlawful.
 96. RW1 admitted that there were indeed alterations in Forms 35A but stated that these did not affect the results. He however denied that political party agents were chased out of polling stations or that his office had developed a scheme in favour of the 1st Respondent. He admitted that he had omitted results for Daraja Mbili Market 3 and Nyankongo polling station 7 but denied that he declared incomplete results. RW1 confirmed that Ogati George Geoffrey, a presiding officer, was on the evening of 10.8.22 found with a tamper proof envelope of Form 35A and counterfoil packets. He stated that it was not unusual for a presiding officer to be walking around with counterfoil packets. He further stated that the said electoral materials were not exposed for long because Ogati realised he had left the documents outside and immediately went for them. RW1 denied that he failed to secure the election materials.
 97. On the ballot box of the County Women Representative, RW1 stated that the General Election involves 6 seats, one of which is the women representative. He stated that the important thing is the serial number but had not availed the serial number for the said ballot box. The same was from Nyankongo DOK 7 of 7 but not pleaded in the affidavit.
 98. RW1 further stated that he did not note the incident of violence reported by an agent as it was it as one of the incidences. He did not use the incident reporting template as there was no major incident to record. He denied being dismissive of Petitioner's complaints.
 99. RW1 asserted that the total voter turnout was 40602 as indicated in Form 35B. The figure of 41230 represented valid votes plus rejected votes which were about 601. They were indicated 40602 votes because they did not factor in the rejected votes. They were unable to tell the voter turnout but what was important was the number of votes assigned to each candidate.
 100. In his affidavit sworn on 15.9.22, Ogati George Godfrey RW2, the presiding officer at Kanyimbo DOK Primary School polling station 2 of 2 averred that he counted and tallied all the votes cast in the polling station and the results of each candidate were; Abuga Eric Osoro 011; Bwongeri Pius Abuki 034; Kibagendi Antony 106; Maubi Andrew Mokaya 086; Mochoge Justus Onsongo 003; Nyaberi Erick Elkanah 000; Nyagami Justine Omwenga 010; Omwando Samwel Kenani 026; Onkangi James Kegoro 001; and Toel Cynthia Kerubo 008. He further stated that the political parties' agents for the candidates who participated in the election were present at the opening of the polling station at part 1.4 of the PSD during the recording of ballot box serial numbers and seals used at the beginning of polling station at part 1.7 of the PSD, to the closure of the polling station, before counting, sealing of packets after ballot and recording of the ballot box seals used at the end of counting at part 3.10 and 3.12 of the PSD. He recorded the said information in her PSD. During the counting of the votes, he read and displayed each ballot paper to all the agents present at the polling station for their confirmation of the candidate in whose favour the vote was cast. After counting and tallying of the votes, the agents present witnessed the correctness of votes garnered by each candidate as recorded in Form 35A by signing it.
 101. He further deposed that on 10.8.22, he was on a queue at the Tallying Centre with other presiding officers, waiting to deliver to the constituency returning officer the results Form 35A, ballot boxes which contained the votes cast, the rejected votes, unused and used ballot paper and their counterfoils.



That when the returning officer saw that the submissions of the said electoral materials was taking long, he ordered all the presiding officers to enter the Tallying Centre hall for their own security and safety since it was almost night fall. Upon reaching the returning officer's desk, he discovered that he had left the transparent tamper proof envelope for the result Form 35A and the counterfoils packets outside, where he had been seated. He immediately rushed back to collect them only to be mistaken by the members of the public to be concealing electoral materials. The public caused a scene and the returning officer intervened and explained the situation to the security officers.

102. On cross examination, RW2 stated that he remembered the incident which was captured on video. He was captured with election materials. He had left the tamper proof for Form 35A and counterfoil packets outside and rushed back only to be mistaken as concealing electoral material. The counterfoils were for the 6 elective posts. The time was past afternoon. He could not tell the exact time. The materials were left exposed from 6 am until the time he discovered that he had left them.
103. The 2nd and 3rd Respondents filed affidavits sworn by presiding officers of the polling stations complained about in response to the complaints. Pursuant to Rule 12(13) of the Rules, the affidavits were by consent of the parties admitted as the deponents' evidence without cross-examination. Rule 12(13) provides:

Every deponent shall, subject to the election court's discretion, be examined-in-chief and cross-examined:

Provided that the parties may, by consent, accept not to cross-examine the deponents but shall have the deponent's evidence admitted as presented in the affidavits.
104. In his affidavit sworn on 14.9.22, Terrence Atemi, the presiding officer for the 3rd Respondent at Raganga DOK polling station 1 of 2 in deposed that he counted and tallied all the votes cast in the said polling station and the results for each candidate were: Abuga Eric Osoro 041; Bwongeri Pius Abuki 020; Kibagendi Antony 076; Maubi Andrew Mokaya 058; Mochoge Justus Onsongo 000; Nyaberi Erick Elkanah 003; Nyagami Justine Omwenga 004; Omwando Samwel Kenani 043; Onkangi James Kegoro 000; and Toel Cynthia Kerubo 023.
105. In her affidavit sworn on 14.9.22, Mireri Olpha, the presiding officer at Boekabu Primary School polling station 2 of 2 deposed that she counted and tallied all the votes cast in the said polling station and the results for each candidate were: Abuga Eric Osoro 25; Bwongeri Pius Abuki 47; Kibagendi Antony 83; Maubi Andrew Mokaya 20; Mochoge Justus Onsongo 001; Nyaberi Erick Elkanah 001; Nyagami Justine Omwenga 007; Omwando Samwel Kenani 012; Onkangi James Kegoro 001; and Toel Cynthia Kerubo 007.
106. She denied that the votes for Nyagami Justin Omwenga were reduced from 0112 to 007 and that the results for Omwando Samwel Kenani were cancelled as alleged. Justin Omwenga garnered 07 votes while Omwando Samwel Kenani garnered 12 votes and that this swop of votes did not affect the correct votes that were received by each candidate at the polling station.
107. In her affidavit sworn on 14.9.22, Ruth Nyaboke Nyabuto, the presiding officer of Nyamatuta DEB Primary School polling station 1 of 2, stated that after counting and tallying the votes cast at the polling station, the results for each candidate were: Abuga Eric Osoro 068; Bwongeri Pius Abuki 016; Kibagendi Antony 038; Maubi Andrew Mokaya 099; Mochoge Justus Onsongo 001; Nyaberi Erick Elkanah 003; Nyagami Justine Omwenga 005; Omwando Samwel Kenani 021; Onkangi James Kegoro 005; and Toel Cynthia Kerubo 010.



108. In her affidavit sworn on 14.9.22, Josephine Mora, the presiding officer of Rera DOK School polling station. She counted and tallied all the votes cast in the said polling station and the results for each candidate were: Abuga Eric Osoro 29; Bwongeri Pius Abuki 012; Kibagendi Antoney 0121; Maubi Andrew Mokaya 046; Mochoge Justus Onsongo 005; Nyaberi Erick Elkanah 001; Nyagami Justine Omwenga 002; Omwando Samwel Kenani 004; Onkangi James Kegoro 000; and Toel Cynthia Kerubo 003.
109. Nyamosi Mwango Edner, the presiding officer of Ong'icha DOK Primary School polling station 1 of 3 swore an affidavit on 15.9.22. She averred that she counted and tallied all the votes cast in the polling station and the results for each candidate were: Abuga Eric Osoro 043; Bwongeri Pius Abuki 050; Kibagendi Antoney 198; Maubi Andrew Mokaya 025; Mochoge Justus Onsongo 001; Nyaberi Erick Elkanah 000; Nyagami Justine Omwenga 001; Omwando Samwel Kenani 005; Onkangi James Kegoro 002; and Toel Cynthia Kerubo 023.
110. In his affidavit sworn on 14.9.22, Lawrence Omari Marungu, the presiding officer at Nyamondo Primary School Polling Station 1 of 1. He stated that after counting and tallying all the votes cast in the polling station the results for each candidate were: Abuga Eric Osoro 058; Bwongeri Pius Abuki 052; Kibagendi Antoney 150; Maubi Andrew Mokaya 106; Mochoge Justus Onsongo 002; Nyaberi Erick Elkanah 001; Nyagami Justine Omwenga 005; Omwando Samwel Kenani 013; Onkangi James Kegoro 001; and Toel Cynthia Kerubo 009.
111. Similarly, Daisy Moraa Moranga, the presiding officer at Ititi Primary School polling station 2 of 2, swore an affidavit on 14.9.22. She deposed that after counting and tallying all the votes cast in the polling station and the results for each candidate were: Abuga Eric Osoro 050; Bwongeri Pius Abuki 009; Kibagendi Antoney 104; Maubi Andrew Mokaya 087; Mochoge Justus Onsongo 005; Nyaberi Erick Elkanah 005; Nyagami Justine Omwenga 008; Omwando Samwel Kenani 018; Onkangi James Kegoro 002; and Toel Cynthia Kerubo 015.
112. Peter Ochenge Mose, the presiding officer at St Mary's Mosoch Primary Boarding School polling station 1 of 2 swore an affidavit on 14.9.22 in which he deposed that he counted and tallied all the votes cast in the said polling station. The results for each candidate were: Abuga Eric Osoro 037; Bwongeri Pius Abuki 015; Kibagendi Antoney 072; Maubi Andrew Mokaya 078; Mochoge Justus Onsongo 003; Nyaberi Erick Elkanah 001; Nyagami Justine Omwenga 010; Omwando Samwel Kenani 008; Onkangi James Kegoro 000; and Toel Cynthia Kerubo 013.
113. The presiding officer of Daraja Mbili Primary School polling station 2 of 3 Nyandoro Maureen Moraa swore and affidavit on 14.9.22 in which she stated that she counted and tallied all the votes cast in the said polling station and the results for each candidate were: Abuga Eric Osoro 013; Bwongeri Pius Abuki 010; Kibagendi Antoney 192; Maubi Andrew Mokaya 021; Mochoge Justus Onsongo 002; Nyaberi Erick Elkanah 004; Nyagami Justine Omwenga 022; Omwando Samwel Kenani 021; Onkangi James Kegoro 000; and Toel Cynthia Kerubo 020.
114. In her affidavit sworn on 15.9.22, Dolphine Kerubo Ondoro, the presiding officer at St. Mary's Mosoch Primary Boarding Polling Station 2 of 2 stated that she counted and tallied all the votes cast in the said polling station and the results for each candidate were: Abuga Eric Osoro 057; Bwongeri Pius Abuki 021; Kibagendi Antoney 048; Maubi Andrew Mokaya 082; Mochoge Justus Onsongo 000; Nyaberi Erick Elkanah 000; Nyagami Justine Omwenga 008; Omwando Samwel Kenani 005; Onkangi James Kegoro 002; and Toel Cynthia Kerubo 017.
115. Similarly, Anne Kemunto the presiding officer at Daraja Mbili Primary School Polling Station 1 of 4 swore an affidavit on 15.9.22. She stated that she counted and tallied all the votes cast in the said



polling station and the results for each candidate were: Abuga Eric Osoro 009; Bwonger Pius Abuki 012; Kibagendi Antony 195; Maubi Andrew Mokaya 030; Mochoge Justus Onsongo 001; Nyaberi Erick Elkanah 003; Nyagami Justine Omwenga 027; Omwando Samwel Kenani 036; Onkangi James Kegoro 000; and Toel Cynthia Kerubo 022.

116. Each of these presiding officers also averred that the political parties' agents for the candidates who participated in the election were present at the opening of the polling stations as indicated in part 1.4 of the PSD, during the recording of ballot box serial numbers and seals used at the beginning of polling station as indicated in part 1.7 of the PSD. They further stated that the agents were present at the closure of the polling station, before counting, sealing of packets after ballot and recording of the ballot box seals used at the end of counting as indicted in part 3.10 and 3.12 of the PSD. The presiding officers recorded the said information in their PSDs. During the counting of the votes, they read and displayed each ballot paper to all the agents present at the polling station for their confirmation of the candidate in whose favour the vote was cast. After counting and tallying of the votes, the agents present witnessed the correctness of votes garnered by each candidate as recorded in Form 35A by signing the same.
117. At the hearing, all these affidavits of the presiding officers were by consent adopted in evidence without cross examination by the Petitioners.
118. After conclusion of the hearing, parties filed their respective submissions as directed by the Court. I have given due consideration to the Petition, the responses, the evidence and submissions by the parties and having done so, I find that the following issues arise for determination:
 - i. Whether the 1st Respondent was validly cleared to contest for the election.
 - ii. Whether the election was conducted in accordance with *the Constitution* and the *Elections Act* 2011 and the Regulations thereunder and whether the 1st Respondent was validly declared as the winner in the election.
 - iii. Who should bear the costs of the Petition.
119. The Court considered the prayer for scrutiny and recount of votes earlier. By a ruling delivered on 16.12.22, the prayer was disallowed.
120. As I embark on considering and the determination of this Petition, it is necessary at the very outset to set out the general principles for the electoral system which are anchored in Article 81 of *the Constitution* as follows:

The electoral system shall comply with the following principles--

- (a) freedom of citizens to exercise their political rights under Article 38;
- (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;
- (c) fair representation of persons with disabilities;
- (d) universal suffrage based on the aspiration for fair representation and equality of vote; and
- (e) free and fair elections, which are
 - i) by secret ballot;
 - ii) free from violence, intimidation, improper influence or corruption;



- (iii) conducted by an independent body;
- (iv) transparent; and
- (v) administered in an impartial, neutral, efficient, accurate and accountable manner.

121. Towards this end, Article 86 places the following obligations upon the IBEC:

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

- a. whatever voting 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.

122. For the Petitioners to succeed in this Petition which seeks to nullify the election of the 1st Respondent as the Member of the National Assembly for Kitutu Chache Constituency, they must meet the threshold and discharge the burden of proof required in Sections 107-109 of the *Evidence Act* which provide:

107 Burden of proof

- 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108 Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109 Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

123. In the case of *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013) (Judgment), the Supreme Court had this to say about the burden placed upon a petitioner seeking nullification of an election:

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.

124. More recently, in the case of *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)* (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 56 (KLR) (Election Petitions) (26 September 2022) (Judgment), the Supreme Court again pronounced itself on the burden and standard of proof borne by a petitioner who seeks to nullify an election as follows:
27. The question, whether or not the 2022 Presidential Election passed constitutional and legal muster, can only be answered upon consideration and with reference to the threshold of the burden and standard of proof borne by the petitioners. It is ultimately therefore, a question of evidence tendered by the petitioners.
28. The law of evidence complements the existing civil and criminal substantive and procedural laws in this country. The outcome of a case depends on the strength, accuracy and reliability of evidence. In an adversarial court system like ours, the courts and Judges are 'blind', in the sense that they do not carry out any investigative roles or gather evidence on behalf of the parties before them. They depend on and determine disputes from what parties present. Consequently, cases are won or lost on the evidence placed before the Court.
125. Having set out the principles that will be guide this Court in arriving at its final finding, I now embark on examining the issues for determination.

Whether the 1st Respondent was validly cleared to contest for the election.

126. The Petitioners submitted that PW1 testified that the 1st Respondent was not validly cleared to contest in the general election as he was outside the country when the 2nd Respondent was clearing the candidates of the general elections. It follows that he could not have availed himself personally to be cleared by the 2nd Respondent contrary to Regulation 38(c) of the Elections (General) Regulations, 2012.
127. The 1st Respondent submitted that he was validly cleared to contest and further that the Petitioners although stating that he was away at the time of clearing, did not tell Court which law was violated.
128. On their part, the 2nd and 3rd Respondents submitted that the 1st Respondent was validly cleared to vie in the election after meeting all the legal requirements. Relying on Article 99(1) and (2) of *the Constitution* and Section 24 of the Act they argued that being out of the country is not one of the grounds to disqualify one from being cleared. In any event this complaint by the Petitioners is by its nature is a pre-election dispute in respect of which this Court lacks jurisdiction.
129. The law is that all pre-election disputes are to be determined by the IEBC by dint of Article 88(4)(e) of *the Constitution* and Section 74(1) Article 88(4)(e) provides as follows:
- (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—



- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;

Section 74 of the Act is couched in similar terms as follows:

Pursuant to Article 88 (4) (e) of *the Constitution*, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

130. The jurisdiction of the election court to entertain electoral disputes is stipulated in Article 105 of *the Constitution* as follows:
- (1) The High Court shall hear and determine any question whether—
 - (a) a person has been validly elected as a member of Parliament; or
 - (b) the seat of a member has become vacant.
 - (2) A question under clause (1) shall be heard and determined within six months of the date of lodging the petition
131. Article 105 confers upon an election court to determine any question on the validity of an election of any person as a member of Parliament. The wording is not limiting but all encompassing. The jurisdiction of the election court to entertain pre-elections disputes in light of Article 88(4)(e) of *the Constitution* and Section 74(1) of the Act has been the subject of judicial consideration by our superior courts right up to the Supreme Court.
132. It would now appear settled that if the dispute before the election court touches on the validity of the election of a person including issues of eligibility to contest in an election, then the election court would have jurisdiction.
133. In the case of *Kennedy Moki v Rachel Kaki Nyamai & 2 others* [2018] eKLR the Court of Appeal considered the jurisdiction of an election Court over a nomination dispute and had this to say:
- 57. Convinced that election is a process which includes nomination of candidates, we take the view that subject to finality and constitutional time lines of the jurisdiction of other competent organs, an election court has jurisdiction to hear and determine pre-election nomination disputes if such dispute goes to eligibility and qualification to vie and contest in an election. If a nomination certificate is issued to a person who is neither qualified nor eligible to vie in an election, the Certificate is not conclusive proof of eligibility and qualification to vie. If a dispute arises as to the validity of such a certificate and eligibility to vie, an election court has jurisdiction to determine the validity of the nomination certificate and the eligibility to vie of the person bearing the certificate.
 - 58. In our view, the provisions of Article 88 (4) (e) of *the Constitution* and Section 74 (1) of *the Constitution* are not clauses that oust the jurisdiction of an election court. Article 88 (4) (e) confers jurisdiction of the Electoral Commission in settling of nomination disputes. The said Article does not confer jurisdiction on the Commission to hear election petitions. The Article reserves the jurisdiction of an election court to determine election petitions. A nomination dispute that goes to the root of the electoral process, or one that determines qualification and



eligibility of a candidate to vie, is an issue of substance that goes to the root of the election, and an election court has jurisdiction to hear and determine the dispute.

134. And in the case of *Silverse Lisamula Anami v Independent Electoral & Boundaries Commission & 2 others* [2019] eKLR, the Supreme Court settled the issue by stating:

51. We have already established that the High Court, as an election Court, has been given the mandate to examine a question whether a person has been validly elected and in essence, adjudicate over an election petition. If for example a person is not qualified for election, would such a person be validly elected? Indeed, if a person does not meet the set-qualifications such as being a registered voter, or being of certain educational standards or being nominated by a political party or an independent candidate and such a person is “elected”, then that cannot be said to be a valid election. In fact, the election would be a nullity. When the election Court is therefore given the mandate to examine the validity of an election, it necessarily means that the said Court would have the power to investigate the legitimacy of that election including on issues of eligibility to contest in an election. In that context, and according to Article 105(1) (a), the election Court stands as the custodian of *the Constitution* in matters of elections with the ultimate mandate of investigating the legitimacy of an election.

135. In the present case, the issue raised by the Petitioners goes to the question of the 1st Respondent’s eligibility to contest in the election in the first place. Flowing from the cited authorities, I do find that by dint of Article 105 of *the Constitution*, this Court being custodian of *the Constitution* in matters of elections with the ultimate mandate of investigating the legitimacy of an election has the requisite jurisdiction to entertain the question as to whether the 1st Respondent was validly nominated to contest in the election.

136. Having said that, I now turn to the complaint itself. The Petitioners claim that the 1st Respondent was out of the country at the time of nominations. As such, he could not have personally presented himself to the 2nd Respondent for clearance to contest.

137. Part IX of the Elections (General) Regulations, 2012 makes general provisions on nomination of candidates. Regulation 38 makes provision for the General requirements relating to political party candidates as follows:

A nomination paper submitted by a political party candidate to the Commission shall—

- (a) contain the candidate’s name as it appears in the register of voters;
- (b) be signed by the candidate and by a proposer and seconder who shall be voters registered in the respective electoral areas, and who shall be members of the political party, and by an authorised official of the political party; and
- (c) be delivered to the returning officer personally by the candidate or by a person authorised by the candidate in that behalf on the day set for the nomination.
(emphasis)

138. It is quite evident from Regulation 38(c) that a nomination paper of a political party candidate submitted to the Commission shall be delivered to the returning officer. Such candidate may deliver the said nomination paper either personally or by a person authorized by the candidate in that behalf. It is therefore quite clear that it is not mandatory for a candidate to present himself personally to the returning officer to deliver his nomination papers and may send authorize someone to do so on his behalf. In any event, being absent from the country at the time of nominations, is not one of



the grounds for disqualification for election as member of Parliament set out in Article 99 (2) of *the Constitution* and Section 24(2) of the Act.

139. In view of the foregoing, I find and hold that that the claim by the Petitioners that the 1st Respondent was not validly cleared to contest for the election in question is hollow and is without merit.

Whether the election was conducted in accordance with *the Constitution* and the *Elections Act 2011* and the Regulations thereunder and whether the 1st Respondent was validly declared as the winner in the election.

140. It is the contention of the Petitioners that the election was marred with illegalities and irregularities, election violence against candidates, unlawful ejection of agents and failure to secure the electoral materials from the polling stations contrary to the express constitutional requirements and the *Elections Act*. It is the Petitioners contention that the illegalities and irregularities affected the outcome of the election as required under Section 83 of the *Elections Act*.
141. On failure to secure election materials, the Petitioners submitted that PW-1, PW-2, PW-3 and PW-5 testified that a presiding officer from Kanyimbo Polling station was nabbed walking around with ballot papers and counterfoils concealed in a bag. PW-2 confirmed raising the issue with the 2nd Respondent and the security officers but no action was taken against the errant presiding officer. Further that PW-1 and PW-4 produced a video clip containing a media reporting of the incident in which the 2nd Respondent advised the aggrieved parties to seek redress from court. Additionally, PW-5 produced photographs that he took at the Tallying Centre showing the unsecured ballot papers and electoral materials. They further contended that the presiding officer from Kanyimbo DOK Primary School polling station 2 of 2 admitted to failing to secure the electoral material and leaving them unattended at the Tallying Center. The returning officer also admitted to being aware of the incident and addressing the media over the same. He also conceded that he advised the aggrieved parties to seek redress from court.
142. The 2nd and 3rd Respondents countered this by submitting that during the hearing the presiding officer for Kanyimbo DOK Primary School polling station 2 of 2 and the 2nd Respondent testified that what was in possession of the presiding officer were counterfoils packets and the tamperproof envelope for the results Form 35A and not marked ballot papers as alleged by the Petitioners. No evidence was produced to prove that Ogati George Godfrey the said presiding officer, was in possession of marked ballot papers. The presiding officer and the 2nd Respondent testified that the failure by the presiding officer to place the counterfoils packets and the tamperproof envelope for the results Form 35A in the ballot box at the close of the polling was inadvertent and attributed to fatigue.
143. It was further submitted that the incident occurred at the Tallying Centre, long after voting had closed and after the votes cast were counted and results declared at the polling station. Accordingly, failure to seal and place the counterfoils packets and the tamperproof envelope for the results Forms 35A in the ballot box did not affect the results garnered by the candidates at Kanyimbo DOK Primary School Polling Station 2 of 2.
144. I have carefully considered the submissions by counsel and the evidence regarding the unsecured election material. Although the Petitioners alleged that the election material in the bag carried by Ogati George Godfrey included marked and unmarked ballot papers, the Respondents stated that the bag had the tamperproof envelop of the results and counterfoils. It was obvious from the video clip played in Court that no one could tell the contents of the bag.



145. In the case of Julius Lekakeny ole Sunkuli v Gideon Sitelu Konchellah & 2 others [2018] eKLR relied on by the Petitioners, the ballot boxes carrying the ballots had been diverted by the presiding officers to unknown place instead of them being transported directly to the tallying centre. the Court of Appeal stated:

How can an election where ballot boxes are diverted by Presiding Officers, who are employees of 3rd respondent for reasons unknown, and even without the knowledge of the Returning Officer, accompanied by falsification and alterations of the same be said to have been accurate, verifiable, secure, accountable, transparent and free from electoral malpractice? There was obviously breach of Article 86(a) of *the Constitution*. All parties to the petition and indeed in this appeal concede to that fact. *The Constitution* has itself proclaimed pursuant to Article 2(4) thereof that any act or omission in contravention of *the Constitution* is invalid.

146. In the present case however, the incident in question occurred at the Tallying Centre. This was after counting and tallying had been done at the polling station in accordance with Article 86(b) of *the Constitution* which required that the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station. In any event, even if it were true that the said presiding officer had ballot papers as alleged, no change of results could take place at the Tallying Center, given that the votes had already been counted and results announced at the polling station.

147. It is now well settled that final results are recorded at the polling station and cannot be altered anywhere else or at any other place. This was the holding in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR where the Court of Appeal stated:

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. It sounds ill that a contrary argument that is so anathema and antithetical to integrity and accuracy should fall from the appellant's mouth.

The Court went on to state:

The lowest voting unit and the first level of declaration of presidential election results is the polling station. The declaration form containing those results is a primary document and all other forms subsequent to it are only tallies of the original and final results recorded at the polling station.

148. As indicated, the incident complained of occurred at the Tallying Centre, long after voting had closed, the votes cast are counted and results declared at the polling station. Hence the failure to seal and place the counterfoils packets and the tamperproof envelope for the results forms 35A in the ballot box did not affect the results garnered by the candidates at Kanyimbo DOK Primary School Polling Station 2 of 2. In this regard, my finding is fortified by the holding in the case of Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 others [2018] eKLR cited by the 2nd and 3rd Respondents, where the Court of Appeal stated:

Regarding the four (4) grounds set out above, upon which the election was invalidated, we think there was no basis to say that failure to seal used ballot papers and counterfoils of used ballot papers in the ballot boxes; failure to locate some Forms 37A in the ballot boxes; the presence of ballot papers in 12 ballot boxes whose ballot booklets could not be located;



and the alleged excess of 111 ballot papers, were irregularities of such magnitude that they seriously undermined and affected the election result.

149. On the claim that declaration of the 1st Respondent as the winner on the basis of incomplete tally and verification of results that were omitted in Form 36B, the Petitioners submitted that the 2nd Respondent admitted that the results from 2 polling stations namely, Daraja Mbili Market polling station 3 and Nyankongo DOK Primary School polling station were not captured in Form 35B. He failed to explain whether he received the results from the 2 polling stations and why he omitted the same from the final declaration. They further submitted after being cross examined on the declaration of incomplete results, the 2nd Respondent he attempted in re-examination, to sneak in and introduce a completely different Form 35B which purported to introduce the results from the two polling stations. The new Form 35B bore a completely different serial number from the Form 35B that had been filed in Court. Additionally, that the Petitioners contended that the results from Nyankongo Primary stream 4 were repeated twice on the Form 35B. Hence the collation by the 2nd Respondent was not accurate and verifiable as required under Article 86(c) of *the Constitution*.
150. In their defence, the 2nd and 3rd Respondents submitted that Daraja Mbili Market Polling Stations 3 of 3 and Nyankongo DOK Primary School Polling Station 7 of 7 were erroneously not captured in the results Form 35 B. They contended that the omission of the results of the 2 polling stations affected all the candidates and none of the candidates was disenfranchised by the omission and that the 1st Respondent garnered the highest number of votes in the two polling stations. Additionally, the 2nd and 3rd Respondents submitted that the said omission was not fatal and did not affect the result and that even if they had been collated in Form 35B, the 1st Respondent will still have emerged the winner. Further that the results for the two polling stations in Form 35A are not disputed the only issue is that they were not capture in Form 35B.
151. For this ground to succeed it must be demonstrated that the omission of the results of the 2 polling stations was sufficient to raise doubt in the mind of the Court that the 1st Respondent was lawfully declared winner of the election. It is noted that the results in the polling stations is not disputed. The only complaint is that these results were not captured in Form 35B. Further it has not been demonstrated that the omission affected the results of any of the candidates. Accordingly, I find and hold that this ground also fails. In so holding, I am guided by the Court of Appeal in the case of *Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 others* [2018] eKLR. The Court stated:
- In the case of *Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 others* [2018] eKLR the Court of Appeal. In *Independent Electoral and Boundaries Commission V Maina Kiai & 5 Others* [2017] EKLR, this Court held that the primary source of results in a Parliamentary election is the ballot box, whose results are recorded in Form 35A at each polling centre, before tallying is done and the results obtained from the various polling centres are captured in Form 35B. There were no complaints regarding the results in Forms 35A and as we have stated earlier. The errors in Form 35B were purely arithmetical and did not affect the results obtained by either the appellant or the 1st respondent.
152. On the claim that agents of candidates were ejected from the polling stations, PW2 and PW6 testified that officials of the 2nd and 3rd respondents unlawfully ejected the agents of PW2 from Riangkoko Primary School, Kiogo Primary School, Nyankongo Primary School, Kianyabinge primary school, Daraja Mbili Market, Nyamorenyo Primary School, Moneke Primary School, Getembe Primary school, Daraja Mbili Market, Nyamataro Market and Nyamondo primary school polling stations. This was denied by the Respondents.



153. The Court notes that in many of the Form 35As in Court did not have the names of agents of PW2 and other candidates. It is not clear why these agents did not sign the said Forms. It would have been helpful if they had been called to testify so that the Court would hear first hand accounts from the horse's mouth as it were. Their testimony would also have been subjected to cross examination for purposes of ascertaining its veracity. Without their testimony, this Court is unable to make anything of the allegations made by the Petitioners in this regard.
154. The law is clear that absence of agents will not affect the proceedings in a polling station. Regulation 62(3) of the Elections (General) Regulations 2012 provides:
- The absence of agents shall not invalidate the proceedings at a polling station.
- Similarly, Regulation 79(7) of the said Regulations stipulates as follows:
- The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under subregulation (2) shall not by itself invalidate the results announced.
155. It is instructive to note that Regulation 79(2A)(b) provides that the presiding officer shall inter alia request each of the candidates or agents present to append his or her signature on the declaration of the results. In the case of the election of a member of the National Assembly, this would be Form 35A. what this provision acknowledges is that there will be instances where candidates in an election and/or their agents will not be present at the time of declaration of results. This is why the wording is clear that the presiding officer will request the candidates and agents present.
156. Flowing from the cited provisions, it is evident that absence of candidates and agents is recognized by law and it has no bearing on the results or declaration thereof. Unless it is demonstrated by evidence, that such absence is as a result of an unlawful action by any person.
157. Although ejection of candidates' agents was a key ground upon which the Petition is premised, neither the Petitioners nor their witnesses were able to give the names of the accredited agents, the letters of appointment or indeed the badges issued to them by the 3rd Respondent. They did not even state the polling stations from which the agents were allegedly ejected nor the names of the presiding officers who ejected them. Even more critical is that none of the agents who were allegedly ejected from the polling stations testified before Court. After carefully considering the affidavits and testimony of the witnesses, I find that this allegation was not supported by evidence.
158. On altered Forms 35A, the Petitioners submitted that cumulatively, the altered forms, unsigned Forms 35A, forms signed by agents not participating in the election, the omitted results and double entry of results election affected over 15,632 votes, which were material to change the outcome of the election. The declaration of the 1st Respondent as the winner of the election was therefore erroneous, invalid and unconstitutional.
159. In his submissions, the 1st Respondent, contended that the election was conducted above reproach and that the declaration of the 1st Respondent as the winner is valid and stands the test of law and common practice. He argued that the 1st Petitioner's production of allegedly cancelled/and or altered Forms 35A did not affect the credibility of the result. The Petitioners and or their witnesses failed to present to Court any Form 35A that bore differed results from those declared at the polling station. He also did not point out to Court a single entry in Form 35B that deviated from the results declared in Forms 35A as held by this Court in the application for scrutiny. It was his case that the Petitioners opted not to cross examine the presiding officers. Their affidavits spoke to the correctness of the votes garnered and



the election being conducted above board and in compliance with the law. They thus cannot claim to have discharged their burden of proof.

160. The 2nd and 3rd Respondents submitted that the 1st Respondent was validly elected. Relying on Article 38 of *the Constitution*, they submitted that the election was conducted in accordance with *the Constitution* and the governing laws. Further that in view of the dismissal of the application for scrutiny, and the Petitioners having not proved that there was any improper counting and tallying of the votes which considerably or at all were to the advantage of the 1st Respondent, it will be just and fair to both the 1st Respondent and the Constituents of Kitutu Chache South Constituency if the Petition were to be dismissed. They urged the Court to uphold the 1st Respondent's victory.
161. I have carefully looked at the alterations in Forms 35A which are analysed as follows:



Polling Station	Candidate	Initial votes	Altered votes	Difference
In Raganga DOK Primary School Polling Station 1 of 2	Abuga Eric	020	041	21
	Osoro	076	020	56
	Bwongeri Pius Abuki	058	076	18
	Kibagendi Antoney	000	058	58
	Maubi Andrew Mokaya			
Bokeabu Primary School Polling Station 2 of 2	Nyagami Justine Omwenga	0112	007	105
	Omwando Samwel Kenani	002 (unclear)	012	10
Rera DOK Primary School Polling station 1 of 1	Bwongeri Pius Abuki	029	12	17
	Kibagendi Antoney	0121	005	11
	Maubi Andrew Mokaya	overwritten	001	4
	Mochoge Justus Onsongo	016		
	Nyaberi Erick Elkanah	005		
Ong'icha DOK Primary School Polling station 1 of 3	Kibagendi Antoney	196 or 198 (overwritten)	-	-
Nyamondo Primary School Polling Station 1 of 1	Omwando Samwel Kenani	003 or 013 (overwritten)	-	-
Ititi Primary School Polling Station 2 of 2	Maubi Andrew Mokaya	087 (overwritten)	-	-
St Marys Mosocho Primary	Bwongeri Pius Abuki	not legible	015	-



Boarding School Polling Station 1 of 2				
Daraja Mbili Primary School Polling Station 2 of 3	Kibagendi Antoney	292 (overwritten)	-	-
Daraja Mbili Secondary School polling Station 1 of 4	Mochoge Justus Onsongo Nyaberi Erick Elkanah Nyagami Justine Omwenga Omwando Samwel Kenani	overwritten overwritten not legible overwritten	027	-
Nyamatuta DEB Primary School Polling Station 1 of 2	Nyagami Justine Omwenga	005 (overwritten)	-	-

162. From the alterations, I noted that some polling stations had cancellations and alterations on the total number of valid votes cast, some had two figures indicated as the total number of valid votes cast, and some were overwritten and altered. Those with overwritten results were, Ong'icha DOK Primary School Polling Station 1 of 3; Ititi Primary School Polling Station 2 of 2; and Riotero SDA Primary School Polling Station 1 of 2. Those with cancelled results were, Nyanguru DOK Primary School Polling Station 1 of 2 from 412 to 401; Nyanguru DOK Primary School Polling Station 2 of 2 from 387 to 365; Daraja Mbili Secondary School Polling Station 1 of 4 from 349 to 335; Riogaro Market Polling station 1 of 2 from 327 to 325; and Nyankongo DOK Primary School Polling Station 2 of 2 from 000 to 405. Those with two figures indicated were, Nyanguru DOK Primary School Polling Station 1 of 2 (401 and 412); Nyankongo DOK Primary School Polling Station 7 of 7 (411 and 400); Bototo Primary School Polling Station 1 of 1 (304 and 298); Gesarara DEB Primary School Polling Station 2 of 2 (202 and 197); Nyankongo DOK Primary School Polling Station 1 of 7 (365 and 373); and Riotero SDA Primary School Polling Station 2 of 2 (325 and 319). In Kanunda Primary School Polling Station 1 of 3 the total number of valid votes cast were altered. In Nyankongo DOK Primary School polling Stations 2 of 2 the total number of registered voters were cancelled from 008 to 621.
163. He alterations are inexcusable and the 2nd and 3rd Respondents cannot escape blame for the carelessness and negligence. After analysing the alterations however, I find that they affected number of votes is insignificant and is less than 500. It certainly would not bridge the gap of over 4000 votes between the 1st Respondent who won the election with 14,478 votes and the runner up, Maubi Andrew Mokaya with 10,378 votes. Accordingly, the alterations cannot upset the election.
164. On violence against candidates, the Court notes from the evidence that in spite the allegations by the Petitioners that various candidates and their agents were attacked by goons and agents of the 1st Respondent at the Constituency Tallying Centre, only PW2 testified to having been attacked by agents



of the 1st Respondent and reported the matter to the police. He did not however give any names of the persons who attacked him. Additionally, he did not produce the police abstract or P3 form as evidence or call any witnesses corroborate his allegations. All this would have assisted the Court in making a finding. Without any evidence to support his claim, the same remains mere allegations.

165. As regards the allegation that the 1st Respondent campaigned after the allowed period, the 1st Respondent denied that the Facebook account was his. He stated that he has not had a Facebook account since 2017. PW4 the ICT practitioner who testified on behalf of the Petitioners stated that it was not possible to know whether the Facebook account belonged to the 1st Respondent or that someone had created it for him. He stated that he could not prove that it was the 1st Respondent who had posted the content.
166. From the foregoing, it is obvious that the Petitioners were unable to prove that the 1st Respondent campaigned after the prescribed period as alleged by the Petitioners.
167. After considering all the evidence placed before the Court, it is the finding of the Court that the irregularities cited by the Petitioners did not substantially affect the result.
168. Section 83(1) of the Act provides:
1. A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that-
 - a. the election was conducted in accordance with the principles laid down in *the Constitution* and in that written law; and
 - b. the non-compliance did not substantially affect the result of the election.
169. From the above provision, it is clear that Parliament recognized that no election is perfect. The election must however be conducted substantially in accordance with the principles set out in *the Constitution* the electoral laws and regulations thereunder. As such, 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 that election.
170. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, the Supreme Court stated:
- (216) It is clear to us that an election should be conducted substantially in accordance with the principles of *the Constitution*, as set out in Article 81 (e). Voting is to be conducted in accordance with the principles set out in Article 86. The *Elections Act*, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.
 - (217) If it should be shown that an election was conducted substantially in accordance with the principles of *the Constitution* and the Election Act, then such election is not to be invalidated only on ground of irregularities.
 - (218) Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election.



171. Similarly, in the case of Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR, the Supreme Court pronounced itself on the issue of irregularities that do not affect the final result of the election. The Court stated:

We also agree with the trial Court's appreciation of the evidence presented before it that the election, despite the isolated cases of irregularities which did not affect the result of the election, was essentially free and fair. We therefore find that in view of the fact that the election went on smoothly in all 165 polling stations, save one, the alleged violation of Article 86(a) of *the Constitution* did not substantially affect the outcome of the election. The Court of Appeal also contravened Article 163(7) *the Constitution* by not applying the binding precedent set by this Court.

172. In the present case, the irregularities cited by the Petitioners though some are acknowledged by the 2nd and 3rd Respondents are in isolated cases. Further it has been not been demonstrated that the irregularities were of such magnitude that they affected the election result. As stated by the Supreme Court in the Gatirau Peter Munya case, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election. Duly guided, and given the circumstances herein I find that the election herein was conducted in accordance with *the Constitution*, The *Elections Act* and the Regulations thereunder. I therefore find no basis for vitiating the election of the 1st Respondent. Accordingly, I find and hold that the 1st Respondent was validly declared as the duly elected Member of the National Assembly for Kitutu Chache South Constituency.

Who should bear costs of the Petition

173. The Petitioners urged the Court to consider the conduct of the parties during the election and the hearing of the Petition. They submitted that there were several breaches of the Act and regulations with regard to the safe keeping of the electoral materials, violence against candidates and the omission of results in Form 35B which necessitated the two Petitioners to approach the Court for the redress. These breaches were occasioned by the Respondents and it is only just and proper that the Respondents be ordered to pay costs, as to order otherwise would be to allow them to benefit from their infractions. The Petitioners further submitted that the Petition was lodged in the public interest and in defense of *the Constitution* and was prompted by the omission of results from 2 polling stations by the 2nd Respondent. In the event however that the Court deems it fit not to condemn the Respondents to bear the costs, they submitted that each party should then bear its own costs.

174. The 1st Respondent cited Rule 30(1) of the Election Petition (Parliamentary and County Elections) Petition Rules, 2017 and dismissed the Petitioners' argument that the Petition was brought in the public interest. He urged the Court to award the costs if the Petition falls. He urged that given that the conduct of the election was above reproach and that the declaration of the 1st Respondent as the duly elected Member of the National Assembly of the Constituency is valid and stands the test of law and common practice, the Petition should be dismissed with costs. For their part, the 2nd and 3rd Respondents submitted that costs follow the event and that the Petition, which lacks merit, should be dismissed with costs to them.

175. Section 84 of the Act provides for costs and states that:

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



176. Rule 30 of the Rules goes further and sets out the discretion of the election Court in the award of costs as follows:

- (1) The election court may, at the conclusion of a petition, make an order specifying –
 - (a) the total amount of costs payable;
 - (b) the maximum amount of costs payable;
 - (c) the person who shall pay the costs under paragraph (a) or (b);
 - (d) the person to whom the costs payable under paragraphs (a) and (b) shall be paid.
- (2) When making an order under sub-rule (1), the election court may –
 - (a) disallow any prayer for costs which may, in the opinion of the election court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent; and
 - (b) impose the burden of payment on the party who may have caused an unnecessary expense, whether that party is successful or not, in order to discourage any such expense.

177. It is trite law that costs follow the event and ordinarily, costs are awarded to the successful party at the discretion of the Court. Given that the Court has found the Petition lacking in merit, this Petition should be dismissed with costs.

178. In the case of *Mohammed Mahamud Ali v Independent Electoral and Boundaries Commission* [2019] eKLR, the Supreme Court addressing the issue of costs stated:

- (61) This Court has previously settled the law on award of costs, deeming that costs follow the event. Further, that a Judge has the discretion in awarding the same. This was our decision in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No. 4 of 2012; [2014] eKLR (*Jasbir Singh Case*) where we stated:

“ [18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

[22] Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The



relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.”

179. The foregoing notwithstanding, there are instances where the Court forms the opinion that the circumstances before it, do not merit an award of costs to the successful party.

180. In the case of *Steven Kariuki v George Mike Wanjohi & 2 others* [2014] eKLR the complaint of the petitioner therein was that the respondent had initially declared him winner of the parliamentary seat in question and issued him with a certificate to that effect. 2 days later the returning officer purported to revoke the certificate of results and issued a new certificate of results to the 1st respondent who was thereafter gazetted as winner of the election. The Court of Appeal condemned the respondents to pay costs and stated:

As the unhappy state of affairs in this matter was brought upon by the 2nd and 3rd respondents, the 2nd respondent will bear the costs of the appellant both in the High Court and in this Court capped at Kshs. 1 million in the High Court and Kshs. 500,000/= in this Court. The 1st respondent will bear his own costs in the High Court and in this Court.

181. The decision of the Court of Appeal on costs was upheld by the Supreme Court in *George Mike Wanjohi v Steven Kariuki & 2 others* [2014] eKLR. The Supreme Court went further and condemned the 2nd Respondent to bear the costs of the 1st Respondent and stated:

[121] From the above statutory provisions and from case law, we are of the view that in election petition matters, Courts should in principle, award costs following the event. In instances where there is a vexatious claim brought by the petitioner or the respondents, the Court will determine whether a party is to be disallowed costs, or the burden of paying costs will fall on such a party. A firm statutory framework for the award of costs in electoral dispute-settlement is established by the wording of Section 84 of the *Elections Act*, and of Rule 36 of the Election Petition Rules. The scope for discretion in this regard, it is clear, is more limited than is the case in normal civil procedure. The purpose is to compensate the successful litigant for expenses incurred in prosecuting the case.

(122) The High Court and the Court of Appeal both found that the 2nd and 3rd respondents were the cause of the dispute before the Court; and the appellant incurred expenses in defending the matter. We hold that the Court of Appeal should have ordered the 2nd respondent to bear the costs of the 1st respondent, as it is only prudent and in the interests of justice to do so.

182. In the present case, the evidence does not support the assertion by the Petitioners that the Petition was filed in the public interest. I have considered that the number of days expended in Court appearances at both the pre-trial conference and actual hearing of the Petition. Further in total 10 witnesses including the primary parties testified. The Petition was not complex but fairly straightforward and raised issues that have been the subject of previous judicial consideration. The Court notes that the 2nd and 3rd Respondents engaged presiding officers who were not keen in their work. This is evident from the alterations in Forms 35A. Further the 2nd Respondent completed Form 35B without capturing the results from 2 polling stations thereby declaring incomplete results. They did not proffer any justifiable reason for doing so, but casually stated that the omission was not fatal and that none of the candidates was disenfranchised.



183. It must be noted that the 3rd Respondent is vested with a vital mandate which must be executed in a manner that inspires confidence in the electorate. More so in a jittery society that is filled with suspicion and mistrust throughout the entire electoral process. It is this irresponsible conduct of the 2nd Respondent and the officials of the 3rd Respondent that gave rise to this Petition. Failure to include the results of 2 polling stations, whether it affected the final result or not, is reprehensible. Had these officials been diligent and vigilant and not negligent in their work, this Petition would not have been necessary. This conduct must be taken into account as the Court considers the issue of costs. The law allows that the burden of costs be imposed upon the party that causes unnecessary expense, whether that party is successful or not. My view is that this is a deserving case for imposition of costs on the 2nd and 3rd Respondents, notwithstanding their success, in order to discourage conduct that will cause unnecessary expense.

184. In the end and in view of the foregoing, I find that the Petition dated 6.9.22 lacks merit and the same is hereby dismissed with costs to the 1st Respondent, which shall be borne by the 3rd Respondent. The costs capped at Kshs. 1,500,000/= shall be taxed by the Deputy Registrar. The 2nd and 3rd Respondents shall bear own costs.

DATED AND DELIVERED IN NAIROBI THIS 28TH FEBRUARY 2023

M. THANDE

JUDGE

In the presence of: -

.....for the Petitioner

.....for the 1st Respondent

.....for the 2nd and 3rd Respondents

