



REPUBLIC OF KENYA



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Walubengo v Independent Electoral and Boundaries Commission & 2 others (Election Petition E002 of 2022) [2023] KEHC 1728 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1728 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
ELECTION PETITION E002 OF 2022
WM MUSYOKA, J
FEBRUARY 28, 2023**

BETWEEN

KELLY BARASA WALUBENGO PETITIONER

AND

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

RETURNING OFFICER 2ND RESPONDENT

SITATI DANIEL WANYAMA 3RD RESPONDENT

JUDGMENT

1. The petition herein, dated 6th September 2022, was filed on 7th September 2022, by Kelly Barasa Walubengo, herein after referred to as the petitioner, to challenge the declaration of Sitati Daniel Wanyama, hereafter referred to as the 3rd respondent, as the duly elected Member of the National Assembly for Webuye West Constituency, in the general elections conducted on 9th August 2022. The other persons named as respondents in the petition are the Independent Electoral and Boundaries Commission, as the 1st respondent, and the Webuye West Constituency Returning Officer, as 2nd respondent. The results declared were –
 - a. Khisa Rael Nekesa Rachelle - 981
 - b. Kimakwa Edward Wafula – 495
 - c. Muniafu George Khaoya Wekesa - 144
 - d. Munyasi Peter Makali – 3, 806
 - e. Sitati Daniel Wanyama – 14, 576
 - f. Sitati Peter Juma – 1, 357



- g. Walubengo Kelly Barasa – 12, 271
 - h. Wanjala Kennedy Mkombozi Wafula – 207
 - i. Wanyonyi Charles Philip Wafula – 283
 - j. Wasike John Wekesa – 2,126.
2. The petition raises complaints covering the conduct of the said elections both prior to, during and after the actual poll.
 3. Regarding the period prior to the actual elections, it is averred that the voter education conducted by the 1st and 2nd respondents was inadequate, that the elections officers appointed for the purpose of the election were compromised by the 3rd respondent, and that voter bribery and voter coercion happened before the election day.
 4. Regarding conduct during the actual election, it is averred that the respondents colluded and conspired to flood polling stations with extra agents and allies of the 3rd respondent in 8 polling stations, intimidated harassed and manipulated voters, chased away the agents appointed by the petitioner from 24 polling stations, there was ballot stuffing with respect to 32 ballot boxes, KIEMS kits were selectively and inconsistently used in identification of voters resulting in ineligible persons being allowed to vote and some eligible to vote being turned away, failure or refusal to enter results at the polling stations in KIEMS kits at all or correctly, forgery and fraudulent erasures and amendments and irregular stamping with respect to results in 23 polling stations, voter bribery at 6 polling stations, inadequate security for voters leading to electoral violence and intimidation particularly in 7 polling stations, presence of 3 unauthorised and uncredited agents at Webuye DEB polling station, unauthorised or fake elections clerks and officials, no proper records were kept by the officials on when ballot boxes and other materials were issued to and received by the polling station officials, no proper timelines were recorded of communication between the 2nd respondent and polling officials at the polling stations, no summary report of the daily occurrence at the tallying centre was kept of communication between the 2nd respondent and the officials at the polling stations, queuing clerks were missing at most polling stations which caused congestion at the polling stations, and the accredited agents of the petitioner were denied entry into 39 polling stations.
 5. With regard to events after the polling, it is averred that strange ballot boxes for Kiminini and Mupeli polling stations were found at the tallying centre, a number of ballot boxes for Kakimanyi polling stations were found sequestered and abandoned at the tallying centre, polling officials from Kakimanyi polling stations were found locked in a room filling forms, one of the abandoned ballot boxes from the Kakimanyi polling station was not properly sealed, one ballot box from Bokoli polling station was not sealed, irregularities with respect the declared results in Forms 35A and 35B in 23 polling stations, discrepancies in the declared results with respect to several candidates including the parties hereto in 70 polling stations, participation of strange and unregistered political parties, forgery and fraud with respect to results by one Stephen Wanyonyi at 2 polling stations, misleading information on total voter turnout, inclusion of a non-existent Kabolon polling station, seals tampered with respect to one ballot box, results at the tallying centre were not projected at the tallying centre for verification, lists of polls officials were not displayed for verification and authentication by the petitioner and his agents, there were last minute reshuffles and transfers and changes of polls officials, the accredited agents for the petitioner were denied access to Forms 35A and 35B and to other information relating to declaration of results of the election, and there was a discrepancy between the gazetted number of registered voters and the declared number of registered voters in 46 polling stations.



6. The petition seeks four principal prayers: a scrutiny and audit of systems and technology used to conduct the election in 77 polling stations, a declaration that the results announced for the National Assembly seat for Webuye West Constituency were invalid null and void, a declaration that non-compliances irregularities and improprieties in the conduct of the election undermines the integrity of the results announced, election offences by the respondents as disclosed in the material placed before the court be reported to the Director of Public Prosecutions, a declaration that the 3rd respondent was not validly elected and that his declaration as the elected Member of the National Assembly for Webuye West Constituency be declared invalid, an order directing the 1st and 2nd respondents to organise and conduct a fresh election, the respondents be condemned to pay costs, and any other order that the court deems appropriate.
7. The petitioner listed 5 witnesses, being himself, Maurice Mukinginyi Wekesa, Enosh Momanyi Isoe, Shaban Simiyu Makokha and Hezron Ford. Witness or supporting affidavits were filed by the petitioner, Maurice Mukinginyi Wekesa and Enosh Momanyi Isoe. Shaban Simiyu Makokha and Hezron Ford filed witness statements, which were subsequently struck out, for being non-compliant.
8. The 1st and 2nd respondents filed a joint response to the petition, dated 27th September 2017. They deny the allegations made in the petition, and assert that they conducted the election for Member of the National Assembly for Webuye West Constituency in accordance with the relevant law. The 3rd respondent, in his response to the petition, dated 28th September 2022, asserts that the election was conducted in a free and transparent manner, and that he was validly elected and declared as winner after the proper counting and tallying of the votes.
9. The oral hearing commenced on 18th November 2022. The petitioner was the first on the stand. I shall refer to him hereafter as PW1. He testified that he contested the election on a United Democratic Party ticket. He stated that his agents, were not allowed into the polling stations, and were not allowed to challenge results, and where they did challenge the results, none of the forms placed on record by the 1st and 2nd respondents indicated that his agents made the challenges. He said that he was aware that his agents were trained, so that they knew their right to challenge results at the polling station. He also testified that he was aware that agents at polling stations had checklists on all the happenings at the polling station, but conceded that he had not presented any checklist by his agents from the polling stations. He also said that he had no evidence of any complaints by his agents at the polling stations. He said that he was aware that an agent may object at the stage of counting of ballots to inclusion of any ballot paper at the counting. He stated that his agents were harassed, and kicked out of polling stations. He said that his agents did not object to the rejected ballots reflected in the 7 polling stations listed in paragraph 24. He said that the United Democratic Party had only 2 candidates in the constituency, himself and an Member of the County Assembly candidate, and they had agreed that he, the petitioner, would provide the agents for United Democratic Party. He said that his agents were trained, by the Chief Agent, and they knew their duties, and their role as agents. They knew that they could takes photographic images of the Forms 35As at the polling stations, after they were populated and signed. He said that they were also aware that they could object to any entry in Form 35A, and even request for a recount. He said that he was aware that none of the Forms 35As that he had presented with his petition, had any complaints by his agents. He said that he was not aware that his agents had not asked for a recount in any of the polling stations. He said that he was aware that the agents needed to be accredited by the 1st respondent, and to have a letter from the political party and an oath of secrecy, before they could be allowed to enter the polling station. He conceded that he had not attached, to his petition, any letter of appointment of his agents by the political party or oath of secrecy for any of his agents, nor a list of his accredited agents. He said that his Chief Agent was in a better position to address the court on the matter of how his agents were treated. He said that only 15% of his agents were denied



access, otherwise 80% of them had access. He stated that he did not give to the court the names of the agents who were not allowed access to the polling stations. When confronted with documents showing that United Democratic Party agents signed polling station diaries and Forms 35As, he said that it was possible that some of those agents were for the Member of the County Assembly candidate, adding that there was an agreement with United Democratic Party on who was to be their agent. He stated that his and United Democratic Party agents kept on being kicked out of the polling stations. He said that in places where he did not accept the agent appointed by United Democratic Party, he appointed his own agents, and that it was his own agents that were being frustrated, yet they had accreditation from the 2nd respondent, and all the other relevant documents. He stated that he had parallel agents to those of the United Democratic Party, based on agreement with United Democratic Party, and it was unique to some polling stations. He conceded that he had no evidence on record of any of such agents. He said that he was aware that the agents appointed by the party were to represent candidates sponsored by the party in all the 6 elections. He stated that some of the agents who were denied entry were going to testify. He said that his Chief Agent was called to all the polling stations where his agents were denied entry, and he was allowed entry into some stations, but not in others. He said that they reported the matter to the presiding officers in the affected polling stations, and even attempted to contact the 2nd respondent. He stated that he did not have copies of the reports that they made to those officials, adding that it was up to the polling officials to keep or maintain records of such reports. He said his agents were chased away from polling stations, clarifying that they had been appointed by him, in collaboration with United Democratic Party, and United Democratic Party was the appointing authority. He said that whenever they asked that they be readmitted they would be readmitted, but then chased away again. He said that he did not have the names of such agents, who were chased away. He mentioned Lutaso as one of the polling stations from which his agents were chased away. He stated that Tony Webale was indicated in Form 35A for Lutaso as agent for United Democratic Party, but he was in fact an agent for the Member of the County Assembly candidate. He mentioned Nawanga as the next one, where Yonah Namai was listed in Form 35A as agent for United Democratic Party, but he said that was suspicious. He stated that there was no record of United Democratic Party agents filing complaints on Kakimanyi polling station. He said that not all United Democratic Party agents were his agents. He asserted that if his agents had not been frustrated he would have gotten more votes.

10. He said that a ballot could be rejected if not stamped with official stamp of the 1st respondent, or it did not have the security features of the 1st respondent, or was unmarked by an elector, or is not clearly marked. He said that he did not know foreign ballots found their way into the ballot boxes. He stated that the percentage of rejected ballots stood at 13.03%, which he described as the highest in the election in the country, adding that anything above 3% was too high. He also stated that most of the rejected ballots would have been in his favour, although he was not just raising the issue as it related to him, but generally, as he wanted to protect the will of the people.
11. On voter education, he said that the high incidence of rejected ballots was due to inadequate voter education. He said that there was a connection between voter education, and rejection of ballots, on account of poor markings. He stated that during the campaigns he did see some posters on the ground educating voters on the voting process. He denounced the report placed on record by the 1st respondent, on voter education, saying that it was exaggerated. He said that although he had pleaded that voter educators were partisan and incompetent, he had not provided particulars of any voter educator who was partisan or incompetent. He said that the few that he came across did not appear adequate, and he did see them at Chief's barazas. He said that at one funeral, the voter educator utilised just a minute to convey his message, which was not adequate, in his view. He asserted that lack of voter education contributed to low voter turnout, although he admitted that he had no statistics to demonstrate that voter turnout was low. He said that the inadequate voter education also contributed



to the high number of rejected ballots. He conceded that low voter turnout affected the 6 elections, and not just the election for the Member of the National Assembly. He said that he did not know what the voter turnout for Bungoma County was, and was not aware that the voter turnout for Bungoma County was higher than that for the neighbouring Kakamega and Vihiga Counties. He stated that he did not conduct a comparative analysis of voter turnout in Bungoma County, neither did he tabulate voter turnout in percentage terms.

12. He said that the 1st respondent had a role in how ballots are marked, after they are given or handed over to a voter, and if a voter asked for assistance from the polling officials, such assistance should be given. He stated that he was praying for scrutiny, in his petition, so as to assess if there was such assistance. He accused the 1st respondent of behaving as if the elderly voters did not matter, as they were told to just sit and wait, and most of them eventually left without voting. He said such one elderly voter was Shaban Simiyu, who he later said actually voted. He asserted that voters were turned away, and persons who were not eligible to vote were allowed to vote, but conceded that he had no list of voters who were turned away, neither that of ineligible persons who were allowed to vote. He said that he was not sure whether his agents took notes of voters who were turned away, and the persons allowed to vote when they should not have voted. He also stated that he had not filed any notes by his agents on what was happening on the ground. He later said that he was present at Matulo polling station, where he saw a group of elderly voters who had been waiting to vote since 5.00 AM. He conceded that he did not have their names, nor had he filed affidavits sworn by them. He said he had no affidavits sworn by elderly or disabled voters, who came with helpers, and who were denied entry.
13. He also testified on how the respondents colluded to have his name appear at position 7 in the ballot paper, instead of position 1. He explained that previous to that he had been shown a dummy of the ballot paper, what he referred to as proof, reflecting how the names of the candidates were to appear on the ballot paper on election day, where his name was at the top, only to be shocked on polling day to find it at position 7. He stated that that was to his disadvantage, for he had sensitised his supporters on where to look out for his name in the ballot paper. He asserted that the change was effected without his approval. He said that he was unaware that names of candidates appear alphabetically on the ballot paper, using the surname. He conceded that he had not filed an affidavit of a voter who had difficulties locating the name the petitioner on the ballot paper, nor of one who was unable to vote on account of that.
14. On voter bribery, he testified that there was a meeting at Downhill Springs Hotel, between the 3rd respondent and presiding officers, where each of the presiding officers was given Kshs. 2, 000.00, although he conceded that he did not know the number of the officials of the 1st respondent who were bribed. He said that that happened between 6th August 2022 and 7th August 2022. He was not present, but was informed of it by his supporters, and he sent his Chief Agent there. He said that the police were present, although it was not him who reported the matter to the police, and that they, the police, made some arrests. He said that the Chairman of the 1st respondent, Mr. Chebukati, even made remarks about it, to the effect that the polls officials involved would not participate in the elections process, although one lady official did participate in the elections. He conceded that he had not provided an attachment to show that the Mr. Chebukati commented on the matter. He described it as a night meeting, which took place between 8.00 PM and 10.00 PM. He could not tell the number of people in attendance, nor the number of presiding officers present. He stated that a Deputy Returning Officer was also present at that meeting. He conceded that he had not provided a list of the presiding officers who attended the meeting, nor of the police officers who responded when it was allegedly reported that an unlawful meeting was underway, nor the persons who tipped him over the meeting. He said that a report was made to the police, and an OB number was given. He said that the 3rd respondent was the one giving out money to those present. He said that he had not provided evidence that the persons



- involved in that meeting were officials from the 1st respondent. He said he was not aware whether any of the polling officials, allegedly present at that meeting, was prosecuted over the incident. He asserted that the collusion between the 3rd respondent and the officials of the 1st respondent made the officials of the 1st respondent do things that were not favourable to him. He said that he had eyewitnesses who witnessed voter bribery on election day. He named Hezron Ford Nyongesa as one of them. He said that the issue was raised with the polling officials, but they did not act. He stated that most of the witnesses had refused to testify on the matter.
15. With respect to irregularities relating to counting, at the polling stations set out in the petition, he testified that those in paragraph 34 of the petition related mainly to Wafula and other candidates, and that only one touched on him. He said that those in paragraph 33 were on misstatement of the total valid votes in the listed polling stations. He said overall he got 12, 271 votes, while the 3rd respondent got 14, 576 votes, which meant a difference of 2, 305 votes between them. He stated that his tables did not show that he won the election. He also said that he did not have his own tabulation of what he considered to be the genuine result. With regard to the irregularities, he stated that there were no polling stations where the votes cast exceeded the voters registered. He stated that there were no discrepancies in the tallying of the votes, and that he was not saying that he had a problem with the results in Form 35B, insisting that his complaint was about the massaging of the figures, as tabulated in his petition. On irregularities, he also mentioned about materials for other constituencies that were found in Webuye West. He particularly talked of Kabolon polling station, which he said did not exist in Webuye West. He testified that the anomalies raised in his petition were not limited to him, but affected other candidates too, and, in his view, they would have affected the final result, and he believed that they were geared to assisting the 3rd respondent.
 16. On stamping of Forms 35A, he testified that some were stamped more than once, although he conceded that he did not know of the law which prohibited stamping of the same more than once. He conceded that he had not identified any Form 35A, whose authenticity he was challenging.
 17. On the unsealed ballot boxes, he stated that, from the pictorial material he had placed on record, at page 68 of the bundle of his documents, that one could tell the serial number of the ballot box in question, although he could not tell whether it was for Webuye West or not. He also stated that the picture did not disclose the location of the ballot box as at the time the photograph was taken, neither could one say whether or not the box was unsealed or not from the picture. He identified one of the ballot boxes, at page 72 of the of his bundle of documents as for the Member of the National Assembly election, but he could not tell for which constituency, nor where the box was located at the time the photograph was taken, nor whether it had been sealed or whether it was abandoned, nor the time when the picture was taken. Regarding the picture, at page 75 of his bundle of documents, he stated that he could see a group of ballot boxes, that looked like they were not attended to nor were on a queue at the tallying centre, and one of them appeared to be for the Member of the National Assembly election. He conceded that from the pictures one could not tell the stage at which the election process was at when the pictures were taken. He stated that he believed that the pictures were taken at the tallying centre. He stated that he had no record of the seals of the ballot boxes, both before, during and after the voting; adding that he did not have his own seals. He said that he could not recall the colours used on the ballot boxes for the said elections. He further stated that none of the polling station diary on record talked of ballot boxes being abandoned. He said that his Chief Agent had said that the boxes were from Kakimanyi polling centre.
 18. He testified that he was not aware that there was no requirement for electronic transmission of results for the Member of the National Assembly election. He said that he was not aware that there was no requirement for the results for the said election to be displayed in a public portal.



19. He stated that there was violence, saying that the same happened in connection with Shaban Simiyu, who, he said was to be a witness. He said that the said Shaban Simiyu was intimidated, but he still voted. He said that it was people affiliated to the 3rd respondent who visited violence on Shaban Simiyu. He testified that the incident affecting Shaban Simiyu happened on 8th August 2022, although a report on the same was made to the police weeks later. He said that he had no other proof of violence other than what was attributed to Shaban Simiyu. He said that there was also violence at the tallying centre, which was witnessed by his Chief Agent and himself, as they were the only individuals, from his side, who were allowed access to the tallying centre. He said that his other agents might have been allowed into the tallying centre, but he could not recall their names. He added that it was only him, and his Chief Agent, who had sworn affidavits on the violence at the tallying centre. He said that by the time of the chaos, most of the agents had left. He referred to a picture, which he said depicted the violence. He confirmed that the persons appearing in that picture were standing, not running. He described the events or happenings at the tallying centre as disorderly conduct.
20. Regarding Kakimanyi polling centre, he stated that the officials of the 1st respondent did not carry out their duties as expected. He said that they had said that they would tally the ballots, but abandoned the same towards the end, and said they would do the tallies at the tallying centre. He said that the officials did not run away, but they did not do the right things, and he was not happy with the way they handled the process. He stated that his agents kept on being thrown out and readmitted. He mentioned one of his agents at that centre as Sarah, but conceded that he had not filed an affidavit by the said Sarah. He said that the Kakimanyi polling centre had 2 polling stations, there was one error relating to that centre, but no complaints were registered with respect to the said 2 polling stations.
21. Morris Mukinginyi Wekesa followed, as a witness for the petitioner. I shall refer to him as PW2. He described himself as the Chief Agent for the petitioner for the purpose of the 2022 general elections. He said that he had not presented a letter of appointment nor an elector's card, nor a badge of accreditation issued by the 1st respondent, but asserted that he was a registered voter. He stated that he visited various polling stations as Chief Agent, on 9th August 2022. He said that he had also trained the agents for the petitioner, on everything, including making field notes. He stated that he had not presented any field notes made by the said agents, nor any correspondence between him and the petitioner on the conduct of the election, nor a list of the agents deployed for the petitioner, nor letters of appointment for any of the agents. He said that he gave them oaths of secrecy to sign and letters of accreditation, but he had not filed them in court. He said that he did not sign any polling station diary nor Form 35A. He testified that some agents informed him of collusion between the respondents, but none of them had filed affidavits. He said the agents of the 3rd respondent were given prioritised attention, and he was eyewitness to it. He asserted that he was the Chief Agent for the petitioner, and not United Democratic Party, the ticket on which he stood, but his letter of appointment was on United Democratic Party letterhead.
22. On agents for the petitioner being denied entry into the polling stations, he stated that he was such an agent, and that he was speaking on behalf of other agents. He said he was denied entry into 9 polling stations. He conceded that in his affidavit he had not averred to being personally barred from entering any polling station. He also stated that he had not listed any polling station where the 3rd respondent was given preferential treatment. He also did not have a list of the agents for the petitioner ejected from polling stations.
23. On the alleged incident at Downhill Springs Hotel, he stated that he did not attend the meeting, he could not tell how many of the polls officials of the 1st respondent attended the meeting, but there was a number of them. He stated that one person was arrested, a presiding officer. He said that he had not



presented evidence that the persons arrested were polls officials. He argued that if they were not polls officials, then Mr Chebukati would not have addressed the matter in the media. He asserted that the matter of the meeting between the 3rd respondent and polls officials, at Downhill Springs Hotel, was a matter of public knowledge. He said the meeting happened on 7th August 2022, between 7.00 PM and 9.00 PM. He stated that when he arrived at Downhill Springs Hotel, he was met by commotion, and he gathered that the meeting had been dispersed by members of the public. The police came to the scene after he arrived, upon a report being made to them by members of the public. He stated that he did not indicate, in his affidavit, the members of the public who tipped him. He said that he did not make a report to the police. He said that he extracted a copy of the Occurrence Book from Matete Police Station on the incident. He said that he did not make a report of the incident to the 1st respondent. He asserted that that meeting had an effect on the results. He also conceded that he had not averred in his affidavit about who gave who money, and he had not provided proof of the alleged bribery and collusion. He also said that they did not have the clip of the address by Mr. Chebukati. He said that it was the petitioner who instructed him to go to Downhill Springs Hotel, to find out what was happening there, and he found the place in disorder. He said he found the police at the scene, and arrests had been made by members of the public. He said he was not aware whether the persons arrested were involved with elections.

24. The other issue that he testified on was on supporters of the petitioner being prevented from voting. He said that he had not presented lists of their names, but one of them was Shaban Simiyu, who was their witness, but who, nevertheless, voted. He later said that no supporter of the petitioner was prohibited from voting. He further stated that no elderly voter had sworn an affidavit to say that they were denied facilitation by the 1st respondent. He said that he had names of disabled voters who were denied facilitation to vote, but conceded that none of them were mentioned in his affidavit. He said that he had no record of any voter who was captured in the KIEMS kit, who was stopped from voting.
25. He also testified on unsealed and abandoned ballot boxes. He stated that Ballot Box No. 115470 was not sufficiently sealed, and ballot materials could be inserted into or retrieved from it. He, however, said that he could not say whether or not that happened, for he did not see anyone remove material from it, nor add anything to it. He confirmed that by the time ballot boxes and other material were brought to the tallying centre, results would already have been announced at the polling station. He conceded that he had not demonstrated how the unsealing of that ballot box would have affected the results. On the alleged abandoning of ballot boxes at the tallying centre, he relied on the pictures on record. He said that he could not identify the serial numbers of the boxes alleged to be abandoned, but he could see the image of an officer of the 1st respondent nearby. On foreign ballot materials, he said he had scoured through Forms 35A and 35B, and had not come across entries from Kabolon polling station. He said that he got information while inside the tallying centre about the foreign material. The documents were not being handled by anyone, but were in a separate room. He asserted that Kabolon polling station did not exist, and no explanation was given about Lingala, Diplo Dibala political parties. He said that they did not request for information on the election technology deployed in the election, before the petition was filed.
26. On election violence, he said that he had only mentioned the incident of violence at the tallying centre and what happened to Shaban Simiyu. He said that violence was widespread, although he had not disclosed, in his papers, the polling stations affected by the violence. He said that Shaban Simiyu was a victim of the violence, by persons who were known to the witness, although did not disclose that in his affidavit. He said he was told of the violence incident by Shaban Simiyu himself. On the incident at the tallying centre, he said the photographs placed on the record showed people crowding outside the tallying centre, instead of being seated inside the tallying hall. He suggested that the picture was telling. He invited the court to consider the 2 as the incidents of violence pleaded, that is the violence



to Shaban Simiyu and what happened at the tallying centre. He stated that the photographs exhibited in his papers show the chaos, violence and intimidation pleaded.

27. On Kakimanyi polling centre, he stated that the petitioner had agents there. He said that he had not said that the ballot boxes for Kakimanyi had been abandoned at the tallying centre. He asserted that as Chief Agent, he was at the tallying centre, he saw the boxes, and the 2nd respondent came out of the tallying hall, and saw them. He said that there were 12 boxes, and only 2 of them related to the Member of the National Assembly election. The 12 boxes were alleged by the polling officials to have come from Kakimanyi polling centre.
28. He stated that he did not have his own tally of the results, but the same was done by his team, although he did not exhibit the tally worked out by the team in his affidavit. He also testified that he had not done a review of Forms 35A. He said that he was not aware whether the agents for the petitioner asked for recounting of votes at the polling stations. Regarding the Kakimanyi polling stations, he said that it was probable that the ballots cast in the 2 stations were counted. He said that it was the duty of the agents at the polling stations to keep records of the counterfoils of the used ballot papers. He conceded that he did not keep such a record himself, and there was none on record.
29. Amos Momanyi Isoe testified next. I shall refer to him hereafter as PW3. He was an accountant, a resident of Webuye West and a registered voter. He described himself as an expert on data, and a person of figures. He stated that his evidence revolved around Forms 35A and 35B, the 1st respondent's portal and the gazette notice of 21st June 2022. He stated that, according to the petition, there was a variance between the votes cast between the 3rd respondent and the petitioner. He explained that the 1st respondent was adding or reducing the votes for some candidates. He mentioned Bujosi, Webuye DEB, Lutaso and Misikhu Mixed polling centres as examples where that happened. He said that he did not tabulate the registered voters for each polling station, but he did a tabulation of Form 35A. He said that he worked with 66 polling stations affected, but did not present a table on the rest of the 176. He stated that he did not have an affidavit of any voter who was unable to mark a ballot paper or to identify a candidate on the ballot paper. He said that as a voter, he did not get voter education, although he did the right thing and voted. He stated that he could read and write, and he was able to identify his candidate from the ballot paper. He asserted that each vote counts, and it is not expected that any vote will be spoilt and rejected, but conceded that he did not do a comparative graph to show the relation between voter education and rejected votes. He asserted that if there was adequacy of voter enlightenment, then there would have been a decline of votes being rejected or spoiled, and that the lower the level of voter education the higher the number of rejected votes. He said that he did not do the demographics of rejected votes in all the 172 polling stations. He said that the deficiency affected all the candidates. He said he was not aware of the circumstances which might lead to rejection of a ballot, nor that a ballot could be rejected if it did not bear the mark or stamp or features of the 1st respondent. He conceded that ballots were marked at the booth, and the 1st respondent had no role in the marking. He said he was not aware whether United Democratic Party raised any objections on the rejected votes. He said that he did not isolate the deficiency with respect to the petitioner. He also did not have statistics isolated for all the 172 polling stations as a percentage. He also did not work out the degree of deficiency from the normal. Regarding ballot stuffing, he averred that he had isolated 32 polling stations, but the statistics were not specific to any candidate. He said ballot stuffing was established by the discrepancy between Forms 35A and Form 35B. He also did not isolate frequency of ballot stuffing as per region, candidate or party. He stated that where the 3rd respondent got more votes, the turnout would be inflated; and where the petitioner got more votes, the turnout would be reduced. He stated that he did not work on the frequency of incidents of ballot stuffing, and he did not deal with that aspect. He said that the negative discrepancies were against all the candidates. He said



an election should achieve 100% accuracy, but the discrepancies reduced the percentage, and made it impossible to achieve 100% accuracy. On electoral fraud, he testified that he studied 23 polling stations, which displayed a negative discrepancy of 1, 134, using data from Form 35B. He said that all the 23 polling stations reflected fraud. He said that he could not tell how many votes the petitioner would have gotten were it not for the fraud. He said that he did not work out a percentage of the polling stations affected by the fraud. He stated that he did not isolate the discrepancies affecting the petitioner relating to the results, and how the said discrepancies affected the final results. He said that there was a lack of consistency in stamping, saying it was just irregular, although he conceded that he did not know the number of stamps that should be on the forms. He stated that the 1st respondent spent a lot of money in conducting the election, but he said he did not understand why the 1st respondent made errors, and relied on them. He stated that the discrepancies that he identified were spread across the candidates, and none of them favoured any candidate, adding that it was not possible that the discrepancies favoured any particular candidate, and it was hard to determine whether they affected any particular candidate.

30. He testified that there was low voter turnout, although he had not provided a comparative analysis with other constituencies. He said that the low voter turnout did not affect the other elections, although he conceded that he had not done a tabulation to show that the low turnout only affected the Member of the National Assembly election. He also claimed that the low turnout affected the petitioner uniquely, but conceded that he did not work out statistics to show that the low turnout only affected the petitioner. He also said that he did not get figures for voter turnout generally in Bungoma.
31. The 2nd respondent was the first witness for the 1st and 2nd respondents. I shall refer to her as DW1. She described herself as the Constituency Coordinator for Webuye West Constituency, and the returning officer for Webuye West Constituency in the 9th August 2022 elections. On adequacy of voter education, she said voter education entailed educating voters about how to mark a ballot, cast it and the whole process of elections, geared at assisting voters understand the voting process. She explained that the 1st respondent had employed 2 educators per ward, and 1 for the Constituency. She stated that the 1st respondent carried out voter education for the 2022 general election cycle. She personally indicted the voter educators, and they signed the code of conduct. She stated that she did not participate personally in the exercise. It was supposed to be carried out for 30 days prior to the election day, and, in the case of the last election, that was done for 30 days. It was done through barazas and house-to-house visits, at churches, funerals and weddings, and even on one-on-one. The educators used fliers and brochures, which they distributed among members of the public. She said that the only challenge was with the materials used for voter education, they were not adequate, and they were only able to procure a number commensurate to the budget. She stated that there was a report on record by the Voter Education Coordinator, which indicated that the voter education was done in 40 days, covering the period before and after elections. She explained that the component after the elections was meant to inform the public of the outcome of the elections. She said that the report she received from the voter education coordinator was properly dated signed and affirmed by the coordinator, and she forwarded it to the County Office of the 1st respondent. She said she had experience from conducting 3 general elections, and asserted that lack of education could not result in a higher number of spoiled or invalid votes. She said that there were many factors that lead to spoiled or invalid ballots. She explained that whether a voter marked the ballots papers they pick from the officials was beyond the 1st respondent. She explained that spoilt and rejected ballots were not valid ballots, and they were not allocated to any candidate, and they were not counted in the final tally of valid votes. She stated that there was no acceptable percentage of spoiled or rejected ballots. She said that the issue of rejected ballots had nothing to do with voter education, explaining that the voters with difficulties or were illiterate were assisted by the polling clerks or their own aides.



32. On agents, she testified that the petitioner had agents at the polling stations, appointed by the United Democratic Party. She said that the petitioner had his own agents, and the party, United Democratic Party, had its own. He also had a Chief Agent. She explained each political party with candidates in the 6 elections was at liberty to provide agents at the polling station, adding that whether they actually had agents was up to the party. She stated the requirements for admission of an agent at the polling station was an identity card, an appointment letter and an oath of secrecy. The agents were required to report at the polling station at 6.00 AM, just before the station opened, and their failure to be present could not prevent the opening of the station. She conceded that some agents arrived after the opening of the polling station, but said that would depend on the organisation of the party or independent candidate. She said all the polling stations opened within time. She explained that the policy of the 1st respondent was of 1 agent per candidate or political party per polling station. She mentioned that section 31 of the [Elections Act](#), provided for appointment of agents by political parties and candidates, and it required for 1 agent per political party for all the contested positions. She stated that the political parties that had sponsored candidates in the Member of the National Assembly election all had agents. She said there were 8 candidates sponsored by political parties, and 2 independent candidates, and that each of the 8 political parties had agents at the polling station. She said that the candidates sponsored by political parties did not have the privilege of appointing agents, and that that privilege only belonged to the independent candidates. She asserted that party candidates relied on party agents. The agents were issued with tags, by the officials at the polling station, which were distributed on election day. She said that the policy with respect to admission of agents into polling stations was applied uniformly for all political parties. She said at any one time no more than 1 agent was allowed into a polling station for 1 candidate or political party. If 1 agent moved out, the party or independent candidate was allowed to substitute. She stated that the polling station officials regulated the coming in of agents, to prevent overcrowding. She stated that if agents were absent, they would not sign the documents. She explained that if the record reflected that more than 1 agent for a party or an independent candidate signed, it would mean that they signed at different times. She explained that the agents were supposed to sign out on the polling station diary, but the document would not be inauthentic if they did not sign. She explained that the polling station diary was a 30 page plus document, and she only attached extracts of the relevant parts in her affidavit. She stated that agents cannot be forced to sign the forms. She conceded that there were errors on the documents, saying that errors could not be avoided or missed in elections. She said that although she got a list of agents from the 3rd respondent, she did not receive any from the petitioner, nor from his party, the United Democratic Party. She mentioned that the departure of a party agent from the polling station, and the closing of the polling station ought not be confused, for an agent was at liberty to exit the polling station at any time at his pleasure.
33. On transport at the polling station, the 2nd respondent testified that no one was in charge at the transport at the polling station, and that what was required was that the presiding officer indicated numbers of individuals to call with respect to transport and other matters. She stated that failure to indicate the person in charge of transport or his number did not mean that the materials were not transported. She stated that the numbers for the in-charge of transport, security, and ICT were uniform throughout the constituency, as these officers were based at the tallying centre. She explained that the presiding officers at the polling centre were not in charge of those dockets. She stated that transport was outsourced, and there was a service provider. She said she could not recall his or its name, but the service provider organised the transport and worked the logistics. She said that transport was provided, and there were vehicles at the polling centres.
34. On security, she testified that each polling station had sufficient security, but towards the evening of the polling day, there were security concerns at Kakimanyi, at the point of counting and tallying of votes. She explained that the elections officials at Kakimanyi had to be rescued. She said that there



were incidents of violence at some polling stations, such as Kakimanyi and Webuye SDA, which were recorded and reported in the polling station diaries. She said that there were also incident reports, but she had not exhibited the same in her affidavit.

35. On closing time, she indicated that all polling stations closed at 5.00 PM, but there was extension in polling stations where there were still voters in the queue at 5.00 PM. Vote counting began thereafter, and continued throughout the night, and some results came in the morning. She explained that the election process was very involving, as it involved counting, tallying and filling of forms before the registers were closed. She gave an example of Matisi polling centre, where counting went on until the next morning, when results were received at the tallying centre at 10.00 AM, even though Matisi was just 5 kilometres from the tallying centre.
36. She had 2 deputy returning officers, being Carren Shivasa Alusa and Peter Momanyi Khaemba, both of whom were gazetted. She testified that presiding officers are assisted by deputy presiding officers, and it was usually the deputy presiding officers who filled the forms. She said that presiding officers were trained on how to handle the documents, including filling the polling station diaries. She said that she could not tell the stages at which the polls officials at the polling stations filled the polling station diaries, as she was not at the polling stations. She said that she had filed a list of all the presiding officers and deputy presiding officers who handled the elections at Webuye West Constituency. She explained that there was no requirement for gazetting of presiding officers and deputy presiding officers.
37. She testified that she was based at the tallying centre, which was at Chebosi Secondary School, and they were housed at the school library, but they also used other rooms to store their materials and accommodate staff. She said that the returning officer, deputy returning officers, presiding officers in charge of some dockets, and security officials were at the tallying centre, as per standard practice. They would be the only officials there during the day. Election observers would also be present. After polling closed, they would be joined by others, among them presiding officers and agents. She explained that the tallying centre opened the day before, to release election materials to presiding officers, and it was only accessible, then, to a select few. Candidates were allowed into the polling centre in the evening, but agents kept coming in and going out, to monitor the process. She said that the first batch of presiding officers arrived at the tallying centre, on 9th August 2022, between 9.00 PM and 10.00 PM, to deliver results. She said that there was a continuous flow of results from the time the first batch arrived, until all were received. She explained that all the presiding officers and deputy presiding officers congregated at the tallying centre after the polling stations closed, and they could all not fit in the tallying hall, hence the need for extra rooms to accommodate them.
38. She testified that there was an incident at the tallying centre, which was contained by security. She said that there were some people who attempted to attack presiding officers, to destroy polling materials. She said the incident happened shortly after the tallying began. She blamed the petitioner and his Chief Agent, and others, of disrupting the tallying process, but said that she did not see the petitioner getting involved in the chaos or violence. The election officials reported to the police, who stepped in and quelled the fracas. She said that there was no need to make a report of the incident anywhere, as the police were present, and they handled the situation. She said that tallying had not been disrupted to a large extent, and continued after that interval of disruption. She explained that electoral violence is a serious matter. She conceded that there was chaos, but not of a very serious nature, as it was contained promptly. She said that the whole thing happened within the premises of Chebosi Secondary School, and lasted 20 minutes. She said that she witnessed the attempts to grab ballot boxes. The police secured the ballot boxes, and calmed the people. She said that the persons involved were not arrested. She said that she did not know what prompted the fracas, but that the presiding officers told her that they were ambushed, and an attempt was made to grab the ballot boxes. She explained that the chaos did



not affect the tallying, as it all happened outside the tallying hall. She said that there was chaos both within and outside the tallying hall. She said that there was a desk at the entry to the hall/library, on the inside, where the materials would be checked in order of arrival. The queue by the presiding officers was outside the hall/library, coming into the room. She said that the presiding officers queued outside with their ballot boxes. She explained that 20 security officers were assigned to the tallying centre, and each of the presiding officers was assigned 2 police officers. It was that group of officers, the ones based at the tallying centre and those with the presiding officers, who restrained the individuals who sought to grab ballot boxes. She said that the presiding officers were assigned rooms with the school, where they could rest as they waited to join the queue, and they were to remain with their ballot boxes until they handed them over. She said that the agents were not allowed to join the queue or get into the rooms adjacent to the queue.

39. She explained about the elections strategic materials that the presiding officers handled at the polling stations, after the closing of polls and the counting, for transportation to the tallying centre. These included the ballot boxes for all the 6 elections, which would have seals, and the results from the counting both inside and outside the boxes. The presiding officer would carry another set of the results. There was also a requirement that a copy of the results be posted on a wall at the polling station. There was liberty for party and candidate agents to be furnished with copies of the results. Transmission of the results at Member of the National Assembly level would be manual, by hand, from the polling station to the tallying centre. There would be several copies of the results, so that if what was carried by the presiding officer was lost or destroyed, there would be proof from the copy at the polling station or from the agents.
40. She explained that the polls officials were trained before the election day, on how to handle election materials and the logistics of moving materials to and from the polling stations. After the training, some of the training materials were retained at the Constituency office, and some would be retained by the presiding officers, especially the polling station diaries, for reference. She explained that the training was not at the tallying centre. She said that if training polling station diaries were found at the polling stations, it was because presiding officers and deputy presiding officers were using them for reference, and that they were entitled to refer to them. She explained that documents that referred to Kabolon and Chematich Tea Buying Centre were training materials that were used by the presiding officers and the deputy presiding officers.
41. On errors and discrepancies, she testified that there were errors in the transposition of results from Forms 35A to Form 35B. She characterised them as addition and subtraction errors. She said that she did her own tabulation, and it showed that the errors affected all the candidates. She said that the discrepancies were minimal and did not affect the final result.
42. On voter turnout, she stated that the population for Webuye West Constituency was 129, 233; out of which the registered voters were 55, 769, which translated to 43% of the population. Of the 55, 769 registered voters, 36, 347 voted, translating to 63.1% voter turnout, which she said was very high compared to the national average, and it was incorrect to say that there was voter apathy, which led to low turnout.
43. She stated that she was not privy to what happened at Kakimanyi, as the same was not brought to her attention. She, however, learnt that there was commotion there, which the police dealt with, and tallying continued, and she even announced the tally for Kakimanyi to the satisfaction of everybody.
44. Victor Wanyonyi Mirundu, testified as DW2. He was a resident of Matulo Ward, within the Webuye West Constituency. For the purposes of the petition, he was the presiding officer for Matisi SA Primary School polling station 1 of 1. He described himself as a hustler, in terms that he did any work which



could bring bread to his family. He stated that he was appointed on 8th August 2022 as presiding officer, by the 2nd respondent, who had custody of the documents relating to that appointment. He further stated that he was trained between 1st August 2022 and 4th August 2022. He testified that he delivered ballot boxes at the tallying centre at 11.00 AM on 10th August 2022, under heavy security. He explained that the 2nd respondent had organised transport for ballot boxes from the tallying centre to the polling station prior to the conduct of actual balloting. He stated that in his case it took the form a Nissan van. He could not recall the registration details of the vehicle, nor the particulars of the driver. He said that he left the tallying centre at 3.30 AM for the polling station, in time to open the polling station at 6.00 AM for commencement of voting, and that he left the polling station for the tallying centre at 10.00 AM on 10th August 2022. He explained that the process of counting and collating results ended at 9.45 AM, and that he left for the tallying centre at 10.30 AM. He explained that he was to use the same means of transport with his co-presiding officer for the other polling station within the Matisi SA polling centre, so he had to wait for him to finish his activities. He stated that his co-presiding officer was unwell, and was, therefore, a little slower on the counting on that account. He said that he waited for him, in his own polling station room, and the election materials were secured by both him, and the security personnel assigned to his polling station. Apart from him and the security, polling clerks for the station and the agents were also present. He stated that no one raised an issue of delay in getting out the materials from his polling station to the tallying centre. He stated that 647 persons had been registered at his polling station, and at the end of voting 375 of them had voted. He said that polling at his station closed at 5.10 PM, and counting commenced at 5.30 PM. He said that counting went on between 5.30 PM and 11.00 AM. When shown the photograph at page 78 of the petitioner's bundle, he identified himself and the presiding officer for Matisi polling station 2 of 2, Allan Kombo. He said that the picture was taken at the polling centre, and it showed him holding a polling station diary. He explained that the polling station diary was not one of the materials that needed to be placed inside the ballot box. He stated that what was sealed in the ballot boxes, after counting and announcement of the results, were the valid ballot papers, the used counterfoils, the unused ballot papers, the used seals and various forms, including statements on rejected ballots and results declaration forms. He explained that the materials to be placed in the sealed ballot boxes should not include forms where voters were assisted, as such documents should be surrendered to the 2nd respondent. He stated that that picture at page 78 was taken after polling had closed, the ballot boxes had been sealed, and the tallying of results was going on. He stated that he returned the polling station diary to the 2nd respondent. He said that he did not receive any complaint by the petitioner regarding matters at Matisi polling station, and that the results were not contested by either the petitioner or the agents. He said that no issue was raised regarding alterations or regarding the results at the polling station that he was in charge of. He said that his Form 35A had no issue. He stated that at his polling station, the petitioner garnered 144 votes, and the 3rd respondent got 167 votes, with a gap of 23 votes between them. He said the valid votes at the station were 363, 13 ballots were rejected. He said that no objection was raised with regard to the rejected ballots.

45. Allan Okomba Kombo followed as DW3. He was a farmer and a resident of Lugulu. He was the presiding officer for Matisi SA polling centre room 2. He stated that polling ended at 5.15 PM, counting started at 5.30 PM, and ended at 10.00 AM on 10th August 2022. He then prepared Form 35A, and keyed in the results for each candidate, but the agents did not sign the form. He said that he was appointed presiding officer on 8th August 2022. He stated that he was trained by the 1st respondent, and he followed the rules set by the 1st respondent. He explained that on 9th August 2022, he fell ill, which had the effect of slowing down the counting process. He said that he got to the tallying centre at 11.00 AM. He said that he started the polling process at 6.00 AM, and the agents were present when voting commenced. He stated that there were no interruptions, and voting continued up to 5.15 PM,



when voting stopped, and counting commenced at 5.30 PM, and was completed on 10th August 2022, at 10.00 AM. He stated that the station had 647 registered voters, out of which 374 voted. He said that some votes were rejected, and some, meant for the Member of the National Assembly election, were found in the ballot boxes for the other elections. He stated that 369 ballots were valid for the Member of the National Assembly election. He said that it took time for the counting of all the ballots in the 6 elections. He said that agents were present at the close of counting, and that they signed the polling station diary. He explained that he started ailing on 9th August 2022, after he had reported at the polling station. He said he had joint pains, and was feeling drowsy, and that that affected his work. He said that if had gotten pretty unwell, he would have reported to the 2nd respondent so that he could be replaced. He said that his condition was not too severe, to warrant replacement. He said that he had a deputy, who would have taken up his place. He said that, despite illness, he was able to complete his duties without incident, asserting that being ill was not an incident. He stated that all the agents left the polling station after he completed counting, they signed on the polling station diary, but not on Form 35A. He said that they left after he announced the results for the Member of the National Assembly election. They then came back, but no one disagreed with the results. He said that the transport availed to him and DW2 was Toyota Hiace matatu. 8 of them used it, being the 2 POs, the 2 deputy presiding officers and 4 security officers. They placed the ballot materials on the seats of the vehicle, and sat on the same seats. He explained that the vehicle was 14-seater. They had, in total, 12 ballot boxes. He said that he did not get a letter from either the petitioner or the United Democratic Party appointing agents for his station, and none of the agents present disputed the results that he announced, and none of them asked for a recount. No one complained about anything. He said that he did not leave the polling station at all that day, despite his illness. He said that the agents all left without signing Form 35A, and they could have asked for a recount, but they did not.

46. Fred Simiyu Mukenda testified as DW4. He was a farmer, resident at Lugulu. He was the presiding officer for Kakimanyi polling centre stream 1. He explained that he and his co-presiding officers were trained before they were formally appointed. He stated that there was violence at Kakimanyi polling stations, which started at about 3.00 PM, and went on until security was brought, and the polls officials were evacuated. He stated that voting was going on when the violence started, and was disrupted for some time, forcing him to extend the time for voting by some 15 to 20 minutes after the 5.00 PM closing time. He reported the incident to the 2nd respondent by SMS and a hotline provided for that purpose. He also noted it in the polling station diary. He said he did not know what caused the violence, but people were chasing each other with clubs, and throwing stones. He described it as chaos. He said he did not know who was responsible for it. He said that the violence extended to the night. He said that the voting process continued, nevertheless, and those running around with sticks were dispersed. He stated that he and his team were evacuated from the polling centre at 3.00 AM. He said that the polling materials were secure in the room, and they were evacuated with all the materials intact. He said that the security at the polling station, before reinforcement, comprised of 1 police officer and 2 National Youth Service officers. He said that the violence was still on at the time they were counting the votes, which happened in the polling room, in the presence of the agents. He explained that the violence was outside the polling room, and did not spill into the polling/counting room. When reinforcements came, those causing trouble were chased out into the playground of the school housing the polling centre. He also attributed the restoration of calm to intervention of Eugene Wamalwa, who visited the centre at around 3.30 PM, spoke to a group of the youths, and some left the compound. He said that counting was completed at 12.00 midnight, after which they began to fill the forms and the polling station diary, and packing election materials. He explained that there were rejected/spoilt papers, which were placed in envelopes, which were then put inside the ballot boxes. He said that they sealed the ballot boxes after they had placed inside anything that needed to be put there. He explained that the sealing happened after the announcement of results, which was done in the presence of agents. He stated that



the agents were present when the ballot boxes were being sealed, and the election materials packed. He said that the agents signed the relevant forms. He stated that the polling station diary was not placed in the ballot boxes, but in an envelope which he then gave to the 2nd respondent, on 10th August 2022 at 9.00 PM. He got to the tallying centre at 4.00 AM on 10th August 2022. He said that upon arrival, he went into a waiting room, together with his election materials. He explained that the security personnel from the polling station, including the reinforcements, were with them. He explained that 2 agents had accompanied them from the polling station, being from the United Democratic Alliance and Ford (K) political parties. They were part of the team that was in the room with them. He stated that he used the right procedure, as the said 2 agents wanted to observe whether the ballot boxes would be delivered to the right place. He said that they travelled with them in the same vehicle, and were put in the same room at the tallying centre. He said that he was not the target of the violence. He said that there was more violence at the tallying centre, where some people poured into the waiting room, and wanted to seize the ballot boxes, in order to burn them. He said that there were no unsealed ballot boxes at the tallying centre, and that when the rowdy youths poured into the room, they were fended off by security. After they grabbed some of the ballot boxes, they broke some seals of some of the boxes, and the security personnel advised them to reseal the said boxes, which they did. He said that he did not provide details of the broken seals for the affected boxes. He said that the security ordered everybody out of the room, and called back the presiding officers and the deputy presiding officers, and asked them to reseal the affected ballot boxes. He said that only 2 ballot boxes were affected. He said that the ballot boxes in that room were for Kakimanyi polling centre streams 1 and 2. He said that the seals broken were for 2 boxes, and that the 2 agents were outside the room. He stated that at Kakimanyi 1 of 2, there were 641 registered voters, out of which 405 voted, translating to 63% turnout. 143 votes were cast for the petitioner, and the 3rd respondent got 116 votes. He stated that he did not announce results at the tallying centre, but at the polling station. He said neither the candidates nor their agents raised any objections.

47. Alex Wafula Nyongesa testified as DW5. He described himself as a pastor. He was the presiding officer for Kakimanyi polling station 2. He explained that there was violence at his polling station. He said that it started at 12.00 noon, and carried on up to the time they exited the polling station at 3.00 AM. He said he did not know the intention of those involved, but the situation was chaotic, and it appeared as if they wanted to break into the polling station. They were armed with stones, it appeared as if they wanted to attack the presiding officer. He stated that only one candidate visited the station, for the Member of the County Assembly election. He mentioned that Eugene Wamalwa also visited, at about 3.30 PM, but did not get into the voting room. He explained that voting went on despite the violence. He said that there was security, who secured the polls officials and the electoral materials. Voting time was not extended as voting went on despite the violence, and there was no disruption. Voting ended at 5.00 PM, and counting started at 5.30 PM. He said that the violence went on outside, even as the counting was underway. He said that reinforcements came at 3.00 AM. Before that, the polls officials, agents and security were holed up in the polling station. He said that counting ended after midnight, and that between 12.00 midnight and 3.00 AM they were filling the forms. He stated that they sealed all the ballot boxes, before they moved with them to the tallying centre. He said that he recorded the numbers of all the seals in the polling station diary. After evacuation to the tallying centre, they were given a room at the end of the queue, to fill in the polling station diary, as they still had a lot of paperwork that needed to be done. He explained that it was the hostile environment at the polling station that had delayed them. He said that the violence did not stop the voters from voting, nor the polls officials from counting, nor him from announcing the results. He said what the violence did was to stop him from doing the paperwork. He said arrival at the tallying centre was at 4.00 AM. He said that transport was by way of Nissan matatu, hired by the 1st respondent, for transportation of electoral materials and polls officials. He said that he, the other presiding officer, the 2 deputy presiding officers,



2 agents and security personnel used the transport. He explained the presence of the agents as that of ensuring that the materials arrived safely at the tallying centre. He said that the polls clerks did not travel to the tallying centre, but went home instead. Upon arrival at the tallying centre, they were assigned a room, from where they could complete filling in their polling station diaries. He explained that the 2 agents were to witness the filling in of the polling station diary. He said that transporting of the agents was at the request of the agents, it was not the choice of the 1st respondent. He explained that they were assigned to that room, not to rest or because the queue was long, but so that they could fill the polling station diaries. He said there were no candidates in the room. He said that goons attacked them at the tallying centre, targeting the ballot boxes, in the process of which the ballot box for the Senate election was weakened and broken. They tampered with the box, and weakened the seals. However, they were chased away by security. He said all the other boxes were intact, except for the Senate one, which they were advised by security to reseal. He said that he recorded the numbers of the seals broken or tampered with, and handed over the record to the 2nd respondent. He said that the box that he sealed was for Kaimanyi 2. He said that he did not chase away any agent at the polling station, nor deny anyone proper documents of entry. He said that his station had 434 registered voters, 379 voted, a voter turnout of 67%, and 55 votes were rejected. He said that no one at the tallying centre touched the results that he came with from the polling station. He said he never finished filling the polling station diaries at the polling station because of the violence. He requested for evacuation to the tallying centre, and that was where he completed the exercise of filling the polling station diaries.

48. Stephen Mandila Wanyonyi testified as DW6. He was a teacher, and the presiding officer for Bokoli FYM 2 of 2. He said that at his polling station voting started at 6.00 AM, and agents were present. He said that there was interruption during counting, for rowdy youths outside the polling station were shouting, making noise, interfering with everything. The effect of it was that the process of tallying at the polling station proceeded at a much slower pace than should have been the case. He said that voting stopped at 5.00 PM, and counting started after a 15-minute break. He added that the trouble started at the time of counting. He said that counting ended past midnight, and agents were present at the closing of the polling station. He said that there was no chaos at the time he announced the results, and even after that. He stated that he left the polling station at 8.30 AM, the next day, for the tallying centre. He said that 336 out of 552 registered voters cast their votes in the Member of the National Assembly election, and added that the combined total of votes cast for the 6 elections was about 2, 000. He said that they had various other things to do, apart from counting ballots, and that included filling forms. He explained that due to insecurity at the polling station, they were relocated to the tallying centre to complete the exercise of filling the forms. He explained that the rowdy youths remained at the polling station till morning, but he and his team completed the counting exercise, and the agents signed the relevant forms. He stated that part of the delay was due to fact that his deputy presiding officer was unwell, and there were very many forms to be filled. He said that counting was done at the polling station, and Form 35A was filled and signed there. He added that the confirmation by agents was also done there. He explained that it was the polling station diary that was filled at the tallying centre. He said the agents were left at the polling station, for after he was done with the agents, it was time to take the results to the tallying centre. He said that he announced the results at the polling station, before relocating to the tallying centre. He said that no one protested about the results. He said that the polling station diary ought to have been filled at the polling station, but the challenges he faced forced him to do it at the tallying centre. He said that upon arrival at the tallying centre, the 2nd respondent assigned them a room. He stated that on voting day, they were allowed to bring with them material that they were using during training, for reference, but they kept them separate from the materials used for the election. He mentioned that Kabolon polling station was used in the training materials, and he did not know whether the same actually existed. He said that his training materials got lost at the tallying centre.



49. The 3rd respondent testified as the seventh witness, and I shall refer to him as DW7. He said that he was a candidate for the Member of the National Assembly, on the United Democratic Alliance party ticket, and that he was duly elected as Member of the National Assembly for Webuye West Constituency. He said that he got about 14, 000 votes, while the petitioner got about 12, 000 votes, there being a difference of 2, 500 votes between them. He said he did not participate in the mock ballot, and that he did not get feedback on it, for he did not send an agent to the exercise. He said that he did not see the mock ballot, and he had no issue with the order of names on the ballot. He said it was not a mandatory exercise, and it was only meant to give candidates a feel of the balloting. He said that that exercise was meant for candidates. He said that he did not really know how his name appeared on the ballot paper. He stated that he saw voter educators carrying out voter education at funerals and in churches. He could not confirm whether mass voter education was undertaken by the 1st respondent. He termed the issue as one for the 1st respondent, and he could not exactly tell how voter education ought to have been carried out or was structured. He said that the voter educators spoke about voter registration and how to vote. He could not tell when the exercise started and when it ended. He said he was satisfied with the education that was given. On spoilt ballots, he said that the same did not affect the will of the people, as such voters would have had a chance to vote. On agents, he said he was the one who appointed them, and gave them to the party, and that the official communication on them came from the party. He said that the agents were trained on matters elections. He said that he and the party were the same so far as agents were concerned. He said that he had 1 or 2 cases of his agents being denied entry to polling stations, after forgetting to come with their letters of appointment. He said that they were only allowed entry after they presented the letters. He said that his agents had a smooth ride as they had the right documents. He said that only 1 agent was allowed per party or candidate, and he did not know whether some parties or candidates had more than one agent in some polling stations. He said that he was at the tallying centre, and there was no incidence of violence, although there was heckling, by supporters of the petitioner, which, he said, could also be characterised as chaos. He said that there was nothing physical. He said that he was in the tallying room, and there was heckling and argument, which required police intervention. He said that the heckling was prompted by allegations that ballot boxes from Kiminini had been brought into the tallying centre. He said that he did not see any ballot box being tampered with at the tallying centre. He said that he did not see presiding officers signing Forms 35A at the tallying centre, neither could he confirm that agents signed forms at the tallying centre. He said that no ballot boxes were opened at the tallying centre. He said that the ballot boxes that were verified were those alleged to have come from Kiminini, and not Webuye West, adding that Kiminini was not one of the polling stations within Webuye West. He conceded that there were discrepancies, but said that the same did not affect the outcome. He said the errors were human, and affected all the candidates, and not any specific candidate, they did not favour any specific candidate. He said that Shaban Simiyu Makokha was his neighbour, but not his supporter. He said that he did not know what happened to him, but he had heard after the elections that his vehicle had been damaged. He said that he did not know who damaged his vehicle, adding that he had no vendetta with him. He said that he did not instruct anyone to damage his vehicle, neither did he threaten him. He said that he was not involved in any forgery or fraudulent amendment or erasure or irregular stamping of any election documents. He said that results were declared at the polling stations, and the results declared there were final. He described Form 35A as the primary election form, and Form 35B as a tally form. He said that the petitioner did not challenge the count in any of the polling stations. He said that there was no list of the United Democratic Party agents in the petition. He said that he did not collude with any officials of the 1st respondent, and that he did not have any meeting with any of them. He said that no meeting happened at Downhill Springs Hotel. He said that he did not visit Kakimanyi polling station 1 of 2, and he could not tell what happened there. He said that he was unaware of any voters who were turned away from any polling station before voting. He said that he did not influence the



order of names in the ballot paper, that he had no say over that, and, in any event, the order of names did not affect the final outcome.

50. Peter Wekesa Barasa was called by the 3rd respondent, and testified as the eighth witness, and I shall refer to him as DW8. He described himself as the Chief Agent for the United Democratic Alliance. He stated that he oversaw the election on behalf of all the United Democratic Alliance party candidates, including the 3rd respondent, and he was reporting to a County Chief Agent. He said that he was trained, by the 1st respondent and the Registrar of Political Parties. He stated that he was assigned to the tallying centre. He said that his name was not in any polling station diary nor Form 35A. He said that he saw the petitioner seated within the tallying centre, and that he saw him make noise sometimes. He said that he did not witness any violence in any of the over 100 polling stations that he visited within the constituency. He said that there was no violence at the tallying centre, although there was some fracas outside the tallying hall at some point. He said that voter turnout was adequate, going by a table attached to his affidavit, adding that the petitioner had not attached a list of the voter turnout according to him. He said that some the United Democratic Alliance party agents, who did not have proper documentation, were denied entry to the polling stations assigned to them, and they were allowed access once they availed the proper documents. He said that he did not see a list of the agents of the petitioner or the United Democratic Party who had been denied entry to the polling stations. He said that the only exercise at the tallying centre was collation of results in Forms 35A.
51. Jack Mukhongo Mumalo testified as the second witness for the 3rd respondent, and was the ninth witness for the respondents. I shall refer to him as DW9. He was an independent Member of the County Assembly candidate for Bokoli Ward. He was based at the tallying centre. He said that there was no violence at the tallying centre, although there was commotion and a rowdy environment, which he said did not denote violence. He said he came across the ballot boxes from Kakimanyi, which had been isolated in a room, and a presiding officer from Kakimanyi gave an explanation, that there was a security issue at the polling centre, in which the seals were loosened. He said that the boxes were properly sealed, except for one senatorial box, which had loose seals. He said that the said box was not opened by any official at the tallying centre. He said that it was the petitioner who commanded the General Service Unit to bring the boxes out of the room, and the presiding officers complied. He said that candidates were not allowed to handle ballot boxes, and that the conduct by the petitioner had a criminal element. He said that the disputed boxes were not opened at the tallying centre, but the agents present were called and asked to confirm whether what they had signed in the Forms 35A was what was in the boxes, and the said agents confirmed that the signatures on the Forms 35A. he said that no votes were counted at the tallying centre, and only tallying happened there. he said that he had agents at Bokoli, and he did not get any reports of any objections to results or of calls for recounts. He said that it was the supporters of the petitioner who were causing trouble at the tallying centre.
52. At the end of the oral hearing, I directed the parties to address me on the issue of scrutiny and recount that had been raised in applications dated 12th September 2022 and 8th October 2022, which I dealt with in a ruling that I delivered 31st October 2022, to effect that the issue be addressed after evidence had been recorded from the witnesses. The parties filed written submissions on that issue, and I dealt with it in a ruling that I delivered on 16th January 2023 to effect that sufficient basis had not been laid for me to order the scrutiny and audit sought.
53. I had directed the parties to file and serve written submissions. There has been compliance, for the 3 sides did file their respective written submissions, which I have read through, and noted the arguments made.



54. At paragraph 2 of this judgment, I have deduced that the petitioner has raised issues about the impugned election at 3 levels, being the conduct of the respondents with respect to the elections before, during and after the actual polling.
55. I will first start by considering conduct of the respondents with respect to the elections in the period prior to the actual polling or polling day. I have identified the issues raised on this at paragraph 3 of the judgment, being on voter education, polls officials being compromised by the 3rd respondent, voter bribery and voter coercion.
56. On voter education, the issue is around the inadequacy of it, and its contribution to low turnout, and the high incidence of spoilt or rejected ballots. The petitioner and PW3 testified on it. The petitioner acknowledged that he did see voter educators in action, but took the view that whatever they did or were doing was not adequate. He did not point out how much of the voter education was adequate. He did not point at what he considered to be the adequate curriculum for it. Neither did he address the law which required it, and from that law demonstrate that whatever the 1st respondent offered did not meet the threshold. On his part, PW3 spoke as a “data or figures person.” I understood him to mean that he was a statistics expert. He did not disclose nor exhibit his professional qualifications, except that he introduced himself as an accountant. He did not try to prove that he was an expert in the field of statistics, so that the court could attach much weight to whatever he was to testify on. He did not claim to have any qualifications in education or communications, and I doubt that he was a proper person to testify on voter education and its inadequacy. He claimed that the voter education was inadequate, but, like the petitioner, he did not demonstrate what was adequate, going by what the law requires or prescribes. More crucially, he did not bring out the correlation between the inadequate voter education he was claiming, and low voter turnout. Indeed, he made no effort to demonstrate that there was in fact a low voter turnout. He gave no statistics nor percentages of voter turnout throughout the constituency, neither did he try to draw comparisons from previous elections. Such material would have been critical for the court to draw conclusions that indeed there was a low voter turnout. He also did not provide any material from which the court could determine whether or not the alleged inadequate voter education disadvantaged the petitioner and advantaged the 3rd respondent, nor that the inadequate voter education happened in the areas that the petitioner drew more support, nor that the resultant low turnout disadvantaged the petitioner or advantaged the 3rd respondent, the low voter turnout was largely in the areas where the petitioner was popular. So, on the evidence tendered, there is nothing upon which I can determine that the 1st respondent engaged in conduct which negatively affected the final outcome. In any event, if there was inadequate voter education throughout the constituency, the same affected all the candidates, and if that be the case, then it cannot be a basis for nullification of an election.
57. On the second issue, of the elections officials being compromised by the 3rd respondent, the petitioner alleges that a meeting was held at Downhill Springs Hotel between the 3rd respondent and elections officials, significantly presiding officers, and that 3rd respondent gave money to them. The petitioner stated that he was not present at that meeting nor was he within the precincts of the hotel himself. He relied on information from his supporters, whose names he did not disclose. This is what is known as hearsay. It is about what he was told, by persons whose names he did not disclose, and who did not attend court to speak about what they saw and heard at that meeting. His witness on this was PW2, his Chief Agent. It was the petitioner who called PW2 to inform him about what was going on there, and to send him there to find out. He went to the scene, but he did not place the 3rd respondent on the scene, neither did he name any polls official as having been there. He said the meeting had been dispersed by the police. He also said that some people were arrested but he did not name any of those arrested. The evidence tendered on that event, if ever there was one, was inadequate. Both talked about



- Mr. Chebukati addressing the media about it, but they did not produce any video clips, nor audio reports, nor print media accounts of it. There is no evidence, therefore, that the 3rd respondent met polls officials and compromised them.
58. On voter bribery, no evidence was tendered. The petitioner and his 2 witnesses did not lead any evidence on when, where and who was bribed and by who. No names were given. No voter who was allegedly bribed was presented as a witness. The only allegation of bribery was with connection with compromise of the polls officials in the alleged meeting at Downhill Springs Hotel, in respect of which I have found had held that there is inadequate evidence.
59. The last issue is about voter coercion. Like the case of bribery, no evidence was led on this. The pleadings refer to violence directed at voters, prior to the actual polls day, and the only reference was with respect Shaban Simiyu. Shaban Simiyu did not testify. None of those who gave evidence in support of the petition led any concrete evidence on voter intimidation, in the run up to the voting day. Therefore, there is no evidence whatsoever to support the allegation on voter intimidation.
60. There is also the issue of lists of polls officials not being displayed for verification and authentication by the petitioner and his agents. The petitioner has not pointed out the legal requirement for that. In any case, if there was indeed such a requirement, it has not been demonstrated that the omission was sufficient ground for nullification of an election. There is also the issue that there were last minute reshuffles, transfers and changes of polls officials. No evidence was led on this, in terms of disclosure of the names of the officials affected, the stations where they had been deployed, and the new stations to which they were assigned, and the time when that happened. Furthermore, this does not sit very well with the allegation that the 1st respondent had not communicated on the names of the polls officials, if the petitioner did not know the officials that were to officiate the polls in Webuye West Constituency, where did he get the information about last minute reshuffles, transfers and changes of polls officials?
61. The second band of allegations is around the matter of the voting process itself. Several allegations are made around this. The first is that the respondents conspired to flood the polling stations with extra agents for the 3rd respondent, particularly in 8 named polling stations. The material relating to the allegation do not demonstrate that the 3rd respondent was represented by a majority of the agents in these polling stations, for that is what flooding would naturally suggest. It would appear that there were instances where the United Democratic Alliance party had 2 agents, but that cannot be construed as a flood, when looked at in in the context of the total number of agents present. In any event, no effort was made to correlate the number of agents for candidates or political parties to the outcome of the election in any given polling station.
62. The other allegation is that voters were harassed, intimidated and manipulated. None of the witnesses who testified in support of the petition led any concrete evidence on this. They did not name any single voter who might have been harassed, intimidated or manipulated. They only mentioned Shaban Simiyu, yet the incident that allegedly involved him was said to have occurred a day prior to the elections. Secondly, no other incident was alluded to, and, if indeed, Shaban Simiyu was a victim of such conduct, it cannot be that that one isolated case of voter harassment, intimidation and manipulation would be sufficient to overturn an election. Thirdly, such a claim would only carry weight where the subject of such harassment intimidation or manipulation was presented as a witness, to testify first-hand on what befell him. Shaban Simiyu did not testify, and any evidence on what he suffered on election day, if at all, can only amount to hearsay.
63. The other issue is about the agents for the petitioner being chased away from 24 polling stations. Of the 3 witnesses who testified in support of the petition, only PW2 was an agent. He was a Chief Agent for the petitioner, and, therefore, he was not an agent at a polling station, he was not attached to any



polling station. My understanding of the petition, and the evidence tendered in support of it, is that it was the agents assigned to the 24 polling stations who were allegedly chased away, or denied entry. Significantly, the petitioner did not avail a list of his agents or of his political party, accredited by the 1st respondent, assigned to any polling station, leave alone the 24 pleaded. The starting point should have been with the list, so that he could demonstrate that out of that list a number were denied entry or chased away from the polling stations to which they had been assigned. Secondly, no names were given of the agents who were chased away from the 24 polling stations. Thirdly, none of the said agents swore any affidavits, neither were they presented as witnesses. Leading evidence on what befell individuals who do not show up in court to lead first-hand evidence amounts to hearsay.

64. The next issue is about ballot stuffing in 32 polling stations. In general terms ballot stuffing refers to electoral fraud. In simple terms, it refers to introduction of marked ballots in to a ballot box. That may happen before the actual balloting starts, or after the balloting closes, or sometime in the middle of the process. The petitioner's case appears to be that there was electoral fraud, in terms of inflation of vote numbers rather than the placing of illegitimate ballots, either before or after the actual voting. He points specifically at the discrepancies in the number of votes each candidate got in certain polling stations. The mere presence of discrepancies or errors in the figures is not, by itself, adequate evidence of ballot stuffing. No election is perfect. Human error is bound to occur. See *Wavinya Ndeti vs. Independent Electoral and Boundaries Commission (IEBC) & 4 others* [2013] eKLR (Majanja, J). Discrepancies or irregularities are not, per se, evidence of fraud. No election can be 100% perfect. Irregularities or discrepancies are to be expected. A general election is a huge undertaking, and the staff that the 1st respondent uses to pull it through are usually recruited days to the actual election, leaving little time for them to train and attain perfection. It is up to the party relying on discrepancies or irregularities to demonstrate that the same was massive, and was deliberate, designed to benefit another party. The petitioner in this case has not sought to demonstrate that the discrepancies or irregularities that he cites were widespread or massive as to demonstrate that the election was conducted in an incompetent manner, or to demonstrate a manipulation of the process in order to attain a certain result. The irregularities or discrepancies highlighted are not limited to the petitioner. They cut across all the candidates. The petitioner did not demonstrate that his votes were suppressed, through these irregularities or discrepancies, and that the same in fact benefitted the 3rd respondent. If anything, it would appear that some of the other candidates, who are not party to these proceedings, suffered more than the petitioner. The 2nd respondent acknowledged the discrepancies, says that they only affect 222 votes, and the same did not affect the final result. I agree.
65. The tabulation in the petition, to support the allegation of ballot stuffing, indicates that the total number of excess votes, if one may call them so, is 222, spread between all the candidates. It would appear that these were mere clerical errors, with little impact on the overall result. The petitioner benefitted from 14 votes and the 3rd respondent 39 votes. The other candidates who benefitted were Khisa 3 votes, Wanjala 100 votes, Wanyonyi 53 votes, Peter Sitati 20, Wasike 6 and Muniafu 3. The other table merges both the negative aggregates and the positive aggregates. The positives add up to 222 votes. The negatives added up to 491, that is to say ballots that were in favour of certain candidates being understated in Form 35B. The petitioner did not suffer from such understatement of ballots, but the 3rd respondent did, by 100 votes. Other candidates affected were Khisa 10 votes, Wanyonyi 61 votes, Munyasi 200 votes, Wanjala 2 votes, Wasike 20 votes, Peter Sitati 3 votes, Kimakwa 3 votes and Wafula 83 votes. Muniafu, like the petitioner, did not suffer the understatement.
66. The other issue is about KIEMS kits being used selectively and inconsistently in the identification of voters, with the result that ineligible individuals voted, and eligible voters were not allowed to vote. No evidence was led by the petitioner on this. Such evidence should have come from his agents, his eyes at



- the polling stations, who would have witnessed first-hand what was happening with respect to use of KIEMS kits. The 3 witnesses presented to support the petition were not polling agents, and could not give useful evidence on what exactly happened at polling stations with respect to how KIEMS kits were used. The little they told the court on how the KIEMS kits were used to identify voters would amount to mere hearsay. It is claimed that ineligible persons cast ballots, but no concrete evidence was led on this. No such individuals were presented to attest to that, and no evidence was led on the particular polling stations where this happened. It was also claimed that eligible voters were turned away, and, therefore, did not vote. It was not indicated where that happened, how many such voters were affected, and not a single such voter was presented to give first-hand evidence on this.
67. The other allegations regarding the KIEMS kits is that there was failure or refusal to enter results at the polling stations in the KIEMS kits correctly or at all. The petitioner did not lead any evidence on the particular polling stations affected by this. More crucially, he has not demonstrated that there was any legal requirement for results of the Member of the National Assembly election to be entered into the KIEMS Kit. The KIEMS kit is relevant to the Member of the National Assembly election for the sole purpose of identification of voters; the entering of results in the KIEMS kit, for transmission purposes was reserved for the presidential election. The 1st respondent was not obliged to enter the Member of the National Assembly results into the KIEMS kit.
68. It is claimed that there was forgery and fraudulent erasures and amendments of entries and irregular stamping of documents, affecting 23 polling stations. Forgery and fraud are criminal offences. Allegations around forgery and fraud suggest criminal conduct. Anyone suggesting another committed fraud or forgery must be prepared to prove those allegations to a higher standard, than preponderance of evidence or balance of probability. The evidence placed on record does not, in my view, present any concrete proof on forgery or fraud. The petitioner could have made a more convincing case, if he were to present evidence from the agents at the affected polling stations, showing that the erasures and amendments were designed to alter the original results as contained in the Forms 35A that they had signed. No proof of forgery or fraud was presented, for the alterations referred to were countersigned, on their face, by the makers of the documents. On the stamping, the petitioner did not provide any evidence of what ought to be regular stamping.
69. The other allegation is about voter bribery at 6 polling stations. Like forgery and fraud, bribery is a criminal offence, evidence on it must be adduced to a very high standard. In this case, the petitioner did not lead any evidence on voter bribery at the 6 polling stations. The 3 witnesses who testified in support of the petition, did not attest to have been at these 6 polling stations, and to have had witnessed voter bribery. They did not state who was bribed and by who. None of the alleged beneficiaries of the bribery was brought forth, neither were any of the alleged givers of the bribes presented in court to give first-hand evidence on it. None of the agents of the petitioner at the polling stations testified, leave alone those from the affected 6 polling stations. Such agents were the eyes of the petitioner in the polling stations, it should have been them to give evidence on such matters.
70. It is alleged that there was inadequate security for voters in 7 polling station, which led to violence. The petitioner and his 2 witnesses did not lead any direct evidence on violence in the 7 polling stations, to demonstrate that the security availed by the 1st respondent, for voters, was inadequate. The little evidence on insecurity at polling stations came from the 1st and 2nd respondents. Their case was that that in Bokoli there was chaos and disruptions, but not violence, for violence denotes physical attacks to persons and property. The petitioner did not lead evidence on physical attacks at the 7 polling stations, on voters or property, for it to be said that there was electoral violence at the polling stations. They did not present any witnesses who saw first-hand the alleged violence. They did not demonstrate how the alleged violence affected the voting process, and ultimately the final results. The 1st and 2nd respondents



presented evidence that where incidents of disruptions happened, they were isolated, they did not target voters and voting proceeded smoothly, the disruptions notwithstanding. Voter intimidation is also alleged. No concrete evidence was led to demonstrate that any voter was intimidated. No evidence was adduced on the manner of the intimidation, and no single voter, who suffered such intimidation, was presented.

71. It is claimed that there were 3 unauthorised and unaccredited agents at Webuye DEB polling station. The 3 witnesses who testified in support of the petition did not adduce evidence on this allegation. The identity of these individuals was not disclosed and no evidence was led to demonstrate that they were unauthorised and unaccredited. Further, no attempt was made to demonstrate how their presence at that polling station affected the election, and especially the final outcome. The agents for the petitioner, at the polling station, did not testify to authenticate the allegation, neither did the petitioner and his witnesses disclose how they came by the information that there were unauthorised and unaccredited individuals at that polling station. In any event, testimony on what happened at Webuye DEB polling station, unless given by individuals who were at the polling station, amounts to mere hearsay. The other allegation is that unauthorised or fake elections officials and clerks participated in the election. No evidence was led by the petitioner on this. It was not demonstrated who these individuals were, in terms of disclosure of their names, and the polling stations where they served.
72. There is the allegation that no records were kept by the officials of the 1st respondent on such things as when ballot boxes and other materials were issued and received by the polling station officials. The petitioner did not lead any evidence to establish that such records do not exist. These could be operational records created and maintained by the 1st respondent, and which I believe are of no relevance to the matters at hand. The petitioner has not alleged that materials used by the polling officials did not emanate from the 1st respondent, to require proof that indeed that they were issued from stores of the 1st respondent.
73. Related to that is the allegation that no proper records were made of the timelines of the communication between the 2nd respondent and the officials at the polling stations. The petitioner did not lead any concrete evidence to demonstrate that no such records were kept. In any event, the relevance of such communication has not been highlighted, to require the 1st respondent avail any records relating to such communication. Related to the above is the claim that no proper record was kept of the daily occurrences at the tallying centre, particularly on communication between the 2nd respondent and officials at the polling stations.
74. There is an allegation that there were no queuing clerks at most polling stations, which caused congestion at polling stations. No evidence was led on this. The 3 witnesses presented by the petitioner did not testify on this. They were not agents at the polling stations, and they could not provide first-hand information on what transpired at the polling stations. They did not attempt to draw a connection between the absence of such clerks, if at all, and of congestion at polling stations, and the final outcome. The allegation of congestion at polling stations contradicts the claim by the petitioner that there was low voter turnout. If there was low voter turnout, then who were these people creating congestion in queues at polling stations?
75. The final allegation, in the second band, is that the accredited agents of the petitioner were denied entry into 39 polling stations. This is related to the second allegation here above, that his agents were chased away from 24 polling stations. The petitioner has not provided proof that he had any accredited agents. No list has been placed on record, of his accredited agents. No list of the names of the accredited agents who were denied entry into the 39 polling stations has been exhibited or tabled before the court. More crucially, none of these accredited agents in the 39 polling stations have been presented in court to give



first-hand information on the allegation. Whatever the petitioner and PW2 said on this amounted to hearsay.

76. The 3rd band of allegations is on what transpired at the tallying centre. The starting point on this band should be a statement that what happens at the tallying centre is to receive results from polling stations, the tallying of the results from the polling stations, the population of Form 35B and the declaration of the final results of the Member of the National Assembly election. No counting of ballots happens at the tallying centre. By this time, results at the individual polling stations would have been announced at the respective polling station, and circulated to the agents and the public. Thereafter, the presiding officers convey the results in Forms 35A to the 2nd respondent so that she tallies all the results in Forms 35A from all the polling stations, puts them together in Form 35B, and announces or declares the winner of the contest. The law is that the final results are those declared at the polling stations. There could be a re-tally of the same at the tallying centre, but nothing else beyond that. The effect of this would be that what happens at the tallying centre cannot alter, fundamentally, the results announced at the polling stations. What really matters is not the events at the tallying centre, but at the polling stations, unless the records from the polling stations are altered or changed.
77. The first allegation under this band is that strange ballot boxes were found at the tallying centre meant for Kiminini and Mupeli polling stations, which were not among the polling stations for Webuye West Constituency. In the first place, the petitioner with his 2 witnesses did not demonstrate that the 2 ballot boxes were at the tallying centre. He who alleges must prove. It is the petitioner making the allegation, and the burden is on him to establish the fact to support the allegation. No evidence was presented to demonstrate that ballot boxes from Kiminini and Mupeli polling stations were found at the tallying centre. Secondly, even if it were true that such boxes were in fact found, what was the impact of that finding on the outcome of the election? I reiterate that no counting of ballots is undertaken at the tallying centre, and, therefore, there was no chance that the ballot papers from the alleged boxes got mixed up with ballots cast for the Webuye West Constituency Member of the National Assembly election. Secondly, the petitioner did not demonstrate that, if the said boxes existed, the Form 35A for the 2 were tallied by the 2nd respondent and the results populated in the Form 35B for Webuye West Constituency. The mere presence of the 2 ballot boxes at the tallying centre, if at all, is not evidence of fraud, unless it can be demonstrated that papers in them were incorporated in the tallying exercise that was being undertaken at the tallying centre. No evidence was led linking the contents of the alleged 2 boxes and the final tally that the 2nd respondent announced.
78. The second allegation in the band is about ballot boxes from Kakimanyi polling centre being found abandoned at the tallying centre. I reiterate that the exercise at the tallying centre is tallying of results from the polling stations and population of Form 35B and declaration of the final results. No counting of ballots is undertaken at the tallying centre. The Returning Officer would not need the ballot boxes to tally the final results and to populate Form 35B. No ballot boxes are to be opened at the tallying centre; indeed, once sealed at the polling stations, they are not to be opened except by an order of the court. The ballot boxes are brought to the tallying centre, not for counting of ballot papers nor their verification, but for surrender by the presiding officers to the custody of the returning officer. Whether the boxes in question, relating to Kakimanyi polling centre, were lying there unattended would have no effect whatsoever on the tallying exercise. In any event, the evidence tendered does not demonstrate that the said boxes had been abandoned, for the photographs relied on by the petitioner, show police officers sitting about a metre or so away from the said boxes, and images of officials of the 1st respondent also appear nearby, all suggesting that the boxes were not abandoned, but were instead under the watchful eye of security officers and officials of the 1st respondent.



79. The other allegation is that one of the abandoned boxes from the Kakimanyi station was not properly sealed. An explanation was given by a witness of the 1st respondent, that all the ballot boxes had been properly sealed when they arrived at the tallying centre, but then a rowdy crowd attempted to grab the ballot boxes and that it was in that melee that the seals for some of them broke or loosened. That explanation was not contradicted by the petitioner, and he did not lead any evidence to suggest that the contents of the boxes were interfered with. Even if there was any interference, the final result would remain as declared at the polling station, copies of which have been shared with the agents for the candidates and made public through the notice posted at the polling station. I am satisfied of the explanation given by the 1st respondent about what might have happened to those boxes. The same applies to the alleged unsealed ballot box from Bokoli.
80. There is a related allegation that officials from Kakimanyi were locked in a room at the tallying centre filling forms. The 2nd respondent and the witnesses testified on the allegation. From the explanation given, the officials were not locked in a room. They were filling forms, principally the polling station diary but not Form 35A, for that form, 35A, would have been filled at the polling station, and the results of the election announced there. The explanation given by the 1st respondent was not contradicted by the petitioner. The petitioner or his party should have had agents at the 2 stations, who should have furnished them with information on what had transpired at Kakimanyi, before the officials relocated to the tallying centre. I accept the explanation by the 1st respondent as credible.
81. It is alleged that there were irregularities with regard to declared results in the Forms 35A and also in the declared results from several candidates in 70 polling stations. I have dealt with discrepancies and irregularities elsewhere. I reiterate that no election is perfect. Human error is to be expected. I have also stated that irregularities or discrepancies would only be relevant where they are massive and widespread, so much as to render the election a farce or make it impossible to determine who had won it. Much of the errors or discrepancies raised by the petitioner are clerical in nature. They appear to cut across, affecting all the candidates. There is nothing to suggest that anything was done to disadvantage the petitioner personally, or to favour the 3rd respondent. The errors appear to affect only 222 ballots, and have no impact on the final outcome.
82. The allegation that strange and unregistered political parties participated in the elections was a wild speculation. I say so as the petitioner did not demonstrate whether the said parties had fielded candidates and whether they had agents at the polling stations. The petitioner did not also demonstrate that any of the Forms 35A had any entries relating to these political parties. He or his agents stumbled on the materials within the rooms of the school where tallying was being done, which appeared to relate to the elections, and took them away. An election official testified that the documents belonged to him, and got lost at the tallying centre. They were training materials, that they had been allowed to keep and to have on election day for reference purposes. He said they had nothing to do with the Member of the National Assembly elections for Webuye West. The petitioner did not provide any evidence that the materials might have been used to manipulate the election or the final results to his disfavour. What the petitioner did was to take away materials belonging to another person without that other person's permission, and then began to construct conspiracy theories around the materials.
83. The petitioner also alleges that there was forgery and fraud with respect to results by Stephen Wanyonyi in 2 polling stations. I reiterate what I have stated above, forgery and fraud are criminal offences. The standard of proof with relation to any allegation founded on forgery and fraud is very high. I do not have before me material upon which I can conclude that Stephen Wanyonyi committed any forgery or fraud with regard to the election materials that he handled. When he testified, Stephen Wanyonyi gave



a plausible explanation of the documentation that he handled, and I have not seen any suggestion of forgery or fraud in his actions.

84. On whether the respondents gave misleading information on total voter turnout, I note that the petitioner did not file any papers on over turnout. He did not place on record any date on what he considered to be the correct figures, which the court can then look at as against what is in the records of the 1st respondent, to assess whether or not the information given was misleading. When PW3 testified and was questioned on these issues, he invited the court to visit the website or portal of the 1st respondent on registration of voters to get the correct numbers. It is not the duty of the court to look for evidence, but that of the parties. Related to that is the allegation about a discrepancy between the gazetted number of registered voters and the declared number of registered voters in 46 polling stations. I have dealt with discrepancies elsewhere, and stated that the mere fact of a discrepancy is no ground for nullification of an election, unless it goes to the heart of the matter. The proper number of the registered voters in a polling station is that which is gazetted, and if there is a misstatement of the number in Form 35A, that can only amount to a clerical error, for the number of registered voters is not determined or created by the presiding officer.
85. It was alleged a non-existent polling station, known as Kabolon, was included in the process. No evidence was led on what that inclusion entailed. The only evidence that came out was that reference to Kabolon polling station arose in the training materials availed to polling staff, and which the petitioner and his people chanced upon, and began to weave a tale around, by creating conspiracy theories. They were obliged to prove that ballot materials from the alleged Kabolon polling station were introduced into the system, and polls results from that alleged polling station were included in the tally that the 2nd respondent used to declare the election. The petitioner did not establish whether any results were received from the alleged Kabolon polling station received by the 2nd respondent, by way of a Form 35A, and that the results from that Form 35A were populated into the Form 35B that the 2nd respondent used to declare results.
86. The other allegation was that results at the tallying centre were not projected or displayed for verification. The petitioner has not demonstrated that there was a legal requirement for that. In any case, the tallying exercise was being done in the presence of his agents, and the omission to project or display the tallies in a big screen cannot possibly be a basis for nullification of results. It is alleged that the accredited agents of the petitioner were denied access to Forms 35A and 35B, and to the information relating to declaration of results. In the first place, the petitioner has not established, by way of evidence, that he had accredited agents for the purpose of the election. Secondly, none of his agents filed affidavits, nor where they presented in court to give first-hand testimony on these allegations.
87. There were other allegations made in the affidavits and in the oral testimonies, that were not averred in the petition. An electoral dispute is founded on the averments made in the petition. The affidavits sworn in support by the petitioner and his witnesses are meant to expound or verify the averments in the petition. The petition is the pleading, and anything not pleaded in the petition cannot be made an issue in the election by way of averment in the supporting affidavits or in the oral testimonies. One such issue is that relating to the positioning of the name of the petitioner in the ballot. It was not pleaded in the petition. It was introduced in the affidavit of the petitioner. It was not an issue for determination in the election dispute. It is a non-issue, and I shall not address my mind to it. See Mr. Charles C. Sande vs. Kenya Cooperative Creameries Limited Mombasa Civil Appeal No. 154 of 1992 (unreported), Nairobi City Council vs. Thabiti Enterprises Limited [1997] eKLR (Akiwumi, Tunoi & Lakha, JJA) and David Sironga ole Tukai vs. Francis arap Muge & 2 others (2014) eKLR (GBM Kariuki, M’Inoti & Mohammed, JJA).



88. The petition herein is very heavy on allegations, but very light on evidence to support the said allegations. Indeed, there is a sense in which it appears that the petitioner has made allegations or raised issues, but has not provided proof of the same, and it would appear that the expectation is that the court would go out of its way to investigate the allegations or to conduct an inquisition to the issues raised. The Kenyan judicial process remains adversarial, including the litigation in electoral disputes. The duty remains with the party initiating the litigation to provide evidence to support each and every allegation made. There is nothing in *the Constitution* and the electoral law which applies the civil or continental system of justice to election dispute litigation. There is no obligation on the part of the court to conduct investigations into issues raised, or to conduct an inquiry or inquisition into allegations, or to go out of its way to find material to establish the truth or veracity of the claims.
89. Having recited the issues raised and analysed the evidence presented, I can now respond to the questions that I identified in my ruling, of 31st October 2022, as up for determination. I shall respond to them as follows:
- a. As to whether there was inadequate voter education by the 1st and 2nd respondents, and whether the same affected the outcome of the elections to the disadvantage of the petitioner, I find that the petitioner has not proved that the voter education was inadequate, and, that being the case, the issue of whether the inadequacy affected the outcome of the elections or disadvantaged the petitioner does not arise;
 - b. As to whether the election was conducted in a manner that did not adhere to the principles of *the Constitution* and the applicable legislation, and whether that impacted on the final results, to the detriment of the petitioner, I find and hold that the petitioner has not demonstrated that the election was not conducted substantially in accordance with *the Constitution* and the applicable legislation;
 - c. As to whether there were irregularities in voter identification, balloting, counting of the ballots, and collation tallying and declaration of results, significant to upset the results, I find and hold that no irregularities were demonstrated with respect to voter identification, balloting and declaration of results, but there were irregularities or discrepancies or errors with respect to counting of the ballots and collation and tallying of results, but the same were not significant as to upset the results declared;
 - d. As to whether the elections were marred by blatant denial of voters rights, voter bribery, voter treatment and voter manipulation, I find and hold that it was not demonstrated that there was any denial of voter rights, voter bribery, voter treatment and voter manipulation;
 - e. As to whether there was insufficient security for voters and whether electoral violence was meted out by the 3rd respondent, and whether the same impacted the final results, I find and hold that it has not been demonstrated that security for voters was insufficient and that violence was meted out by the 3rd respondent on voters, and the issue of whether it impacted on the outcome does not arise, and that although there were incidents of chaos, the same were not shown to have been directed at voters, did not affect the voting process and had no impact on the results;
 - f. As to whether there was intimidation and harassment of the election agents of the petitioner, I find and hold that it was not established that the election agents of the petitioner were harassed or intimidated, and the issue of that affecting the overall conduct of the election and the results does not arise;



- g. As to whether the court ought to order an audit and scrutiny of the system and technology deployed in the election, I found and held, in my ruling of 16th January 2023, that I ought not to as a basis had not been laid for that order; and
- h. As to who should bear the costs of the litigation, I shall make that order after making the final determination on the outcome of the petition.
90. In view of the above, the final finding and holding is that the election the subject of this petition was conducted and managed substantially in accordance with *the Constitution* and the relevant electoral law; that the allegations made in the petition of electoral malpractice, fraud and manipulation were not proved; that where any transgressions or discrepancies or errors or irregularities happened, the same were not substantial and did not compromise or affect the final result or outcome of the election; and that the result returned in favour of the 3rd respondent was valid and reflected the will of the people of Webuye West Constituency. As a consequence, I find that there is no merit in the petition herein, and I hereby dismiss it.
91. Costs follow the event. The event to be followed here is the dismissal of the petition, which would mean that the petitioner has to bear those costs. The petitioner had 3 witnesses, the 1st and 2nd respondents 6, and the 3rd respondent 3. There was a flurry of interlocutory applications filed and argued. The costs shall be taxed by the taxing officer, in the usual manner, considering the above, but the total costs payable shall not exceed Kshs. 5, 000, 000.00.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 28TH DAY OF FEBRUARY .2023

W. MUSYOKA

JUDGE

Mr. Nyaribo and Mr. Wechabe, instructed by Omondi Omeri & Mwasaru, Advocates for the petitioner.

Mr. Odhiambo Oloo, instructed by Muthaura Mugambi Ayugi & Njonjo, Advocates for the 1st and 2nd respondents.

Mr. Masinde and Mr. Wasilwa, instructed by Masinde & Company, Advocates for the 3rd respondent.

