



**Panyako v Independent Electoral & Boundaries Commission & 2 others (Election Petition E001 of 2022) [2023] KEHC 1135 (KLR) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1135 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
ELECTION PETITION E001 OF 2022  
RB NGETICH, J  
FEBRUARY 24, 2023**

**BETWEEN**

**SETH AMBUSINI PANYAKO ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**JUMA ODOUR JOSEPH IEBC CONSTITUENCY RETURNING  
OFFICER ..... 2<sup>ND</sup> RESPONDENT**

**HON. MOSES MALULU INJENDI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner SETH AMBUSINI PANYAKO filed petition dated 2<sup>nd</sup> September 2022 following election of the Member of the National Assembly for the Malava Constituency which was conducted on 9<sup>th</sup> August 2022 by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent where the 2<sup>nd</sup> respondent who was the Returning Officer declared the 3<sup>rd</sup> Respondent HON. MOSES MALULU INJENDI as the duly elected winner on 11<sup>th</sup> August 2022.
2. The petitioner having been one of the candidates for the position of National Assembly Malava Constituency being aggrieved by the declaration of the results by the 2<sup>nd</sup> Respondent, alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent worked in cahoots with the 3<sup>rd</sup> Respondent to interfere with the results of the Malava Parliamentary Election.

**GROUND OF THE PETITION**

3. The petitioner cited ten (10) grounds as the basis for filing this petition summarized as hereunder: -



- a. The transportation of election materials was done by the 3<sup>rd</sup> Respondent and or his proxies/ staunch supporters in the Constituency. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent deliberately contracted close friends, including Peter Ngure, Henry Galia Muluya and Arthur Shalo and other supporters of the 3<sup>rd</sup> Respondent to transport election materials and in the process, the 3<sup>rd</sup> Respondent improperly influenced the results of elections.
- b. Corruption and compromised Constituency Returning Officer and IEBC Logistics Officer who sought bribes to influence elections; that the 2<sup>nd</sup> Respondent was highly corrupt by act/ s of directly and indirectly, favoring various candidates of the Parliamentary elections and solicited bribes to influence the race in their favor and in particular 2<sup>nd</sup> Respondent approached the petitioner by soliciting a bribe of Kshs 300,000/=; that he used his agent Thomas Mwinamo to solicit bribes from the petitioner.
- c. Failure of the KIEMS KIT- The petitioner contends the failure of the KIEMS KIT was deliberate and it delayed the commencement of the voting exercise; that the 1<sup>st</sup> Respondent did not use KIEMS KIT to identify voters in half of the Polling Stations within Malava Constituency, partly as voter suppression. The petitioner further contend that voting should have been postponed due to failure of KIEMS KIT.
- d. Voter differential -The 1<sup>st</sup> and 2<sup>nd</sup> Respondents used two different registers in conducting the elections. As per form 34B, in the Presidential race, the number of registered voters was 93,863 while in the Parliamentary race in form 35B was 94,447 bringing voter discrepancy of 584 votes.
- e. The denial of entry or forceful ejection of the petitioner's agents into various Polling Stations. The Petitioner contends his agents were not allowed into the Polling Stations and denial of his agents into the Polling Station led to ballot stuffing and rigging of elections.
- f. Bribery of voters. The petitioner contends the 3<sup>rd</sup> Respondent was directly involved in the widespread voter bribery in the Malava Constituency by offering Kshs 10,000/= to petitioner's agent Joseph Werabunuku at Mache Polling Station to assist in the bribery of voters and abandon acting for the petitioner. The petitioner further cited Namatala Polling Station, Ikoli Polling Station, Kabras East Ward and Mangurilo Polling Station East Kabras Ward Polling Stations as Polling Stations where the 3<sup>rd</sup> Respondent participated in voter bribery.
- g. That the 3<sup>rd</sup> Respondent agents assisted illiterate voters in voting.
- h. Instigation of violence by the 3<sup>rd</sup> Respondent before and during the election period. The Petitioner's contention is that on 16<sup>th</sup> July 2022 at Malava Primary School Grounds, the 3<sup>rd</sup> Respondent's gate crushed his campaign rally and caused violence. He alleges that the 3<sup>rd</sup> Respondent's agents and goons attacked his supporters in broad daylight; that he was issued with OB from the Police Station following report. He added that the 3<sup>rd</sup> Respondent instigated violence on 6<sup>th</sup> August 2022 and 8<sup>th</sup> August 2022 at Kamuchisu Polling Station where Kevin Mukwale was beaten by the 3<sup>rd</sup> Respondent's goons and violence of 9<sup>th</sup> August 2022 where Philip Sasaka was accosted by goons initiated by the 3<sup>rd</sup> Respondent. He also stated that there was violence in Lugusi Polling Station, Mahira Polling Station, St. Gerald Sasala Polling Station and Burundu Polling Station violence on 9<sup>th</sup> August 2022 and voters were accosted by the Police officers.
- i. Allowing dead voters to vote. The petitioner contends the names of dead people were still in the register and they voted.



j. The Petitioner contends that because the 3<sup>rd</sup> Respondent was in charge of the whole elections in terms of transport, logistics and in view of irregularities above, he prayed for scrutiny of all election materials in the following Polling Stations namely:

1. Shipala Primary Polling Station
2. Mahusi Primary Polling Station
3. Silungai Primary Polling Station
4. Tombo Primary Polling Station
5. Matete Primary Polling Station
6. Namangara Primary Polling Station
7. Fuvuye Primary Polling Station
8. Teresia Primary Polling Station
9. Namatala Primary Polling Station
10. Muriola Primary Polling Station
11. Mukhonje Primary Polling Station
12. Lwanda (k) Primary Polling Station
13. Bunuku Primary Polling Station
14. Chiveli Polling Station
15. Fuvale Polling Station
16. Mukavava Primary Polling Station
17. Namanja Polling Station
18. Shilongo Polling Station
19. Namushiya Polling Station
20. St. Martins Primary Polling Station
21. Burundu Polling Station
22. Bulupi Polling Station
23. Ingwe Polling Station
24. Sawawa Primary Polling Station
25. Kamuchisu Primary Polling Station
26. All Polling Stations in Chimuche Ward
27. All Polling Stations in East Kabras Ward.



## PRAYERS IN THE PETITION

4. By reasons of the discrepancies alleged by the petitioner captured above, he sought the following declaration/orders: -
  - i. A declaration invalidating the elections of the 3<sup>rd</sup> Respondent as the Member of the National Assembly for Malava Constituency.
  - ii. An order be and is hereby made consequent upon nullification of the declaration of the results by the 3<sup>rd</sup> Respondent directing the 1<sup>st</sup> Respondent to scrutinize, tally and verify the count and declare the petitioner as a duly elected member of the National Assembly for Malava Constituency.
  - iii. A declaration in alternative to (ii) that the Parliamentary election held on 9<sup>th</sup> August 2022 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void.
  - iv. An order quashing the certificate issued to the 3<sup>rd</sup> Respondent and the consequent Gazette Notice declaring the 3<sup>rd</sup> Respondent as the Member of Parliament for Malava Constituency.
  - v. Order in respect to (iii and iv) ordering fresh Parliamentary election in Malava Constituency.
  - vi. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent jointly and severally committed election irregularities.
  - vii. A declaration that the 3<sup>rd</sup> Respondent is unfit to hold public office.
  - viii. A declaration that the 2<sup>nd</sup> Respondent is unfit to hold public office.
  - ix. A declaration that the 2<sup>nd</sup> Respondent is in breach of the authority and trust assigned to his office as a state officer and has brought dishonor to the nation and indignity to the office of the Constituency Returning Officer and underpinned confidence and integrity bestowed in his office.
  - x. The election offences by the 1<sup>st</sup> Respondent, Presiding Officers, the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent pleaded to be reported to the Director of Public Prosecutions for appropriate action.
  - xi. The respondents be condemned to pay the petitioner's cost and incidental to this petition.
  - xii. Such other and consequential orders as this honourable court may lawfully make.

## 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENT'S CASE

5. The Respondents denied allegations levelled against them in the petition in their respective responses. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent filed response dated 15<sup>th</sup> September 2022 together with the witness affidavits. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent's contention is that the 3<sup>rd</sup> Respondent was duly elected as a Member of the National Assembly for the Malava Constituency and the Commission adopted a simple, accurate, verifiable, secure, accountable and transparent system during the 9<sup>th</sup> August 2022 general election
6. On the issue of transportation of election materials, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent contends the same was done in two folds; on the 7<sup>th</sup> of August 2022, transportation of election officials to the 198 Polling



- Stations in Malava Constituency for mapping; and on the 8<sup>th</sup> of August 2022 electoral materials and officials were transported to the 198 Polling Stations in readiness for voting.
7. The 1<sup>st</sup> & 2<sup>nd</sup> Respondent's position is that procurement of the motor vehicles to transport the election materials was done at the County Election Manager's Office in Kakamega where PANAMARK Limited was awarded the contract and as per the contract, Panamark was to provide 199 Motor Vehicles to be used in the transportation of the election materials and election officials across all Polling Stations in the Malava Constituency; that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not privy to the details of the owners of the motor vehicle.
  8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent further deny the allegation of ballot stuffing and contend if ballot stuffing was done during the transportation of the election materials, the agents of the Petitioner would have noticed on the 9<sup>th</sup> of August 2022 before the voting exercise began; that the agents would have raised alarm at commencement of voting and at the close of the voting, the petitioners' agents would not have signed form 35A.
  9. The 2<sup>nd</sup> Respondent denied the allegation of soliciting a bribe of Kshs. 300,000/= through Thomas Mwinamo. He stated that the meeting on 6<sup>th</sup> July 2022 concerned the violent incident at Shikutse and it was aimed at cautioning candidates against violence.
  10. The 2<sup>nd</sup> Respondent also denied interacting with the 3<sup>rd</sup> Respondent's agents during Election Day and stated that Sarah Mukhwana is a stranger and she was not an IEBC commissioner.
  11. On the issue of the recruitment of staff, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent averred that the procedure for recruitment is initiated at the headquarters where the applications are done using the online portal. Thereafter the applications are sorted into various Constituency batches. The Constituency batches are sent to the Returning Officer with guidelines on how to handle the applications; in the Constituency level, three (3) member committee is constituted which must comprise of permanent staff who conduct interviews and recruit successful candidates.
  12. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent further contend that the failure of the KIEMS Kits was not deliberate. The failure was in 77 Polling Stations out of 198 but it did not disenfranchise the voters in the affected areas neither did it suppress the voter turnout. They further averred that as per the analysis of 17 Polling Stations where KIEMS Kits worked, 17 Polling Stations where the KIEMS KIT failed and 17 Polling Stations where the KIEMS Kits worked throughout the day in terms of voter turnout gave almost a similar voter turnout. That the failure of 77 Polling Stations amounted to 38.9% of all Polling Stations which is minority and could not have contributed to the cancellation of the election.
  13. On voter differential, the 1<sup>st</sup> and 2<sup>nd</sup> respondents pointed out that the error of omission in form 34B for a presidential result where the registered voters of 584 in Namatala Polling Station, station 1 were not entered in form 34B; and in Kimang'eti Polling Station 2 the error which was captured was 471 instead of 475, Sambuli Polling Station the error captured the number of votes in form 34B as 183 instead of 173, the error was corrected in form 34B which was duly signed by the agents of Azimio and UDA.
  14. On the issue of dead votes, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent stated that the register is a living document and the register cannot be cleaned without receiving instructions from the Registrar of Births and Death. Further, the register was open for inspection by the public from 4<sup>th</sup> May 2022 to 2<sup>nd</sup> June 2022 and argued that the petitioner did not adduce evidence to support the wild allegation.



### 3<sup>RD</sup> RESPONDENT'S CASE

15. In response, the 3<sup>rd</sup> Respondent filed Replying affidavit sworn by Hon. Malulu Injendi. He denied the allegations levelled against him and stated that the election of the Malava Constituency was peaceful, free, fair, accurate and verifiable; that there was no interference with the integrity, credibility and security of the election for members of the National Assembly Malava Constituency.
16. The 3<sup>rd</sup> Respondent further stated that he concluded his campaigns peacefully and he did not engage in criminal activities.
17. On the issue of the transportation of election material, the 3<sup>rd</sup> Respondent stated that he is not an employee of the 1<sup>st</sup> Respondent and denied offering transportation services to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent nor being involved with the logistical planning of the elections; he denied any involvement with Thomas Mwinamo and Peter Njure.
18. The 3<sup>rd</sup> Respondent pointed out that the NG-CDF is an independent institution established by an Act of Parliament. He denied being involved in the day-to-day running of the NG- CDF and was not therefore involved in the award of tenders.
19. He denied involvement with Arthur Shalo as his agent and is not liable for the actions of the third party. He further denied involvement in the planning of the general election.
20. On the issue of the corruption of the Independent and Electoral & Boundaries Commission Officials, he denied being approached by the 2<sup>nd</sup> Respondent for bribes. He further stated that no evidence has been tendered as there is no report made to the police availed in court. He further denied having a concubine by the name of Sarah Mukhwana or any other involvement with her.
21. In respect to failure of the KIEMS Kits, the 3<sup>rd</sup> Respondent stated that the failure of the KIEMS Kits did not give him any special advantage over the Petitioner or other candidates and that he was also affected by the failure of the KIEMS Kits and had to vote manually. He further stated that where voting was started late, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents extended the voting time to compensate for the lost time and during manual voting, no photographs are taken.
22. The 3<sup>rd</sup> Respondent's argument is that there was supplementary method of identifying the voters and the Petitioner has not given credible reasons as to why the 1<sup>st</sup> Respondent should have postponed elections where the KIEMS Kits failed, neither has the Petitioner demonstrated that the votes were not properly accounted for.
23. On the issue of denial or forceful eviction of the petitioner's agents, the 3<sup>rd</sup> Respondent stated that due to a large number of candidates, the 1<sup>st</sup> Respondent allowed each political party or coalition to have at least one agent in each Polling Station unless individual agent lacked the proper documentation.
24. The 3<sup>rd</sup> Respondent denied knowing Joseph Werabunuku, Marini Peter Kianda, Timothy Chiliswa, Muse Kunyi and Juma Ndochi and bribery allegations in the Manguliro Polling Station. He further denied allegation that his agents were allowed to assist voters.
25. The 3<sup>rd</sup> Respondent further denied the allegation of violence of 16<sup>th</sup> July 2022 and stated that his supporters did not attack Petitioner's employees. He stated that no one was allowed to attend the rally with pangas and machetes; that the rally was attended by many people including police officers who enhanced security. He denied any involvement with the persons blamed for the incident.
26. On the issue of Dead voters, the 3<sup>rd</sup> Respondent stated that no evidence has been tabled before the court.



27. On the prayer for scrutiny, the 3<sup>rd</sup> Respondent's argument is that the Petitioner has not laid a basis to warrant an order for scrutiny and stated that the margin between the Petitioner and the 3<sup>rd</sup> Respondent is 2,758 votes which is too wide to order scrutiny.
28. The 3<sup>rd</sup> Respondent contends he was duly elected and won the position of Member of the National Assembly for Malava Constituency seat in an open and fair contest.
29. According to the 3<sup>rd</sup> Respondent, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent fully complied with the Constitution and the Election Act No.24 of 2011 in conducting credible, verifiable and accountable results, the Petitioner has not laid any basis to demonstrate the minimum threshold to warrant the nullification of the elections.
30. In view of the above allegations, the Petitioner and the Respondents called witnesses in support of their respective arguments. The Petitioner called a total of 21 witnesses, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent called a total of 9 witnesses while the 3<sup>rd</sup> Respondent called a total of 3 witnesses.

### **PETITIONER'S ORAL EVIDENCE**

31. The Petitioner who testified as Pw1 adopted his affidavits sworn on 2<sup>nd</sup> September 2022 and 7<sup>th</sup> October 2022 which contain the averments captured above. He testified that he was a candidate for UDA in position of National Assembly in Malava Constituency and he is representing the interests of the people of the Malava Constituency. In his view, the election should be fair and free from violence; there should be sanity; the election is required to be conducted as per the Constitution and voters of the Malava Constituency should have a Member of Parliament whom they voted for but not one who rigged elections.
32. During cross-examination by Mr. Samba counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, the Petitioner stated that the 3<sup>rd</sup> Respondent and his supporters were violent to his supporters Enock, Shoto and Elijah on the eve of the Elections and the said incident was reported at Kabras Police Station. He further stated that the 3<sup>rd</sup> Respondent colluded with the police officers in unleashing violence on voters on Election Day.
33. The petitioner testified that his agents were forcefully ejected from the Mahira , Emusali Primary and Namtala Polling Stations and were only allowed in after his intervention. He denied the agents who signed Polling Station diary were his agents.
34. The petitioner stated that the 3<sup>rd</sup> Respondent's vehicles which were used during the campaign period transported election material and there was ballot stuffing during the transportation of the election materials.
35. The Petitioner further stated that on 16<sup>th</sup> July 2022, the 3<sup>rd</sup> Respondent was present during the rally when violence erupted resulting in his driver and media people being assaulted and on 5<sup>th</sup> July 2022 at Mukuyu, the violence was between the 3<sup>rd</sup> Respondent and other candidates. He denied being on the ground during the violence.
36. The petitioner informed the court Thomas Mwinamo approached him and they convened a meeting at the downhill hotel.
37. He said failure of the KIEMS KIT affected voting in Malava Constituency and there was no form 32A filled by voters who voted manually. According to him, the KIEMS Kits failed in 99 Polling Stations.
38. The Petitioner testified that during the voting, the IEBC officials issued three (3) to four (4) ballot papers to the voters and crossed the names of dead voters.



39. He further testified that his Chief agent Elijah Karungani was not allowed to comment on form 35B when signing and the signing by the agents did not mean that they agreed with the results. He testified that forms 35A and 35B for Namatala Polling Station were amended and amendments were made in form 34B.
40. On the issue of bribery, the Petitioner informed the court he reported the matter to the CID but he was not assisted.
41. During Cross-examination by Mr. Anzala counsel for the 3<sup>rd</sup> Respondent, the Petitioner said he had no evidence to demonstrate that the 3<sup>rd</sup> Respondent participated in the tendering process to procure vehicles to be used in the transportation of election material and he had no evidence to show that the 3<sup>rd</sup> Respondent paid money to the 2<sup>nd</sup> Respondent.
42. He further stated that votes were removed from Shitirira Polling Station but he could not tell at what point they were removed during the transportation. Pw1 contends that 500 votes were ballot stuffed. He testified that IEBC officials in the Namatala Polling Station were relatives of the 3<sup>rd</sup> Respondent. On the issue of voter bribery, he told the court he would rely on the evidence of his witnesses who witnessed the bribery.
43. The Petitioner said he did not witness the violence alleged at Chemkusi Polling Station, Burundu Polling Station, Lugusu Polling Station, Mahira Polling Station, or St. Gerald Polling Station but he will rely on the evidence of his witnesses who witnessed the violence.
44. PW2, Pw3, Pw4, Pw5, PW8, Pw9, PW11 and PW20 despite saying they were attacked by 3<sup>rd</sup> respondent's supporters during election period, they were not able to link the attackers to the 3<sup>rd</sup> Respondent. According to the petitioner's witnesses the arrival of police officers at the Mahira Polling Station made voters not to vote.
45. Pw6 Lewis Shoto who testified on the issue of bribery informed the court that he saw Alica Shanganya at the Namatala Primary bribing voters but he did not have any evidence to demonstrate the same.
46. Pw10 Catherine Munyaka informed court that she saw Dorcas holding a brown envelope which she suspected contained money but she could not verify the content of the brown envelope.
47. In respect to violence of 16<sup>th</sup> July 2022, Pw7 testified the rally at Malava Primary was convened by leaders of Kenya Kwanza. He said both the petitioner and the 3<sup>rd</sup> respondent attended the rally and the supporters of the 3<sup>rd</sup> Respondent unleashed violence on the petitioner's supporters.
48. Pw13 Stephen Soita told the court he is a Boda Boda rider and that he met with Thomas Mwinamo. He could not however indicate to the court the time and place of the meeting. He told the court he could not link the meeting with Mwinamo to Malulu.
49. Pw14 testified that Peter Ngure who was given the contract to transport election materials is a relative to the 3<sup>rd</sup> Respondent but did not adduce any evidence to confirm relationship.
50. Pw15 Tom Shoto informed the court that ballot stuffing was done during the transportation of election materials, he however could not identify the number of votes stuffed, the manner and the place where the votes were stuffed. He said he had no evidence to show the date and time when Luka Kenyatta transported election materials.
51. Pw16, Timothy Kisiangani testified that he was the Chief Agent of Democratic Action Party Kenya. He stated that the Returning Officer re-announced the results but he could not tell if the re-announced



- results differed from the earlier results. He however did not adduce evidence to show the results as announced were altered.
52. PW 17 testified he was an agent at Chemoroni Polling Station. According to PW17 the failure of the KIEMS Kits was aimed at rigging elections. He however did not substantiate the allegation of rigging; how it was done and by who and how many votes/any collaborations by IEBC official to cause failure of KIEMS Kits to facilitate rigging.
  53. PW 18, and PW 20 testified that they were not allowed into the Polling Station until 8.00 am. They however confirmed that they signed the Polling Station diary at 8.00 am and they were allowed in the Polling Station.
  54. PW21, Elijah Kisiangani testified that he was the Chief Agent of the Petitioner stationed at the Malava constituency tallying centre. He adopted his witness affidavit dated 2<sup>nd</sup> September 2022. In his witness affidavit he states he was the Chief Agent of the petitioner; his main duties were to act for and on behalf of principal to ensure election was conducted in a free and fair manner
  55. He reiterated the evidence of the petitioner and stated that on 8<sup>th</sup> August 2022 he was at the dispatch centre at Malava Boys Centre in the Company of Patrick Mambale, when he saw Thomas Mwinamo remove one booklet from each of the four (4) ballot box and handled them to 3<sup>rd</sup> Respondent and they both left the IEBC offices.
  56. Pw 21 further stated that on 10<sup>th</sup> August 2022 the 3<sup>rd</sup> Respondent's Chief Agent Henry Muluya held private talks with the IEBC officials at the tallying station in an attempt to influence the elections and shortly thereafter, the 3<sup>rd</sup> Respondent went and talked with the Returning officer for about five (5) minutes.
  57. According to Pw21 on 11<sup>th</sup> August 2022, the Returning officer for Malava Primary Polling Station read out the results which were contested by one Chief Agent but the protest was objected to by the Returning officer.
  58. He stated that he received complaints of voter bribery, ejection of the Petitioner's agents, issue of dead votes and the manipulation of votes from his agents.
  59. He further stated that Thomas Mwinamo contacted him on 14<sup>th</sup> June 2022, in an attempt to rig elections, he solicited for Kshs. 300,000/= in return, the Petitioner was to select 60 Polling Stations where the Presiding Officers were to be paid to mark and stuff ballot papers. He stated that after rejecting the offer, Thomas Mwinamo approached the 3<sup>rd</sup> Respondent for the favour and they worked together. He stated that he witnessed Mr. Shibweche an employee of the 3<sup>rd</sup> Respondent give Thomas Mwinamo Kshs. 2,000/=. According to PW21 the election was not free and fair since it was rigged in favor of the 3<sup>rd</sup> Respondent.
  60. During cross-examination by Ms. Odeck for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, he was not able to see which Polling Stations the ballot booklets given to the 3<sup>rd</sup> Respondent belonged.
  61. He however confirmed that the August 2022 general elections, each ballot paper printed indicated the name of the Polling Station and Polling Centre and contained the exact number of voters. He told the court he was not present when the ballot pellets were being opened. He also informed the court he had not listed the Polling Stations where the ballot boxes were stuffed. He testified that there was no complaint from other agents that results announced at the tallying centre were different from the results announced at the Polling Station.



62. He told the court that agents could freely talk to the Returning officer while in the Polling Station. He testified that Shitembe gave Mwinamo Kshs. 2,000/= but he did not state the time and date. He told the court that the result at the Polling Station is final and as such cannot be altered at the tallying centre.
63. During cross-examination by Mr. Anzala counsel for the 3<sup>rd</sup> Respondent, told the court he did not witness any incident of bribery but received complaints from his agents. He also stated that he did not see any person voting for a dead person and said he was forced to sign form 35B when he raised the issue of the election results.

### **1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENT'S ORAL EVIDENCE**

64. In response and in support of their averments the 1<sup>st</sup> and 2<sup>nd</sup> Respondent called a total of nine (9) witnesses.
65. 1RW1 Clarence Wanjala Simiyu who is a teacher by profession adopted his witness statement dated 15<sup>th</sup> September 2022. During cross-examination by Mr. Anzala counsel for the 3<sup>rd</sup> Respondent. He said he was the Presiding Officer at Mali Mali Polling Station stream 2, the Polling Station was opened at 6.00 am but due to the failure of the KIEMS Kits, voting started at 12.50 p.m. He said he did not witness violence incidents in the Polling Station. He further stated that for a party agent to be allowed in the Polling Station, four documents namely; a party badge, oath of secrecy, appointment letter, and copy of Identity Card were required.
66. 1RW1 pointed out that as per the Polling Station diary of Mali Mali Polling Station Zachariah Moses Shitimi, Geoffrey Masinde Asange and Khandi Glifigh Shitimi were not agents at Mali Mali Polling Station.
67. During Cross Examination by Mr. Chisengo for the Petitioner, R1W1 stated that when voters are identified manually, there is no form that is required to be signed neither is a photograph supposed to be taken.
68. 1RW2 Alexander Lodgers adopted his witness affidavit dated 15<sup>th</sup> September 2022. He stated that he was an agent at the Lutali Primary School Polling Station stream 1 and informed court that he signed the Polling Station diary at 0651 hours; that he signed twice. He said agents are required to sign the diary every time they are being admitted to the Polling Station. He confirmed that there was a failure of the KIEMS Kits and voting started at 1.00 pm and extended till midnight.
69. 1RW3 Joslaty Namcha Musuo testified that he was the Presiding Officer at St. Gerald Asala Primary Polling Station stream 1. He denied that Sammy Sunguti was an agent and confirmed from the Polling Station diary. He said there were no incidences of violence in the Polling Station. He confirmed that there was the failure of the KIEMS Kits and voting began at 12.55 hours. He said the petitioner's agents were present during the voting exercise.
70. 1RW4 Agripina Nechesa adopted his witness statement dated 15<sup>th</sup> September 2022. He stated that he was the Presiding Officer of Chemoroni Primary stream 1 and there were no disputes raised by the agents during the voting exercise. He said he denied Benjamin Kinusia entry into the Polling Station due to lack of valid documents but was later allowed in at 8.00 a.m.
71. 1RW5 Douglas Ndunde Luchiso testified that he was the Presiding Officer at Mahira Polling Station stream 1 and confirmed that there was a failure of the KIEMS Kits but voting started at 12.50 pm and closed at 11.50 pm. He said the petitioner came to the Polling Station with a group of people and demanded to know why his agent had been ejected; he refused to leave the Polling Station and vote counting stopped until OCPD Kabras Police Station was called; the OCS sent police officers to the



- Polling Station to eject the petitioner and vote counting went on in the present of his agent who signed Polling Station diary.
72. 1R1W6 Peter Karagu Ngure adopted his witness affidavit dated 15<sup>th</sup> September 2022. He testified that his wife's Motor vehicle KBD 801J was outsourced by Panamark Enterprises Limited to carry election materials. He denied any association with the 3<sup>rd</sup> Respondent as alleged by Pw14 Enock Lutomia Murambi. He said he knew the 3<sup>rd</sup> Respondent as Member of Parliament for Malava Constituency. He said there was no contract signed between him and Panamark.
  73. 1R1W7 Samuel Mayukuva Shikanga testified that he was the Presiding Officer at Namatala Polling Station. He denied allegation that Tom Shoto was an agent of the Petitioner and said there was no dispute raised by the agents in respect to results.
  74. 1RW8 Thomas Mwinamo testified that he was the logistic officer contracted by the 1<sup>st</sup> Respondent for a period of 30 days from 17<sup>th</sup> July 2022 to 18<sup>th</sup> August 2022 to facilitate distribution of election materials from county warehouse to constituency warehouse. He said that the Presiding Officer is in charge of transport. He denied any involvement with the 3<sup>rd</sup> Respondent on 8<sup>th</sup> August 2022. He denied handing the 3<sup>rd</sup> Respondent ballot papers nor soliciting for bribes on behalf of the Returning officer (2<sup>nd</sup> Respondent).
  75. He further denied giving any document to the petitioner, holding any meetings at the Downtown Hotel nor approaching Catherine Munyaka to schedule a meeting with the petitioner. He said the 3<sup>rd</sup> Respondent was not present during the breaking of the ballot pellets.
  76. 1RW9 Joseph Juma Odour adopted his witness affidavit dated 15<sup>th</sup> September 2022. He stated that he was senior election officer in the Malava Constituency but transited to Returning officer four (4) months before the elections. He said he was not in charge of the tendering process and denied visiting the home of the Petitioner and that of the 3<sup>rd</sup> Respondent. He confirmed that he was the supervisor of Thomas Mwinamo the logistics assistant and that he was aware of all the actions he was undertaking on behalf of the commission. He confirmed that he summoned the Petitioner and the 3<sup>rd</sup> Respondent over the violent incidences by their supporters reported from time to time by voters and other candidates.
  77. 1RW9 testified that each candidate should have one agent and that he issued badges for chief agents and agents. He further stated that as a norm, he issues one badge for the chief agent and he would issue two under special circumstances. He referred to the further affidavit filed by the Petitioner at pages 21-35 and pointed out that the badges were 18 which was above the 12 badges he had issued. He further stated that in Malava Constituency, voting in some Polling Stations started late after 6.00 am due to the failure of the KIEMS KIT. He said on Election Day he was stationed at Malava Tallying Centre but he visited a few Polling Stations.
  78. 1RW9 further stated that when he received the reports of the failure of the KIEMS Kits, he assembled the ICT team and informed them of the Polling Stations with the challenge; he said he replaced six (6) KIEMS Kits and the voting process began; and for the stations where the KIEMS Kits failed, he received the communication to resort to manual voting at around 12.20 pm; and in cases of manual identification of voters, there are no photographs taken, voters present themselves with the ID for verification in the manual register and if his name is identified, his name is crossed out using a ruler. He said the only time when a photograph is taken is when the biometric of voters that is print fingers fail three (3) times.
  79. 1RW9 testified that when he announced the results there was no dispute from the agents of either party and he cannot change the results as announced by the Polling Station. He said after announcing the results, he generates the form B series, which is signed by the chief agents.



80. He further stated that he is involved in the recruiting of Presiding Officers and the 3<sup>rd</sup> Respondent was not involved. He denied claims of receiving bribery.
81. During the Cross-examination by Mr. Malenya, he said he was not party to the procurement process for the commission to procure election materials and did not know how the commission chose Panamark Limited to provide transportation services; that Panamark was to provide 198 vehicles; and he knows Peter Ngure but he could not tell if his Motor vehicle was hired by Panamark. He further stated that he did not know if the agents of the 3<sup>rd</sup> Respondent were involved in the transportation of election materials. He added that all agents sign the Polling Station diary when they arrive at the Polling Station.
82. On further cross examination, the 2<sup>nd</sup> Respondent said he did not take any minutes in the meeting attended by Petitioner and the 3<sup>rd</sup> Respondent in his office following the pre-election violence. He further stated that persons who were not IEBC officials were not allowed to visit the designated areas for IEBC officials.
83. He said failure of the KIEMS Kits could not warrant the postponement of the elections and the only form he corrected was form 34B and the same was signed by two agents.
84. On being cross- examined by Mr. Chisengo counsel for the petitioner, he said printing of ballot papers is based on the number of voters in a Polling Station and where voters are to be assisted, the illiterate voter may choose to come with their own assistant and in this case, the assistant swears an oath of secrecy and the second case is where the IEBC officials assist the illiterate voter.

### **3<sup>RD</sup> RESPONDENT'S ORAL EVIDENCE**

85. 3RW1 Paul Indече Kiteresi testified that he lives in Malava Constituency. He adopted his witness affidavit dated 14<sup>th</sup> September 2022 as evidence. He said he was an agent of the 3<sup>rd</sup> Respondent stationed at Mahira Polling Station. He said he arrived at 5.30 am while the Polling Station was opened at 6.00 am but the KIEMS Kits failed and voting started at 12.30 p.m. and the Polling Station was closed at 10.00 pm. He said at around 1.00 am, the Petitioner went to the Polling Station with a crowd of people to inquire why his agent was not allowed in the station and he refused to leave until he was ejected by police officers. He said the petitioner's agent who introduced himself remained as they resumed counting and signed the Polling Station diary.
86. During cross-examination by Mr. Chisengo, he said he received the communication to resort to manual voting at around 12.30 pm and he was not aware if a complaint was filed in respect to the Petitioner's visit to the Polling Station during the tallying. He said no complaint was raised concerning results.
87. 3RW2 Henry Galia Muluya. He adopted his witness affidavit dated 14<sup>th</sup> September 2022. He stated that he was the chief agent of the 3<sup>rd</sup> Respondent and he did not participate in the tendering process neither was his vehicle used by IEBC in transportation. He denied having had an agent by the name Arthur Shalo and he did not witness violence on 16<sup>th</sup> July 2022. He also denied sitting with the Presiding Officer on Election Day.
88. During cross-examination by Mr. Malenya counsel for the petitioner, he said he was using Motor Vehicle KMB 521R. He further stated that he did not visit any Polling Station rather than the one he voted from. He said he was not at Mahira Polling Station and was only informed of the incidents by his agents. He further stated that he was not keeping the 3<sup>rd</sup> Respondent's campaign schedule and could not therefore tell where the 3<sup>rd</sup> Respondent was supposed to be on 16<sup>th</sup> July 2022.
89. 3RW3 Moses Malulu Injendi testified that he is the 3<sup>rd</sup> Respondent and the duly elected Member of Parliament for Malava Constituency. He adopted his witness affidavit dated 14<sup>th</sup> September 2022. He



stated that he is serving 3<sup>rd</sup> term as member of National Assembly Malava Constituency having been declared member of National Assembly on 11<sup>th</sup> August 2022. He stated that being an aspirant, he was notified of the code of conduct which he adhered to and he was never summoned by the 1<sup>st</sup> Respondent concerning any electoral offence. He stated that the election was peaceful, fair, accurate and verifiable; that it met the requisite statutory and constitutional requirements

90. He denied allegations levelled against him. In particular he denied being in Shkutse Market on 6<sup>th</sup> July 2022. He admitted attending a Rally on 16<sup>th</sup> June 2022 at Malava Primary School organized by Kenya Kwanza a coalition which him and petitioner belonged but denied being summoned by the 2<sup>nd</sup> Respondent regarding any incident but for a meeting to discuss issues relating to keeping peace during campaigns
91. He denied the 2<sup>nd</sup> Respondent approached him soliciting for bribes. He stated his chief agent's communication with the IEBC official was in his cause of his work. He denied that his chief agent compromised the IEBC officials.
92. The 3<sup>rd</sup> Respondent stated he was affected by the failure of the KIEMS KIT and the failure was not deliberate. He stated that the election was free, fair, and transparent and he was duly elected into office, he urged the court to uphold his election.
93. During cross-examination by Mr. Samba, the 3<sup>rd</sup> Respondent said that he was not present at Shitutshe Market on 6<sup>th</sup> July 2022 but only received complaints from his agents. He said on 16<sup>th</sup> July 2022 during the Kenya Kwanza rally, he did not witness any violence and when he attended the meeting as summoned by the Returning officer, the petitioner was also in attendance but he walked away when the he (3<sup>rd</sup> Respondent) arrived.
94. He further testified that on the 8<sup>th</sup> of August 2022, he was not at the Tallying center and did not witness the breaking of the ballot paper pellets; and he did not interact with Thomas Mwinamo at the tallying Centre. He said he does not know Peter Nguni and he had no idea of individuals who were awarded contracts by the CDF. He denied being involved in the transportation of electoral materials and said his nature of interaction with the returning officer at the tallying centre was to request for the enlargement of the font of the screen.
95. The 3<sup>rd</sup> respondent further stated that he voted manually at Lugusi Polling Station at 1.00 p.m. He denied interfering with the KIEMS KIT and said there was no dispute of the results as announced at the Tallying centre.
96. During cross-examination by Mr. Malenya, the 3<sup>rd</sup> respondent said he is the patron of the CDF and his role is to ensure the money released by the government is well utilized. He said he does not know the projects undertaken by Peter Nguni.
97. On whether dead voters voted, he said he did not know if the register for Malava constituency had dead voters and Malulu Paul Manderu Injendi was not his late brother.
98. During re-exam by his Advocate Mr. Anzala, he said he could not tell the projects conducted by Peter Nguni because NGCDF advertises for tenders and only qualified persons are awarded the tenders and the committee supervises the projects and upon completion, the projects become the property of the committee. He further stated that he was not shown a document to demonstrate the petitioner did not have agents in all Polling Stations.



## SCRUTINY AND RECOUNT

99. At the conclusion of the hearing, the court gave directions on application for scrutiny dated 4<sup>th</sup> October 2022 and the second application dated 21<sup>st</sup> October 2022 which relate to sealing of ballot boxes at the commencement of this petition. Parties filed written submissions in respect to the two applications and the court delivered ruling dated 15<sup>th</sup> December 2022 allowing scrutiny to establish the allegation of ballot stuffing by the petitioner scrutiny to be conducted in the following stations: -
- i. Kimangeti 1 Polling Station
  - ii. St. Geral Sasala 1 Polling Station
  - iii. Mahira 1 Polling Station
  - iv. Shitirira Primary Polling Station 1
  - v. Chimoroni Primary Polling Station 1
  - vi. Lutali 1 Polling Station
  - vii. Emusali 1 Polling Station
  - viii. Lwanda (K) 1 primary School Polling Station
  - ix. Mali Mali 1 Polling Station
  - x. Tombo Primary School 1 Polling Station.
100. On 30<sup>th</sup> December 2022, the Deputy Registrar prepared a report on the scrutiny and re-count exercise. The report is captured as hereunder: -
1. Kimangeti Primary School 1 Polling Station. The results after the recount were similar to those captured by form 35A. Seth Ambusini Panyako garnered 25, while Moses Malulu Injendi Garnered 171. As per the Scrutiny Report there were no discrepancies captured.
  2. St Gerald School Sasala 01 the seals had not been interfered with. The Results as per the recount tallied with the results as per form 35A Seth Ambusini Panyako -117 Moses Malulu Injendi -80  
The number of counter foils counterfoils used in the Polling Station diary is 298. After the recount, it is 297. There were No discrepancies
  3. Mahira 1 Of 3 all seals were intact, however the Serial number for the aperture on the ballot box differ with that on the Polling Station diary. The Results after the Recount tallied. Seth Ambusini Panyako-123 Moses Malulu Injendi- 134
  4. Shitirira Primary School 01 there were no discrepancies after the recount. Seth Ambusini 11 Moses Malulu Injendi 264
  5. Chimoroni Primary 01 Counterfoils of unused ballots missing, unused ballots missing, tally sheets (form 33) missing, used seals missing, carbon copy of form 35A missing Seth Ambusini Panyako 24 Moses Malulu Injendi 247 as per the recount. The court could did not have the benefit of comparing the results.
  6. Lutali 001 Polling Station, out of the 6 rejected votes, the team interprets 3 of them to be valid votes. Serial no. 14582395- Moses Malulu, Serial no. 14582287 – Moses Malulu and Serial



no. 14582452 – Seth Ambusini. After the recount the results were as follows; Seth Ambusini Panyako 87 Moses Malulu Injendi 80

7. Emusali 01 no discrepancies after the recount. Seth Ambusini Panyako – 60 Moses Malulu Injendi 70
  8. Lwanda Kabras Primary school, two (2) valid votes for Malulu Injendi and two (2) valid votes for Seth Panyako captured as rejected (found in the rejected bundle) 1 rejected vote counted as valid vote for Malulu Injendi. No statement for rejected votes. Seth Ambusini Panyako 102 Moses Malulu Injendi 171
  9. Malimali Primary School, there were no discrepancies ballot intact. The number of votes garnered are as follows; Seth Ambusini panyako- 120 Moses Malulu Injendi - 98
  10. Tombo primary School 01 there were 3 unmarked rejected ballots. No unused counter foils. Votes garnered are as follows: Seth Ambusini Panyako-93 Moses Malulu Injendi 133
101. From the report, there were no discrepancies on the votes cast and the votes at the recount in all 10 polling centers.
102. At the conclusion of the scrutiny exercise all parties filed their respective submissions.

#### **PETITIONER’S SUBMISSIONS**

103. Counsel for the petitioner submitted that the absence of unused ballot papers amounts to interference with the election materials and a whopping 178 ballot papers missing in Tombo 1 Polling Station; and in the Chimoroni 1 Polling Station, unused ballot papers, result tallying sheet used seals and a carbon copy of form 35A were also missing which is a clear indication of interference with the election materials.
104. The Petitioner further submitted that the variance of the of the serial number on the aperture of the ballot box of Mahira 1 Polling Station is evidence that there was access to the ballot boxes after sealing and a fresh seal was affixed. Counsel submitted that the Deputy Registrar failed to record that after the recount, the Petitioner had garnered 102 votes as opposed to the 96 votes recorded in form 35B and urged the court to take note that it was in Mahira Polling Station where the Petitioner’s agents were forcefully ejected.
105. In respect to Technological challenge / failure of KIEMS Kits, Counsel acknowledged that technology may fail but submitted that IEBC was supposed to promptly resort to manual identification and comply with the requirements of filing form 32A as per Regulation 69(e) of the Elections Regulation of 2012.
106. Counsel further submitted that the importance of KIEMS Kits is well settled in the case of Raila Odinga & 16 others Vs William Ruto & 10 others; Law Society of Kenya & 4 others (Amicus curiae) Presidential Election Petition E005, E001, E002, E003, E004, E007, & E008 of 2022 (consolidated) (2022) KESC 54 KLR where the Supreme Court held as follows: -

“As noted in the introduction, lack of trust in the electoral system, has endured in Kenya for a long time. This led to the introduction of electoral technology following the recommendations made by the independent review commission on the general elections held on December 27, 2007 (Kriegler commission Report). The report recommended integration of technology into Kenya’s electoral process for registration, identification of voters and transmission of results. These were enacted in section 44 of the Election Act



2011. By this statute, IEBC is enjoined to adopt technology in the electoral process. As a consequence, the IEBC developed a technology known as Kenya Integrated Electoral Management Systems (KIEMS) making Kenya's election process hybrid as it employed both technology and manual process."

107. Counsel further submitted that the Supreme Court in *Raila Odinga & 16 Others Vs. Ruto & 10 others; Law Society of Kenya & 4 Others (Amicus curiae) Presidential Election Petition (Supra)* held as follows: -

"Upon considering all the pleadings, submissions and the ICT scrutiny and inspection, tallying and recount report which fully examined the IEBC's result transmission system (RTS), we are not persuaded by the allegation that the Technology deployed by IEBC failed the standard of Article 86(a) of *the Constitution* on integrity, verifiability, security and transparency for the following reasons;

a. Whereas it is true that the KIEMS KIT failed in 235 Polling Stations, 86,889 voters were granted the right to vote manually and the requisite forms 32A duly filled. This happened successfully in Kibwezi West Constituency and parts of Kakamega County."

108. Counsel further submitted that there was no form 32A filled where the voters were identified manually and the failure to fill form 32A opens up to possible manipulation in all manner of ways including double voting, impersonation and use of dead votes; and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent failed in their duties and resulting declared results not being verifiable.

109. Counsel for the petitioner further submitted that KIEMS Kits failed in nearly 50% of the Polling Station in Malava constituency; that in Malava Constituency KIEMS KIT failed in 77 Polling Stations out of the 235 and Malava constituency accounts for more than half of the KIEMS KIT failure in the entire country a clear indication it was deliberate by omission or commission; that the same is supported by the fact that all the Presiding Officers in Malava Constituency acted in a similar manner by failing to fill form 32A and the time taken by the 2<sup>nd</sup> Respondent to communicate the decision to revert to manual voting raises eyebrows.

110. According to counsel voting was extended till late night to pave way for the 3<sup>rd</sup> Respondent to engage in violence. Counsel submitted that it was proper to postpone the elections rather than extend the same late into the night.

111. In respect to election malpractices, counsel for the petitioner submitted that there was violence in Mahira and St. Gerald Polling Station Kabras ward on 9<sup>th</sup> August 2022 contrary to Article 81(e)(2) of *the constitution* which provides that an election should be free from violence, intimidation, improper influence or corruption; that the violation was meted against the petitioner and his agents; the 1<sup>st</sup> and 2<sup>nd</sup> Respondent used the police to unleash the violence.

112. Counsel submitted that the other incidents of violence were witnessed in Malava Primary School in Shirugu Ward on 16<sup>th</sup> July 2022 where the 3<sup>rd</sup> Respondent invaded the rally of the petitioner and the goons of the 3<sup>rd</sup> Respondent unleashed violence and in Kamuchisu and Burundu West Kabras Ward the 3<sup>rd</sup> Respondent organized goons who waylaid the petitioner's supporters on 8<sup>th</sup> August 2022 and the petitioner's supporters were injured.

113. In respect to denial of entry or forceful ejection of petitioner's agents from Polling Stations, Counsel submitted that the petitioner's agents were denied entry or forcefully ejected in the Polling Station



as a deliberate scheme to pave way for ballot stuffing and rigging of elections in favour of the 3<sup>rd</sup> Respondent; and listed Chimoroni Polling Station, and Lutali Polling Station in Shirungu Mugai Ward as Polling Stations where agents were ejected

114. On transportation of election materials, counsel submitted that the agents of the 3<sup>rd</sup> Respondent Peter Ngure, Authur Shalo, Luka Kenyatta, and Henry Muluyia transported the election materials to various Polling Stations and argued that Panamark was a conduit in the whole process orchestrated by the 2<sup>nd</sup> Respondent in cahoots with the 3<sup>rd</sup> Respondent, and it affected the sanctity of the election.
115. On allegations of corruption, the petitioner submitted that Thomas Mwinamo and Juma Odour were highly compromised and the evidence led by the Petitioner on their various allegations was not controverted; that the 2<sup>nd</sup> Respondent openly demanded for kshs. 300,000/= from the petitioner and the 2<sup>nd</sup> Respondent also visited the Petitioner at his home in an attempt to solicit a bribe from the petitioner; that the actions of the 2<sup>nd</sup> Respondent discredits the election held.
116. In respect to dead voters having voted, counsel for the petitioner submitted that the name of the 3<sup>rd</sup> Respondent brother who died in 2017 was reflected in the register and the issue of dead votes in the register was admitted by the 2<sup>nd</sup> Respondent.
117. On voter differential counsel submitted that 1<sup>st</sup> and 2<sup>nd</sup> Respondent used a different register as the number of the total of registered voters that were recorded in form 34B was 93,863 while in form 35B was 94,447, thus a difference of 584 votes were unaccounted for; and submitted that the purported correction in form 34B by the 2<sup>nd</sup> respondent was a forgery; that there were notable differences between the impugned form 34B and the original form 34B.
118. On allegation between the 3<sup>rd</sup> respondent and IEBC official, counsel submitted that Sarah Mukhwana who was a Polling Clerk was a concubine of the 3<sup>rd</sup> Respondent and the 3<sup>rd</sup> Respondent's Chief agent sat with the IEBC desk and exchanged pleasantries with the 1<sup>st</sup> Respondent's officials.
119. In conclusion, counsel urged the court to allow the petition with costs.

#### **1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENT'S SUBMISSIONS**

120. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's submitted that the burden of proof as per Section 107 of the Evidence Act Cap 80 Laws of Kenya imposes the burden on the petitioner to prove the existence of the facts as pleaded in the petition as was held in the case of Raila Amolo Odinga & Anor Vs IEBC & 4 others & the Attorney General & Anor (2017) eKLR and argued that the petition fails to meet the yardsticks of the burden of proof as set in the above cited case.
121. On the issue of whether the technological challenge or failure of the KIEMS Kits substantially affected the results of the Member of Parliament for Malava Constituency counsel submitted that the petitioner has not claimed any irregularities in respect to the Polling Stations where the KIEMS Kits worked and submitted that the issues raised in the petition are at variance with the submissions as filed.
122. Counsel further submitted that the issue of form 32A was raised in the submissions and the petitioner failed to particularize the Polling Stations where voters were identified manually and form 32A not filled to allow the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to produce the forms in court for inspection.
123. Counsel submitted that the KIEMS Kits failure was in 77 Polling Stations and there was no deliberate interference with the KIEMS KIT; the malfunction was due to a genuine technological challenge which was a mismatch of the SD memory card and the QR codes, which happened at the IEBC headquarters.



124. Counsel further submitted that the delay in resulting to the manual identification of voters was as a result of the challenge in communication where by the Presiding Officers were waiting for communication from the commission and argued that the failure of the KIEMS Kits did no disenfranchise or suppress the voters.
125. Counsel submits the failure of the KIEMS Kits affected a minority of the Polling Stations in Malava Constituency and thus not a basis to postpone the election and the failure of KIEMS Kits affected candidates for all the 5 positions in the constituency.
126. As to whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent engaged in election malpractices that interfered with the election process, counsel submitted that the petitioner has not proved the allegations of malpractices to the required standard of proof and submitted that the election was conducted in accordance with the constitution and the law as the election was free, fair and transparent; that the claim of ballot stuffing during the transportation of the election materials was not substantiated by any witness.
127. In conclusion, Counsel submitted that the 1<sup>st</sup> Respondent complied with the Constitution and Electoral Laws in delivering a simple, accurate, verifiable, accountable and transparent election and in the absence of evidence to prove the contrary, the 3<sup>rd</sup> Respondent was validly elected into office; and the petitioner having failed to prove the case on the required standard, is not entitled to the reliefs sought and urged the court to grant costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

### **3<sup>RD</sup> RESPONDENT'S SUBMISSIONS**

128. On the issue of the failure of the KIEMS Kits counsel for the 3<sup>rd</sup> respondent submitted that the allegation that the failure was pre-planned has not been backed up by any proof neither was the allegation that voters voted twice, proved to the required high standard as the allegation of fraud is criminal in nature; that there was no IT expert presented in court to demonstrate to the court the interference with the KIEMS Kits court as alleged.
129. On the issue of whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent engaged in electoral malpractices that indeed interfered with election process and the results, Counsel submitted that most of the allegations made in addition to being electoral offences are criminal offences which have not been proved to the required standard of beyond reasonable doubt.
130. Counsel further submitted that this court lacks the jurisdiction to determine issues of violence that occurred prior to the election and urged this court to dismiss the petition; further the allegation of bribery cannot be relied upon to invalidate the sovereign will of the people as they were never reported at the police station by any of the witnesses called by the petitioner.
131. On the issue of whether the 1<sup>st</sup> Respondent complied with the constitution in delivering a simple, accurate, verifiable, accountable and transparent election, counsel submitted that the petitioner did not dispute numbers; that the petitioner's agents agreed with the counting and tallying of the votes; that accuracy and verifiability of the results is verified by the scrutiny and recount report as filed by the Deputy Registrar.
132. Counsel further submitted that the petitioner is geared to have things go his way and if not so, he paints all participants black.; and submitted that the elections was conducted was simple, accurate, transparent, and verifiable.
133. He submitted that the issue of form 32A as submitted was not pleaded in the petition and should not be allowed to introduce it late in the proceedings and submitted



134. On whether the 3<sup>rd</sup> Respondent was validly elected into office, counsel submitted that the failure of prove of any malpractices on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent by the petitioner indicate that the election was conducted in a free and fair manner; the election was simple, accurate, verifiable, accountable and transparent and thus the 3<sup>rd</sup> Respondent was validly elected into office; that the election of the Member of Parliament Malava Constituency met the threshold as stipulated under *the constitution*.
135. In conclusion, Counsel submitted that most of the allegations made besides being electoral offences are criminal allegations that have to be stated with specificity and concrete evidence to prove beyond reasonable doubt and while urging this court to dismiss the petition, cited the case of Peter Odima Khasamule v independent Electoral & Boundaries commission (IEBC) & 2 others [2018] where the court stated as follows: -
- “The allegations of bribery, violence and oath taking do not only violate electoral laws and regulations but are also criminal offences. The Law enjoins every citizen who observes the same to report to authorities for appropriate action to be taken...”
136. In respect to costs, counsel submitted that the petition having failed to meet the threshold to upset the will of the people of Malava Constituency, the 3<sup>rd</sup> Respondent is entitled to costs.

#### **PETITIONER’S SUPPLEMENTARY SUBMISSIONS**

137. With the leave of court, the petitioner filed supplementary submissions in respect to new issues raised by the respondents’ in their submissions
138. Counsel submitted that there was massive violence in Malava Constituency during campaigns through to the election day and brought witnesses who were first hand victims of the violence who ably testified and narrated the ordeals that they endured in the hands of the 3<sup>rd</sup> respondent’s supporters; that the witnesses produced OB and P3 forms in court and showed the court fresh scars they sustained in the violence.
139. Counsel submitted that the witnesses testified that they were attacked by people well known to them and who were the supporters of the 3<sup>rd</sup> Respondent and the Respondents are misleading the Court by stating the Petitioner did not prove his case to the Required standard. The petitioner submits the issue of violence was proved beyond reasonable doubt.
140. Counsel further submitted that the petitioner averred and confirmed during hearing that he was in Malava Primary on 16th July 2022 and filed his campaign schedule Marked as annexure SAP – 3 at page 12-13 of his Further Affidavit and it is misleading for the 3<sup>rd</sup> Respondent to submit that the petitioner was not present at Malava Primary school on 16th July 2022 when violence was visited on him and his supporters.
141. Further that in an effort to cover up the violence of 16th July 2022 and to paint the 3<sup>rd</sup> respondent with saintly colours, the 3<sup>rd</sup> respondent’s chief agent Mr. Henry Muluya lied on oath that he there was no violence in Malava primary School on 16th July, 2022 and that he did not witness any violence in Malava on that day; and Paul Indechi kitelesi, the 3<sup>rd</sup> respondent’s Agent at Mahira Polling Station confirmed during cross examination that the petitioner did not attack or injure anybody at the station. Paul Indechi further stated during cross examination that he and others assisted the police to remove the petitioner and his team from Mahira Polling Station. That the 1<sup>st</sup> Respondent has misrepresented in their Submissions that the violence at Mahira Polling Station was caused by the petitioner and submitted that it is the Presiding Officer Mr. Douglas Ndunde Luchiso who called the police; that the



- 3rd respondent's supporters led by his agent at Mahira Mr. Paul Indeche Chitelesi joined the police in unleashing heavy violence on the petitioner and his team.
142. On the issue of KIEMS KITs counsel submitted that the undue delay to revert to manual voter identification directly disenfranchised the voters in his strong hold areas listed in paragraph 36 of the petition. The Respondents did not controvert these averments in paragraph 36. That the Respondent witnesses testified that voting started between 12.30 and 1pm in all stations where KIEMS KITs failed and the voting ended past midnight so as to compensate for the time they had lost.
  143. Counsel urged the court to take judicial notice that elections in Kenya are characterized by tension and fear due to rival groups that in most cases tend to be violent and voters would not be willing to stay out in the cover of the night to vote and Malava Constituency is a rural Constituency without electricity supply and voters would not be willing to take such a high risk to stay in a Polling Station till midnight waiting to vote; and the KIEMS KITs failure and the unreasonable and unjustified delay by the 2nd Respondent to authorize his officers to revert to Manual Voter identification led to voter suppression.
  144. On manual voter identification, Counsel submitted that contrary to the assertion that the petitioner did not plead the use of Form 32A, in paragraph 38 of the petitioner averred there was no proper method of voter identification which allowed many voters to vote more than once in favor of the 3rd Respondent and submitted that the Respondents failed to rebut this averment; that 1<sup>st</sup> and 2<sup>nd</sup> Respondent ought to have filed evidence of form 32A in order to confirm that voters were identified manually.
  145. Counsel further submitted that that mandatory procedure of identifying voters manually is provided under Regulation 69(e) of the Elections Regulation provides in mandatory terms that Verification Form 32A has to be filled before being allowed to vote. That the Respondents have conveniently avoided to provide the procedure of manual voter identification and have simply brushed it off.
  146. Counsel submitted that 1<sup>st</sup> and 2<sup>nd</sup> Respondent failed to challenge the allegation by the petitioner on the manual voting; and submitted that the petitioner did not introduce new facts in the middle of trial as alleged by the Respondents; that the allegation should be treated as an admission that the Respondents failed to discharge their duties as provided for by the law and in the process mismanaged the elections of Malava Constituency and urged this court to find that the petitioner has ably demonstrated to this Honorable Court that technological failure seriously affected the elections of the MP Malava Constituency.
  147. On transportation of electoral materials, Counsel submitted that the petitioner demonstrated the transportation of electoral materials in Malava constituency was carried out by people close to the 3rd Respondent; that Peter Ngure admitted that he has carried out contracts sponsored by NG-CDF whose patron is the 3rd Respondent. That the nebulous contractor in the name of Panamark Company limited was never unraveled by the 1st and 2nd Respondent. There was no evidence to show that the procurement of transport services for election materials was conducted by the IEBC County Procurement Committee.
  148. Counsel submitted that the 1st Respondent introduces new fact at page 31 of their submissions that Panamark carried out transportation of election materials in Matungu Constituency.
  149. Counsel urged this court to find that the petitioner has demonstrated that the elections for Member of parliament Malava Constituency was not free, fair, simple and verifiable and allow the petition with costs and nullify the 3<sup>rd</sup> Respondent election.



## ANALYSIS AND DETERMINATION

150. During the pre-trial conference, the court framed issues and parties herein agreed with the issues set out hereunder: -
- a. Whether technological challenge or failure of the KIEMS KIT substantially affected the results of the Member of Parliament for Malava Constituency.
  - b. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent engaged in electoral malpractices which interfered with election process and the results.
  - c. Whether the 3<sup>rd</sup> Respondent and his agents engaged in violence during and before the elections which interfered with results of the elections.
  - d. Whether the 1<sup>st</sup> Respondent complied with *the constitution* in delivering a simple, accurate, verifiable, accountable and transparent election.
  - e. Whether the 3<sup>rd</sup> Respondent was validly elected as the Member of Parliament Malava constituency?
  - f. Whether the petitioner is entitled to the reliefs sought.
  - g. Who bears the costs of the Petition?

### **i. Whether technological challenge or failure of the KIEMS KIT substantially affected the results of election of the Member of Parliament for Malava Constituency.**

151. The petitioner alleged that the KIEMS KIT failed in nearly 50% of the Polling Stations in Malava Constituency and the failure of the KIEMS Kits was deliberate and geared towards manipulating the results in favor of the 3<sup>rd</sup> Respondent. He further argued that upon failure of technology, the 2<sup>nd</sup> respondent took long to give directions to resort to manual identification of voters which resulted in voters being disenfranchised and voter suppression. He further argued that where voters voted manually, form 32As were not filled as required by law and it led to the manipulation of votes.
152. On the other hand, the respondents' argument is that the failure of the KIEMS Kits was not deliberate and 2<sup>nd</sup> Respondent followed due process as per directions of the Court of Appeal in Civil Application No. E288 of 2022 United Democratic Alliance Party (UDA) Vs Kenya Human Rights Commission & Others on 8<sup>th</sup> August 2022 which required the Presiding Officer to report to County Elections Manager who intern reports to Director ICT at IEBC Headquarters in Nairobi who then reports to Deputy Commission Secretary, Operations who reports to the Chairman IEBC for approval to resort to manual identification of voters.
153. The respondents further argued that voters were not disenfranchised by the failure of the KIEMS Kits as the hours lost were adequately compensated by extension of voting time which went up to late into the night further that failure of the KIEMS Kits affected all the five (5) elective positions and not only the seat for the Member of Parliament Malava Constituency.
154. Article 81 of *the Constitution* outline the general principles for electoral system as hereunder: \_

“(e) Free and fair elections which are –

- i. By secret ballot
- ii. Free from violence, intimidation, improper influence or corruption



- (iii) Conducted by an independent body and
- iii. Transparent; and
- iv. Administered in an impartial, neutral, efficient, accurate and accountable manner”

155. Further, Article 86 of *the Constitution* provides that IEBC shall ensure inter alia that: -

“(a) whatever voting method is used, the system is simple accurate, verifiable, secure, accountable and transparent”

156. In respect to use of technology, Section 44(3) of the Election Act No. 24 of 2011 (Revised 2022) places responsibility on IEBC to ensure that the technology used is simple, accurate, verifiable, secure, accountable and transparent. Section 44A of the Election Act, provides as follows: -

“Notwithstanding the provisions of section 39 and section 44, the Commission shall put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of *the Constitution*.”

157. From the foregoing, Section 44A of Election Act No. 24 of 2011 (Revised 2022) permits IEBC to result to a complementary mechanism in case of failure of the technology and the Mechanism so adopted should be simple, accurate, verifiable, secure, accountable and transparent

158. Further Regulation 26(2) of the Elections (Technology) Regulations, 2017 [Rev.2022] provides as follows: -

“(2) Before suspending or terminating the use of election technology under sub-regulation (1)

- a. The clerk at the Polling Station shall inform the Presiding Officer of the failure of the technology;
- b. the Presiding Officer at the Polling Station shall retry the system to confirm the failure of the technology;
- c. The Presiding Officer at the Polling Station shall document the incident on an incident report in the Polling Station diary which shall be signed by all the agents;
- d. The Presiding Officer shall notify the returning officer of the failure and submit a copy of the incident report;
- e. The returning officer shall inform the director in charge of information communication and technology of the incident and the director shall investigate the incident and advise on the suspension or termination of the use of the election technology;
- f. The returning officer shall approve the request for suspension of the use of technology based on the advice under paragraph (e) and invoke the complementary mechanism.”



159. The above provision gives clear steps to be taken in situations where technology fail. The Presiding Officer informed the court that he took the above steps and by the time he received instructions to resort to manual voting, it was around 12.20 P.m and from evidence adduced, voting commenced in the affected stations thereafter. From evidence of R1W2 Alexander Rodgers Ndaluh who was Presiding Officer at Lutali primary school stream 1 voting started at 1p.m and closed at 11. 00p.m and at St. Gerald Sasala Primary School stream 1 voting started at 12. 55p.m. Evidence adduced show that time for voting was extended to compensate for time lost while waiting for instructions to resort to manual voting.
160. From the foregoing, the delay was occasioned by the requirement to comply with Regulation 26(2) of Election (Technology)Regulations 2017[Rev.2022] and not deliberate or scheme by 2<sup>nd</sup> and 3<sup>rd</sup> respondent to delay voting for the benefit of the 3<sup>rd</sup> respondent.
161. On failure to fill form 32A, the 1<sup>st</sup> and 2<sup>nd</sup> respondent submitted it was not pleaded nor specified and they did not therefore avail the documents in court. In supplementary submissions, counsel for the petitioner submitted that petitioner pleaded in paragraph 38 of his affidavit. I have perused and note that he stated that there was no proper method of voter identification. In my view, this did not come out clearly as referring to form 32A not being filled or issue that relate to manual register.
162. From the foregoing, the 1<sup>st</sup> and 2<sup>nd</sup> respondent were not notified that filling of form 32A was being questioned in order to respond adequately.
163. Section 83 of the *Elections Act* (as it was before it was amended by the Election Laws (Amendment Act, 2017) Act No. 34 of 2017) which provides:

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

159. It is not disputed that the failure of KIEMS KIT affected candidates of all the other five (5) positions but not position of National assembly alone and it is not disputed that the failure affected both the petitioner and the 3<sup>rd</sup> respondent as findings of almost all the station scrutinized and votes recounted did not reveal discrepancies captured in paragraph 100 above.
160. From the foregoing, the petitioner failed to adduce sufficient evidence to demonstrate how the KIEMS Kits failure led to the Manipulation and rigging of the election results as alleged; he failed to discharge his burden of proving that the failure of the KIEMS Kits affected the results of the Member of Parliament for Malava Constituency.

**ii. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent engaged in electoral malpractice that interfered with election process and the results.**

159. The burden of proof in electoral disputes is on the Petitioner, the burden only shifts to the Respondent once the petitioner has discharged that burden. In the case of Raila Amolo Odinga –Vs- Independent Electoral and Boundaries Commission & 3 Others 2013 eKLR, the Supreme Court of Kenya stated as follows: -

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the



burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite ET solemniter esse acta*: All acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."

159. The Petitioner alleges the election for Member of National Assembly conducted in Malava Constituency was marred with violence, denial of entry/ejection of the petitioner's agents from the Polling Stations, transportation of election materials by agents of the 3<sup>rd</sup> Respondent, vote differential, voter bribery, and voting by dead voters.
160. In his testimony in court, the petitioner indicated that his witnesses were to adduce evidence on the above-mentioned malpractices.

#### **(a) Bribery**

159. The petitioner alleged that the 2<sup>nd</sup> respondent solicited a bribe from him through Thomas Mwinamo who testified as 1RW8. Thomas Mwinamo confirmed that he was logistics officer whose role was to deal with logistics of transportation of electoral materials from county warehouse to constituency warehouse. He denied meeting with petitioner in downtown hotel. Besides the petitioner alleging that he solicited a bribe, he never adduced any evidence to prove that. Further bribery is an election criminal offence which he ought to have reported to police for investigation and possible charge before election criminal court but he did not take any action in so far as the allegation of bribery is concerned. The said allegation of bribery against 2<sup>nd</sup> respondent and the said Thomas Mwinamo therefore remain unsubstantiated.
160. Further, the petitioner contends the 3<sup>rd</sup> Respondents agents bribed voters during the voting day. PW6 testified that she saw Alica Shanganya bribe voter while pw10 testified she saw Dorcas holding a brown envelope which she suspected had money. On further cross examination they said they were at a distance and could not ascertain exactly what was happening. The allegation therefore fell short of prove.
161. Further Pw21 who was the Petitioner's chief agent stated that he did not witness any incident of bribery but he received complaints from his agents as captured in paragraph 63 above.
162. Suspicion is not sufficient to prove offence of bribery. In the case of Bernard Kibor Kitur Vs Alfred Kiter IEBC Supreme Court Petition No. 27 of 2018 the court stated as follows: -

"That mere suspicion is not enough neither is confession of the person alleged to have been bribed and that it must be demonstrated that the money was given to influence the voters or manipulate them in favour of a candidate."
159. The petitioner stating in his testimony on oath that he did not witness any act of bribery but would rely on the evidence adduced by his witnesses however evidence adduced herein point at mere suspicions with no tangible evidence to prove the allegation. I therefore find that no sufficient evidence was adduced by the petitioner to prove allegations of bribery; if one was to believe that bribery existed, the question is why was complaint not lodged to enable investigations and charge before an election Criminal Court.



**(b) Whether dead voters voted**

159. The petitioner alleges the manual register contained names of deceased persons who voted leading to double voting in favour of 3<sup>rd</sup> respondent. The 2<sup>nd</sup> respondent however explained that the register is a living document and the law provide for inspection of registrar before election but in view of the fact that people die daily, there is possibility of dead voters in the register of people who die from the time the register is closed and time for voting.
160. I however note that the petitioner did not provide evidence to show that any dead voter voted. The 3<sup>rd</sup> Respondent denied that his deceased brother voted. The petitioner failed to adduce evidence of the manual register where the dead voters' names were cancelled to confirm that the dead voters voted.
161. From the foregoing, the petitioner failed to adduce sufficient evidence to prove that there were dead voters who voted.

**(c) Denial of entry/ejection of the petitioner's agents from the polling station.**

159. The petitioner alleged that his agents were denied entry and or were forcefully ejected in Chimoroni, and Lutali polling stations. In respect to Lutali polling station Alexander Rodgers Ndalu testified that he was required to admit not more than one agent for each candidate or political party and stated that Pw20 Shea Khatuchi Isiye was denied entry to polling station because there was an agent for the petitioner (UDA) already in but on further consultation, she was allowed in at 8. 00a.m and voting started at 1p.m; she was already in at the time voting started and he said agent signed polling station diary twice. From R1w4's evidence, Pw18 was not allowed into the polling station due to lack of the accreditation documents which he obtained and was later allowed into the polling station.
159. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent produced the polling station diary for Chimoroni polling station where it was confirmed that Benjamin Kinusia Wanami signed; and the assertion therefore by the petitioner that his agent was ejected from Chimoroni polling station is not supported by evidence.
160. From the foregoing, I find the petitioner has not adduced sufficient evidence to prove that his agents were deliberately denied entry into or ejected from the polling stations.

**(d) Whether electoral materials were Transported by the agents of the 3<sup>rd</sup> Respondent**

159. The petitioner's allegation is that the 3<sup>rd</sup> respondent's agents/supporters were awarded tender to transport election materials so as to give room for ballot stuffing. However, no evidence was adduced connecting the 3<sup>rd</sup> respondent to vehicles which transported election materials
160. Further, voting was done at polling station, thereafter counting was done there and results announced at polling stations. All parties confirmed that the results announced at polling stations were final and the petitioner's Chief agent confirmed that there was no complaint on results announced at polling stations being different from results received and collated at the tallying centre.
161. From the foregoing, besides failing to connect 3<sup>rd</sup> respondent to vehicles that transported election materials, transportation of election materials did not affect results of election.

**(e) Assisting of illiterate voters**

159. The Petitioner and his witnesses' testimony was that the agents of the 3<sup>rd</sup> Respondent were allowed to assist illiterate voters at the polling stations. The petitioner alleges the Presiding Officers assisted illiterate voters in the exclusion of the agents of the petitioner. The petitioner has not adduced evidence



before this court on the number of illiterate voters that were assisted and the manner in which the act of assisting illiterate voters affected the outcome of the results of the election. The petitioner has failed to demonstrate how the Presiding Officers manipulated the voters in voting for 3<sup>rd</sup> Respondent as opposed to the petitioner in the process of assisting illiterate voters.

160. Based on the above the evidence adduced by the petitioner did not sufficiently prove the allegation of election irregularities and illegalities. The petitioner has failed to discharge the burden of proof as required under the law.

**iii. Whether the 3<sup>rd</sup> Respondent and his agents engaged in violence during and before the elections which interfered with results of the elections.**

159. On the issue of violence, the petitioner and his witnesses testified that there was violence before and during elections. They alleged violence at Malava primary school in Shirungu Mugai Ward on 16<sup>th</sup> July 2022 arguing that the 3<sup>rd</sup> Respondents agents and supporters stormed the rally and caused violence resulting in injury of his driver Joel Muyekho. The petitioner's evidence was that the matter was reported at Kabras Police Station and an OB issued but the O.B was however not produced in court.
160. The petitioner also alleges at Kamuchisu and Burundu in West Kabras Ward on 8<sup>th</sup> August 2022 according to the petitioner the 3<sup>rd</sup> Respondent's supporters and goons attacked the Petitioner's supporters using crude weapons, like Machetes and metal bars. Pw2, Pw3, Pw4, Pw5, Pw6, pw7, pw8 and pw9 all stated they attacked but none-adduced evidence that indeed incriminated the 3<sup>rd</sup> Respondent. PW2, Pw3, Pw4, Pw5, PW8, Pw9, PW11 and PW20 despite saying they were attacked by 3<sup>rd</sup> respondent's supporters during election period, they were not able to identify them. They said arrival of police made them not to vote.
161. I have discussed the issue of violence above, having found that the petitioner has not demonstrated through evidence, the violence caused by the 3<sup>rd</sup> Respondent and or his agents. I am of the view that the violence alleged by the petitioner's witnesses on the Election Day was not instigated by the 3<sup>rd</sup> Respondent. Further from the evidence adduced by the petitioner's witnesses none of them told the court to have witnessed the 3<sup>rd</sup> Respondent or his agent engage in violent activities. Further no explained mechanism that was used by the petitioner or his agents to point out the petitioner's agents from a crowd full of supporters.
162. Further to the above, there is no evidence of any criminal case relating to alleged violence registered in courts gazetted to deal with election offence prior to elections
163. From the foregoing, besides the petitioner alleging that the 3<sup>rd</sup> respondent's supporters caused violence, no evidence was adduced to show that indeed the people who caused violence were indeed 3<sup>rd</sup> respondents' supporters or agents.
164. That aside, the petitioner ought to show that the malpractices complained of were of such magnitude as to affect the results and the integrity of the results.
165. In view of the above I find the allegations of violence by the 3<sup>rd</sup> Respondent and his agents was not proved.



**iv. Whether the 1<sup>st</sup> Respondent complied with *the Constitution* in delivering a simple, accurate, verifiable, accountable and transparent election**

159. The Petitioner contends that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent failed to conduct the elections in strict compliance with the law and has cited the issues ranging from agents being denied access, manipulation of results, failure of Kiems Kit
160. The Petitioner is required to establish the election officials failed to comply with some provision of the law or some regulation and the non-compliance affected the results of the election. The Petitioner has not proved to the required standard that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to comply with any written law and the non-compliance affected the results of Member of Parliament for Malava Constituency.
161. The petitioner in his submission and during the hearing contends the election was not in compliance with the law as the presiding officers failed to fill form 32A when voters were identified manually. I note failure to fill form 32A was not pleaded in the plaint and was only introduced at the hearing and through submissions. A party may not introduce new facts not pleaded in the petition as the Respondents did not have the time to substantively respond to the allegations as pleaded.
162. In respect to Voter differential the petitioner alleges the voter differential was in form 34B with 93,863 votes and form 35B with 94, 447 votes with a difference of 584 votes.
163. In the case of Moses Masika Wetangula -vs- Musikali Kombo & 2 others [2014] eKLR the court stated as follows: -

“No election can be voided for non-compliance with any written law relating to that election unless it is demonstrated inter alia that the non-compliance affected the result of that election.”

**v. Whether the 3<sup>rd</sup> Respondent was validly elected as the Member of Parliament Malava constituency?**

159. Having found the petitioner did not prove to the required standard the existence of the irregularities and illegalities I find and hold the 3<sup>rd</sup> Respondent was duly elected into office.
160. Having analyzed all the issues raised in the petition, the evidence, the law and the legal authorities, I find the petition fails for lack of merit.

**v. Who should pay cost and how much**

159. On the issue of costs, it is trite law that costs follow the events Regulation 32 of the Elections (Parliamentary and County) Petition Rules, 2017 stipulates:
- 1) The court shall, at the conclusion of a petition, make an order specifying
    - (a) The total amount of costs payable; and
    - (b) The persons by and to whom the costs shall be paid.
  - (2) When making an order under sub rule (1), the court may —
    - (a) Disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent; and



- (b) Impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.

159. Further Section 84 of the Election Act No. 24 of 2011 provides that;

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

159. The hearing of the petition took approximately two (2) weeks after the pre - trial conference. Considering the time spent by the parties in preparing pleadings, long hours I spent during hearing, I award costs to the Respondents.

160. Before I pen off I wish to appreciate and thank the advocates, the parties and their supporters for complying with directions agreed on during the pre-trial conference and in the course of hearing. I am grateful to advocates a for their input and adhering to the strict time lines, parties and their supports for conducting themselves with decorum.

161. FINAL ORDERS: -

1. This petition is hereby dismissed with costs to the Respondents.
2. I hereby declare HON. MOSES MALULU INJENDI as validly elected Member of the National Assembly for the Malava Constituency following election conducted on 9<sup>th</sup> August 2022.
3. I hereby certify the validity of election of HON. MOSES MALULU INJENDI as Member of National Assembly Malava Constituency to the Commission and notify the Speaker of National Assembly as per Section 86 of the Election Act No. 24 of 2011 (Revised 2022).
4. I hereby cap costs for 1<sup>st</sup> and 2<sup>nd</sup> respondent at Kshs. 2,000,000/= and for the 3<sup>rd</sup> respondent at Kshs 2,000,000/= the exact figures to be determined by the taxing master.

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KAKAMEGA THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2023.**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

**Merciline – Court Assistant**

**Mr. Malenya and Enoch Chisengo for the Petitioner**

**Mr. Anzala for the 3<sup>rd</sup> Respondent**

**Ms. Odeck for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

