



**Imanyara v Independent Electoral and Boundaries Commission; Orange Democratic Movement (Interested Party) (Constitutional Petition E297 of 2022) [2022] KEHC 13341 (KLR) (Constitutional and Human Rights) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13341 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E297 OF 2022**

**AC MRIMA, J**

**SEPTEMBER 30, 2022**

**BETWEEN**

**MUGAMBI IMANYARA ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ..... RESPONDENT**

**AND**

**ORANGE DEMOCRATIC MOVEMENT ..... INTERESTED PARTY**

**Images of nominated deputy presidential and gubernatorial candidates should be included in the presidential and gubernatorial candidates' ballot papers**

Reported by Kakai Toili

**Constitutional Law** - constitutionality of statutes - constitutionality of forms 25 and 29 in the Schedule to the Elections (General) Regulations, 2012 (as amended) (the Regulations) - claim that forms 25 and 29 did not provide for the photographs of persons nominated as deputies/running mates by presidential and gubernatorial contestants - whether forms 25 and 29 were contrary to the Regulations - whether the non-inclusion of photographs/images of deputy presidential and deputy gubernatorial candidates in their respective ballot papers was a derogation of political rights and an affront to article 27 of the Constitution on the right to equality and freedom from discrimination - Constitution of Kenya, 2010, articles 27 and 38; Elections (General) Regulations, 2012, schedule, forms 25 and 29.

**Electoral Law** - elections - conduct of elections - candidates in elections - whether persons nominated as deputies/running mates by presidential and gubernatorial contestants were candidates for purposes of an election - Constitution of Kenya, articles 148(1) and (2) and 180(5); Elections Act, cap 7, section 2.



**Constitutional Law** - interpretation of the Constitution - factors to consider - what were the factors to consider while interpreting the Constitution of Kenya.

### **Brief facts**

The petitioner challenged the printing of presidential and gubernatorial ballot papers by the respondent, Independent Electoral and Boundaries Commission (IEBC) to be used for the August, 2022 general elections without the inclusion of the photographs/images of the deputy president and the deputy governor nominees respectively. It was the petitioner's case that the office of the Deputy President and that of the Deputy County Governor were distinct from those of the President and Governor and that the respective deputies had their supporters who specifically vote for them.

The petitioner averred that the ballot papers should not contain only the photographs/images of the presidential and the gubernatorial candidates. The petitioner prayed for, among others, an order of *mandamus* to compel the IEBC to include the photographs of the candidates for the positions of Deputy President and Deputy Governor in printed form on both the presidential and gubernatorial ballot papers.

### **Issues**

- i. Whether the non-inclusion of photographs/images of deputy presidential and deputy gubernatorial candidates in their respective ballot papers was a derogation of political rights and an affront to article 27 of the Constitution on the right to equality and freedom from discrimination.
- ii. Whether persons nominated as deputies/running mates by presidential and gubernatorial contestants were candidates for purposes of an election.
- iii. Whether forms 25 and 29 in the schedule to the Elections (General) Regulations, 2012 (as amended) were contrary to the Regulations for failure to provide for the photographs of persons nominated as deputies/running mates by presidential and gubernatorial contestants.
- iv. What were the factors to consider while interpreting the Constitution of Kenya, 2010?

### **Held**

1. A petitioner had to identify the constitutional entitlement threatened, infringed or violated and demonstrate with some level of precision on the manner of violation as to enable the respondent to mount a defence. The petitioner described the gravamen of the petition. He identified the constitutional provisions that warranted the court's intervention and tied them up with the factual matrix of the case.
2. Courts were guided by the following principles when interpreting the Constitution: :
  - a. The Constitution had to be interpreted holistically; only a structural holistic approach breathed life into the Constitution in the way it was intended by the framers.
  - b. The Constitution did not favour formalistic approaches to its interpretation. It should not be interpreted as one would a mere statute. The Constitution had incorporated non-legal considerations, which the court had to take into account, in exercising its jurisdiction.
  - c. The Constitution had provided its own theory of interpretation to protect and preserve its values, objects and purposes.
  - d. In interpreting the Constitution, non-legal considerations were important to give its true meaning and values.
3. The Constitution did not define who a candidate was for purposes of an election. Section 2 of the Elections Act defined a candidate as a person contesting for the position of an elective post. That definition could not, on its own, resolve the issue at hand. Under articles 148(1) and (2) and 180(5), the Constitution was deliberate in the use of the words as a candidate for deputy president/deputy governor. The Constitution therefore recognised that a person nominated as a deputy president or deputy governor by the principal became a candidate for the office of deputy president or deputy governor.



4. There were only two ways in which a person could stand elected in Kenya;
  - a. by way of universal suffrage under article 38 of the Constitution; and
  - b. by way of nomination through the party lists.
5. The manner in which a deputy president and a deputy governor took office was through universal suffrage and not party lists nominations. The universal suffrage, as a process, had various facets. Whereas one facet referred to how the principal candidate was nominated, another facet dealt with how the deputy was nominated. The two modes of nominations were not similar, but they were under the same process. They all fell under the universal suffrage mode of elections. The different processes were just, but a constitutional design to enrich elections in Kenya. Therefore, one part of the larger process could not be deemed to be superior to another part.
6. It could not be the case that through some craft of interpretation, the process of universal suffrage was dismembered to mean that the deputy presidents and the deputy governors were not part of that salient and constitutionally-sacred process. That was why the Constitution itself expressly recognised such persons as, and used the words ‘as a candidate for Deputy President/Deputy Governor’.
7. A person who was elected through party lists nominations did not go through the rigours of the election by way of universal suffrage. However, upon gazettelement, such a person stood elected and that election could only be challenged in the same manner as the person who was elected through universal suffrage. Such a nominated person was regarded as a candidate for purposes of an election.
8. A person nominated for the position of Deputy President and Deputy Governor went through the rigorous process of universal suffrage. The names and photographs of such persons found their way to the ballot papers, they underwent campaigns convincing the electorate why they were worth of being elected, their conduct was generally monitored throughout the electoral process among many other bottlenecks. In fact, the principal and the deputies were at par as far as the universal suffrage process was concerned. A person nominated by a principal for the position of Deputy President and Deputy Governor was a candidate in that election.
9. Article 38(3)(b) of the Constitution introduced the way in which the voting should be conducted. It should be by way of secret ballot. The voting was, therefore, to be conducted secretly by a voter by use of a ballot paper. The Constitution did not define what a ballot paper was. It was section 2 of the Elections Act which provided that a ballot paper meant a paper used to record the choice made by a voter and should include an electronic version of a ballot paper or its equivalent for purposes of electronic voting.
10. The Constitution and the law generally regulated the manner in which elections ought to be conducted. Article 86 of the Constitution commanded the IEBC to ensure that whatever voting method was used, the system was simple, accurate, verifiable, accurate, accountable and transparent. Whatever form the ballot paper took, it should not occasion any unnecessary restriction to both the candidates and the voters.
11. The Elections (General) Regulations, 2012 (as amended) (the Regulations) provided for how the ballot papers should be printed. Regulation 68(1) of the Regulations had it that the ballot paper for use at a presidential election should be in form 25 set out in the schedule and that one for use at an election for governor should be in form 29 set out in the schedule. Further details of the ballot papers were provided for in regulation 68(4).
12. Form 25 in the Schedule to the Regulations was a sample of the counterfoil of a ballot paper for a presidential candidate. Form 25 provided for the symbol of a party or independent presidential candidate, presidential candidate’s photo and name, deputy presidential name and a place for the voter’s mark. Form 25, therefore, only provided for the name of the deputy presidential candidate and not the photograph.
13. Form 29 in the Schedule to the Regulations related to the ballot paper to be used for county governor elections. The form as it appeared in the Schedule only provided for the symbol of a party or



- independent gubernatorial candidate, the gubernatorial candidate's photo and name and a place for the voter's mark. That form did not have anything to do with the deputy gubernatorial candidate at all.
14. The Elections (General) (Amendment) Regulations, 2017 did not amend the form 29. The 2017 amendments replicated the form 29 the way it was in the 2012 Regulations. It, therefore, meant that the ballot paper for the gubernatorial election should not contain anything to do with the deputy governor candidate. Having found and held that deputy presidential and deputy gubernatorial nominees were candidates in an election, then forms 25 and 29 in the Schedule to the Regulations ran contrary to the Regulations. Whereas the Regulations provided that the photographs of candidates in an election had to appear in the ballot papers, the Schedule to the Regulations seemed to overrun the Regulations. The Regulations were subsidiary legislation.
  15. There were a thousand and one reasons justifying the need to have the photographs of deputy candidates to be in the ballot papers. The failure to include the photographs, therefore, led to constitutional infractions. For instance, there was a direct discrimination between the principal candidate and the running mate. That was an affront, not only, to article 27 of the Constitution, but also to regulation 68(4) of the Regulations. The practise further placed an unnecessary restriction to the voters, especially those who were illiterate. That infringed the political rights in article 38 of the Constitution as well making the voting system not simple as envisaged in article 86 of the Constitution.
  16. Whereas the petition did not seek to render regulation 68 of the Regulations unconstitutional, that notwithstanding, the court had unhindered powers to render any appropriate relief that protected and enforced not only the bill of rights, but also the Constitution.
  17. The non-inclusion of photographs/images of the deputy presidential and deputy gubernatorial candidates in their respective ballot papers was a derogation of political rights under article 38 and an affront to article 27 of the Constitution for want of equal application and benefit of the law.

*Petition allowed.*

### **Orders**

- i. *Declaration was issued that the exclusion of the photographs/pictures/images of deputy presidential and deputy gubernatorial candidates from the ballot papers for presidential and gubernatorial elections was a derogation of political rights under article 38 and an affront to article 27 of the Constitution for want of equal application and benefit of the law.*
- ii. *The ballot papers for the presidential and gubernatorial candidates in any election should include the photographs/pictures or images of the deputy presidential and deputy gubernatorial candidates as duly nominated.*
- iii. *The judgment to be transmitted to the Kenya Law Reform Commission as well as the Attorney General of the Republic of Kenya by the Deputy Registrar of the court.*
- iv. *Each party was to bear their own costs.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Anarita Karimi Njeru v Republic (No 1)* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); ([1979] KLR 154; [1976- 80] 1 KLR 1272 - (Explained)
2. *Attorney General v David Ndiu & 73 others* (Petition 12 (EO16) of 2020); [2021] KESC 17 (KLR) - (Explained)
3. *Center for Rights Education and Awareness & anothers v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 249 (KLR); [2012] 2 KLR 261 - (Explained)
4. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR) - (Explained)



5. *Imanyara, Mugambi v Attorney General & 5 others* Constitutional Petition 399 of 2016; [2017] eKLR - (Explained)
6. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2014; [2014] KESC 33 (KLR); [2014] 2 KLR 356 - (Explained)
7. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 223 - (Explained)
8. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR); [2012] 3 KLR 718 - (Explained)
9. *Kenya Medical Practitioners, Pharmacists and Dentists Union v Kenya Hospital Association t/a the Nairobi Hospital* Petition 76 of 2020; [2020] KEELRC 555 (KLR) - (Explained)
10. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
11. *Mwau, John Harun v Independent Electoral And Boundaries Commission & another* Petition 26 of 2013; [2013] KEHC 6762 (KLR); [2013] 3 KLR 402 - (Explained)
12. *Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* Petition 1 of 2015; [2016] KESC 2 (KLR) - (Explained)
13. *Ndii, David & others v Attorney General & others* Petition E282, 397, E400, E401, E402, E416, E426 of 2021; [2021] KEHC 8196 (KLR) - (Explained)
14. *Ole Kores, Josiah Taraiya Kipelian v David Ole Nkediye & 3 others* Petition 6 of 2013; [2013] KEHC 3480 (KLR) - (Explained)
15. *Ole Tukai, David Sironga v Francis Arap Muge & 3 others* Civil Appeal 76 of 2014; [2014] KECA 155 (KLR) - (Explained)
16. *Rai & 3 others v Rai & 5 others* Petition 4 of 2012; [2013] KESC 21 (KLR); [2013] 1 KLR 685 - (Explained)
17. *Waweru, Peter K v Republic* Miscellaneous Civil Application 118 of 2004; [2006] KEHC 3202 (KLR) - (Explained)

## Statutes

### Kenya

1. Civil Procedure Act (cap 21) sections 1A, 1B - (Interpreted)
2. Constitution of Kenya articles 1, 1(1)(b); 1(4); 2; 2(1); 3; 3(1); 4; 10; 19; 20; 21(1); 22; 22(1); 27; 28; 33; 34; 35; 38; 38(2); 38(3); 81; 137(1)(d); 147; 148; 148(1); 159; 180; 180(5); 180(6); 232; 259 - (Interpreted)
3. County Government Act (cap 265) section 32 - (Interpreted)
4. Election (Registration of Voters) Regulations, 2012 (cap 7 Sub Leg) regulations 27, 30, 51, 51(2); 68; 68(1); 68(4); 68(4)(b) - (Interpreted)
5. Elections (General) Regulations, 2012 (cap 7 Sub Leg) In general - (Cited)
6. Elections Act (cap 7) section 2 - (Interpreted)
7. Supreme Court Act (cap 9B) In general - (Cited)

## Advocates

*Mr Otieno* for the petitioner

*Miss Hannan* for the respondent

## JUDGMENT

1. The petitioner herein, Mugambi Imanyara, is the secretary general of the devolution empowerment party which is one of the registered political parties in Kenya.



2. At the heart of his grievance is the lack of the photographs/images of the persons taking part in elections as nominees for the positions of the deputy presidents and the deputy governorls in the respective ballot papers for the president and gubernatorial candidates.
3. The petitioner, therefore, cited the Independent Electoral & Boundaries Commission (hereinafter referred to as ‘the respondent’ or ‘the IEBC’ or ‘the Commission’) for variously breaching the Constitution and the law in the circumstances.
4. Whereas the petition is supported by Orange Democratic Movement (hereinafter referred to as ‘ODM’), the interested party herein, it is vehemently opposed by the IEBC.

### **The Petition**

5. Through the petition dated June 20, 2022, supported by the petitioner’s affidavit deposed to on July 5, 2022, the petitioner challenged the printing of presidential and gubernatorial ballot papers by IEBC without the inclusion of the photographs/images of the deputy president and the deputy governor nominees respectively.
6. Contemporaneously with the filing of the petition was the filing of an evenly dated application by way of a notice of motion. The application sought some conservatory orders for the inclusion of the photographs/images of the deputy president and the deputy governor nominees in their respective ballot papers since the printing of the ballot papers to be used in the general elections scheduled for August 9, 2022 was underway.
7. The application was heard on June 28, 2022 and a ruling delivered on July 29, 2022. The court issued a conservatory order directing the IEBC to include the photographs/images of the deputy president and the deputy governor nominees in their respective ballot papers to be used in the general elections scheduled for August 9, 2022. The court reserved its reasons thereof into this judgment.
8. This judgment is, therefore, in respect to the main petition and will, as well, dispose of the application.
9. The petitioner contended that the IEBC violated articles 10, 27 and 38(2) of the Constitution as well as regulation 68(4) of the Elections (General Regulations) 2012 (hereinafter referred to as ‘The regulations’).
10. It was the petitioner’s case that the office of the deputy president and that of the deputy county governor are distinct from those of the president and governor and that the respective deputies have their supporters who specifically vote for them.
11. On the foregoing, the petitioner averred that the ballot papers should not contain only the photographs/images of the presidential and the gubernatorial candidates.
12. In reference to article 147 of the Constitution and section 32 of the County Government Act, the petitioner further averred that the principal bearers of the two offices are distinct office holders and they cannot remove their deputies from their respective positions save as provided by the Constitution and statute.
13. It was, therefore, his position that it is imperative for voters to see both the pictures of the deputy presidential and deputy gubernatorial candidates in the ballot paper in order to make an informed choice.
14. The petitioner asserted that images/photographs of all candidates who vie for elective positions on joint tickets play a major role in persuading voters into electing leaders of their choice.



15. On a different standing the petitioner posited that it was necessary for the deputy president's and deputy governor's names and photos to appear on the ballot because they were not nominated by the people/electorate but by the principal person or political parties.
16. On the foregoing arguments, the petitioner stated that inclusion of the images/photographs of the deputy presidential and deputy gubernatorial candidate is consistent with the national values and principles of democracy, good governance, accountability, participation, transparency as established by article 10 of the Constitution which makes the requirement that the voters elect their representatives in a transparent manner.
17. The petitioner further averred that as per the IEBC's tender document for ballot printing, Section 4.3.1 provided for coloured passport size photos and symbols, coloured passport size photos for the aspirants and referendum symbols to be printed on the ballot paper as specified by IEBC.
18. It was his case that the foregoing was consistent with regulation 68(4)(b) of regulations which provides for a ballot to contain a photograph of the candidate where applicable.
19. He further posited that pursuant to the section 2 of the Elections Act, a candidate means a person contesting an elective post and as such, a candidate in a presidential election and/or for governor nominates a candidate for deputy president or deputy governor and hence should be governed by the same rules, conditions and requirements including but not limited to having all their respective photographs/images in printed form on the ballot papers.
20. On the foregoing arguments, the petitioner prayed for the following reliefs: -
  1. A declaration that where, in the same general election, or in any elective election, all candidates, whether nominated by political parties or not, or are independent, or women, should be governed by the same rules, conditions and requirements;
  2. A declaration that the acts and/or omissions of the respondent to exclude the photographs/images of respective candidates/running mates for the positions of deputy president and deputy governor in printed form on the presidential/gubernatorial ballot papers to be used in the August 9, 2022 general elections, is an affront to the rule of law, is discriminative hence contravenes article 27 of the Constitution;
  3. A declaration that the acts and/or omissions of the respondent to exclude the photographs/images of respective candidates/running mates for the positions of deputy president and deputy governor in printed form on the presidential/gubernatorial ballot papers to be used in the August 9, 2022 general elections, infringes on article 10 of the Constitution which requires that the voters elect their representatives in a transparent manner. Further, the exclusion violates article 38(2) of the Constitution in as far as the right to free, fair and regular elections based on universal suffrage and free expression of the will of the electors is concerned;
  4. A declaration that the fundamental rights and freedoms guaranteed to the petitioner and the running mates/deputy candidates on the joint tickets of the President and Governor, especially under articles 1(1)(b), 1(4)(b), 2(1), 3(1), 19, 20, 21(1), 22, 27, 28, and 232 of the Constitution have been contravened and/or are threatened by the respondent through their acts/omissions of excluding photographs/images of respective candidates/running mates for the positions of deputy president and deputy governor in printed form on the ballot papers set to be used for the August 9, 2022 general elections;
  5. A declaration that the respondent's acts and/or omissions to exclude the photographs/images of respective candidates/running mates for the positions of deputy president and deputy



governor in printed form on the Presidential/Gubernatorial ballot papers to be used for the August, 2022 general elections is inconsistent with the tenets of the constitution hence their actions and or omissions are invalid;

6. A declaration do issue that the deputy president and deputy governor respectively are entitled to have their photos in printed form on the presidential and Gubernatorial ballot papers set to be used for the August, 2022 general elections;
7. An order of *mandamus* do issue to compel the respondent to forthwith include the photographs of the candidates for the positions of deputy president and deputy governor in printed form on both the presidential and gubernatorial ballot papers set to be used for the August, 2022 general elections;
8. Costs of the petition;
9. That this honourable court be pleased to make any further orders as it may deem just and fit to grant.

### **The Submissions**

21. The petitioner filed written submissions dated July 5, 2022 in further support of his case.
22. From the outset he identified issues for determination as being: -
  - a. Whether the photos of the deputy presidents and deputy governors should be in printed form on the presidential and gubernatorial ballot papers and;
  - b. Whether the respondent's acts and/or omissions to exclude the photographs or images violate and/or threaten the constitutional rights under the bill of rights?
23. On the first issue, the petitioner submitted that the exclusion of the deputy's president's and the deputy governor's photos/images from the ballot was tantamount to unequal application of the law upon the said candidates.
24. In a bid to buttress the need to have the images of the deputy president in the ballot, it was submitted that the candidature of deputy president's office is an office created under article 148(1) of the [Constitution](#).
25. It was his case, therefore, that it is equally important for the image of the deputy presidential candidate to be in the ballot just as it is for the Presidential candidate.
26. He submitted further that by virtue of regulation 68(4)(b) and section 2 of the [Elections Act](#), since the deputy president is nominated by the person who is elected as president, he/she is also a candidate for election as deputy president and that being an elective post, his or her photo ought to be in the presidential ballot papers.
27. In respect to the deputy governors, the petitioner pitched the same argument and referred to article 180(5) of the [Constitution](#) and submitted that since each candidate for election as county governor nominates a person who is qualified for nomination for election as a candidate for deputy governor, it is paramount to have his/her photo on the gubernatorial ballot paper.
28. On the foregoing, the petitioner submitted that according to articles 148 and 180 of the [Constitution](#), the deputy president and deputy governor respectively, correctly fit the definition of a candidate as per section 2 of the Election Act, vying for an elective post.



29. The petitioner further submitted that according to the definition of ‘ballot paper’ in the [Elections Act](#), it ought to contain full and accurate information of each candidate including the photographs in printed form to enable voters make informed choices on each candidate including candidates on joint tickets.
30. In conclusion the petitioner stated that regulation 68(4)(b) of the [Regulations](#) having been made under the [Elections Act](#), it ought to supplement the parent Act and not contravene any of its provisions.
31. On the foregoing, the petitioner submitted that the respondent cannot purport to use the regulations as to who a candidate is for purposes of elections to oust what the Elections Act in order to exclude photos of any candidate from the ballot paper.
32. To buttress the foregoing position, the petitioner referred to Petition No 6 of 2013 [Josiah Taraiya Kipelian Ole Kores v Dr David Ole Nkediemye & 3 others](#) [2013] eKLR where the court observed that: -

To my mind, this means that the election of governor and his deputy is one ticket. When electing the governor, the voters likewise elect the governor's deputy. The nomination of the deputy governor is prior to and not after election. Although it is not a direct election, it remains an elective post since the name of the deputy governor must be in the ballot paper. A purposive interpretation of the Constitution in my view will lead to no other conclusion than that the deputy governor's position elective. This is because of the requirement that the deputy's qualification must be akin to those of the governor and once a vacancy in the governors position arises no by election is to be held but automatic assumption of office of governor by the deputy. To my mind therefore the election of governor cannot be separated from that of his deputy. Is I therefore hold that the post of deputy governor is elective and therefore susceptible to an election petition as is a governor's seat.

33. Further reliance was placed on Petition No 26 2013 [John Harun Mwau v Independent Electoral and Boundaries Commission & another](#) [2013] eKLR; where it was held that;

However, I believe that it is good practice and good order for their names and photos to appear on the ballot paper for simple reasons. First, these deputies were not nominated by the people/electorate but by the person vying who may have been nominated by members of a political candidate by an independent candidate who may have been nominated by the requisite number of registered voters. It is therefore good practice and it is only logical that their names and photos should be on the ballot paper so that as a voter casts his/her vote must be well informed as to who he is voting for; ie the president and his deputy and the governor and his deputy. Secondly, national values and principles of democracy, good governance, accountability, participation, transparency as established by article I of the [Constitution](#) require that the voters elect their representatives in a transparent manner. I therefore believe that the printing of the names and photos of deputy president and governor ensures that the voters participate in electing their deputy as well. I see nothing unlawful or unconstitutional about the practise.

34. In submitting on the second issue that the failure to include the images/photographs would amount to violation of constitutional rights under the bill of rights, the petitioner stated that article 27 of the [Constitution](#) was violated.
35. He hastened to add that the exclusion was not only an affront to political rights of the deputy president and/or the deputy governor of major/popular and/or all political parties but also a threat and/or violation of the political rights of independent candidates who may not be popular with the voters.



36. The petitioner further urged that the since major campaign tools for any elections are photos, bill boards, adverts on televisions and social media platforms, photographs/images in printed form on the ballot papers will go a long way in attracting votes to voters as they can easily relate to what they see.
37. In the end, the petitioner urged the court to allow the petition as prayed.
38. As the interested party supported the petition, a recap of its case follows.

### **The Interested Party's Case**

39. The ODM supported the petition through an undated replying affidavit of Oduor Ongwen, its executive director.
40. While speaking to the purposive and transformative nature of the Constitution in furthering democratic values, he deposed that granting the orders as prayed in the petition would be ideal in strengthening the electoral system under article 81 of the Constitution.
41. It was his case that it was regressive and fallacious to presume that voting choices are wholly premised on the principal candidates and not their running mates hence the decision to exclude their pictures.
42. The interested party stated that based on the report by UNESCO of 2008, the literacy rate in Kenya is at 18% and as such, many Kenyans are unable to identify the candidates on ballot paper by only reading the name of a candidate.
43. Mr Oduor deposed that there was nothing in the regulations or the substantive laws that are inconsistent with or negate the orders sought. It was his case that the requirements for the nomination of a presidential and gubernatorial candidate apply substantively to their respective running mates.
44. He added that that the orders sought will fortify rights of the voter under article 38(3) for the Constitution and that a running mate is a candidate within the meaning of section 2 of the elections Act and under regulation 68(4) of Regulations, a ballot paper shall contain a photograph of the candidate.
45. In the end it urged the petition to be allowed as prayed.
46. The interested party did not file written submissions.

### **The Respondent's Case**

47. The IEBC opposed the petition through the replying affidavit of Chrispine Owiye, the director legal affairs, deposed to July 1, 2022.
48. He lodged the first attack on the petition by deposing that it does not disclose any reasonable cause of action for failing to demonstrate particulars of constitutional violations that would bring the case within the confines of article 22 of the Constitution.
49. It was his case that the petition lacks precision, is unmerited and an abuse of court process warranting dismissal for not citing the law infringed in IEBC's exercise of mandate of printing of ballot papers.
50. He deposed that that IEBC has over the years conducted elections in a democratic, free and fair manner by printing ballot papers in line with the Constitution, the Elections Act and the Elections General Regulations 2012 as amended in 2017.
51. It was his case that the petitioner has not demonstrated how IEBC failed to abide by regulation 68(1) of Regulations 2012 which requires ballot papers for an election for use at presidential election to be in form 25 as set out in the schedule whereas that of the governor to be in form 29.



52. In claiming that the Commission complied with the regulations, he deposed that the petition was seeking to make the IEBC act contra-statute, a deviation of the formant decreed by the regulations.
53. Mr Owiye maintained that the petitioner did not challenge the constitutionality or legality of regulation 68(1) which have been in operation since the year 2012.
54. He maintained that the process of procuring the printing material was done in strict compliance of the laws and the Constitution and there was no demonstration of discrimination on the part of the respondent.
55. It was his case that the voters right under article 38 of the Constitution is not taken away by the requirement in regulation 68 of the regulations that makes provision for the photograph of the principal candidates.
56. He deposed further that the ballot paper satisfactorily met the requirement in regulation 30 and 68(4) (b) of the regulations which provides that every ballot paper for use at an election shall contain a photograph of the candidate being the principal office bearer.
57. Based on the provisions of article 180 of the Constitution, Mr, Owiye deposed that the office of a deputy governor and that of the governor are intimately linked but deputy governor is not directly elected by the voters and thus does not fall within the meaning of a candidate as per section 2 of the Elections Act contesting for an elective post.
58. To buttress the foregoing, it was his case that according to regulation 51(2) of the regulations, the returning officer is required to issue a nomination certificate to a candidate who is validly nominated to contest for the county governor position and no such certificate is given to the running mate.
59. He reiterated that the literal interpretation of the law shows that a candidate is a person contesting for an election, being the principal office bearer.
60. In countering the argument that not all voters are educated as to need the aid of a photograph to identify their candidate, it was Mr Owiye's case that regulation 27 makes provision for assisted voters and allows the presiding officer to permit a voter to be assisted or supported by a person of the voter's own free choice and who shall not be an agent or a candidate.
61. In the end, he urged the court to dismiss the petition.

### **The Submissions**

62. The 1<sup>st</sup> respondent filed written submissions dated June 8, 2022 to further urge its case.
63. It was reiterated that the petition had failed to attain the particularity as to bring it within the disputes contemplated in article 22 of the Constitution.
64. It was its case that the failure of the petitioner to challenge regulation 68 of the regulations was fatal to their case and as such was undeserving of the orders prayed for.
65. The respondent found support of the foregoing submission in the Court of Appeal case of David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR where it was observed thus: -

The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.



The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings.

66. The respondent was categorical that it indeed complied with regulation 68 since the ballot papers contained party/candidate symbol, the first name and surname of the presidential/county governor, the photo of the presidential/governor candidate and the first name and surname of the deputy president/deputy county governor.
67. Based on the foregoing, it was submitted that the information contained in the ballot papers were sufficient to enable a registered voter to make an informed decision about his preferred candidate.
68. It was urged that the regulations were constitutional and the petitioners had not discharged the burden of disproving that position. Reliance was placed on the decision in *Mugambi Imanyara & another v Attorney General & 5 others* [2017] eKLR, where it was observed that: -

There is the general presumption that every act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise.

69. The respondent claimed that the petitioner failed to show that the photographs of the deputies have any influence over a registered voter's choice of candidate. He reiterated that no evidence was presented that a person right to vote was curtailed because the photographs of the deputies are not on the ballot papers.
70. It was asserted that no evidence was presented to show that any registered voter has been disenfranchised by the non-inclusion of the photographs in the ballot papers.
71. In urging the court to make a finding that the position of a deputy governor is not elective, reference was made to *Josiah Taraiya Kipelian Ole Kores v Dr David Ole Nkediemye & 3 others* [2013] eKLR where it was observed that: -

Article 180(6) of the *Constitution*... In my view... is self-explanatory and only requires a literal interpretation. The 4th respondent is barred by law from conducting separate elections for the post of deputy governor. It may therefore seem that the position of deputy governor is not an elective post per se. A candidate for deputy governor only assumes such a position by being a nominee of the successful candidate of county governor. Under regulation 51 of the *Elections (General) Regulations 2012* the returning officer is required to issue a nomination certificate to a candidate who is validly nominated to contest for the county governor position. No such certificate is given to a running mate. It would seem that the law only contemplates one elective post in the gubernatorial election and that is the post of county governor.

72. In buttressing that there was no discrimination, the respondent relied on the decision in *Peter K Waweru v Republic* [2006] eKLR and submitted that its compliance with regulation 68(4)(b) was not demonstrated on how IEBC unequally applied the law on the deputy president and the deputy governor.
73. In the end, the respondent prayed that the petition be dismissed.

## Analysis

74. From the foregoing presentation of the parties' cases, the following issues arise for discussion: -



- i. Whether the petition satisfies particularity and precision threshold required of constitutional petitions.
  - ii. Depending on (i) above, the principles in constitutional and statutory interpretation.
  - iii. Whether persons nominated as deputies/running mates by presidential and gubernatorial contestants are ‘candidates’ for purposes of an election.
  - iv. Depending on (iii) above, whether exclusion of pictures of presidential and gubernatorial running mates in the ballot papers is a violation of the constitutional rights under articles 10, 27, and 38 of the Constitution.
  - v. Remedies, if any.
75. I will hence deal with the issues sequentially.
- i. Whether the petition satisfies the particularity and precision threshold required of constitutional petitions:
76. This issue invites this court to abide by the long-standing principle that a petitioner must identify the constitutional entitlement threatened, infringed or violated and to demonstrate with some level of precision on the manner of violation as to enable the respondent to mount a defence.
77. The said position was coined in Miscellaneous Criminal Application 4 of 1979, Anarita Karimi Njeru v Republic [1979] eKLR when the court remarked as follows: -
- ... if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...
78. The above precedent has been subsequently cited with approval by various courts of superior jurisdiction. In Kenya Medical Practitioners, Pharmacists and Dentists’ Union v University of Nairobi & another [2021] eKLR, this court wholesomely discussed the precision requirement in the following manner: -
87. The foregoing finding (*Anarita Karimi* case) received endorsement from the court of Appeal in Nairobi Civil Appeal No 290 of 2012, Mumo Matemu v Trusted Society of Human Rights Alliance when the Learned Judges remarked on the importance of compliance with procedure under article 159 of the Constitution, the overriding objective principle under section 1A and 1B of the Civil Procedure Act and need for precision in framing issues in constitutional petitions. It was observed thus: -
- (41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and



the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

88. The learned judges further bolstered the foregoing finding by making reference to the decision of Jessel, MR in *Thorp v Holdsworth* (1876) 3 ChD 637 at 639 where he made the following findings: -

... The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing....

89. In making a finding that the High Court was right in its assessment that the petition before it had not been drafted with the necessary precision, the learned appellate judges reaffirmed the *Anarita Karimi Njeru* principles and made the following findings: -

- (43) The petition before the High court referred to articles 1, 2, 3, 4, 10, 19, 20 and 73 of the *Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1<sup>st</sup> respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.
- (44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (*supra*). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1<sup>st</sup> respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1<sup>st</sup> respondent.

196. The apex court has, as well, discussed the issue. That was in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR where the court stated as follows: -

Although article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as



a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

79. I will now interrogate the respondent's claims and how it scales against the petition.
80. The respondent claimed that petition was unworthy of this court's consideration for failing to identify with precision the constitutional provisions violated and the manner of violation.
81. I have keenly gone through the petition. In paragraphs 24 to 58, the petitioner in a very clear and elaborate manner describes the gravamen of the petition. He identifies in paragraph 3 to 23 the constitutional provisions that warrant this court's intervention and ties them up with the factual matrix of the case.
82. The petitioner is very precise on the manner the exclusion of pictures of the running mates of presidential and gubernatorial candidates violates the rights and fundamental freedoms in the Constitution.
83. The petitioner particularizes the foregoing by identifying the twin aspect of discrimination or unequal application for the law and the resultant violation political right of voters and candidates as provided for in articles 27 and 38 of the Constitution respectively.
84. To that extent, I find that the petitioner met threshold required of him as established in *Anarita Karimi Njeru* case (*supra*).
85. Having answered the first issue in affirmative, this court will now deal with the next issue.

**(ii) The principles in constitutional interpretation**

86. This petition calls for interpretation of some of its provisions. As such, it is imperative to run through the principles that guide courts when called upon to interpret the Constitution.
87. The consideration will no doubt lay a solid basis for consideration of the rest of the issues.
88. The High Court in *David Ndi & others v Attorney General & others* [2021] eKLR (famous referred to as 'the BBI case') captured with precision the manner in which our transformative constitution ought to be interpreted. The Learned Judges presented themselves thus: -

399. One of the imports of recognition of the nature of the transformative character of our constitution is that it has informed our methods of constitutional interpretation. In particular, the following four constitutional interpretive principles have emerged from our jurisprudence:

- a. First, the Constitution must be interpreted holistically; only a structural holistic approach breathes life into the Constitution in the way it was intended by the framers. Hence, the Supreme Court has stated in *In the Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference* No 1 of 2012; [2014] eKLR thus (at paragraph 26):

But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.

- b) Second, our transformative constitution does not favour formalistic approaches to its interpretation. It must not be interpreted as one would a mere statute. The supreme court



pronounced itself on this principle *In re Interim Independent Election Commission* [2011] eKLR, para [86] thus:

The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern bill of rights, that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in article 10, in chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.

- c) Third, the Constitution has provided its own theory of interpretation to protect and preserve its values, objects and purposes. As the retired CJ Mutunga expressed in his concurring opinion in *In re the Speaker of the Senate & another v Attorney General & 4 others*, Supreme Court Advisory Opinion No 2 of 2013; [2013] eKLR. (paragraphs 155-157):
- (155) In both my respective dissenting and concurring opinions, *In the Matter of the Principle of Gender Representation in the National Assembly and Senate*, Sup Ct Appl No 2 of 2012; and *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others Sup Ct Petition* No 4 of 2012, I argued that both the Constitution, 2010 and the *Supreme Court Act*, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.
- (156) The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the court as the searchlight for the illumination and elimination of these legal penumbras.
- d) Fourthly, in interpreting *Constitution of Kenya, 2010*, non-legal considerations are important to give its true meaning and values. The Supreme Court expounded about the incorporation of the non-legal considerations and their importance in constitutional interpretation in the Communications Commission of Kenya case. It stated thus:



- (356) We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on chapter four – the bill of rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145-163.
- (357) We begin with the concurring opinion of the CJ and President in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No 2B of 2014 left off (see paragraphs 227- 232). In paragraphs 232 and 233 he stated thus:
- (232) ...References to *Black’s Law Dictionary* will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts.
- (233) It is possible to set out the ingredients of the theory of the interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of Section 3 of the Supreme Court Act, that introduce non-legal phenomena into the interpretation of the Constitution, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this court as the custodian of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the Supreme Court Act, is to “facilitate the social, economic and political growth” of Kenya.
400. With these interpretive principles in mind, which we will call the Canon of constitutional interpretation principles to our Transformative Constitution, we will presently return to the transcendental question posed in these consolidated petitions.....
89. Adding its voice to the principles of constitutional and statutory interpretation, the Court of Appeal in *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR stated as follows: -
- (21).... Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus: -
- that as provided by article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.
  - that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.
  - that the Constitution must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.
  - that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result;



the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. .... The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.

90. As stated above, the foregoing will, accordingly so, guide this court in the analysis which follows.
- ii. Whether persons nominated as deputies/running mates by presidential and gubernatorial contestants are ‘candidates’ for purposes of an election:
91. The Constitution does not define who a candidate is for purposes of an election.
92. It is section 2 of the [Elections Act](#) which defines a ‘candidate’ as follows: -

### **A person contesting for the position of an elective post**

93. The above definition may not, on its own, resolve the issue at hand. Therefore, a further tour of the Constitution, the law and settled judicial decisions becomes imperative.
94. The starting point is what the Constitution provides for in respect of the manner in which deputy presidents and deputy governors find their way into office.
95. As for the position of the deputy presidents, the provisions of article 148(1) and (2) of the [Constitution](#) states as follows: -
1. Each candidate in a presidential election shall nominate a person who is qualified for nomination for election as President, as a candidate for deputy president.
  2. For the purposes of clause (1) above, there shall be no separate nomination process for the deputy president and article 137(1)(d) of the [Constitution](#) shall not apply to a candidate for deputy president.
96. Regarding the deputy governors, article 180(5) of the [Constitution](#) provides that: -
- Each candidate for election as a County Governor shall nominate a person who is qualified for nomination for election as county governor as a candidate for deputy governor.
97. In the foregoing provisions, the Constitution is very deliberate in the use of the words ‘as a candidate for deputy president/deputy governor’. The Constitution itself and in no uncertain words, therefore, recognises that a person nominated as a deputy president or deputy governor by the principal becomes a candidate for the office of deputy president or deputy governor.
98. The respondent has, however, argued that since the deputy president and the deputy governor are not elected on their own, then they are just, but not candidates.
99. This court has critically considered the argument. It is persuasive. However, perhaps, it is important to understand the various ways in which a person may be deemed elected for purposes of elections in Kenya.



100. There are only two ways in which a person may stand elected in Kenya. These are, first, by way of universal suffrage under article 38 of the Constitution and, second, by way of nomination through the Party lists.
101. The position was affirmed by the Supreme Court in Petition No 1 of 2015 Moses Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR where the Apex Court stated as follows: -
- (117) It is clear to us that the Constitution provides for two modes of ‘election’. The first is election in the conventional sense, of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of ‘election petition.
102. The apex court further stated as follows: -
- [106] The gazette notice in this case, signifies the completion of the “election through nomination”, and finalizes the process of constituting the Assembly in question. On the other hand, an “election by registered voters”, as was held in the Joho case, is in principle, completed by the issuance of Form 38, which terminates the returning officer’s mandate, and shifts any issue as to the validity of results from the IEBC to the Election Court.
- [107] It is therefore clear that the publication of the gazette notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts. The gazette notice also serves to notify the public of those who have been “elected” to serve as nominated members of a county assembly.
103. The twin processes are further well defined in statutes.
104. In this case, the manner in which a deputy president and a deputy governor take office is through universal suffrage and not Party lists nominations. The universal suffrage, as a process, has various facets. Whereas one facet refers to how the principal candidate is nominated, another facet deals the deputy. The two modes of nominations are not similar, but they are under the same process. They all fall under the universal suffrage mode of elections. The different processes are just, but a constitutional design to enrich elections in Kenya. Therefore, one part of the larger process cannot be deemed to be superior to another part.
105. Deriving from the foregoing, it cannot, therefore, be the case that through some craft of interpretation, the process of universal suffrage is dismembered to mean that the deputy presidents and the deputy governors are not part of that salient and constitutionally-sacred process. And, that is why the Constitution itself expressly recognises such persons as, and uses the words ‘as a candidate for deputy president/deputy governor’.
106. Another salient point in furtherance of the position that deputy presidents and deputy governors are candidates lies in the following consideration. A person who is elected through Party lists nominations does not go through the rigours of the election by way of universal suffrage. However, upon gazette, such a person stands elected and that election can only be challenged in the same manner as the person who was elected through universal suffrage. Such a nominated person is regarded as a candidate for purposes of an election.



107. On the flip side, the one nominated for the position of deputy president and deputy governor goes through the rigorous process of universal suffrage. The names and photographs of such persons find their way to the ballot papers, they undergo campaigns convincing the electorate why they are worth of being elected, their conduct is generally monitored throughout the electoral process among many other bottlenecks. In fact, the principal and the deputies are at par as far as the universal suffrage process is concerned. Should, therefore, such a person who is nominated for the position of deputy president and deputy governor not be regarded as a candidate in that election? I do not think so.
108. Coming to an end on this issue, this court returns the finding, and so holds, that a person nominated by a principal for the position of deputy president and deputy governor is a candidate in that election.
109. The court will now deal with the next issue.
- iii. Whether the exclusion of pictures/photographs of Presidential and gubernatorial running mates in the ballot papers is a violation of constitutional rights under articles 10, 27 and 38 of the Constitution:
110. This matter relates to the manner in which Presidential and gubernatorial elections are to be essentially conducted. the gravamen being whether the pictures/photographs of deputy presidential and deputy gubernatorial candidates ought to appear in the ballot papers for the presidential and gubernatorial elections.
111. The Constitution and the law generally regulate the manner in which elections ought to be conducted. Article 86 of the Constitution commands the IEBC to ensure that whatever voting method is used, the system is simple, accurate, verifiable, accurate, accountable and transparent.
112. In article 38(3) of the Constitution amplifies the electoral system as follows: -  
Every adult citizen has the right, without unreasonable restrictions—
- (a) to be registered as a voter;
  - (b) to vote by secret ballot in any election or referendum; and
  - (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.
113. It is article 38(3)(b) of the Constitution which introduces the way in which the voting should be conducted. It should be by way of secret ballot. The voting is, therefore, to be conducted secretly by a voter by use of a ballot paper.
114. The Constitution does not define what a ballot paper is. It is section 2 of the Elections Act which provides as follows: -  
“ballot paper” means a paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for purposes of electronic voting.
115. It is that ballot paper which is in issue in this matter. As a way of emphasis, whatever form the ballot paper takes, it must not occasion any unnecessary restriction to both the candidates and the voters.
116. The Elections (General) Regulations, 2012 (as amended) (hereinafter referred to as ‘the Regulations’) provide for how the ballot papers should be.



117. Regulation 68(1) has it that the ballot paper for use at a Presidential election shall be in form 25 set out in the schedule and that one for use at an election for governor shall be in form 29 set out in the schedule.
118. Further details of the ballot papers are provided for in regulation 68(4) as follows: -  
Every ballot paper for use at an election shall—
- (a) contain the name and symbol of the candidate validly nominated;
  - (b) contain a photograph of the candidate where applicable;
  - (c) be capable of being folded up;
  - (d) have a serial number, or combination of letter and number, printed on the front; and
  - (e) have attached a counterfoil with the same number or combination printed thereon.
119. This court has looked at the forms 25 and 29 in the schedule of the Regulations. Form 25 is a sample of the counterfoil of a ballot paper for a presidential candidate.
120. The said Form 25 provides for the symbol of a party or independent Presidential candidate, Presidential candidate's photo and name, deputy presidential name and a place for the voter's mark.
121. Form 25, therefore, only provides for the name of the deputy presidential candidate and not the photograph.
122. Form 29 relates to the ballot paper to be used for county governor elections. the form as it appears in the schedule only provides for the symbol of a party or independent gubernatorial candidate, the gubernatorial candidate's photo and name and a place for the voter's mark. This form does not have anything to do with the deputy gubernatorial candidate at all.
123. What surprises most is that even the Elections (General) (Amendment) Regulations, 2017 did not amend the Form 29. The 2017 amendments still replicated the Form 29 the way it was in the 2012 Regulations. It, therefore, means that the ballot paper for the gubernatorial election should not contain anything to do with the deputy governor candidate.
124. This court having found and held that deputy presidential and deputy gubernatorial nominees are candidates in an election, then forms 25 and 29 in the schedule run contrary to regulations.
125. That is, however, not all. Whereas the regulations clearly provide that the photographs of candidates in an election must appear in the ballot papers, the schedule seems to overrun the regulations. Suffice to note that the regulations are subsidiary legislation.
126. Perhaps, at this point in time one ought to ask whether the inclusion of the photographs of the deputy candidate nominees in ballot papers add any value in an election.
127. On this, the court readily agrees with the position taken by the petitioner. There is no doubt that the vote-seeking endeavours in Kenyan elections are mainly through in-person meetings, billboards, both social and mainstream media, among others. The person vying for any position becomes the centre-stage during the campaign times. The voters are urged to vote for a specific person who is always introduced to them. Such is the person any voter would reasonably expect to see his/her photograph in the ballot paper.



128. That aside, the literacy levels in Kenya are appalling. There are millions of Kenyans who are still illiterate and are registered voters. Such voters are sincerely and reasonably likely to imagine that certain a candidate is not taking part in the election if that person's photograph is missing from the ballot papers.
129. There are, hence, a thousand and one reasons justifying the need to have the photographs of deputy candidates to be in the ballot papers.
130. The failure to include the photographs, therefore, leads to constitutional infractions. For instance, there is a direct discrimination between the principal candidate and the running mate. That is an affront, not only, to article 27 of the *Constitution*, but also to regulation 68(4).
131. The practise further places an unnecessary restriction to the voters, especially those who are illiterate. That infringes the political rights in article 38 of the *Constitution* as well making the voting system not simple as envisaged in article 86 of the Constitution.
132. Apart from holding that it was only relying on the regulations whose constitutionality or otherwise is not contested in the matter, the respondent did not give any other justification for non-inclusion of the photographs of the Presidential and Gubernatorial running mates in the ballot papers.
133. Whereas it is true that the Petition does not seek to render regulation 68 unconstitutional, that notwithstanding, this court has unhindered powers to render any appropriate relief that protects and enforces not only the bill of rights, but also the Constitution. That is the trajectory which this court takes in this matter.
134. In sum, therefore, it is the finding and holding of the court that the non-inclusion of photographs/ images of the deputy presidential and deputy gubernatorial candidates in their respective ballot papers is a derogation of political rights under article 38 and an affront to article 27 of the *Constitution* for want of equal application and benefit of the law.
135. Since there is need to re-look at the law on the issue subject of this decision, the judgment will be transmitted to the Kenya Law Reform Commission as well as the Hon Attorney General of Kenya by the Hon Deputy Registrar of this court.

### **Disposition**

136. In the end, the court finds the petition successful and the following final orders hereby issue: -
  - a. A declaration hereby issues that the exclusion of the photographs/pictures/images of deputy presidential and Deputy Gubernatorial candidates from the ballot papers for Presidential and Gubernatorial elections is a derogation of political rights under article 38 and an affront to article 27 of the *Constitution* for want of equal application and benefit of the law.
  - b. The ballot papers for the Presidential and Gubernatorial candidates in any election, shall henceforth, include the photographs/pictures or images of the deputy presidential and Deputy Gubernatorial candidates as duly nominated.
  - c. Each party shall bear their own costs since this is a public interest dispute.
  - d. This judgment shall be transmitted to the Kenya Law Reform Commission as well as the Hon Attorney General of the Republic of Kenya by the Hon Deputy Registrar of this court.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF SEPTEMBER, 2022.**



**A. C. MRIMA**

**JUDGE**

**Judgment virtually delivered in the presence of:**

**Mr. Otieno**, Learned Counsel for the petitioner.

**Miss. Hannan**, Learned Counsel for the Respondent.

**Kirong/Bernard** – court Assistants.

