



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**ELECTION PETITION NO. 1 OF 2021**

**DAVID AOKO WERE.....PETITIONER**

**VERSUS**

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

**THE CONSTITUENCY RETURNING OFFICER,**

**JOHN KIPLANGAT KIRUI.....2<sup>ND</sup> RESPONDENT**

**NABULINDO PETER OSCAR.....3<sup>RD</sup> RESPONDENT**

**AND**

**CLEOPHAS WAKHUNGU MALALA.....INTERESTED PARTY**

**JUDGMENT**

1. This petition arises from a by-election that was conducted on 4<sup>th</sup> March 2021, by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, for election of a Member of Parliament for the Matungu Constituency National Assembly seat, in which the petitioner and the 3<sup>rd</sup> respondent were candidates. The results were declared and announced on 5<sup>th</sup> March 2021 by the 2<sup>nd</sup> respondent, where the 3<sup>rd</sup> respondent emerged the winner with 14, 257 votes as against 10, 565 in favour of the petitioner. The results, as declared, were as follows: Achayo Paul Agutu 139 votes, Amunga Christabel Jane 427 votes, Atoko Gregory Lisamadi 115 votes, Borry Netcus Kevin 18 votes, Faida Godfrey Ouma 257, Khamis Athman Wangara 248 votes, Kongoti Anzelimo Ronald 41, Lanya Alex Wamukoya 5, 513, Lutta Charles Kasamani 143 votes, Lutta Wilberforce Chitechi 94 votes, Munyekenye Samuel Onyimu 366 votes, Murunga Eugene Ambwere 94 votes, Nabulindo Peter Oscar 14, 257, Wakoli Benard Ouma 1, 513 votes and Were David Aoko 10, 565 votes.

2. The petitioner was dissatisfied with the manner the election was conducted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the declaration of the 3<sup>rd</sup> respondent as the winner of that electoral contest. Consequently, he filed the petition herein, dated 28<sup>th</sup> March 2021, on 1<sup>st</sup> April 2021, in his capacity as a contestant in that poll as well as a voter. The principal orders sought in the petition are:

(a) A declaration that the 3<sup>rd</sup> respondent was not validly elected as Member of National Assembly for Matungu Constituency in Kakamega County and that the declaration that he was the victor was invalid, null and void;

(b) A declaration that substantial and significant non-compliance, irregularities and improprieties affected the result of the by-election;

(c) A declaration that all the votes affected by each and all the irregularities are invalid and should be struck off and from the final tally and computation of the parliamentary election;

(d) A declaration that the parliamentary by-election held on 4<sup>th</sup> March 2021 in Matungu Constituency was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;

(e) An order directing the petitioner the rightly elected candidate, or, in the alternative that a fresh parliamentary election be organised and conducted in strict conformity with the Constitution and the Elections Act, No. 24 of 2011;

(f) A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, jointly and severally committed election irregularities;

(g) An order that the costs of the petition be borne by the respondents, jointly and severally; and

(h) Any other orders that the court should deem to be just and fit to grant.

3. In his pleadings, the petitioner principally raises 3 grounds, being violation of the principles of a free and fair election and electoral process; partiality of polling staff; and election violence and intimidation.

4. Regarding the principles of a free and fair election, it is pleaded that the by-election was conducted in a manner that contravened the said principles, as enunciated in Article 81(e) of the Constitution and section 39 of the Elections Act. On partiality of the officials of the 1<sup>st</sup> respondent, it is averred that accredited agents of a majority of the candidates were denied entry and access during the voting and tallying exercises for several hours, and for some completely; the agents for the petitioner were allowed into the polling station and tallying room late, and, therefore, they were not able to witness a substantial part of the polling and tallying. It is also averred that the agents for the petitioner were not allowed to participate in or witness the opening of the ballot boxes, the voting process, the sealing of ballot boxes and the counting of votes. It is also averred that the agents for the petitioner were ejected from the tallying centre, and at tallying it was noted that a number of Forms 35A were not signed by party agents, and no explanations were given. It is specifically pleaded that Josephat Wapereto was one such agent, who was denied access and entry to the Bulimbo Tallying Centre. On election violence, it is pleaded that the polling exercise was characterised by excessive violence, and the officials of the 1<sup>st</sup> respondent, agents of the petitioner and party officials were shot at, stabbed, beaten and flogged. Various incidents are pleaded at various stations, involving individuals named in the petition. The polling stations mentioned as affected by the violence and intimidation include Munami, Mayoni, Mwira, Emakale, Namayiakalo, Bulonga, Mukhweya, Lung'anyiro and Namamba. Some of the individuals named as associated with the pleaded acts of violence and intimidation include the interested party and Rashid Echesa.

5. The factual background to the petition is set out in the affidavit of the petitioner, sworn on 28<sup>th</sup> March 2021. There are also affidavits by Nabwera Daraja Nabii, Mophat Mandela, Libinus Juma Odwori, Anaclet Were, Frederick Ochola, Patrick Oduya, Edith Akinyi, Galkanos Ekesa, Nixon Waswa, Hilda Angalwa, Kelvin Ekesa, Joseph Makokha Nyangi, Francis Ouma, Julius Mahasi, Josephat Wapereto, Hannington Were, Mercy Akoth, William Opemi, Onesmus Maina Boniface Odunga, among others, focusing on acts of violence and intimidation at the various polling stations as pleaded in the body of the petition.

6. The 1<sup>st</sup> and 2<sup>nd</sup> respondents reacted to the petition, by filing their response, dated 3<sup>rd</sup> May 2021, on even date. They deny that there was pervasive, widespread and extensive violence perpetrated by supporters of the 3<sup>rd</sup> respondent. They concede that there were some problems at Munami and Bulonga polling stations, which they characterise as isolated cases of unruly behaviour. They aver that at Munami, an unruly crowd forced its way into the polling station and attempted to carry away the ballot boxes, but the incident was swiftly contained by security agents and polls officials. At Bulonga, they aver, Rashid Echesa assaulted an election official. They aver, however, that those incidents did not affect the outcome of the election. They assert that the subject by-election was conducted in a free and fair manner, and any malpractices were reported to the relevant State authorities for action. They aver that the voting, counting, tallying, transmission and declaration of election results was done in a manner that was efficient accurate and accountable lawful, and the outcome represented the true will of the people of Matungu Constituency. They further aver that accredited agents of the candidates were allowed access to the polling stations, to witness the voting and vote tallying processes. They state that the alleged incidents of violence, if at all they were there, were isolated and did not go to the heart of the matter. They dismiss the alleged grounds on violations of the principles of free and fair elections and electoral process; partiality of the polling staff; and election violence and intimidation.

7. The factual case for the 1<sup>st</sup> and 2<sup>nd</sup> respondents is stated in the affidavits sworn and placed on record by the 2<sup>nd</sup> respondent, Maureen Naliaka Lusambu, Mary Adhiambo Nikasio, Lydia Wesonga, Conslyne Atieno Wesaya, Timothy Namukuru Juma, Peter Juma Okura, Justus Wamoyi Likhayo and Joseph Martin Mulama. In addition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents also placed on record the statutory forms used in that by-election, being Forms 35A and 35B.

8. The 3<sup>rd</sup> respondent replied to the petition through his response filed on 3<sup>rd</sup> May 2021, and bearing an even date. Although headed response to the petition, the same reads more like an affidavit than a response to a principal pleading. Nonetheless, the 3<sup>rd</sup> respondent avers that the petitioner had admitted, in his affidavit, that the voters who were eligible to participate in the by-election did cast their votes and went home. He says that he did not witness any of the incidents of violence averred to by the petitioner. He further avers that the petitioner did not attempt to link the acts of violence to any of the respondents. He has supported his response with the averments made in his affidavit sworn on 3<sup>rd</sup> May 2021, and the annexures attached to that affidavit. On 28<sup>th</sup> May 2021, a bundle of affidavits, sworn by persons who supported his case, were filed.

9. The interested party was added or joined to these proceedings on his own application, on grounds that his presence in the proceedings could assist the court completely and effectually determine the issues at hand, given that he had been named in the petition as one of the perpetrators of the violence, alleged to have marred the by-election, the subject of these proceedings. He was directed to file a response to the petition, which he did, but his participation was limited, to the matters pleaded against him in the petition.

10. The petition was heard orally, by way of *viva voce* evidence, based on the affidavits lodged in record by the witnesses called by both sides. The oral hearing commenced on 27<sup>th</sup> July 2021 and terminated on 30<sup>th</sup> July 2021. The petitioner testified and called 13 witnesses, including himself. The 2<sup>nd</sup> respondent testified and called 4 witnesses including himself. The 3<sup>rd</sup> respondent also testified and called 5 witnesses, including himself. The interested party also testified, but he did not call any other witness, as the directions given for his participation in the proceedings precluded that.

11. PW1, the petitioner, stated that, at the polling station where he cast his vote, things moved smoothly. He said that he visited about 20 or so polling stations out of the 58 in the constituency, and that he did not witness any acts of destruction and dispersal of voting materials, nor

of any acts of violence, and that his petition was based on what he was able to gather from his agents. He also mentioned that, although he had talked of squads led by the interested party and Rashid Echesa, which allegedly harassed and intimidated people around, and caused chaos, he did not see them in action himself. He asserted that whatever they did greatly affected the outcome of the by-election. He stated that several of his agents were barred from accessing polling stations, by supporters of his opponents. He said that his agents were also barred from entering the tallying centre at Bulimbo, and that some of them were in fact ejected. He said that the 3<sup>rd</sup> respondent bribed voters, but then clarified that he did not personally witness him do so. He also stated that the police harassed and intimidated his supporters and voters, but conceded that he did not make any report to anyone with regard to that. He said that he did not generally have issue with the poll numbers, but added that he had his doubts. He said that his problem was with the conduct of the officials of the 1<sup>st</sup> respondent in some polling stations, such as where a ballot box was taken out of the polling room and then returned, and was readmitted. He said that at the tallying centre his agents were not allowed in, and, therefore, he had no information on what transpired there, as he did not go there himself. He said that he wanted to be declared the winner because of the violence that denied his supporters a chance to vote.

12. PW2, Mophat Mandela Shikhuyu, a general agent for the petitioner, and a member of the committee that coordinated the event for the petitioner from a centre at Kakamega, testified on an incident that allegedly happened on the road at Mwira, as he and others headed to Emakale, where he had gotten information that there was violence at a polling station. He stated that the convoy of vehicles that he was in was obstructed by another convoy, which was coming from the opposite direction, led by the interested party and others. He said that he was attacked by a bodyguard of the interested party, and a gun was pointed at him. He was assaulted, money was stolen from him and he was stabbed with a knife. He mentioned his tormentors, saying that they all worked for the interested party. Eventually, he was taken to hospital. He asserted that the incident was intended to intimidate the agents and supporters of the petitioner, and to scare way people from voting, especially those who supported the petitioner. He said that he heard that homes were attacked during that incident, but he himself did not witness any home being attacked. He was not a registered voter for Matungu Constituency.

13. PW3, Francis Muchere Ouma, confirmed that he was registered voter at Namayiakalo polling station, where he was also the agent for the petitioner. He confirmed that he voted that day. His evidence was that his home, next to the polling station, was attacked by persons led by the interested party, who beat up people at the home, including his daughter, PW7, who he said was nearly killed. He stated that after a while, they left his homestead, and drove towards the polling centre, and along the way, the occupants attacked and assaulted people. When he eventually got home, he found his property damaged and money stolen. He stated that the violence that he described happened at his home, and not at the polling centre. He said that the person who led the group was someone he knew, saying that he was targeted for political reasons. He said that he fled the polling centre after the incident. He said some of the voters waiting in the queue scattered. He said that he made a report to the police, and that there was a criminal matter arising from the mistreatment of his daughter, PW 7. He said that not everybody voted, for those who had been in the queue fled. He said that he made a report on the commotion to the presiding officer, informing him that the same was preventing voters from accessing the polling centre. He said that the people involved did not scatter the voters nor the votes. He said that the voters headed for the polling centre were being scattered as they came to vote.

14. PW4, Patrick Augustine Oduya voted at Munami polling station in the morning and left. He described the process at that time as peaceful. He was later attracted back to the same polling centre in the afternoon, after he saw a large convoy of vehicles entering the compound. Out of curiosity, he followed them into the polling centre. They entered the polling station, and came out with a polls official, whom they assaulted. One of the persons carried a ballot box, which they took to the playing field. A police officer warned them against breaking the ballot box. Later the police took charge, and escorted the polls official and ballot box back to the polling room. The group that had come to the centre had been led by the interested party. It went to the playing field and one of them shot a person called Boniface Odunga. He said that the incident took roughly 30 minutes, and that some of the voters left the queues, although he could not tell who did not vote. He described some of the persons present at the polling centre at the time as spectators who had voted earlier. He said that the ballot box was not opened, but he did see polling materials that were torn. He said that the chaos only affected one of the two streams at that polling centre. He said that some people fled after the incident, but he could tell who did. He alleged that they were among the persons who had lined up to vote. He also said that part of the crowd disrupted voting, by interfering with the persons who had lined up to vote. He said that there was tension. He said that there was reinforcement by General Service Unit (GSU) personnel, after 45 minutes, which came after the shooting incident.

15. PW5, Boniface Oduor Odunga, was the person who was shot at the Munami polling station incident. He was not a voter at that centre, and he said that he did not vote. He was a *boda boda* operator at the Munami trading centre, who was attracted to the scene after he saw the convoy of vehicles entering the polling centre. He said after disembarking from their vehicles, the people in the group, led by the interested party, and walked to the polling station, and came out with a ballot box and an elections official, telling her to pour out the ballot papers for counting. The police later secured the elections official and the ballot box, and escorted the official and the ballot box back to the polling station. He said he was shot after that, in circumstances that he said were not clear to him. He conceded that he had made a statement at the police station where he had alleged that he had voted at Munami, yet he was not a registered voter there.

16. PW6, Nabwera Daraja Nabii, was an official from the political party on whose ticket the petitioner contested the by-election, and he described himself as the campaign secretariat coordinator for the Matungu Constituency by-election, whose role was to supervise and coordinate poll managers and agents. He was at Bulimbo polling station, where he witnessed what he called an altercation between the interested party, Gladys Wanga, a Member of Parliament who was an agent for the petitioner, and Edwin Sifuna, the Secretary-General of the said party, and some youths. He stated that when he got there the commotion was ongoing. There was security and the police were on the ground. The standoff took 1 hour to resolve, before voting resumed. He stated that he witnessed, at that polling station, as women who had come to vote, walk away. He also said that he was among the people caught up in the chaos at Mwira, on his way to Emakale. His evidence was that their vehicle was blocked by about 10 Toyota Prado vehicles, whose occupants included the interested party, Stanley Livondo and youths. He was pulled out of the vehicle and beaten senseless. The front tyre of their vehicle was shot at. When he tried to run away, he was abducted, and locked up in the vehicle belonging to the interested party, where he remained for the rest of the day. He said that he was unconscious until 5.30 PM of that day. He regained consciousness at a private clinic, from where his transfer to hospital was arranged. He subsequently reported the matter at Matungu Police Station and a PE Form was issued. He stated that the 3<sup>rd</sup> respondent did not feature in those events. He also stated that he lost some money in the process. He also confirmed that he was not a registered voter at Matungu Constituency.

17. PW7, Mercy Akoth, was a voter at Namayiakalo, and she did vote at 9.00 AM, and went home. Her testimony was on events that happened at her home. She said that she was attacked at home by a group led by the interested party, sometime between 10.00 AM and 10.45

AM. She stated that they asked about her father, PW3, pointed a pistol at her, and beat her. They then put her in a vehicle and dropped her just outside the Namayaikalo Primary School gate. She reported the incident at Koyonzo Police Station. She thereafter travelled to Port Victoria, and did not go to hospital until the following day. She said that they also took money from her, which was meant for her college fees. PW8, Julius Kisawayi Mahasi, was a registered voter at Bulonga Polling Station, where he voted, and remained as he was an agent for the petitioner. The interested party and Rashid Echesa visited the polling station. When Rashid Echesa arrived, he caused trouble, and people began to leave. A person he identified as Peter Juma, an official of the 1<sup>st</sup> respondent, went out to establish what was happening, and he was slapped by Rashid Echesa. He said that he, PW7, was chased away from the polling station. He said that some voters left the polling station.

18. PW9, Joseph Makokha Nyangi, was a registered voter at Munami Polling Station, and an agent for the petitioner. He voted. He stated that he was present when the interested party visited the polling station with a crowd of youths, and demanded to know why she was stealing votes in favour of the petitioner. He said that the interested party ordered the youths to remove the officer, whose name he identified as Doreen, from the voting room. There was commotion, some voters left. The official was taken outside, together with a ballot box. He stated that the interested party instructed the youths to grope her. They took her to the field, and sat her down. The witness did not get out of the polling room all this while. He stated that the police later came secured the place, the polls official returned to the polling room and voting resumed, after a break of about 3 hours. He stated that the interested party was at the station for about 30 minutes. He said that many people left without voting. He said that a ballot box was removed from the voting room. It was taken outside, with all its materials. He did not follow it, for he remained in the polling room. He said that it was intact when it was removed. He said the same was later returned to the room, but he could not say what had happened to it when it was taken outside. He put the time the ballot box remained out of the room as between 30 and 40 minutes. He said that he had consented to the voting resuming. He said that voting time was extended to compensate for the time lost due to the commotion.

19. PW10, Nixon Simiyu Waswa, was a registered voter at Namanda Polling Centre, and an agent there for the petitioner. He voted. He testified of how Dr. Boniface Khalwale visited the polling station and assaulted him. He said that Dr. Khalwale demanded to see his personal documents after which he slapped him and told to go and vote, and that that was when he went and cast his ballot. He made a report at Harambee Police Station, and was treated at Kabula Health Centre. He stated that because of the violence, some of the electors in the queue left, although he could not tell their number, nor give their names.

20. PW11, Josephat Kalibo wa Peretio, was a registered voter at Khalaba Polling Station. He voted on the material day. His evidence was that he was meant to be an agent for the petitioner at the Bulimbo Tallying Centre, but he was chased away by the police who were at the centre. He said that the petitioner did not have another agent at the tallying centre. He said he did not know what transpired inside the tallying centre. PW12, Edith Mildred Akinyi, was a registered voter at Mayoni, and she confirmed that she did cast her vote. His evidence related to events outside Mukhweya Polling Station where she was agent for the petitioner. She said she was assaulted outside that polling station after she stepped out to buy food for her colleagues. The individuals who assaulted her were in a pickup vehicle. She sought medical treatment after that. She opined that her assailants believed that she had a lot of money. She confirmed that the incident did not happen at the polling station, and she that she did not know the names of the voters who were intimidated. PW13, Martin Shikuku Bushuru, was the last witness for the petitioner. He was a registered voter for that election, and he did vote that day. He testified that he was with PW12 when she was being assaulted, and he too was assaulted by the same individuals. He also sought medical treatment. He stated that he did not know whether any voters were intimidated and prevented from voting.

21. The case for the respondents opened on 29<sup>th</sup> July 2021, with the 3<sup>rd</sup> respondent on the stand. He stated that after he cast his vote, he went home, where he remained until 5<sup>th</sup> March 2021, when he visited the tallying centre at Bulimbo. He said that he did not witness any violence that day, and he could not however deny or accept the incidents referred to by the witnesses for the petitioner. He also said that no election could be perfectly conducted, and the by-election was no exception. He said that members of his political party, including the interested party, campaigned for him. He said that if there were imperfections with the manner the by-election was conducted, the same did not affect the outcome of the by-election. He said the incident involving Mophat happened outside the polling station, and if at all happened it could not have impact on the election, as the person affected was not even a registered voter for the by-election, nor a resident of the area. He also said that the interested party was not from Matungu. He said as a leader he did not encourage violence.

22. Mildred Naliaka Kwoba was the second witness for the 3<sup>rd</sup> respondent. She was an agent at Bulonga Polling Centre for another candidate. She said she did not see Rashid Echesa assault a polling official, as all she saw was him adjusting the official's face mask. She said that voting time was extended on account of the incident involving Rashid Echesa. Vincent Muyeyi Malala was the third witness for the 3<sup>rd</sup> respondent. He was a registered voter at Namayaikalo Polling Centre, where he voted on the material day. He said that if there had been an incident at the polling centre before he visited the station to vote, he would not have known about it. He said that he did not know PW3, and he did not know his children, nor what might have happened at his home. He said his home was 100 metres from the polling centre, and he did not witness any commotion from his home. Benson Pamba testified as the fourth witness for the 3<sup>rd</sup> respondent. He was a registered voter at Munami Polling Station, where he voted. He was an agent for the 3<sup>rd</sup> respondent. He stated that the petitioner visited the 3<sup>rd</sup> centre, and left. Then the interested party also came to the centre. He spoke to him about the voting, and he also left. He said that there was a time when there was commotion, noise coming from supporters of some of the candidates. According to him, they pushed around, and a ballot box was taken out of the polling station, but was later returned. He said that the presiding officer had sealed the box before it was removed to the outside, and the seal was still intact when the ballot box was returned. He said that he followed the ballot box to where it was taken outside. He said that he did so because his role was to protect the votes. Voting resumed after that, and everyone was contented.

23. The case for the 1<sup>st</sup> and 2<sup>nd</sup> respondents was taken on 30<sup>th</sup> July 2021. The first on the stand was Timothy Namukuru Juma, the presiding officer at Namayaikalo Polling Station. He said he did not recall a convoy of vehicles driving into the centre, nor a rowdy group storming into the polling station. He said that he did not hear any commotion outside the polling centre. Lydia Wesonga Washikomera followed. He was a presiding officer at Namanda Polling Centre. He confirmed that Dr. Khalwale visited the centre and asked for the presiding officer, he identified himself and they had a chat, where the visitor asked about the polling exercise. He briefed him, after which he left. He said he did not witness any confrontation between the visitor and PW10. He said he did not know that Nixon Waswa was an agent for the petitioner, for the records he had had the name of a different person. Peter Juma Okura testified next for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. He was the presiding officer for Bulonga Polling Centre. He stated that he heard some commotion, and when he went to investigate, he found Rashid Echesa and, a candidate accompanying him, harassing the deputy presiding officer, while questioning something about their party agents not being allowed to assist voters. The witness intervened, and informed him about election regulations which required him to leave the centre. Rashid

Echesa then pulled down his face mask, and slapped him. He made a report of the matter to the police, and Rashid Echesa has been charged over the incident. He said that the incident did not scare voters, as voting went on smoothly thereafter. He said that the altercation was between him and Rashid Echesa and did not affect the process. He said that Rashid Echesa left after noting the presence of the media. He said that time for voting was extended for 30 minutes, to compensate for the time lost over that incident.

24. Maureen Naliaka Lusambu was the fourth witness for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. She was that presiding officer for Munami Polling Station stream 1. She said that polling went on well until around 3.00 PM, when she heard noise outside, and a crowd showed up at the door of her polling station. On seeing the crowd, she quickly, according to her, sealed the aperture of the ballot box, to secure the polling materials. The interested party was in the group, he remained at the door, and asked for the presiding officer, and the witness identified herself, and had a chat with him. Persons in the group then walked out of the polling station with the ballot box, and also pushed her out. Vulgar language was used, and she was hassled and manhandled. She telephoned the 2<sup>nd</sup> respondent, who sent reinforcements, calm returned, and polling resumed. She affirmed that during the whole commotion no foreign material entered the ballot box. She also said that the ballot box did not leave the precincts of the polling station. She also stated that only the ballot box was removed from the voting room. She also affirmed that voting time was extended to compensate for the time lost during the disruption. According to her, the disruption did not affect the voting, for electors continued to vote thereafter. She also stated that she did not see the 3<sup>rd</sup> respondent at the polling centre. She said the interested party did not use vulgar language against her, and that he did not take out the ballot box nor voting material outside the polling room. She confirmed that when the ballot box was returned to the voting room, it was intact. The agents for the candidates, polling clerks and election officials were present as witnesses. They held a meeting and it was agreed that voting should resume, and the voting period extended.

25. The 2<sup>nd</sup> respondent was the last witness for himself and the 1<sup>st</sup> respondent. He was the retuning officer for the by-election. He stated that he received reports about the incident at Bulonga Polling Station, where the presiding officer was slapped by Rashid Echesa. He advised that voting continue at the station, after he confirmed that there were no injuries or casualties, and that the election materials were intact. The other report was from Munami Polling Centre, where the presiding officer was hustled and a ballot box forcibly taken out of the voting room. He mobilised for security reinforcements, and calm was restored, and voting resumed after it was confirmed that the ballot box was secure. Voting time was extended, to compensate for the time lost during the disruption. He said that violence at the Matungu Constituency by-election was not unprecedented. He asserted that there was no violence at all. He said that it was not his wish that elections officials were slapped in the course of discharging their duties of conducting the election. He said that he did not receive any reports of violence outside the polling stations. He stated that he confirmed the 3<sup>rd</sup> respondent as the winner, and no complaints were recorded in Form 35A. He said that the incidents at Munami and Bulonga did not affect the election. He stated that he did not deny the tallying agents for the petitioner access to the tallying centre. He said PW11 was not the Chief Agent for the petitioner, he should not have been at the tallying centre and his ejection from the centre was in order.

26. The interested party was the last to testify, before the oral hearings closed. He described himself as the Chief Agent for the party that had sponsored the 3<sup>rd</sup> respondent. He stated that he did not visit Namayiakalo Polling Centre, and that he did not know PW3, or PW7, or their home. He said that he also did not visit Bulonga Polling Centre, and that he did not accompany Rashid Echesa at that centre. He said that he visited Munami Polling Centre. He went straight to the polling room where voting was happening. That was after he had been alerted about anomalies, and he had visited to meet the presiding officer. He met her, spoke to her and left. He said that he did not witness a ballot box being carried or materials being removed from the polling room, and that he did not carry one himself. He said he was not aware of any shooting at Munami Polling Centre, nor that the same involved a bodyguard attached to him. He stated that he was at Bulimbo polling station, which had also served as the tallying centre, but denied having any altercation with Gladys Wanga. He said he did not recall coming into contact with Nabwera and Mandela, but confirmed that his convoy met another convoy as they left Emakale on their way to Matungu Police Station, while the other group was headed in the opposite direction, and the two convoys were unable to bypass each other due to the narrow nature of the road at that stretch. He denied abducting anyone, but confirmed that there was an exchange between both sides, occasioned by the confusion caused by the obstruction. He said that he did not witness any form of violence and did not organise any.

27. At the close of the oral hearings parties were directed to file and serve written submissions which they were to highlight.

28. In his written submissions, the petitioner addresses 11 issues, being: whether the by-election was conducted in accordance with the Constitution; whether there were irregularities and illegalities committed in the conduct of the by-elections, whether the 3<sup>rd</sup> respondent or his agents committed violence, malpractices, misconduct, irregularities, acts of intimidation, improper influence, or other actions of omission that were contrary to the electoral laws, which negated the spirit and intent of a free and fair election; whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents, or their agents, were impartial managers of the by-election and whether they acted in favour of the 3<sup>rd</sup> respondent; whether the pervasive and extensive violence experienced had an impact on the integrity of the by-election; whether commission of violence in any election once proven is sufficient to cause nullification of the results; whether the tallying of the scores from the various polling stations was a true reflection of the results; if there were irregularities and illegalities, what was their influence on the integrity of the election; what was the evidential standard required to prove election violence in an election petition, whether the 3<sup>rd</sup> respondent was validly elected and declared; and what orders, reliefs and consequential declarations ought to be made.

29. On the first issue, the petitioner argued that there ought to be a two-tier test on whether or not the elections were conducted in accordance with the Constitution. The petitioner cites *Rozah Akinyi Buyu vs. Independent Electoral & Boundaries Commission & 3 others* [2014] eKLR, where quantitative and qualitative tests were stated, where one looks at numbers and figures, while the other focuses on the quality of the entire election process, and where the court held that section 83 of the Elections Act required the courts to strive to preserve the outcome of an election as much as possible, but observed that the court will nullify the election conducted in a manner that was inconsistent with the principles laid down by the Constitution, even if the result was not affected by errors, irregularities or malpractices. *Dickson Mwenda Kithinji vs. Gatirau Peter Munya & 2 others* Nyeri CA No. 38 of 2013, *John Okello Nagafwa vs. Independent Electoral & Boundaries Commission & 2 others* Busia EP No. 3 of 2013, *Morgan vs. Simpson* [1974] 3 All ER 722 [1975] 1 QB 151, *Col. Dr. Kizza Besigye vs. Attorney-General* Petition No. 13 of 2009 and others, were also cited where the same principles were stated. It is submitted that an election conducted amidst violence, in the face of intimidation, abductions, stabbing and shooting of voters, is not the one anticipated under the Constitution, and the court should adopt a purposive and progressive interpretation of section 83 of the Elections Act to give effect to the spirit of the Constitution. It is submitted that the by-election was marred by extensive violence, and, therefore, it did not conform to the principles laid down in the Constitution and the law relating to conduct of elections, especially Articles 38, 81, 82, 88

and 163 of the Constitution.

30. On the second issue, it is submitted that the by-election was marred by irregularities and illegalities. It is stated that the petitioner led evidence of 14 witnesses who gave testimonies on gunshots, stab wounds, abductions, home invasions, car jackings, intimidation, threats to families, beatings, disruption of polling, destruction of voting materials, locking out of agents from voting and polling stations, election officials assaulted, ballot box theft, among others. On the third issue, it is submitted that the a number of witnesses, such as Mercy Akoth Muchere, Nabwera Daraja Nabii, Mophat Mandela Shikhuyu, Patrick Augustine Oduya and Julius Kisawayi Mahasi testified on acts of violence targeted at them or other individuals, which it is submitted, were corroborated by the witnesses for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, especially Peter Juma Okuna, Maureen Naliaka Lusambu and John Kiplangat Kirui, and the court is urged to find that the agents of the 3<sup>rd</sup> respondent were responsible for the violence and other acts of irregularity and illegality which negated the spirit of and intent of free and fair elections. On the fourth issue, it is submitted that the beating and harassment of the officials of the 1<sup>st</sup> respondent, took away any possibility of impartiality and neutrality due to fear of further assaults. It is submitted that fear negates free will. On the fifth, sixth and eighth issues, it is submitted that the violence had the overall effect of invalidating the election, and *Muliro vs. Musonye & another* [2008] 2 KLR (EP), are cited to make the point that court ought, where an election is characterised and marred by violence of any kind, to the extent of disenfranchising voters, to consider whether or not the overall effect was such as to make that election a sham.

31. On the ninth issue, relating to burden and standard of proof, *Raila Odinga* [2013] eKLR and *Hassan Mohamed Hassan & another vs. Independent Electoral & Boundaries Commission & 2 others* Garissa EP No. 6 of 2013, are cited to make the point that the burden lies with the petitioner, and that the standard of proof is as in ordinary civil cases. *Ramadhan Seif Kajembe vs. Returning Officer, Jomvu Constituency & 3 others* Mombasa EP No. 10 of 2013 and *Dickson Mwenda Kithinji vs. Gatirau Peter Munya & 2 others*, are cited for the proposition that the court is not bound only to the petitioner's evidence, and must consider the totality of the evidence adduced by all the parties. The petitioner argues that he has presented sufficient evidence to prove all the allegations in the petition to the required proof. On the seventh and eleventh issues, it is submitted that the results of the by-election were not a true reflection of the voting process, and the 3<sup>rd</sup> respondent was not validly elected, and declared as the winner of the contest.

32. The petitioner has also addressed the issue of the interested party, and he frames his issue, as to whether the interested party was able to offset the evidence against him with regard to the violence that was attributed to him in the petition. It is submitted that the interested party played a part in the chaos of that day, and, therefore, he was not able to offset the averments relating to him in the petition.

33. In the end, the court is urged to invalidate the results of the by-election, and to pronounce that the 3<sup>rd</sup> respondent was not validly elected, which made his declaration as winner null and void. The petitioner also prays for the costs of the petition.

34. In their written submissions, the 1<sup>st</sup> and 2<sup>nd</sup> respondents, identified 5 issues for determination, being whether there were any irregularities or non-compliance with the law on conduct of elections, and if so, whether the same had been pleaded as required by law and proven to the required standard; whether the alleged irregularities or non-compliance met the legal threshold to upset the outcome of the election; whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents conducted the election in accordance with the Constitution and the other relevant laws; whether the petitioner had made out a case for grant of the orders sought; and who was to bear the costs.

35. On the first issue, it is submitted that the petition focused on occurrences or incidents at 5 polling stations out of 116 polling stations in the entire constituency. It is submitted that the incidents of violence purported to have been committed at Bulonga, Munami, Emakale, Namanda and Namayiakalo constituted electoral offences if proved, however the petitioner had failed to place before court adequate evidence to prove that the incidents happened to the required standard, failed to provide cogent evidence of any voter who failed to vote or was disenfranchised on account of the alleged incidents, and the said incidents were at best speculative and based on general or vague assertions from the witnesses. It is averred that the petitioner had failed to demonstrate the nexus between the incidents and the outcome of the elections at the affected polling stations and the overall result. It is submitted that the petitioner had failed to establish any irregularities or non-compliance with the law in the conduct of the elections. It is also submitted that the petitioner had not pleaded the allegations of violence as required by law. The decisions in *Mohammed Mahamud Ali Independent Electoral and Boundaries Commission* [2019] eKLR and *Philip Kyalo Kituti vs. IEBC & 2 others* [2018] eKLR are cited to support the submissions on that issue.

36. On the second issue, it is submitted that the foundation of the petition is the claim that there was pervasive, widespread and extensive violence, which affected the integrity and veracity of the election, which meant that the petitioner had made violence the basis for nullification of the election. *Julius Makau Malombe vs. Charity Kaluki Ngilu & 2 others* [2018] eKLR, is cited, for the proposition that proof of violence *per se* cannot vitiate the results of an election unless the same was, *inter alia*, widespread, in terms of extending over a wide area, to a large extent or to a great extent. In that case, it was also said that widespread violence, in an election context, has to be systematic, planned or organised targeted at any person because they have voted in a particular way or to induce them to vote in a particular way. It was noted that widespread violence would lead to nullification or voidance of an election where the winner or returned candidate is directly or indirectly responsible for the violence, and, therefore, it ought to be demonstrated that the perpetrators of the violence were agents of the candidate, and that they engaged in the aged acts with the candidates' consent. *Owino Paul Ongili Babu vs. Francis Wambugu Mureithi & 2 others* [2018] eKLR, is cited, for the argument that it was not enough to find that there was some form of violence and proceed to nullify an election, for it has to be demonstrated that the violence affected not only the voting but also the final result of the election, or that the violence disenfranchised some voters or gave an undue advantage to one of the parties. It is submitted that the violence was attributed on the interested party, and not on the candidate, the 3<sup>rd</sup> respondent, and that there was no proof that the perpetrators of the violence were agents of the 3<sup>rd</sup> respondent.

37. On the third issue, it is submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents conducted the by-election in accordance with the Constitution and other relevant laws, and that the petitioner did not seek to challenge the results declared at any of the polling stations nor the final tally declared by the 2<sup>nd</sup> respondent at the tallying centre. It is further submitted that the allegations of disruptions at Mayoni, Mwira, Emanani, Bulimbo, Namalasire, Khalaba, Itete, Namberekeya and Mukhweya were never reported by the petitioner to the 1<sup>st</sup> and 2<sup>nd</sup> respondent. It is further submitted that the allegations of bribery by PW12 were not substantiated nor proven to the stated required in law, as stated in *Richard Kalembe Ndile & another vs. Patrick Musimba Mweu & 2 others* [2013] eKLR.

38. On the fourth issue, it is submitted that the petitioner had not established his case as his petition is anchored on allegations that are speculative and based on general vague assertions, and which did not meet the test in *Hassan Ali Joho vs. Hothan Nyange & another*, Election Petition (Mombasa) No. 1 of 2005, that allegations in an election petition must be proved by cogent, credible and consistent evidence. It is argued that the petitioner has not provided evidence of the voters who were disenfranchised or who failed to vote on account of the alleged violent incidents. On costs, it is submitted that costs ought to follow the cause.

39. In his written submissions, the 3<sup>rd</sup> respondent has identified 3 issues for determination, namely, whether the by-election was conducted in accordance with the relevant provisions of the law; whether there was breach of the elections process that compromised the integrity and outcome of the results; whether such breach substantially affected the results; and whether the petitioner was entitled to the relief sought. On the first issue, it is submitted that the petitioner had not demonstrated that the election was not conducted in line with Articles 38, 81, 82, 83, 86 and 87 of the Constitution, the Elections Act and the Regulations. He relies on the *Dickson Mwenda Kithinji vs. Gatirau Peter Munya & 2 others* case. On the second issue, that the election was marred by violence, it is submitted that there was no widespread violence across Matungu Constituency, as the petitioner only fingered 6 out of 116 polling stations where he alleged violence occurred. He submits that the evidence merely demonstrated that there were pockets of violence. He cites *Justus Gesito Mugali M'mbaya vs. Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, for the position that alleged violence must be traceable to a person. It is submitted that no nexus was established between the alleged incidents of violence and their impact on the outcome of the elections, and that no evidence was adduced to connect the 3<sup>rd</sup> respondent with the violence. *Sarah Mwangudza Kai vs. Mustafa Idd & 2 others* [2013] eKLR, is cited for the proposition that violence would benefit candidates equally where it was not attributable to either of them. It is further submitted that there was no proof of violent activities, and that election petitions being matters of grave public importance, evidence of violence must be proved by cogent and consistent evidence, as stated in *Justus Gesito Mugali M'mbaya vs. Independent Electoral Boundaries Commission & 2 others*. On the third issue, it is submitted that the election was conducted in accordance with the law, and the court is urged not to interfere with it, based on *Lenno Mwambura Mbagu & another vs. Independent Electoral & Boundaries Commission & another* [2013] eKLR.

40. In his written submissions, the interested party submits largely on the allegations that he perpetuated violence on the polling day, as that was what his joinder to the proceedings limited him to. His submissions dwell on the burden and standard of proof, especially with respect to election offences, for what he is accused of borders on that.

41. The parties made highlights of the points made in their respective written submissions on 26<sup>th</sup> August 2021. I need not recite the arguments made in the highlights, since they were based on the written submissions that I have narrated here above. The only thing from there that I wish to address is with respect to issues that were introduced by the petitioner. He sought to draw my attention to two things; one, a statement that the Chairman of the 1<sup>st</sup> respondent had issued, where he had apparently admitted that there was violence on the day of the by-election, and two, the decision of the Court of Appeal in *Independent Electoral and Boundaries Commission vs. David Ndi and others* Civil Appeal No. E291 of 2021, where the court had declared that the 1<sup>st</sup> respondent did not have quorum to conduct its business. I reserved the two issues for argument on 15<sup>th</sup> September 2021, to allow the parties file and exchange written submissions on the two subjects. They did file written submissions as directed, and they made their oral arguments on the same on 15<sup>th</sup> September 2021.

42. Let me start with the last two issues, for I believe they can be disposed of in a summary manner.

43. The issue of the press statement by the Chairman of the 1<sup>st</sup> respondent is a matter of evidence. It is not something that the court ought to take judicial notice of. If the petitioner desired to have the court consider that press statement, as part of his evidence that the by election was marred by violence, and that the 1<sup>st</sup> respondent, through its Chair, even admitted the fact of that violence, he ought to have sought to place evidence of the making of that press statement before the court as part of his evidence during the oral hearing. He should not have waited to try to sneak the same in through his written submissions. The device of written submissions is designed to merely summarise arguments based on the pleadings, filings and the recorded evidence. No evidence ought to be introduced together with these summaries. The only documents that may be filed simultaneously with these written submissions are copies of the authorities, that is to say statutory and judicial materials, that the parties rely on. I shall, therefore, have no regard whatsoever to the press statement of the Chair of the 1<sup>st</sup> respondent for that reason.

44. The other matter is more substantial. It relates to a decision of a higher court on an issue that is relevant herein, on the status of the 1<sup>st</sup> respondent as at the date of the by-election with respect to capacity or legal competence to conduct that by-election. The Court of Appeal is hierarchically superior to the High Court, and its decisions are binding on the High Court. The Court of Appeal pronounced itself, during the pendency of these proceedings, on whether the 1<sup>st</sup> respondent was quorate to conduct business as at the time it conducted the by-election. It is my position that that decision came during the currency of the instant proceedings, and it touched on the competence of the 1<sup>st</sup> respondent to conduct the by-election, and that had bearing on the petition. The question then is whether that decision had an impact on the by-election and the instant petition.

45. The matter of the competence of the 1<sup>st</sup> respondent to conduct business had been addressed previously by the High Court. In *Katiba Institute & 4 others vs. The Attorney General & 2 others* [2018] eKLR, the court was of the view that the 1<sup>st</sup> respondent was not quorate, and that its decisions would be skewed and unconstitutional if it operated without quorum. In *Isaiah Biwott Kangwony vs. Independent Electoral Boundaries Commission & another* [2018] eKLR, the court held that lack of quorum did not make the 1<sup>st</sup> respondent improperly constituted, as the lack of quorum only affected policy decisions made without requisite numbers. It was stated that the reduction in the number of Commissioners only limited the operations of the 1<sup>st</sup> respondent. The argument was that conduct of by-elections was an administrative matter, that the secretariat of the 1<sup>st</sup> respondent could execute and carry out, with the Commissioners paying a mere oversight role. The decision in *Independent Electoral and Boundaries Commission vs. David Ndi and others* was limited to conduct of the referendum. To that extent, the same cannot possibly be of any application to the petition before me. In any event, the issue was still open to the petitioner to raise in his petition, and I am not persuaded that it should advert to it at the tail end of these proceedings. The petitioner did not need to wait for the Court of Appeal to rule on it for him to raise it. The issue had been out there. Indeed, one wonders why the petitioner even chose to participate in the by-election, if he held the view that the 1<sup>st</sup> respondent had no legal capacity to carry out a by-election in the first place. The decisions, in *Katiba Institute & 4 others vs. The Attorney General & 2 others* [2018] eKLR and *Isaiah Biwott Kangwony vs. Independent Electoral Boundaries Commission & another* [2018] eKLR, were by courts of jurisdiction concurrent to that which I am exercising herein,

and, they, therefore, do not bind me, and it was open to the petitioner to raise the matter, of lack of legal capacity or competence to conduct a by-election, as a substantive issue in his petition, to give the other parties a chance to respond to it, and so that I could consider it on its merits in the end.

46. In the matter before me, the petitioner seeks nullification of the results of the by-election that was conducted on 4<sup>th</sup> March 2021. The circumstances under which an election can be nullified by the court have been stated in a wide body of cases. The starting point should be with the law which governs elections in Kenya, the Election Act. Section 83 of the Election Act, which deals with outcome of election petitions, states that 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 that the election was conducted in accordance with the principles laid down in the Constitution and the relevant written law or that the non-compliance did not affect the result of the election. The purport of that provision, which constitutes the law on nullification of elections, has been stated in a number of cases. *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others* is perhaps the most notorious. In that decision, the Supreme Court stated the applicable principles. One, that an election ought to be conducted substantially in a manner that accords with the principles of the Constitution, as stipulated in Articles 81(e) and 86 of the Constitution. Two, if it is established that an election was conducted substantially in accordance with the principles of the Constitution and the Elections Act, then such election should not be invalidated only on grounds of irregularities. Three, where the irregularities and other errors were of such magnitude as to affect the result, or affected the result, then such election stood to be invalidated. Four, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election. It was underlined, in *Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 others* [2014] eKLR, again by the Supreme Court, that an election should not be nullified except on cogent and ascertained factual premises. However, according to *Morgan vs. Simpson*, if the election is conducted so badly that it is not substantially in accordance with the law as to elections, then the same ought to be vitiated regardless of whether the result is affected or not. This brings in the quality test, which obliges the court to consider the quality of the election, and satisfy itself as to whether it accords with the principles of elections as set out in the Constitution and the relevant electoral laws. The said test was applied in such cases as *Richard Kalembe Ndile & another vs. Patrick Musimba Mweu & 2 others* and *James Omingo Magara vs. Manson Oyongo Nyamweya & 2 others* Kisumu CA No. 8 of 2010. I also bear in mind that proof of an election offence or a single act of bribery against the successful candidate will automatically lead to nullification of the election, according to *Fredrick Otieno Outa vs. Jared Odoyo Okello & 4 others* Supreme Court 2014 and *Karanja Kabage vs. Joseph Kiuna Kariambegu Ng'ang'a & 2 others* Nairobi CA No. 301 of 2013.

47. In addition, I have to be alive to the standard and burden of proof in cases of this nature. The burden of proof is, and remains throughout, on the petitioner, see *Raila Odinga vs. Independent Electoral and Boundaries Commission & 3 others*. It was stated, in *Raila Odinga vs. Independent Electoral and Boundaries Commission & 3 others*, that the standard of proof in election disputes is higher than in civil standard of balance of probabilities, but lower than the criminal standard of proof beyond reasonable doubt. One exception to that general rule is where commission of election offence is alleged, according to *Raila Odinga vs. Independent Electoral and Boundaries Commission & 3 others*, the standard of proof would go higher, to proof beyond reasonable grounds, because the allegations turn on criminal activities.

48. The petitioner herein has alleged election irregularities, in the sense of pleading that the by-election was badly conducted, administered and managed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, to the extent that it failed to comply with the principles of the Constitution. It is pleaded that there was massive, systemic, widespread and deliberate non-compliance with the Constitution and the law. It is also pleaded that the nature and enormous extent of the non-compliances and irregularities significantly affected the results to the extent that the 1<sup>st</sup> respondent could not accurately and verifiably determine the number of votes garnered by any of the candidates. It is also pleaded that the tallying and results announced by the 2<sup>nd</sup> respondent were contrived, illegal and against the law and regulations that govern elections, and were calculated to favour the 3<sup>rd</sup> respondent.

49. The burden of proof was on the petitioner to establish these allegations of irregularities, non-compliances and illegalities on the part of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, in an effort to demonstrate that they conducted the election so badly, that its quality was so poor, that it did not measure up to the standard expected of a free and fair election. Other than these general grounds, the petitioner did not particularise the specific irregularities or non-compliances or illegalities that he had in mind, relating to the way the election officials handled election materials during the polling, the administrative management of election documents, the way they treated electors during that process, and the way the counting and tallying of votes was handled. It is with respect to these processes that the question of malpractices, irregularities, non-compliances or illegalities arise. The only pleadings, in the petition, that are close to specifics, relate to accredited agents being denied access to polling stations and the tallying centre, and being denied a chance to witness or participate in the opening of ballot boxes or to the voting process and the counting of votes. It is also pleaded that the agents of the petitioner were ejected from the tallying centre, and that during tallying a number of Forms 35A were not signed by party agents and no explanations were offered. Although it is pleaded that polling agents were denied entry to polling stations, the petitioner has not cited the polling agents who were denied entry and to which polling stations. There is mention of only one agent, who was not even a polling agent, PW11, it is later pleaded that he was supposed to be a tallying agent. It is also not specified by name the polling agents who were denied a chance to witness the opening of ballot boxes or the voting process, and the particular polling centres where that happened. Even with respect to tallying, there is mention of only one of the agents of the petitioner who was allegedly ejected from the tallying centre. It is alleged that Forms 35 A were not signed, yet there is no specific mention of the polling stations whose forms were not signed by party agents. As stated above, the burden of proof is on the petitioner throughout, and the standard of proof is slightly higher than balance of probability and lower than beyond reasonable doubt. To attain proof to those standards, the petitioner was obliged to plead material which would have assisted him establish a case that the election was badly managed, and marred by massive irregularities, as alleged, by providing specifics of where these massive irregularities happened. The respondents ought not be condemned on such serious allegations where no particularity is provided. Inadequate pleading, no doubt, correlates with inadequate proof, for proof of facts is dependent on the frame of the pleadings.

50. Let me now advert to the matter of proof. Majority the persons that the petitioner presented as witnesses were his alleged agents. None of those who claimed to have been his polling agents testified to being denied access to the polling centres and stations. None of them testified to being denied a chance to participate in the opening of ballot boxes, or to witness the exercise of actual voting, or the sealing of boxes, or counting of the ballots. Indeed, most of them testified that they were able to access the polling stations early, and that they were in fact among the very first persons to cast ballots, and that they remained within the polling centres throughout, unless they left for reasons that had nothing to do with the officials of the 1<sup>st</sup> respondent. None of the polling agents called by the petitioner talked about any election malpractices, irregularities and non-compliances by the 1<sup>st</sup> respondent or its agents. From what was placed on record by way of evidence, I am unable to find proof of any irregularities, non-compliance or illegalities committed by the agents of the 1<sup>st</sup> respondent at the polling

stations as alleged.

51. With respect to the tallying centre, PW11 testified that he was a tallying agent for the petitioner, but that he was ejected from the tallying centre. Curiously, it is not pleaded that the petitioner was not represented during the tallying exercise at Bulimbo. He did not complain that the persons who signed the Form 35B on record were not his agents. When the 2<sup>nd</sup> respondent testified, he stated that the candidates were represented at the tallying centre by a chief and deputy chief agent, and stated that PW11 was not among them, and that the petitioner was represented by his chief and deputy tallying agents. His testimony on this was not seriously tested at cross-examination.

52. On Forms 35As not being signed by party agents, I reiterate that the petitioner has not specifically pleaded on the particular polling stations whose forms were not so signed. When the petitioner testified, he did not pinpoint any polling station, and say that his agents did not sign the relevant Form 35A. When the witnesses for the 1<sup>st</sup> respondent were presented for cross-examination, they were not tested on the matter of the execution of Forms 35As by the agents of the petitioner. They were not confronted with any particular forms, and asked to explain any discrepancies in them. Overall, they faced no challenge at the trial on the manner in which they conducted the by-election. The petition was not about numbers and figures, and the petitioner did not talk about tallying and results being contrived. None of the witnesses for the 1<sup>st</sup> respondent was challenged about the numbers, to demonstrate that the same were contrived to favour the 3<sup>rd</sup> respondent.

53. Overall, I have not found any material upon which it can be concluded that the by-election was badly conducted or administered or managed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, or that there was massive, systemic, widespread and deliberate non-compliance. The conclusion that can safely be drawn is that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did conduct the by-election substantially in compliance with the Constitution and the written law, as it has not been demonstrated to the contrary by the petitioner. He was obliged to prove to the contrary, but he has woefully failed to.

54. The case for the petitioner is built largely around election violence and intimidation. Indeed, even the grounds around irregularities are founded on this, that the election was affected by such a level of violence, that it cannot be said to have been free and fair. Evidence was led on incidents at Munami, Namayiakalo, Mukhweya, Bulonga and Namamba polling stations. At Bulonga and Munami, officials of the 1<sup>st</sup> respondent, who were conducting the election, were harassed and assaulted by individuals who had stormed the polling centres. Significantly, at Munami, a ballot box was interfered with, by being removed from the polling room by rowdy youths. There were altercations involving agents of the petitioner and other individuals. In the melee outside the polling station a person was shot. At Mwira, polls teams affiliated to the petitioner and the 3<sup>rd</sup> respondent had an altercation, away from any polling centre. The Namayiakalo incident occurred outside the polling centre, and involved a member of the family of an agent of the petitioner. At Namanda, an agent of the petitioner was slapped by a person who was not affiliated to the 3<sup>rd</sup> respondent. At Mukhweya, an agent was assaulted and robbed by individuals, allegedly affiliated to the interested party.

55. The petitioner argues that these acts of violence were geared towards intimidating voters. The respondents have argued that they had no impact on the election. Secondly, the petitioner argues that the violence was so widespread that it made nonsense of the whole exercise, and was testimony to the fact that the by-election was badly conducted.

56. Let me first deal with the first aspect, that the violence was geared towards intimidating voters. This argument is being made on the basis of the rule that an election is to be vitiated only where the breach or mistake affects the result. The submission appears to be that the violence that the petitioner sought to prove was intended to intimidate voters, and that it did intimidate voters, as it was alleged that in some of the incidents some persons who were in the voting queue abandoned the queue and went away. The submission is that the said violence, to the extent that it intimidated voters, affected the final outcome, and on that basis the election ought to be nullified. The majority of the persons that the petitioner presented as witnesses of the violence were his agents. They had all voted, except for three, PW2 and PW6, who were not registered voters nor residents of Matungu Constituency, and PW5, who was not a registered voter at the station where he got shot. The fact that the majority of these witnesses voted would mean that they were not good testimony to intimidation of voters. They were not intimidated, they voted. Secondly, their testimonies did not speak to the violence being directed at voters, the persons who were on the line queuing, waiting to vote, or outside the polling centres on their way to the polling station. The altercations that they testified to had nothing to do with voters. PW2 and PW6 were not registered voters in the subject constituency, they did not join any queue of electors. The altercation that allegedly happened between them and the interested party, and his team, was on a road, way away from any polling centre. The interested party was, himself, not a registered voter in the constituency. It was, clearly, fracas that happened as between two teams of two opposing sides, and none of the two groups demonstrated that the altercation had anything to do with voters, or it involved voters or potential voters, or that as a result some electors shied away from voting. PW3 and PW7, had both voted, before the incident they testified on happened, which apparently, did not touch on anyone else, apart from themselves. PW4 had voted and left the station by the time the incident he described happened. According to him, the group involved was unhappy that their agents were not being allowed access. The interested party and the presiding officer at the station confirmed that they conferred over the voting process. PW4 did not talk about the electors on the line being targeted by the group, for they dealt directly with the presiding officer. PW5 was injured in the melee at Munami, which PW4 described. He was not a registered voter at the station, he was just a spectator who followed the leaders who had visited the station. He did not talk about the group targeting voters. He did not vote at the by-election. He was registered at Namberekeya. He did not present himself at his polling station to vote. No one had stopped him from voting. He should not have been within the grounds of Munami Primary School at all, and, it can safely be said, that he was among the persons causing trouble at that polling centre. PW9 was also at Munami when these events unfolded. He did not state that the group was targeting voters. PW10 was, allegedly, in an altercation with Dr. Khalwale, who was not affiliated to the 3<sup>rd</sup> respondent. Dr. Khalwale did not prevent PW10 from voting. Indeed, according to him, it was Dr. Khalwale who prompted him to vote, after he called for his identification documents and realised that he had not voted, slapped him and told him to go and vote. PW11 voted. His case was that he was denied entry to a tallying centre. PW12 and 13 had both voted, before they were involved in an altercation with individuals outside a polling station other than the one where they cast their ballots. According to them, their assailants believed that they had a lot of money, being agents for a candidate, and, therefore, their motive was theft of money, nothing to do with voting.

57. From the incidents discussed above, none of the witnesses were stopped from voting due to the circumstances in the incidents that they described. None of them testified as to the fact that the incidents had anything to do with anyone forcing them or others to vote in a particular way, or to prevent them or others from voting. None of the incidents were directed or targeted at any of the persons who were lining up to

vote, or on the way to the voting centre. I cannot, therefore, find nor hold that these incidents in any way amounted to voter intimidation, or resulted in voter intimidation and suppression. Significantly, the petitioner did not present even a single witness to testify to the fact of being intimidated in order not to vote for him or forced to vote for someone else, or turned away from voting, or prevented from accessing the voting centres. No witness was presented, who testified, that due to the incidents narrated by the witnesses presented, he or she shied away from the polling out of fear for their own security. There is, therefore, no evidence of voter intimidation, nor evidence that these incidents affected the final outcome in any way.

58. The second aspect is the submission that the violence was widespread or pervasive. The subject constituency has 116 polling stations. Out of the 116, the petitioner presented evidence about polls officials being harassed or assaulted in 2 of them. Indeed, the incidents that the petitioner led evidence on which happened within a polling station were just 2 out of 116. The rest of the incidents happened outside or away from polling centres. It cannot, therefore, be said that the violence was widespread or pervasive as to have significantly affected the outcome of the polls throughout the constituency. In any event, the petitioner has not set out to demonstrate that in his submissions. The mere fact that violence happened in one or two polling stations, which was contained, and after which normal voting resumed, cannot be a basis for vitiating an election, that was otherwise largely conducted in compliance with the law.

59. Of course, if, from the evidence on the violence, it is established that the election offences were committed by the 3<sup>rd</sup> respondent, that would then be adequate to nullify his win. None of the witnesses that the petitioner presented mentioned the 3<sup>rd</sup> respondent in all the occurrences they testified on. Some did not even know him in person. The principal actors in those events were said to be the interested party, Rashid Echesa and Dr. Khalwale. The interested party and the 3<sup>rd</sup> respondent belonged to the same political party, and the interested party described himself as working for the interest of the party, and less as an agent of the 3<sup>rd</sup> respondent. The petitioner did not place any material before me, that suggested that the 3<sup>rd</sup> respondent was complicit in the acts of violence, pleaded in the petition and the testified upon at the oral hearing. Whereas the interested party has been charged with respect to those activities, the 3<sup>rd</sup> respondent has not. No evidence was placed before me, at all, pointing to commission of any election offence or offences by the 3<sup>rd</sup> respondent. Rashid Echesa was not in the same camp with the 3<sup>rd</sup> respondent, neither was Dr Khalwale.

60. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were accused of not taking any action after their officials, Timothy Namukuru Juma and Maureen Naliaka Lusambu, were assaulted while discharging their duties. The 2<sup>nd</sup> respondent testified that he was in contact with these officials throughout, and that he consulted with them before decisions were made for voting to resume, and for voting time to be extended. Of course, regarding the personal physical attacks on them, those were acts of criminality, and the agencies of the law responsible took action, for criminal proceedings were initiated against those that were involved. That is the most that the 1<sup>st</sup> and 2<sup>nd</sup> respondents could do; report to the agencies responsible, and let the law take its course.

61. With regard to violence, therefore, I do not find anything pointing towards the acts alleged having been widespread or the pervasive, or having the effect of rendering the by-election, conducted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, null and void.

62. Overall, it is my finding that the evidence presented by the petitioner falls short of establishing that the by-election conducted on 4<sup>th</sup> March 2021, for Matungu Constituency parliamentary seat, was not in compliance with the Constitution and other relevant law, to warrant the said by-election being nullified. Consequently, I find that the petitioner has not proved his case to the required standard, and I hereby dismiss the said petition, dated 28<sup>th</sup> March 2021, with costs. The costs of the petition shall be capped at Kshs. 3, 000, 000.00, to be shared at the ratio of 2:1, as between the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the 3<sup>rd</sup> respondent. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**W. MUSYOKA**

**JUDGE**