



**REPUBLIC OF KENYA**

**IN THE HIGH COURT KENYA AT NAIROBI**

**(CORAM: R MWONGO, PJ.)**

**ELECTION PETITIONS NO. 13 & 16 OF 2017 (AS CONSOLIDATED)**

**ABDIRAHMAN ADAN ABDIKADIR.....1<sup>ST</sup> PETITIONER**

**ADOW MOHAMED ABIKAR.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**COUNTY RETURNING OFFICER.....2<sup>ND</sup> RESPONDENT**

**ABDULLAHI IBRAHIM ALI.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction and Background**

1. Cradled between the counties of Mandera, Marsabit, Isiolo and Garissa, and bordering the nations of Somalia and Ethiopia, lies Wajir County – the third largest county in Kenya, after Turkana and Marsabit counties. At 56,686 square kilometres, it is eighty times the size of Nairobi County, but has just one fifth (661,941) of Nairobi’s population. According to the 2009 Kenya national population survey, the average population density of Wajir is just under 12 people per square kilometer; which means that every 21 acres is generally occupied by one resident.

2. Wajir is considered to be one of the Kenya’s formerly marginalized regions, and has a tormented history of shock and awe. Attacked by the Italians during the Second World War; saddled under emergency rule during the “Shifita War” of 1963-1967 –when secessionists in the so-called Northern Frontier District sought to form a Greater Somalia – and whose guns died down only in the 1970s. It suffered the Wagalla massacre under the hands of state security in February 1984 when about five hundred people lost their lives – some memorialized by the Monument at Korahey grounds; it remains exposed to Al Shaabab activities. Wajir town is the capital of the County.

3. In this vast hot and generally arid, drought-prone County, the general election of 8<sup>th</sup> August, 2017, was held in a difficult terrain, but with great hope under the 2010 Constitution. A total of 434 polling stations were gazetted in this large county comprising of the six constituencies of Wajir North, Wajir South, Wajir East, Wajir West, Tarbaj and Eldas that form Wajir County. The registered voters ranged from just 6 voters at Harawale Water Point polling centre to 663 voters at Ahmed Liban polling station.

4. Nine candidates contested the Wajir Senatorial election. On 10<sup>th</sup> August, 2017, the 1<sup>st</sup> respondent, the IEBC, declared Ali Abdullahi Ibrahim of Jubilee Party the winner. The result announced placed the candidates as follows:

<i>Name</i>	<i>Party</i>	<i>Votes</i>
Ali Abdullahi Ibrahim	Jubilee Party	35,393
Abikar Adow Mohamed	Kenya African National Union	26,769
Abdikadir Abdirahman Adan	Orange Democratic Movement	19,096
Ali Mahat Salat	SAFINA Party	18,501
Barre Hussein Abdi	Amani National Congress	16,745
Keynan Warsame Hussein	Economic Freedom Party	946
Baraka Abdia Hassan	Justice and Freedom Party	884
MohamedAbdi Khalif	The Labour Party of Kenya	601
Hussein Adan Noor	Wiper Democratic Movement Kenya	425

5. Abikar Adow Mohamed of ODM Party and Abdirahman Adan Abdikadir of KANU, the top two losers, by margins of 8,624 votes and 16,297 votes, respectively, were dissatisfied with the conduct and outcome of the elections. They thus filed separate petitions on 5<sup>th</sup> and 6<sup>th</sup> September, 2018. The respondents filed their responses but the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not simultaneously file their affidavits.

6. The petitioners' prayers ultimately are, inter alia, that the court should declare that the 3<sup>rd</sup> respondent was not validly elected as the Senator of Wajir County, and that the 1<sup>st</sup> respondent be ordered to conduct a fresh election in strict conformity with the Constitution and the Elections Act.

7. At the pre-trial conference held on 12<sup>th</sup> October, 2017, the parties agreed on the road map for the proceedings. They also consented to the consolidation of the two petitions, with petition 13 being designated as the lead file. The parties were re-designated with Abdirahman Adan Abikar and Adow Mohamed Abikar being the 1<sup>st</sup> and 2<sup>nd</sup> petitioners, respectively. IEBC and the County Returning Officer were designated as the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, and Abdullahi Ibrahim Ali, the winner, was designated as the 3<sup>rd</sup> respondent. Agreement was also reached on the hearing of interlocutory applications filed or to be filed by the parties. A summary of the applications filed and determined follows.

8. The first contested application was filed by the 1<sup>st</sup> Petitioner as an amended notice of motion on 16<sup>th</sup> October, 2017, seeking preservation and production of a broad range of election materials. These included ballot boxes, KIEMS kits and electronic data, polling day diaries, various forms, books for purposes of scrutiny, and for audit and/or inspection of all the logs, servers hosted by or on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. They also sought orders for scrutiny and audit of the system and technology used by the 1<sup>st</sup> Respondent in the Wajir Senator Elections including but not limited to the specific GPRS locations of each KIEMS Kit used during the Senate Elections for Wajir County.

9. This application was determined by a Ruling on Application No 1 on 9<sup>th</sup> November, 2017 as follows: the court ordered:

*1. That the IEBC do produce the original Forms 38A, B and C no later than two days before the date fixed for hearing of this petition.*

2. *With regard to the request for KIEMS kit, SD Cards containing the KIEMS information shall be availed to the Registrar within 24 hours upon the making of an order of the court when evidence is adduced in court, respectively in relation to any specific polling station necessitating the reading, audit or access to the SD Card(s) for purposes of obtaining information on the Register of Voters; the Biometric voter registration; Electronic voter identification; polling station information that is contained in the SD Cards and for such other purpose that the court may specify during the proceedings.*

3. *The Court retains the right and discretion at any time during the adduction of evidence to call for any election materials which would aid the court in reaching a just decision in this matter*

10. The second contested application was by the 1<sup>st</sup> and 2<sup>nd</sup> respondents dated 5<sup>th</sup> October, 2017. It sought leave to file additional witness affidavits. The court allowed the application in its Ruling on Application No 4 on 9<sup>th</sup> November, 2017.

11. Based on the court's ruling in Application No 4 allowing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents leave to file additional witness affidavits, the 1<sup>st</sup> Petitioner sought and was granted leave to file affidavits in response to those of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The petitioner filed five affidavits on 16<sup>th</sup> November, 2017, deposed by the following persons: Abdikani Abdirahman Yahya Mohamed Abdi, Yusuf Abdisalan, Mohamed Mohamed Ahmed and Hamdi Muktar Elow. The 1<sup>st</sup> respondent objected to the filing of the said affidavits. In its Ruling No 5 the court determined as follows:

*a. the 1<sup>st</sup> Petitioner's replying affidavits for Yahya Mohamed Abdi, Yusuf Abdisalan, Mohamed Mohamed Ahmed, and Hamdi Muktar Elow are hereby admitted;*

*b. The 1<sup>st</sup> Petitioner's affidavit for Abdikani Abdirahman is disallowed.*

*c. The 1<sup>st</sup> Petitioner be and is hereby deemed to be the person who exhibited pages 1-137 of the 1<sup>st</sup> Petitioner's Bundle of Documents.*

12. The court also gave directions on the dates, times, venue and mode of execution of the orders given. The hearing was fixed for 20<sup>th</sup> to 23<sup>rd</sup> November, 2017. The 1<sup>st</sup> petitioner was represented by: Mr Abdulhakim, Ms Otieno and later Prof T Ojienda and the 2<sup>nd</sup> petitioner was represented by Mr Maobe and Mr Ombati. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by: Mr H Omiti, Mr Kubai and Mr Malenya, while the 3<sup>rd</sup> respondent was represented by Mr Issa, Ms Lipo, Ms Agwata and Mr Hussein.

13. On the day fixed for the hearing, the 1<sup>st</sup> petitioner introduced Prof Ojienda as the new counsel to lead the 1<sup>st</sup> petitioner's case. Immediately, Prof Ojienda sought a five day adjournment of the trial to enable him to take a grasp of his case. The court firmly declined and granted adjournment only until that afternoon, the costs of the thrown away time being for the 1<sup>st</sup> petitioner to bear.

### **Grounds of the Petitions**

14. The 1<sup>st</sup> petitioner's grounds for impugning the election are as follows:

***"a. That the electoral process was not conducted in a free, fair, transparent verifiable and accountable manner contrary to Articles 10, 81 and 86 of the Constitution;***

***b. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents engaged in intimidation of the petitioner's agents;***

***c. That the voting, counting, tabulation, collation and declaration of results was conducted in breach of the principles of a free, fair, transparent and credible election as decreed by Articles 81 and 86 of the Constitution;***

***d. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contravened, impinged and violated the petitioner's right to access to information decreed and protected under Article 35(1) of the Constitution of Kenya 2010 contrary to the principles of a free, fair, transparent, credible election decreed by Articles 81 and 86 of the Constitution;***

***e. The 1<sup>st</sup> and 2<sup>nd</sup> respondent failed to transmit the election results in the manner prescribed by law; and***

***f. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents engaged in manifold electoral illegalities, offences rendering the entire electoral process null, invalid and void."***

15. On his part, the 2<sup>nd</sup> petitioner's complaints were under the following heads:

***a. Irregular, unprocedural and unlawful assisted voting;***

***b. Incorrect and illegal tallying;***

***c. Verifiability of the results;***

***d. Voting, counting and tabulation of results reflecting the discrepancies;***

***e. Making false entries;***

***f. Striking coincidences and incredible figures/ vote result padding/manipulation;***

16. These are the facts which the 1<sup>st</sup> and 2<sup>nd</sup> petitioners set out to prove, and which will form the headline subjects for the analysis and discussion later on.

### **The Hearing**

17. The hearing of the petition on its merits took place on November 20<sup>th</sup> to 23<sup>rd</sup> November, 2017. The 1<sup>st</sup> Petitioner gave evidence and called five other witnesses. The 2<sup>nd</sup> petitioner gave evidence, and called one other witness. For the 1<sup>st</sup> and 2<sup>nd</sup> respondents' case, a total of 17 witnesses gave evidence, and the 3<sup>rd</sup> respondent testified for himself. By consent of the parties, the 2<sup>nd</sup> petitioner's case was heard first followed by the 1<sup>st</sup> petitioner and the respondents in the order in which they are listed.

18. At close of the hearing and during issuance of consent directions on the filing of closing submissions, the 1<sup>st</sup> petitioner sought to file an application for scrutiny. In Ruling No 6 issued on 5<sup>th</sup> December, 2017, the court ordered as follows:

***" 2. In respect of the following seven (7) Polling stations, namely, Basineja Centre 1 of 1; Bute Secondary School 1 of 1; Kajaja Two Primary School 1 of 1; Batalu Primary School 1 of 1 and Unsile Water Point 1 of 2 and 2 of 2, it is ordered as follows:***

***d. That the SD Cards and Ballot boxes for these polling stations where alterations of results occurred will be produced to the court within 24 hours.***

***e. Read – only access to SD Cards will be provided to the parties in respect of the number of votes cast for each candidate, and***

***f. A facsimile of the candidate vote tally shall be provided to the court and entered into a template in the format of Form 38A under Regulation 79 (2)(b) for senator election all of which shall be prepared under court's direction.***

*g. Ballot boxes for the aforesaid stations shall be availed to the court within 24 hours and votes of the candidates shall be similarly counted and tallied under the court's direction.*

*2. In respect of Gunana Primary Polling station 2 and Johar Primary Polling station where the lack of stamping of Form 38A was asserted, the court in exercise of its discretion orders that:*

*h. The ballot boxes to be produced to the court within 24 hours, and*

*i. The votes therein shall be counted and recorded in presence of the parties and under court's directions”*

19. The scrutiny ordered by the court of the specified Ballot boxes and SD Cards of the KIEMS Kit took place on 7<sup>th</sup> and 13<sup>th</sup> December, 2017. After close of hearing, the parties highlighted their written submissions on 11<sup>th</sup> December, 2017,

### **The Legal Framework Applicable in the Petitions**

20. In this consolidated case, all parties made detailed and voluminous submissions on the applicable law in election petitions and cited numerous authorities. A summary of the applicable principles is set out hereunder. It is not my intention to repeat the submissions or reiterate the authorities cited, but will instead briefly summarise the law as I understand it.

21. The starting point in the discussion on electoral law is **Article 38** of the **Constitution** That provision establishes the political rights enjoyed by all citizens and concretises the ultimate expression of their will through the vehicle of elections. The Article provides as follows:

*“38(1) Every citizen is free to make political choices, which includes the right—*

*(a) to form, or participate in forming, a political party;*

*(b) to participate in the activities of, or recruit members for, a political party; or*

*(c) to campaign for a political party or cause.*

*(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—*

*(a) any elective public body or office established under this Constitution; or*

*(b) any office of any political party of which the citizen is a member.*

*(3) 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.”*

Universal suffrage is thus the fundamental underpinning and starting point of any discussion on the electoral process.

22. To achieve such universal suffrage through the electoral process, **Article 81** of the **Constitution**

makes provision for general principles for the system of elections as follows:

***“81. The electoral system shall comply with the following principles—***

***(a) freedom of citizens to exercise their political rights under Article 38;***

***(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;***

***(c) fair representation of persons with disabilities;***

***(d) universal suffrage based on the aspiration for fair representation and equality of vote; and***

***(e) free and fair elections, which are—***

***(i) by secret ballot;***

***(ii) free from violence, intimidation, improper influence or corruption;***

***(iii) conducted by an independent body;***

***(iv) transparent; and***

***(v) administered in an impartial, neutral, efficient, accurate and accountable manner.”***

23. In terms of enabling the citizens to enjoy their right to make those political choices and in particular their right to vote, the Independent Electoral and Boundaries Commission is required by the Constitution to ensure certain minimum standards for voting. These minimum standards are provided for in **Article 86** which makes provision for the manner and method of voting, in the following terms:

***“86. At every election, the Independent Electoral and Boundaries Commission shall ensure that***

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

***(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;***

***(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and***

***(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”***

24. Since the Constitution anticipates that the exercise of universal suffrage may face challenges, it provides for electoral justice through electoral dispute resolution under **Article 87**. That Article obliges Parliament to make legislation to establish mechanisms for the timely resolution of electoral disputes. The following statutes and regulation were therefore enacted by Parliament and are directly relevant in this dispute: namely, the **Elections Act, 2011**, the **Elections (General) Regulations, 2012** (as amended in 2017) and the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**. In this judgment, I will refer to the latter two as the **Elections Regulations** and the **Elections Petitions Rules**.

25. On their part, the courts are required to discharge their role in electoral dispute resolution guided by the principles values, requirements and standards set out in the Constitution, the various statutes and regulations and guided also by precedent. They are required to appraise the validity of challenges to

elections from both qualitative and quantitative perspectives and to determine whether the impugned election was free and fair.

### ***Burden of Proof in Electoral Dispute resolution***

26. It is now well settled that elections disputes are a special category of civil suit. It is also well settled that they are required to be determined expeditiously within strict statutory timelines, and in accordance with their own regimen of electoral law and procedures.

27. Nevertheless, the law of evidence applies to electoral disputes and, in particular, there is the unique appreciation of the burden and standard of proof which is discussed hereunder.

28. It must be remembered that the IEBC is the state organ which has the responsibility of developing and maintaining all materials used in elections, and is thus in the unique position of an entity that has access to all elections materials which a challenging party may not have. Nevertheless the question of the who bears the burden of proof in electoral cases was settled in the case of **Raila Odinga and 5 Others v Independent Electoral and Boundaries Commission & 3 others, Supreme Court Election Petition No. 5 of 2013, [2013]eKLR**. There, the Supreme Court held, inter alia, that the petitioner bears the burden of proof in the following words:

***“ A petition seeking to nullify an election should clearly and decisively demonstrate that the conduct of the election was so devoid of merits and so distorted as not to reflect the expression of the peoples’ electoral intent and that the evidence should disclose profound irregularities in the management of the electoral process,”***

And further that:

***“Where a party alleges non-conformity with electoral law, the petitioner must not only prove that there had been non-compliance with the law but that such failure and non-compliance did affect the validity of an election. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies Ominia Praesumuntur rite solemniter esse acta (All acts are presumed to have been done, rightly and regularly). So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the presumption of the law “***

29. The Supreme Court, in the **Raila case** (supra) also gave the following guidance with regard to the standard of proof in elections petitions:

***“...The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt –save that this would not affect the normal standards where criminal charges linked to an election are in question...”***

30. I have tried as much as possible to identify what this level of proof (above balance of probabilities but below beyond reasonable doubt) looks like. What does that level of proof look like to an ordinary man? In my view, if a reasonable man in the street were asked to quantify it, he would state something along these lines: if proof on balance of probabilities is something like proof at the level of fifty:fifty, and beyond reasonable doubt is something in the region of sixty-five: (x) plus, then it figures that proof in between the two levels would be something in the region of fifty-five: forty five to under sixty-five: thirty five. In other words, to achieve proof in an election case, the petitioner would have to satisfy the court to at least fifty five to sixty five percent certainty concerning the strength of their evidence.

31. It is to that standard of proof that every allegation of the petitioner in this case must be subjected for the petitioner to be able to disprove the legal presumption that the public authority acted rightly and regularly. The legal presumption that all acts of a public body are deemed regular is reiterated in **Raila 1** above.

32. So, it is the petitioner's burden to establish, not only that there were irregularities, illegalities, violations, omissions and malpractices in the conduct of the Ruaraka parliamentary election, but that these affected the outcome or result of the election. As earlier stated, the proof must be at the level of beyond a balance of probabilities but not above the level beyond reasonable doubt. It must be proved that these alleged irregularities, illegalities, malpractices and violations did in fact affect the result in such a manner that they did not reflect the will of the people. Only upon establishing the foregoing to the satisfaction of the court, will the evidentiary burden shift to the respondents to establish the contrary.

33. The burden of proof may shift from the petitioner to the respondent as held by the Supreme Court in **Raila 1**. There, the court held as follows:

*“[195] There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.”*

34. It is also well settled that the court's role is not to arrogate itself the power to substitute its will for that of the people. And if the people's will is clear and evident, the court's role is to give effect to that expression.

35. In the English case of **Morgan & Another v Simpson & Another [1974] 3 ALL E.R 722**, the court enunciated the principle that where breaches of the election rules affect the results, then the election could be annulled. There, the court held as follows:-

*“An election court was required to find an election invalid:*

*(a) if irregularities in the conduct of elections had been such that it could not be said that the elections had been conducted as to be substantially in accordance with the law as to the election; or*

*(b) if the irregularities had affected the results.*

....

*Accordingly, where breaches of the election rules, though trivial, had affected the results, that, by itself, was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected.”*

36. **Section 83** of the **Elections Act** provides for this state of the law, as described in **Morgan v Simpson**. It indicates how the court is to treat non-compliance with the law specifically in election petitions in the following manner:

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

37. In **Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission Supreme Court Election Pet No 1 2017 [2017] eKLR** the Supreme Court of Kenya analysed **Section 83** of the **Elections Act** in detail. In its interpretation of that provision, the court determined as follows::

*“[211] In our respectful view, the two limbs of Section 83 of the Elections Act should be applied*

*disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election”*

38. In summary, and as I stated in the petition of **Elizabeth Ongoro v Tom Joseph Kajwang’ and IEBC and Another [2017] eKLR** there are two disparate bases for annulment of an election:

*“39. First, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in the Constitution as well as other written law on elections, will on that ground alone, void an election;*

*Second, if a petitioner proves that the election was fraught with irregularities or illegalities that affected the result of the election he will also be able to void the election even though it is shown to have been conducted substantially in accordance with the principles laid down in the Constitution as well as other written electoral law.”*

39. I now turn to consider the parties’ cases.

## **The Parties’ Cases**

### *Petitioners’ Case*

40. Both Petitioners contest the return of the 3<sup>rd</sup> Respondent as the duly elected member of the Parliament as a member of the Senate for Wajir County. It is the Petitioners’ case that the election was not conducted in a free, fair, transparent, verifiable and accountable manner contrary to **Articles 10, 81 and 86 of the Constitution**. In fact, the 1<sup>st</sup> Petitioner contends that the voting, counting, tabulation, collation and declaration of results did not conform to the law as required.

41. The petitioners also state that the elections were marred by irregularities which constituted of: stuffing of votes, transmission of false results, exaggeration of voter turn-outs, irregular and unlawful assisted voting, intimidation of the Petitioner’s agents by declining to allow them to sign or give them copies of the Forms 38A, B and C; and unlawful denial of entry into the polling stations or ejection of political party agents from the polling stations.

42. The Petitioners further that there were massive irregularities as pertains the Forms 38A’s. They contend that some forms were not stamped; that they had altered results; that there were forms used that do not bear any security features contrary to assurances by the 1<sup>st</sup> Respondent; that there were forms unsigned by both the Presiding Officer and the Deputy Presiding Officer; forms unsigned by agents; forms with signatures forged on behalf of the Orange Democratic Movement (ODM) agents or persons who were not the Petitioners’ legitimate agents; failure to accurately enter, add and declare the total votes cast for each candidate including rejected and spoilt votes; and disparities as to the total votes cast for the different electoral positions.

43. Also impugned by the Petitioners is the manner in which the election results were transmitted. They contend that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to transmit the Election results in the manner prescribed by law. On this assertion, the Petitioners state that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ were in breach of **section 44 of the Elections Act, 2011** in the transmission of results through the Kenya Integrated Electoral Management System (KIEMS) Kits.

44. It is the Petitioners’ case that the elections were also marred by violence and intimidation.

45. As a result of all the alleged irregularities and electoral malpractices, the petitioners contend that the election process for the position of Member of the Senate, Wajir County was invalid, null and void.

46. Consequently, the Petitioners urged the Court to find and declare that: the non-compliance, irregularities and improprieties in the election for Member of Senate Wajir County was substantial; that such irregularities did affect and render the results as declared on 10<sup>th</sup> August, 2017 invalid, null and void; and that the election same was not conducted in accordance with the electoral laws. The Petitioners also seek an order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to organize and conduct fresh elections for the position of Senator, Wajir County. The Petitioners also seek costs of the Petition.

#### *1<sup>st</sup> and 2<sup>nd</sup> Respondents' case*

47. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents deny all the allegations of the Petitioners. In particular, they assert that they conducted the election for the Senator for Wajir County as envisaged under **Articles 38 and 81 of the Constitution of Kenya, Section 25 of the Independent Electoral and Boundaries Commission Act, No. 9 of 2011, Section 44A of the Elections Act, No. 24 of 2011** as well as all the electoral laws.

48. The Respondents' case is that: the counting, tallying and declaration of the results were done in an open and transparent manner; It was done in the presence of all candidates and or their agents and member of the public; that the results declared were accurately counted and tallied and thus reflect the will of the people of Wajir County; that there was no unlawful assistance to voters as claimed by the Petitioners; that any assistance accorded to the voters was done in accordance with **Regulation 72 of the Elections (General) Regulations, 2012** and in the presence of the agents of various candidates and political parties.

49. The respondents further deny that there was unlawful ejection of any political party agent or candidates' agent. In any event, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents state that they did not receive reports or complaints of this nature. On the allegation that the political party agents were not allowed to sign the Forms 38A, B and C, it is the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case is that all agents were free to sign the forms. However, where an agent refused or failed to sign the forms, the 1<sup>st</sup> Respondent's officials had no power to force such a person to sign.

50. With regard to Forms 38A, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents: denied the allegations of wanton and widespread unsigned or unstamped forms; they denied any forged signatures. Instead, they assert that the results declared in these forms reflected an accurate count; and that no discrepancies were cited or reported by any candidates, agents or members of the public. Where alterations were made to the forms, the same were countersigned in the presence of the agents. Further, that the results as declared in the forms were signed by agents with scattered incidents of refusal of an agent to sign. In any event, the failure to sign a form does not in itself invalidate the results.

51. On the issue of transmission of election results through the KIEMS Kits, it is the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's case that there is no requirement in law that transmission of results must be electronic. The exception is in the case of presidential results under **section 39 1C of the Elections Act, 2011**. Under the same provision, both the Presiding Officers and the Constituency Returning Officers are required to transmit results in prescribed forms to the Constituency tallying centre and the County tallying centre. In the present case, the forms are those in the Schedule to the Act identified as Forms 38 A and B.

52. On the issue of violence and intimidation, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case is that there were no incidences of violence or otherwise that would compromise or jeopardize the validity and credibility of the election of Senator, Wajir County.

53. Accordingly, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents urge the court to declare that the election of Senator, Wajir County held on 8<sup>th</sup> August, 2017 was conducted in full compliance of the law and therefore valid. In the circumstances, they urge the court to dismiss the Petition with costs to the Respondents.

### *3<sup>rd</sup> Respondent's Case*

54. The 3<sup>rd</sup> Respondent's case is that the elections held on 8<sup>th</sup> August, 2017 were conducted in accordance with **Articles 10, 38, 81 and 86** of the **Constitution**. Further, that the same were free, fair, transparent and held in a credible manner and devoid of any incidences of violence and intimidation of the Petitioners' agents or irregularities as alleged. According to him, the voting, counting, tabulation, transmission and declaration was done in accordance with the **Constitution**, the **Independent Electoral and Boundaries Commission Act**, the **Elections Act** and all elections regulations

55. The 3<sup>rd</sup> Respondent maintains that: none of the Petitioners' agents were denied entry into the polling stations; that all that an agent needed to do was produce the requisite documentation to be allowed entry, failing which they could not access the polling stations; that, on assisted voters, such voters were accompanied by the respective Presiding Officers in the presence of all agents and in compliance with **Regulation 72** of the **Elections Regulations**.

56. With regard to the Forms 38A's, the 3<sup>rd</sup> Respondent denies that the same were not stamped, altered, lacked security features, were unsigned by respective Presiding Officers and had forged signatures. It is further denied that the Forms 38B had inaccurate number of votes. It is stated that any inadvertent failure to sign the Forms 38A by the 1<sup>st</sup> Respondent's Officers does not invalidate the results for the position of Senator, Wajir County.

57. On transmission of results, the 3<sup>rd</sup> Respondent asserts that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents relayed and transmitted the results in accordance with **Section 44 and 39** of the **Elections Act, 2011**; and collated the results in an impartial, efficient, accurate and accountable manner. The 3<sup>rd</sup> Respondent claims that all the data and information recorded in Form 38A's was accurately entered into the KIEMS Kits and allegations of false entries and transmission is denied.

58. Accordingly, the 3<sup>rd</sup> Respondent urged the court to dismiss the Petition and find and hold that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not in breach nor contravened provisions of the law; and to find that the election for Senator, Wajir County was conducted in accordance with the constitution and electoral laws. Further, the 3<sup>rd</sup> Respondent urged the court to find and hold that he was validly elected as the Senator, Wajir County. He also asked for costs of the Petition.

59. The court framed the following issues for its determination

#### ***Parties' submissions***

60. Mr. Omwanza made submissions on behalf of the 2<sup>nd</sup> Petitioner. On the issue of opening of ballot boxes, it was Counsel's submission that ballot boxes are delivered to the tallying centre; they can only be opened by an order of the court as stipulated under **Regulation 93** of the **Election (General) Regulations, 2012**. Counsel sought to rely on the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] e KLR**. According to the 2<sup>nd</sup> Petitioner, the ballot boxes should not have been opened and in any event, all parties ought to have been present. Their absence, it was submitted was an infraction of the law.

61. On the issue of the alleged lost KIEMS Kit, it was submitted that the Returning Officer has the sole custody of the Kit. He is therefore obligated under the Constitution to safe keep electoral materials as provided under **Articles 81 and 86**.

62. With regard to Forms 38A. It was Mr. Omwanza's submission that these statutory documents are for purposes of ensuring that the elections are free and fair. Therefore, where an issue arises in an election petition with regard thereto, it was submitted that an election court should apply the test as observed in the case of **Mason Oyongo Nyamweya v James Omingo Magara & 2 others [2009] e KLR**. On this assertion, Counsel urged the court not to turn a blind eye stating that the Petitioners had discharged their

burden and as such, the elections ought to be nullified

63. Mr. Abdulhakim, urging the 1<sup>st</sup> Petitioner's case, submitted that evidence was led in support of the assertions that the Petitioners' agents were locked out of the polling stations yet they had all the requisite documentation; and that participation of agents is a key component in promoting transparency of the electoral process. Counsel sought to rely on the cases of **Manson Oyongo Nyamweya v James Omingo Magara & 2 others [2009] e KLR; Bwana Mohamed Bwana v Salvano Buko Bonaya & 2 others [2013] e KLR**. He further stated that under **Regulation 79** of the **Elections (General) Regulations, 2012**, agents are required to append their signatures on the requisite forms. In the event that they refuse to do so, reasons for their refusal must be stated by the presiding officer. It was submitted that the Petitioners had listed polling stations where their agents had been locked out.

64. With regard to the statutory forms, Mr. Abdulhakim's submitted that they had listed polling stations where the forms contained alterations made in favour of the 3<sup>rd</sup> Respondent. Such alterations were not countersigned. On this counsel relied on the case of **William Kabogo Gitau v George Thuo & 2 Others, Nairobi Election Petition No. 10 of 2008**.

65. On the issue of unsigned and unstamped Form 38 A's by the IEBC officials, it Mr Abdulhakim submitted that the authenticity of the forms was questionable.

66. On the issue of breaking of seals used to seal the ballot boxes, Mr. Abdulhakim submitted that they have pointed out the polling stations where such seals containing ballots for the vote of the position of Senator were changed. It was counsel's submission that when this was put to the County Returning Officer, the same was acknowledged; with the County Returning Officer further stating that he was acting under instruction by the Presiding Officer. This evidence, counsel argued, was contained in the court proceedings of 23<sup>rd</sup> November, 2017.

67. On the issue of irregular assistance of voters, it was counsel's submission that the Returning Officer admitted that there was a high level of illiteracy. Further that Forms 32A and a copy of the marked register on voters assisted was not produced thus, this allegation was not countered. It was therefore counsel's submission that voters were illegally assisted.

68. It was further submitted that statutory forms were not in the prescribed format yet they were used to declare the results of the election.

69. Mr. Omiti submitted for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that a petition cannot be clothed in generalities. Counsel stated that no agent had sworn an affidavit saying that they had been denied entry into the polling stations, while another stated that he did not have all the requisite documents needed to access the polling station. When the 1<sup>st</sup> Petitioner was put to task, it was submitted, he said he was relying on the affidavit of Mohammed Jelle, (1PW2), who in turn stated that he was merely relying on an analysis done by Dr. Noah Akulo.

70. With regard to signing of the Form 38A's by agents, it was Mr. Omiti's submission that in polling stations where the forms had not been signed, the agents had already left the polling station. In any event, it was submitted that failure to sign the forms does not invalidate them as provided **under regulation 79**. However, he said, the Presiding Officers had the responsibility to record the reasons for such failure. According to Counsel, failure to record the reasons by the Presiding Officer does not invalidate the results.

71. On the issue of unstamped forms, it was Counsel's submission that this was explained during oral evidence. However, in such instances, the agents signed the forms, thus the results captured therein were authentic.

72. On the issue of irregular assistance of voters, Counsel submitted that no evidence that was led. He stated that the law makes prescription as to assisted voters. Further that no documents as to assisted voters

was requested, thus the same were not furnished to the court.

73. It was Mr. Omiti's submission that as regards discrepancies, the same is relative to the number of votes cast vis-à-vis the registered number of voters. Counsel stated that the Petitioner had made a comparison as to all the six elective positions, yet each elective position should be treated on its own. Thus, the summation by the 1<sup>st</sup> Petitioner that shows alleged discrepancies as to the votes cast is illogical and only shows that the 1<sup>st</sup> Petitioner misunderstands the electoral process. Thus the burden of proof had not been discharged.

74. On whether the will of the people was reflected, it was Counsel's submission that not every procedural breach affects the elections. Thus, the Petitioners have to go the extra mile and prove that the non-compliance actually affected the outcome of the elections. A fact which according to the Respondents had not been proved. In this regard, Mr. Omiti urged the court to dismiss the Petitions.

75. On issues not raised in the Petition, it was Counsel's submission that parties are bound by their pleadings and any derogation thereof amounts to litigation by ambush. It was stated that both Petitioners had raised issues not brought up in their petitions. The court was therefore urged to disregard the same.

76. Mr. Issa made submissions on behalf of the 3<sup>rd</sup> Respondent, associating himself with the submissions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He submitted that the Petitioners were specific as regards their complaints. These complaints, it was stated, demarcate the petitions. Thus, the evidence tendered with regard to the specific complaints made forms the subject of the court's determination. Thus, any other issue that crops up at cross examination cannot be considered. Therefore, it was urged that issues not covered in the pleadings cannot become the subject of determination.

77. On the issue of agents not being granted access to the polling station, it was Mr. Issa's submission that the Petitioner had to prove that the agents were accredited by the 1<sup>st</sup> Respondent to specific polling stations. It was submitted that the 1<sup>st</sup> Petitioner's witness, Mr. Mohamed Jelle said that he had a list of all the agents, however, this list was not provided. Thus, according to counsel, the Petitioners ought to have discharged the legal burden before the evidentiary burden could be discharged. It was Mr. Issa's submission that the legal burden was never discharged, instead sweeping allegations were made with no specificity and as such, the burden did not shift. On this assertion, counsel relied on the case of **Gitarau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] e KLR**.

78. On the issue of alteration of the Forms, it was counsel's submission that there was no contestation on them at the polling station. The first test was not met as the results were undisputed. The second test is that results contested must be recounted at the polling station. This was not done. nor was a reason given. The third test is whether the Petitioners' agents disputed the results given by the respective agents at the Constituency Tallying Centre. This, it was submitted, was not done. The last test is whether the results as aggregated were contested. If there were no complaints, then such disputes cannot arise long after the event when at the primary level they were not contested.

79. Counsel further submitted that on the issue of statutory forms and the results declared, the question as to the alterations is important only if it can be shown that there was evidence of clear manipulation of results and that it affected the results announced. It was Mr. Issa's submission that none of the parties made submissions to this effect. Counsel sought to rely on the case of **Jama v. Mohamed & Others [2014] EA 177** in support of thereof.

80. On the issue of stamping of the statutory forms, it was Counsel's submission that this is neither a statutory nor a regulatory requirement. This, it was submitted, is a consideration by the 1<sup>st</sup> Respondent to ensure that the process remains credible. Thus, it was submitted that the role of the stamp fades away once the 1<sup>st</sup> Respondent's officers have admitted the results to be his. Thus, if a stamp is lacking, it was submitted that it must be relative to the facts that the results are accepted.

81. With regard to the KIEMS Kit, it was submitted that there was no evidence that the Kit did not work.

Further, that the one kit that had been misplaced been locked and thus no one could alter the results contained in it. When the same issue was pursued further, stressed, the results tendered had been found to be the same, counsel submitted.

82. As regards voter assistance, it was Mr. Issa's submission that Form 32 is used when a voter enters the polling station and the person who assists the voter is required to fill it. In this regard, it was submitted that no evidence was tendered so as to shift the burden to the 1<sup>st</sup> Respondent.

83. On variation of results, it was Counsel's submission that the 2<sup>nd</sup> Petitioner sought to rely on the portal. However, the court was told that this evidence falls short of the evidence required in terms of **Section 106(4) of the Evidence Act**. The legal burden of proof, it was submitted, was not achieved. In impugning Dr. Akalla's evidence, Counsel submitted that this witness had not compared the various results with those contained in the statutory forms. It was Mr. Issa's submission that the totality of the evidence must show there were such serious infractions that the court cannot uphold the elections. As against such a test, it was Counsel's submission that none of the petitioners satisfied the probative test or met the required threshold.

### **Issues Arising**

84. The following are the issues as arising from the consolidated petition which the parties agreed.

1. Whether the alleged irregularities affected the conduct and thus the result of the election.
  - (a) Whether the alleged intimidation of the Petitioner's agents, denial to sign or give them copies of Forms 38A, B, and C affected the conduct or outcome of the election.
  - (b) Whether voting, counting, tabulation, collation and declaration of results were conducted in accordance with the law.
  - (c) Whether the Petitioner's right to access information under Article 35 (1) of the Constitution was violated.
  - (d) Whether the alleged failure of the Kenya Integrated and Management System and mode of transmission of election results affected the conduct and result of the election.
  - (e) Whether there was irregular, un-procedural and unlawful assisted voting.
2. Whether the alleged electoral offences affected the conduct and thus the result of the election.
3. What is the order as to costs?

### **Discussion and Analysis**

85. In my discussion and analysis of the evidence in this consolidated petition, I think it will be more appropriate and easier to deal with each of the heads or issues complained of by the petitioners in the petitions. This will to ensure comprehensive attention and treatment of the evidence availed in relation to them under those heads.

*Complaints of the 1<sup>st</sup> Petitioner:*

***a. That the electoral process was not conducted in a free, fair, transparent verifiable and accountable manner contrary to Articles 10, 81 and 86 of the Constitution:***

86. The 1<sup>st</sup> petitioner's complaint on this issue is in paragraphs 35-38 of his petition. In summary, he asserts that the 1<sup>st</sup> and 2<sup>nd</sup> respondents made a concerted effort to ensure opaqueness in the entire

electoral process in a bid to exclude the petitioner and his party's agents from most polling stations. He identifies the polling stations from which agents were allegedly excluded as indicated in information supplied by his Chief Agent, Mohamed Jelle.

87. The 1st petitioner states that his Chief Agent visited these stations and found that: the agents were locked out; imposters were permitted in; presiding officers were marking ballot papers; that where agents were allowed in, they were denied access to Forms 38A and that at Habaswein Primary School polling station stream 2, voting was suspended and resumed at 7.00pm, disenfranchising many voters.

88. Since the 1<sup>st</sup> petitioner's evidence was stated to have been obtained from the Chief Agent, it is imperative to consider and assess the Chief Agent's testimony on this issue. Jelle gave evidence as 1PW1. In his affidavit at paragraph 9 (a)-(n) on this issue, he points out stations where he received complaints as being in respect of:

- d). Agents excluded from entry at: Millisadet Primary School in Korondile Ward, Elbow (sic Elboru) 1 D.O. Water Point in Bute Ward and Andaraka Primary School in Danaba Ward;
- j). Presiding officers marking ballot papers for assisted voters at: Gurar Old Primary School, Bute Arid Zone, Bute Boys' Secondary School and Ajawa Primary School;
- l). Widespread bribery: no details availed; a copy of a press statement alleged to be by the Ethics and Anti-Corruption Commission (EACC) which is indicated as being attached but was in fact not attached;
- m) & n). Suspension of polling at Habaswein Primary School due to non-functioning gadgets: he states that he received this information from Abdirahman Ali Hassan his agent at Habaswein polling station.

It is noted, however, that Abdirahman Ali Hassan, the Habaswein agent, was not called to give evidence..

89. In cross examination by Mr Omiti, 1PW1 Jelle, stated that he was the 1<sup>st</sup> petitioner's Chief Agent and responsible for all 685 ODM agents and visited 7-10 polling stations, without naming them. He said that there were 440 polling centres with 685 polling stations. Some stations had two or three ODM agents. He admitted that the agents for the polling stations he had mentioned as having receiving complaints from, did not file affidavits. He said he was more concerned with the petition than the witnesses. Asked how he knew that the agents were chased away, he said that he knew because the legitimate agents did not sign the Form 38As.

90. Cross examined by Mr Issa for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on this issue, Jelle said: that he was not sure if any ODM agents had signed an affidavit stating that an imposter had signed Form 38As; that he had not seen an affidavit of any agent who had been denied entry to a polling station; that he did not report any alleged bribery to the police; that he did not know if Abdirahman, the agent at Habaswein polling station, had filed any affidavit.

91. In his testimony, the Constituency Returning Officer Anthony Kimani, 1RW 13, did confirm that the KIEMS kit failed to work at Habaswein polling station 2 of 2, and voting was suspended. However, on his request another kit was sent there, and voting took place from 6.00pm to 4.00am. Thus, he said, there were no voters who were disenfranchised. He attached Form 38A for Habaswein polling station 2 of 2 which shows that valid votes were 252 out of 426 registered voters. In comparison, Form 38A of polling station 1 of 2 shows 261 valid votes out of 462 registered voters.

92. The foregoing constitutes the evidence on record on the issue under consideration. In it, I do not see any demonstration of agents being locked out; or imposters signing Forms 38A; or widespread bribery; or disenfranchisement of voters at Habaswein. All appear to be bare allegations, based on hearsay allegedly received from agents who did not appear to give evidence of their allegations.

93. The court went further and analysed the original Forms 38A for the afore-mentioned stations as part of its scrutiny. The result is as follows:

**Table 1A: Stations where Agents were allegedly excluded:**

	<i>Polling Station</i>	<i>PO /DPO signature</i>	<i>Agents</i>	<i>IEBC Stamp</i>	<i>Valid Votes: (against) Regd Voters</i>
1	Millisadet Pry School	Too Faint to read	Writings too faint to read	Yes	104 : 116
2	El-boru 1 D O Water Point	Signed by both	None	Yes	127 : 162
3	Andaraka Primary School	Signed by both	Wiper - 1 Jubilee - 1	Yes	455 : 565

**Table 1B: Stations where Presiding Officers Allegedly Marked Ballots:**

	<i>Polling Station</i>	<i>PO /DPO signature</i>	<i>Agents</i>	<i>IEBC Stamp</i>	<i>Valid Votes: (against) Regd Voters</i>
1	Gurar Old Primary School	Signed by both	Wiper-1 Jubilee-2	Yes	299 : 360
2	Bute Arid Zone	Signed by both	ODM-1	Yes	387 : 497
3	Bute Boys Secondary School	Signed by both	Jubilee -3	Yes	532 : 655
4	Ajawa Primary School	Signed by both	KANU -1	Yes	428 : 538

94. From the evidence availed by the parties and the court's scrutiny of the Forms 38A for the listed polling stations complained about, nothing emerges that would suggest the veracity of the claims made by the petitioner under this head. In light of the foregoing, I am not satisfied that the allegations are proved to the standard of proof required. I therefore hereby dismiss the same.

***b. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents engaged in intimidation of the petitioner's agents;***

95. The 1<sup>st</sup> petitioner's evidence on this issue was primarily provided by his witnesses in the field. 1PW1, Mohamed Jelle, gave general evidence of reports he had received of his agents who had been locked out of polling stations. He was based in Wajir Town. He went to 7-10 stations which he did not name. In the stations from which he received reports set out in paragraph 9 of his affidavit, none of the agents stationed there gave evidence.

96. 1PW4 Hamdi Muktar Elow was the 1<sup>st</sup> petitioner's agent at Johar polling station in Tarbaj. He said he arrived at the station at 6.00am, but was turned away by two police officers who took his documents but

did not allow him in. It was not clear what documents were taken away from him. It was also not clear during his evidence and on cross examination that he had carried his IEBC badge with him, nor did he attach a copy of it to his affidavit. He admitted that he had signed two contradictory affidavits. In the second affidavit he said he was present at the counting of votes and declaration of results. The presiding officer was Mahat Ahmed Abdi, 1RW2. He was silent on the complaint of denial of access to agents in that station. He admitted that Form 38A was not signed by any agents; he explained that at the time of counting the ballots no agent was at the station.

97. 1PW5, Yahya Mohamed Abdi was the petitioner's, not ODM's, agent at Gunana Primary school polling station 2. He said he arrived at the polling station at 6.30am but was denied entry. He was told there was another ODM agent in the station. He said he had his ID, Oath of secrecy and letter of appointment but no IEBC badge, as none was provided. He said in cross examination that he was never told about a badge; that he would not be surprised to hear that ODM had its own agents. He spent the day outside the polling station. He later saw Form 38A of Gunana polling station and noted that no agent had signed it.

98. 1 RW9 Abdullahi Abdi was the presiding officer at Gunana polling station. He denied that any agent was turned away. All agents present at opening of the station signed the polling station diary. However, he said, by the time of counting ballots for the senate, most agents had left or had slept. He confirmed that Form 38A was signed by his deputy as allowed by law.

99. 1PW6 Yusuf Abdisalan the 1<sup>st</sup> petitioner's agent at Basineja polling station said he arrived there at 6.30am. He said that despite having his letter of appointment, oath of secrecy and IEBC badge, he was denied entry by the police. In cross examination he admitted that the Form 38A was in fact signed by two ODM agents, and their presence was captured in the polling station diary.

100. I have carefully assessed the evidence given under this head on denial of access and intimidation of agents. Hamdi Mukhtar Elow may have failed to gain access into Johar polling station in the morning. But his evidence was not clear that he had the requisite documents. In addition, he said he was present at counting of votes. Yahya Mohamed Abdi said he did not have an IEBC badge and that he was never told about a badge. If he was disallowed entry, on balance that would be a reasonable rationale for it. Yusuf Abdisalan may have been denied entry. He arrived at 6.30 am. Under **Regulation 66**, polling stations open at 6.00am, although there is no evidence as to when Basineja station actually opened. There is also evidence that two ODM agents were at that station for the signing of Form 38A. It is also not clear what effect, if any, the absence of any of the three agents had on the voting and final results in those stations.

101. Given the above evidence, I do not find that, overall, the allegation of intimidation and denial of access to the polling stations and refusal to allow the agents access to or to sign forms under this head is proven to the standard of proof above balance of probabilities but below beyond reasonable doubt. I do not see the evidence availed as proof of the petitioner's allegation at paragraph 35 of the petition that ***"there was a concerted effort by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to ensure opaqueness in the entire electoral process in a bid to exclude the Petitioner and his party's agents from most polling stations in Wajir County"***. There were 434 polling stations in Wajir, and the evidence of the three agents was hardly convincing in respect of any of the three stations where they were agents. I am therefore unable to find in favour of the petitioner on this issue and would dismiss the allegations under this head.

***c. That the voting, counting, tabulation, collation and declaration of results was conducted in breach of the principles of a free, fair, transparent and credible election as decreed by Articles 81 and 86 of the Constitution;***

102. This issue is canvassed in paragraphs 39-43 of the petition where the 1<sup>st</sup> petitioner, relies on an analysis of results from four constituencies, namely: Tarbaj, Wajir West, Wajir South and Wajir North. The analyses are attached at pages 1-137 in his bundle in the petition. He also relies on the tabulated analysis of one Dr Noah Akala Oduwo, 1PW2, attached to that witness's affidavit. In summary, the petitioner alleges that:

- there were unstamped Forms 38A in over 60 stations;
- there were altered Forms 38A in 30 stations;
- Forms 38A were unsigned by the PO and DPO in at least 40 polling stations;
- there were Forms 38A unsigned by agents in at least 70 stations;
- there were forged signatures on behalf of ODM agents in at least 60 stations;
- there were Forms signed by strangers in at least 50 stations;
- there was failure to accurately enter, add and declare total votes cast for each candidate;
- there were differences in votes cast, rejected and spoilt indicated in the 2<sup>nd</sup> respondents portal compared to those indicated in the forms;

These are the matters sought to be proved by the 1<sup>st</sup> petitioner under this head.

103. It will be recalled that during interlocutory hearings the 3<sup>rd</sup> respondent had sought to have the 1<sup>st</sup> petitioner's bundle of documents at pages 1-139 expunged, as they were not exhibited and founded upon any affidavit. The court in Ruling No 5 declined to expunge the same and held that the said documents be deemed to be exhibited by the 1<sup>st</sup> petitioner himself. The court has assessed the complaints in the said bundle for the four constituencies against the original Forms 37A which the court ordered the 3<sup>rd</sup> respondent to deposit in court. The Summary Analysis is in a fairly lengthy table, but necessary to ensure a full appreciation of the complaint vis-à-vis the contents of the statutory forms.

104. Further, it was asserted by the 1<sup>st</sup> petitioner in paragraphs 41-43 of his affidavit that:

- there were stark differences between votes cast for the various positions of President, Governor, Senator, Members of National Assembly, Women Representatives and Members of County Assembly;
- as a result of all the alleged mistakes, infractions and irregularities, the results of the election were substantially affected rendering them unaccountable, suspicious, null and void;
- the entire process of relay and transmission of results from polling stations to the constituency tallying centres and then to the county tallying centre, was not simple accurate, accountable, secure, verifiable, transparent and open contrary to the provisions of the law.
- The data entered on the KIEMS kit was not consistent with the information received from the respective Forms 38A;
- That from FTP server logs, there were no Forms 38A or 38B uploaded for the entire Wajir County;

105. In his testimony 1PW3, the 1st petitioner, repeated the allegations in the petition. In cross examination, he admitted that a substantial amount of the data availed in his petition came from information obtained by Dr Noah Akala from his involvement in the presidential petition of August 2017. He also relied on Forms 38, information from the IEBC portal and on information given to him by his chief agent.

106. Dr Noah Akala Oduwo, 1PW2, was the 1<sup>st</sup> respondent's star witness with regard to the issues of alleged irregularities in electoral data. He testified that he held several degrees – a bachelor's degree in medicine, and Masters' degrees in Public Health; in Public Administration; and in Business

Administration. He stated that he had been involved in the presidential election petition of August 2017 working with a number of experts in the scrutiny of the electronic result transmission system. During that period, he said, he had obtained varied data and statistics on those elections.

107. At the interlocutory stages of the hearing, the court had directed that if any witness was being called as an expert witness, such must be indicated to the court and that the terms of reference regarding the matters of opinion on which such witness would testify should be indicated. Further, that such witness' expertise should be indicated early so that if other parties or the court desired to call like experts in equal measure, as entitled, they would have opportunity to do so. No party having complied with the court's direction, every witness in the proceedings is deemed to be a witness of fact, not of opinion.

108. Dr Akala's evidence was that he had compiled and analysed IEBC's server logs and concluded that no forms 38A and 38B were uploaded for Wajir county; that he had analysed Forms 38 on the online portal of IEBC and it was apparent that out of 434 polling stations, there was a mismatch in the total number of votes cast for each of the six elections in 316 polling stations. He had formed the opinion, in paragraphs 8 and 9 of his affidavit, that ***“the accountability measures put in place by the law to ascertain and assure the credibility of the final results...was deliberately manipulated”***, and that ***“the qualitative aspects of the Senator elections of Wajir County were blatantly violated and defied thereby vitiating the entire gubernatorial elections for Wajir county”***.

109. In cross examination, Dr Akala testified that the IEBC had handed over to him and the team information for all 40,837 polling stations for all six elections. He had summarized the raw data and had annexed exhibit NA-1-NA-3 being a table showing polling stations in Wajir County where the valid votes cast for senator had allegedly been found to be more than the registered votes. He admitted that: he had not attached the raw data which he used for his analysis; that he had not attached the reports of the ICT experts nor the scrutiny reports availed in the Presidential petition. He said he was familiar with the law on transmission of results and asserted that **section 44** of the **Elections Act** provided for the use of technology in elections. He admitted that though he had analysed 434 polling stations and referred to 316 of them as having a mismatch of results data, the list he had attached as NA1-NA-3 had indicated mismatches for only 22 polling stations.

110. Further, he said he was giving evidence as a statistical expert, but had not looked at the Forms 38A availed to court or annexed any such forms because another witness would be called to do so. He stated that the mismatch in voter numbers was available in the FTP servers, and that he had the FTP logs from which he made his analysis. In re-examination, he reiterated that his affidavit relates to the use of information communications and technology (ICT) in results transmission.

111. In my view, the evidence of Dr Akala is of little probative value. It is essentially opinion evidence based on information from work he did under the presidential election to which the parties in this petition were not privy or given access. No raw data in relation to Wajir senate elections was provided by him; nothing was exhibited concerning any documents or electronic data he relied on in making his analyses; he clearly stated that he had the FTP logs in preparing his report, but did not attach them; he admitted: that he had not compared the original forms 38A with the analyses he made; that he had not specifically identified the 316 polling stations that had an alleged mismatch in voter numbers; that the list he attached to his affidavit showed only 22 such stations; that he did not attach the forms 38A downloaded from the servers to which he allegedly had access and to which he referred when doing his analysis. Ultimately, there were too many gaps that required to be filled before Dr Akala's evidence could be usefully appreciated or put to probative test.

112. The foregoing notwithstanding, the court perused the original Forms 38A for the seven of 22 polling stations listed by Dr Akala which he had identified as ***“suspicious/invalid”*** for having recorded more votes than registered voters. The outcome of the perusal shows as follows :

- |   |                    |     |
|---|--------------------|-----|
| a. Gararoba village- registered voters 614;     | valid votes cast - | 306 |
| b. Buna Old Dispensary – registered voters 311; | valid votes cast-  | 242 |

- c. Harawale Water Point- registered voters 6; valid votes cast - 4
- d. Laghdima Primary School – registered voters 511; valid votes cast - 338
- e. Eldas Primary School - registered voters 653; valid votes cast - 475
- f. ASAL Centre - registered voters 463; valid votes cast - 310
- g. Hodhan Dispensary- registered voters 443; valid votes cast - 321

In fact none of the polling stations had more votes cast than there were registered voters as alleged.

113. Finally on this head, the court analysed the complaints of the 1<sup>st</sup> petitioner concerning the four constituencies of Tarbaj, Wajir West, Wajir North and Wajir South in respect of which he had an analysis. The summary is as follows:

**TABLE 2:**

**Analysis of Forms 37A for Polling Stations Complained of by 1<sup>st</sup> Petitioner**

<b>Polling Station</b>	<b>1<sup>st</sup> Petitioner's Allegation on Forms</b>	<b>Comparison with content of original Form 38A</b>	<b>Remarks (Court)</b>
<b>TARBAJ</b>	<b>CONSTITUENCY</b>		
1. DigDiga Dam-002	Signed by one person for two agents	a. Form signed by Asha Mohamed-SAFINA and Ahmed Sheikh-KANU. Their signatures appear somewhat similar.	
2. Ogarale	One person signed for all agents	a. Signed by two agents. Their signatures appear quite dissimilar.	
3. Elben	DPO has signed has not signed/one person signed for all agents	a. DPO has signed b. Form signed by one agent	
4. Dambas Pry-009/1	Form altered/One person signed for all agents	a. Form not altered b. Two agents of PDR have signed the forms. The signatures appear dissimilar.	
5. Dambas Pry-009/2	DPO not signed/Not stamped/One person signing for all agents	a. DPO has signed b. One agent from ODM signed the form. c. The form is however a carbon copy, thus not legible where the other agents have signed	
6. Machine Ben -	Not stamped	a. Form not stamped	

Polling Station	1 <sup>st</sup> Petitioner's Allegation on Forms	Comparison with content of original Form 38A	Remarks (Court)
010			
7. Jaijai Pry-011	Not stamped	a. Form not stamped	
8. Mansa Pry-004/2	PO not signed/one person signed the names of all agents	a. PO's name indicated, but not signed. b. Two agents, MCC and NARC-Kenya have signed the form.	DPO has signed
9. Abdi Gaaney-005	No DPO/No agents/ Not stamped	a. DPO has not signed. b. <b>No agents have signed this form</b> c. Form not stamped	Sec 6(j) Election Offence to report
10. Durway -006	Not stamped/one person signed for all agents	a. Form not stamped b. Two agents have signed. One KANU, the other is PDR	
11. Singo well-008	One person signed for all agents	a. Three agents have signed the form. FORD-KENYA, PDR & NARC-KENYA	
12. Dunto Primary-014/1	DPO did not sign/not stamped/alterd form/one person signed for all agents/an agent representing DC signed	a. DPO has not signed the form b. Form not stamped c. JUBILEE, PDR & DC agents have signed the form-one is representing DC	PO has signed
13. Berjini Dam-016	DPO not signed	a. DPO has signed the form	
14. Gunana Pry-017/2	PO not signed/No agents/Not stamped	a. PO has not signed the form b. <b>No agent has signed</b>	DPO has signed Sec 6(j) Election Offence to report
15. Sarman Pry-012/1	Both PO & DPO not signed/No agents/not stamped/alterd	a. <b>Both PO &amp; DPO's names indicated but they have not signed.</b> b. One agent's name is indicated but he has not signed. c. Form not stamped d. No alterations	-Results not authenticated <b>343 votes counted as valid</b> -Sec 6(j) Election Offence to report
16. Sarman Pry-	DPO not signed/no agents	1. DPO has not signed the	

Polling Station	1 <sup>st</sup> Petitioner's Allegation on Forms	Comparison with content of original Form 38A	Remarks (Court)
012/2	signature/altered	form. 2. Two agents have signed the form-PDR & JUBILEE 3. No alterations	
17.Elyunis Pry-023	Not stamped	a. Form not stamped	
18.Balatul Amin pry-024	DPR -no such party contestant/One person signed for all agents/not stamped	a. PDR agent has signed the form b. Two agents have signed the forms- one PDR, the other JP c. Form not stamped	
19.Ausemudule -038	Unstamped/altered	a. Form not stamped b. Alteration is countersigned	
20.Madathe Pry-039	Unstamped/one person signed for all the agents	a. Form not stamped. b. Signed by NASA, PDR & JUBILEE agents Signatures dissimilar.	
21.Kajaja Two Pry-040	No agents signatures/altered	a. <b>No agent has signed.</b> b. Figure 3- for Vote of Abdikadir Abdirahman Adan has been overwritten	Sec 6(j) Election Offence to report
<b>WAJIR</b>	<b>WEST</b>		
22.Ademasajide Pry	Unsigned forms by agents	a. <b>Not signed by any agents.</b> b. PO/DPO signed	-Sec 6(j) Election Offence to report
23.Kanchara West Pry	Unsigned forms by agents	a. Two agents have signed, ODM, the other KANU	
24.Lolkuta South pry	Unsigned by DPO	a. DPO has signed the form	
25.BOA primary Sch	Unsigned by DPO	a. DPO's name indicated but has not signed	
4. Boji Heri Nur	Unsigned by DPO	a. DPO's name indicated but has not signed	
<b>WAJIR</b>	<b>SOUTH</b>		
26.Finnii	One person signed for 1& 2	a. Signed by two PDR party agents	

Polling Station	1 <sup>st</sup> Petitioner's Allegation on Forms	Comparison with content of original Form 38A	Remarks (Court)
27.Old Borehole	No agents signed	a. <b>No agent signed</b> b. PO/DPO signed	-Sec 6(j) Election Offence to report
28.Mathah Baqay	Unsigned by agents	a. No agent has signed b. PO has signed	-PO Has commented in the comments that No agents around  - No Offence
29.Biya Madahow Sec-023	Unsigned by agents/102 not 107 as indicated	a. Signed by five agents. b. The aforesaid figures are not reflected anywhere in the form	
30.Shimbirey Centre	Unstamped/one person signed for all agents	a. Form is stamped and signed by PO and DPO b. Two agents from JUBILEE have signed the form.	
31.Ibrahim Jilibey-028	Unstamped/one person signed for all agents	a. Form has been stamped b. Two agents KANU, JUBILEE have signed. Signatures are dissimilar.	
32.Gullet dere-031	Unstamped	a. Form has been stamped	
33.Qoqar Primary-032	DPO not signed/agents listed but not signed-one person listed all the names	a. Form has been stamped b. <b>Agents listed but none has appended their signature.</b> c. PO signed, but not DPO	Sec 6(j) Election Offence to report
34.Dadajbulla-036	Officials and agents are the same/ badly altered	a. No indication that Officials and agents are the same. b. Figures not altered.	
35.Health centre-037	Officer not signed/one person signed for two agents	a. Officials have signed the form. b. Four agents have signed - signatures are dissimilar.	
36.Fadiweyne-051	Not signed/not stamped	a. Form has been signed	

Polling Station	1 <sup>st</sup> Petitioner's Allegation on Forms	Comparison with content of original Form 38A	Remarks (Court)
		b. Form has been stamped	
37.Abakore Sec Sch-052	Not dated/one person signed for all agents	a. Not dated b. JUBILEE, NASA & ANC agents signed ; with dissimilar Signatures	
38.Dalsan- 059	Not stamped/one person signed for all agents	a. Form is stamped b. <b>Not signed by any agent</b> c. PO/DPO signed	-Sec 6(j) Election Offence to report
39.Asal-060	DPO not signed/one person signed for all agents/alterd	a. DPO has not signed b. JUBILEE & KANU agents have signed; signatures are dissimilar	
40.Abore Pry - 063	No agent signature/not stamped	a. Four agents have signed. b. Form is stamped	
41.Tesore Pry-065	Not signed/not stamped/vote cast 272	a. Signed by both P.O. & DPO b. <b>Not signed by agents</b> c. Form is stamped d. Figure indicated in the form is correct-267	Sec 6(j) Election Offence to report  -Form authenticated
42.Ali Dumale	Not stamped/one person signed for all agents	a. Form is stamped b. Signed by Four agents - Signatures dissimilar	
43.Egal Pri. Sch	Not stamped	a. Stamped	
44.Lagbogol South Centre Station-71	Not stamped	a. Stamped	
45.Eyrib Dam- 072	Not stamped	a. Stamped	
46.Hussein Kamir-073-1 of 2	Not stamped/One person signed for all agents	a. Stamped b. Two agents have signed; Signatures are dissimilar	
47.Hussein Kamir-073- 2 of 2	Not stamped/one person for all agents	a. Stamped b. Signed by one agent	
48.Khumbi -079	Total captured is 289	a. Figure captured is 294 and	

Polling Station	1 <sup>st</sup> Petitioner's Allegation on Forms	Comparison with content of original Form 38A	Remarks (Court)
		it is correct.	
49.Hodhan Dispensary-1 of 2	PO & DPO not signed/not stamped/ one person signed for all agents	a. <b>Not signed by PO &amp; DPO</b> b. Stamped c. Five different agents have signed	Form not authenticated; Cancel result <b>321 votes counted as valid</b> Sec 6(j) Election Offence to report
50.Abubakar Sidiq 2 Of 2	Altered	a. Form not altered	
51.Ibrahi Ure Centre-086	No name/one person signed for all agents	a. Names indicated b. JUBILEE & ANC. agents have signed. Signatures dissimilar	
52.Higle	No agent signatures/not stamped	a. PDR & JUBILEE agents have signed., signatures dissimilar b. Stamped	
53.Handaki Dam-088	Not stamped/one person signed for all agents	a. Stamped b. Signed by JUBILEE, PDR, ODM NASA, & INDEPENDENT agents.	
54.Gubbambow-089	One person signed for all agents	a. Three agents have signed.	
55.Diif Pri 094- 1 of 2	No agent signed/not stamped	a. <b>No agent has signed.</b> b. Stamped c. DPO has signed	Sec 6(j) Election Offence to report
56.Diif Pri 094- 2 of 2	Not stamped	a. Stamped	
57.Salama Pri 1 of 2	Not stamped/one person signed for all agents	a. Stamped b. PNU, JUBILEE, JUBILEE & KANU agents have signed	

Polling Station	1 <sup>st</sup> Petitioner's Allegation on Forms	Comparison with content of original Form 38A	Remarks (Court)
58.Salama Pri 2 of 2	Not stamped	a. Stamped	
<b>WAJIR</b>	<b>NORTH</b>		
59.Walenstutu Centre -012	Reasons objection/refusal/one signed for all agents for person	a. Reasons for objection cancelled on this part of the form b. 8 agents have signed. PNU, JUBILEE X3, KANU, PDR NASA x2	
60.Bute Girls-013	One person signed for all agents	a. No figures have been altered b. Signed by agents of PDR, JUBILEE &KANU	
61.Gararoba Village-014	Figures altered/one person signed for all agents	a. No figures altered. b. JUBILEE, PNU & NASA agents have signed.	
62.Adadijole pri-015	One person signed for all agents	a. JUBILEE, KANU, ODM agents have signed.	
63.Bute Boys -018	One person signed for all agents	a. 3 different agents have signed. All JUBILEE	
64.Jartey Centre-019	One person signed for all agents	a. 6 different agents have signed: KANU, NASA x 2, PNU JUBILEE x 2,	
65.Unsile Water Point-023-1 of 2	Not signed by PO & DPO/not signed by agents/not stamped/ungazetted polling station and name	a. <b>Not signed by both PO &amp; DPO</b> b. <b>Not signed by agents</b> c. Not stamped d. The form originally was Bute Boys Polling Station 1 of 1 e. There are two forms for this polling station	There are two forms for this polling stn. -Results Not Authenticated - Cancel <b>316 votes counted as valid</b> -Sec 6(j) Election Offence to report
66.Unsile Water Point-023-2 of 2	No agent column/Form 38A self-generated/ one person signed for all IEBC officials	a. <b>No column for agents to sign</b> b. Form different from the standard prescribed form. c. Signed by both the PO &	-Not a standard Form 38A -Not

Polling Station	1 <sup>st</sup> Petitioner's Allegation on Forms	Comparison with content of original Form 38A	Remarks (Court)
		DPO	Authenticated - Cancel  320 Votes counted as valid  Sec 6(j) Election Offence to report
67.Korondile Pri-020 – 1	Not signed by P.O. & DPO/not signed by agent	a. <b>Not signed by both PO &amp; DPO</b> b. Signed by Jubilee agent-1	-Results Not Authenticated  -Cancel  277 votes counted as valid
68.Korondile pri-020 – 2 of 2	P.O not signed/one person signed for all agents	a. P.O. has not signed; DPO has signed b. 3 different agents signed. ODM, JB, KANU Signatures are dissimilar.	
69.Lensayu Pri-021	One person signed for all agents	a. 3 agents signed. JUBILEE x 2, ODM	
70.Nyata Borehole-024	-	PO signed  Agents signatures not clear: ODM and Another	
71.Rabsu Centre-025	One person signed for all agents	a. 2 different agents signed. PNU, NASA. The signatures are different	
72.Tuluroba Centre-026	One person signed for all agents	a. 3 agents signed. NASA, PNU, KANU. Signatures dissimilar	
73.Bitorey Water point-027	One person signed for all agents/form altered	a. PNU, PNU, JUBILEE, FORD-K, WIPER agents signed. Signatures dissimilar	
74.Milisaded Pri	No agent/form altered	a. Form is a carbon copy, hence not clear. b. Signed by PO/DPO c. Form stamped	

<b>Polling Station</b>	<b>1<sup>st</sup> Petitioner's Allegation on Forms</b>	<b>Comparison with content of original Form 38A</b>	<b>Remarks (Court)</b>
		d. Signed by agents	
75.Korondile Boys Sec-030	One person signed for all agents	a. Signed 2 NASA agents; Signatures dissimilar	
76.Basir North Centre-031	One person signed for all agents	a. 2 agents signed. ODM, JAB. The signatures are dissimilar.	
77.Malka Gufu Pri-032-1	Not stamped/form altered/ One person signed for all agents	a. Form not stamped b. 2 agents signed. KANU, JP. The signatures dissimilar	
78.Malka Gufu Pri-032-2	Not stamped/ One person signed for all agents	a. Form not stamped b. 2 agents signed. KANU, PDR. Signatures dissimilar	
79.Gurar Pri-003	One person signed for all agents	a. 4 agents signed. JUBILEE, WIPER, PDR, ODM. The signatures dissimilar	
80.Bamba Dam-004	One person signed for all agents	a. 2 agents signed. JUBILLE, KANU. Signatures are different.	
81.Garikilo Pri-005	Not stamped/ One person signed for all agents	a. Form not stamped. 4 agents signed. The signatures are different.	
82.Qarsa Abulla-008	One person signed for all agents	a. 2 agents signed. WIPER, JUBILEE. Signatures are dissimilar.	
83.Bilatul Amin-009	One person signed for all agents	a. 3 agents have signed. FORD-K, JUBILEE, WDM-K. The signatures are different.	
84.Malaba Pri-011	Form written over showing 497 in duplicate/One person signed for all agents	a. Results in the form are clear. b. Overwritten figure on total valid votes. c. Agents of ODMx2 & PNU signed	
85.Berti Abdiaziz	PO signed but not with name/ One person signed for all agents	a. PO has not signed. DPO has signed. b. 3 agents of KANU, JUBILEE x2 signed..	DPO has signed - Reg 5(4) applies

Polling Station	1 <sup>st</sup> Petitioner's Allegation on Forms	Comparison with content of original Form 38A	Remarks (Court)
		Signatures are dissimilar	
86.El-boru IDO Water point	No agent signatures/ One person signed for all agents	a. <b>No agent has signed.</b> b. PO & DPO signed c. Form stamped	Sec 6(j) Election Offence to report
87.Ingirir Pri-036	One person signed for all agents	a. 4 agents have signed. KANU, PDR, NASA, JUBILEE. Signatures are dissimilar.	
88.Batalu Pri-038	Form altered/ One person signed for all agents	a. Form overwritten-not countersigned. b. PO & DPO signed c. 6 agents have signed. ODM, KANU, JUBILEE x 2, PDR & ODM; signatures dissimilar	
89. Basineja Centre-039	Not stamped/form altered/ One person signed for all agents	a. Form not stamped. b. Figures overwritten c. 4 agents signed. ODM, JUBILEE, ODM, KANU. Signatures dissimilar	
90.Kurow Centre-040	One person signed for all agents	a. 4 agents signed. ODM, JUBILEE, KANU, PDR. Signatures dissimilar	
91.Buna Pri-041	Form altered/ One person signed for all agents	a. Form altered but countersigned. b. ODM, NASA agents have signed. Signatures dissimilar	
92.Garse Ake Water Point-042	One person signed for all agents	a. 7 agents have signed. NASA, KANU, NARC, PDR, JUBILEE, NASA(ODM) JUBILEE. Signatures dissimilar.	
93.Funanbua Pri School-044	No PDR candidate for Senate while PDR agent signed/One person signed for all agents	a. 2 agents have signed. JUBILEE, CCM. Signatures dissimilar b. PO/DPO signed	
94.Cherate Mobile-045	One person signed for all agents	a. 1 agent has signed. PDR	

Polling Station	1 <sup>st</sup> Petitioner's Allegation on Forms	Comparison with content of original Form 38A	Remarks (Court)
95.Buna Sec-046	One person signed for all agents and officials	a. 3 agents have signed. PDRR, JUBILEE, NASA. Signatures are dissimilar.	
96.Beramu Pri-047	One person signed for all agents	a. NARC-K, JUBILEE agents have signed. Signatures dissimilar	
97.Beramu Centre 2	One person signed for all agents	a. 3 agents have signed. PDR, KANU, NASA. Signatures dissimilar	
98.Danaba Pri 050 3 of 3	One person signed for all agents	a. 3 agents have signed. JP, NASA, PDR. Signatures dissimilar	
99.Danaba Pri of 3 2	DPO not signed	a. DPO has not signed. PO has signed.	
100.Andaraka Pri-053- 2 of 3	No agent signatures	a. <b>No agent has signed.</b> b. PO/DPO signed	-Sec 6(j) Election Offence to report
101. Fardahoma Water point-055	One person signed for all agents	a. 3 agents have signed. ODM, PDR, JP. The signatures are dissimilar	
102.Bosicha Centre-060	One person signed for all agents	a. 2 agents have signed. ODM, FORD-KENYA. Signatures dissimilar	
103.Bolowle Centre-061	No agent signatures 19 of the 20 registered voters turned up	a. <b>No agent has signed.</b> b. 19 of the 20 registered voters did vote. c. PO/DPO signed	-Sec 6(j) Election Offence to report -
104.Godoma NEP Primary /062	One person signed for all agents	a. PNU, JUBILEE, NASA agents have signed. Signatures dissimilar.	
	<b>UNAUTHENTICATED RESULTS :</b>  <b>Effect if Disregarded</b>	NB: (Striking Off votes not expressly allowed under Reg 82(2))	<b>1577 votes</b>

114. It is noted from the above table that no agents signed on **thirteen (13)** Forms 38A, and the presiding officer or his/her deputy did not record the fact of their refusal or failure to sign as mandatorily obliged by **Regulation 79(4)** of the **Regulations**. This may constitute an offence under section **6** of the **Election Offences Act**. As such the same is to be reported to the Director of Public Prosecutions in accordance with the law.

115. Further, from the above scrutiny of original Forms 38A for all polling stations complained of in the 1<sup>st</sup> petitioner's schedule, I find that the critical irregularity demonstrated is that results were taken into account in respect of **five (5)** Forms 38A which had no signatures of both the PO and DPO. The results in these five scrutinized forms cannot therefore be authenticated. The number of valid votes taken into account in obtaining the election outcome from these five forms amount to 1,577 votes. The court notes that upon conducting a scrutiny it is not expressly entitled – under **Reg 82(2)** of the **Elections Regulations** – to strike off votes. If, however, these votes were to be disregarded for want of verifiability and authentication due to lack of presiding officers' signatures, and even assuming all the votes therein were in favour of the petitioners, the petitioners' margin as against the winner would not substantially alter the election outcome.

116. This is not to undermine the gravity of the error. The importance of the presiding officer signing the declaration in the result form at the polling station cannot be overemphasized. It is at the core of electoral integrity, verifiability and transparency that such electoral result at the grassroots of the voting process be safeguarded and it must all times be verifiable and free from doubt. Errors at this stage will permeate and fester in the rest of the results declared for the candidate. It is for this reason that agents and observers are allowed to witness and interrogate the filling in and signing of results declaration forms. It is upon this appreciation that the Court of Appeal in **Maina Kiai's case** held that the principal instrument for declaration of elections, including the presidential election, is the result declaration form filled in and signed by the presiding officer at the polling station. It is this initial result counting form filled at the polling station that underpins any tallying, collation or declaration of results for any election. It is the form that bears the imprimatur of the electoral outcome.

117. On account of this, **Regulation 79(1)** of the **Regulations** provides for the mandatory signing of the declaration form. For senatorial elections, the declaration is set out in Form 38A under **Regulation 79(2) (b)**. The relevant provisions of **Regulation 79** state:

*“(1) The presiding officer, the candidates or agents shall sign the declaration form in respect of the elections.*

*(2) For purposes of sub-regulation (1), the declaration for –*

*(a). ....*

*(b) the National Assembly, County women representatives, Senator, Governor and county assembly shall be in Forms 35A 36A, 37A, 38A and 39A set out in the Schedule” (emphasis supplied)*

Form 38A in the Schedule is entitled “*Senate Election Results At the Polling Station*”, pursuant to [**Reg 79(2)(b)**], and contains at the bottom of the form a section entitled “*Declaration*”. This is the mandatory form that the presiding officer must sign. In the present case several presiding officers failed to sign this form. The absence of a candidate or agent or their failure to sign is permitted so long as a record of the fact is made. No exception is permitted for the failure to sign by the presiding officer. This, in my view, indicates the critical necessity for the presiding officers signing the form as a means of authentication of the result. The Regulations recognize that the presiding officer may, for whatever reason, not sign, and makes the exercise easier for those officers by permitting the deputy presiding officer to sign, and declaring in **Regulation 5(4)** that an action by the deputy presiding officer shall suffice for an action which the presiding officer is authorized to perform.

118. Is this failure to sign the declaration forms sufficient to annul the election in this case? I think not. I have read the decision of Mabeya J in respect of the gubernatorial election for **Wajir in Ahmed Abdullahi Mohamad and Another v Hon. Mohamed Abdi Mohamed, and IEBC, HCEP No 14 of 2017 [2018]eKLR**. In relation to Form 37A the court held, and I concur, as follows:

*“88. From the foregoing, it is clear that while the non-signing of the statutory form by a candidate or his agent is excused under Regulation 79 (6), it is not so for the presiding officer or*

*the returning officer. It is a criminal offence for any of those officers to fail to sign the statutory forms under section 6 (j) of the Election Offences Act. Statutory Forms that are not signed by the said officers are but worthless pieces of paper whose contents would not count in the final tally of results. It is the signing of those statutory forms by the said officers that gives the forms credence and make the results therein accountable and verifiable. Failure to sign a statutory form is not a mere error, it is a grave irregularity that destroys the credibility and authenticity of the results contained therein.*

.....

*91. In the present case, the Forms 37A for Hodhan Dispensary, Ahmed Liban Secondary, Katote Primary, Hadado Waberi and Aqar-Ar-Centre polling stations were not signed by either the Presiding Officer or his deputy. That of Aboore Primary Polling Station was signed by the Deputy Presiding Officer and therefore cured by dint of Regulation 5 (4) of the Regulations. Although the explanation given by R2W1 and the Presiding Officers for the said polling stations was not challenged or denied, that cannot authenticate the said forms and their results. Therefore, the results therein should have been excluded from the final tally. R2W1 himself testified that if an unsigned Form 37A was presented to him, he would not accept it.*

119. There, the court annulled the governor's election for this same county on grounds of, *inter alia*, election irregularities similar to those complained of in this election. However, in **Ahmed Abdullahi Mohamed**, the irregularities proved were grave and cumulatively wrought incredibility to the entire gubernatorial election. It is apt to trace the journey the court there took in reaching its conclusion.

120. The evidence availed in **Ahmed's case** showed – unlike in this case – that there was overwhelming illiteracy and yet the respondents were only able to provide evidence of four assisted voters in fifty three polling stations where scrutiny was carried out (paras 61-65 of judgment). Further, the court there made a finding of falsehood on the part of the County Returning Officer and IEBC when it:

*“took the view that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent (IEBC) were doctoring documents because some of the documents originally filed in court had no signatures or stamps. However, copies of the same documents that were later on introduced had signatures and stamps”* (See paragraph 93 of the Judgment).

121. In addition, in **Ahmed's case**, the IEBC filed Forms 37A for only 80 out of 119 polling stations in Wajir South Constituency in response to a scrutiny application. This made it impossible for the court to verify those missing Forms 37A for that constituency. (See paragraph 98-99 of judgment). It was also impossible to verify Form 37B for Wajir North Constituency for similar reasons ( paragraph 102 Judgment).

122. Further, and critically, the court found in **Ahmed's case**, that there were seventeen polling stations in Wajir South Constituency *“whose results were entered but names not indicated”* (paragraph 103 judgment), and that:

*“104. It is the view of this court that this is in breach of Regulation 87 (2) (b) (i). That Regulation makes it mandatory for each polling station to be named and the results in each entered. Anyone looking at the said Form 37C cannot be able to discern for which polling stations those results are. There was no explanation that was given for this anomaly. This is the Form which was used to declare the results for governor in Wajir County. This anomaly in my view makes those results unaccountable and unverifiable.*

*105. This then was the unsatisfactory nature of the declaration forms which the 2nd and 3rd respondent relied on to declare the results in the Wajir Gubernatorial election.”*

123. **Ahmed's case** further succeeded in nullifying the Wajir gubernatorial election because the court also found evidence of alterations of Forms 37A in polling stations whose ballot boxes had been unlawfully

opened, and that such unlawful opening had **“interfered with the integrity and credibility of results from the two polling stations”** (paragraph 142 judgment).

124. The final nail in the gubernatorial election coffin in **Ahmed’s case** was the proven allegation that the winner (incumbent) had not been qualified to vie as a candidate for the said election. The court there found and held as follows:

**“197. As regards the Master’s degree in Diplomacy and International Relations, this Court takes judicial notice that one cannot obtain a Master’s degree before obtaining a Bachelor’s. As at 3rd September, 2014, the 1st respondent had not yet graduated with any degree. It is therefore not possible that he would have obtained a Master’s degree six months later, on 12th March, 2015.**

**198. In my view, the 1st respondent failed to show that he had actually obtained the two degrees from Kampala University. The petitioners proved this allegation to the required standard. The source and how the two degrees came into being are facts that were in the special knowledge of the 1<sup>st</sup> respondent. In view of the uncontroverted evidence on record, they are not what they purport to be.**

.....

**201. Accordingly, I make a finding that as at 8th August, 2017, the 1st respondent did not have the academic qualifications to vie for position of governor. He was therefore not legally cleared to vie for that position as he did not satisfy the provisions of section 22 (2) of the Elections Act. The case of Peter Kingara v. IEBC (supra) is not applicable as the reports relied in this case are conclusive.**” (emphasis supplied).

125. All these findings in **Ahmed’s case**, taken cumulatively, led the court to conclude that:

**“208. In the present case, the Court has found that the principle of the secrecy of the ballot was breached. The record of the election through the prescribed Forms 37A, 37B and 37C was neither accountable nor credible. That because of the irregularities committed by the 2nd and 3rd respondent, the elections could not be verified..... The totality of the irregularities that were proved, were so grave that they not only affected the credibility of the election but they affected the results of the election itself. No reasonable tribunal can uphold that election.”** (emphasis supplied).

As already pointed out, the evidential scope and its cumulative foundational depth in **Ahmed’s case** are dissimilar to that which is demonstrated in the present case, and thus demand, in my view, different censure.

126. From the cumulative evidence tendered under this head, I am not satisfied that the errors and omissions highlighted so substantially affect the results, nor that they were massive and widespread with the object of undermining the will of the voters of Wajir. Thus, notwithstanding that there were findings of irregularities which I have highlighted in this judgment I nevertheless dismiss this ground of the petition for the reasons stated.

127. As earlier indicated, however, I am obliged to make a report pursuant to **section 87** of the **Elections Act**, as to the fact that election offences of not signing forms that mandatorily require signatures under **section 6(f)** of the **Elections Offences Act** may have been committed by the presiding officers.

**d. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contravened, impinged and violated the petitioner’s right to access to information decreed and protected under Article 35(1) of the Constitution of Kenya 2010 contrary to the principles of a free, fair, transparent, credible election decreed by Articles 81 and 86 of the Constitution;**

128. The 1<sup>st</sup> petitioner complained in paragraph 27(d) of the petition that he was denied access to

information on the electoral process to which he was entitled pursuant to Article 35(1) of the Constitution, and contrary to the principles of a free, fair, transparent, credible election as decreed by Articles 81 and 86 of the Constitution. This allegation was expounded in paragraph 44-46 of the petition where the petitioner states that his advocates requested Forms 38 A, B, and C from IEBC on 1<sup>st</sup> September, 2017, but the request was declined. However, no evidence of this request was annexed. I consider the allegation to be a bare allegation, and not proved.

***e. The 1<sup>st</sup> and 2<sup>nd</sup> respondent failed to transmit the election results in the manner prescribed by law;***

129. The complaint here was in paragraphs 47-48 of the petition. It states that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not transmit the elections results through electronic transmission via the KIEMS kit, accompanied by an electronic picture or image of the results form. According to the petitioner, this was a legal requirement of **section 44** of the **Elections Act**. He argued that the FTP server logs did not indicate any uploading of Forms 38A or B for the entire Wajir county, and would at the appropriate time seek access to the 1<sup>st</sup> respondent’s server logs for scrutiny.

130. I believe I need not set out the detailed evidence concerning the allegations and responses, because the scrutiny report summarized in part in this judgment, clearly shows that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did in fact transmit results electronically. And although IEBC was unable to activate the SD Cards so that they enlarge the scanned Forms 38As to make them legible during the scrutiny exercise, there was no doubt at all that text results were transmitted, and the scanned forms also featured except for the enlargement glitch.

131. This contrasts sharply with Dr Akala’s averments and evidence that **“there were no Forms 38A and 38B uploaded for the entire of Wajir County as prescribed by law”**. I prefer to believe what I saw during scrutiny to what was alleged by the 1st petitioner.

132. As indicated earlier, the court granted limited scrutiny in respect of seven (7) Polling stations where alterations of results allegedly occurred, as well as other complaints. These were: Basineja Centre 1 of 1; Bute Secondary School 1 of 1; Kajaja Two Primary School 1 of 1; Batalu Primary School 1 of 1 and Unsile Water Point 1 of 2, and Unsile Water Point 2 of 2. The court ordered that the SD Cards and Ballot boxes for these polling stations be produced to the court within 24 hours and that Read – only access to the SD Cards for those stations will be provided to the parties in respect of the number of votes cast for each candidate.

133. The scrutiny was done in open court in the presence of the parties using an agreed process. With regard to Ballot boxes, they were opened and election materials scrutinized, ballots counted where parties requested, and a report was made. With regard to SD (Secure Disk) cards, complications arose after the information in the cards was accessed, but the 1<sup>st</sup> respondent’s officers could not enlarge the scanned image of the Form 38A transmitted during the election. A Scrutiny Analysis Report combining the ballot opening reports and the SD card reports was prepared by the Legal Researcher and Court Clerk. It is dated 13<sup>th</sup> December and was signed for by parties at the time of collection. The reports form part the proceedings hereof.

134. The Scrutiny Analysis Report is summarized as follows in respect of significant aspects:

TABLE 3 A

*Bute Boys Secondary School polling station*

Candidate	Votes transmitted by text in SD	Votes by scanned Form 38A	Votes in Original Form 38A in court	Votes in Form 38A contained in ballot box	Votes as counted in Ballot box

Abdikadir Abdirahman	4	Not legible	4	Form 38A missing	4
Abikar Adow Mohamed	54	ditto	56	ditto	56
Ali Abdullahi Ibrahim	469	ditto	466	ditto	466
Registered voters	655	-	655	-	-
Valid votes cast	532	-	532	-	531

TABLE 3 B

*Unsilé Water Point polling station 1 of 2*

Candidate	Votes transmitted by text in SD	Votes scanned by Form 38A	Votes in Original Form 38A in court	Votes in Form 38A in box	Votes counted as in Ballot box
Abdikadir Abdirahman	21	Not legible	21	Form 38A missing	21
Abikar Adow Mohamed	20	ditto	20	ditto	20
Ali Abdullahi Ibrahim	271	ditto	275	ditto	275
Registered voters	401	-	401	-	401
Valid votes cast	320		320		320

TABLE 3C

*Unsilé Water Point polling station 2 of 2*

Candidate	Votes transmitted by text in SD	Votes scanned by Form 38A	Votes in Original Form 38A in court	Votes in Form 38A in box	Votes counted as in Ballot box
Abdikadir Abdirahman	34	Not legible	34	34	Not counted
Abikar Adow Mohamed	18	ditto	18	ditto	18
Ali Abdullahi	257	ditto	257	ditto	257

Ibrahim					
Registered voters	401	-	401	-	401
Valid votes cast	317	-	317	-	317

TABLE 3 D

*Batalu Primary Polling Centre 1 of 1*

Candidate	Votes transmitted by text in SD	Votes scanned by Form 38A	Votes in Original Form 38A in court	Votes in Form 38A in box	Votes counted as in Ballot box
Abdikadir Abdirahman	2	Not legible	4	Form 38A missing	4
Abikar Adow Mohamed	3	ditto	56	ditto	56
Ali Abdullahi Ibrahim	374	ditto	466	ditto	466
Barre Hussein Abdi	54	ditto	54	ditto	54
Registered voters	595	-	655	-	-
Valid votes cast	502	-	502 (overwritten)	-	499

TABLE 3 E

*Basineja Centre Polling Station*

Candidate	Votes transmitted by text in SD	Votes scanned by Form 38A	Votes in Original Form 38A in court	Votes in Form 38A in box	Votes counted as in Ballot box
Abdikadir Abdirahman	3	Not legible	4	Form 38A missing	4
Abikar Adow Mohamed	4	ditto	56	ditto	56
Ali Abdullahi Ibrahim	256	ditto	466	ditto	466

Barre Hussein Abdi	124	ditto	124	ditto	124
Registered voters	568	-	568	-	-
Valid votes cast	464	-	464	-	463

TABLE 3 F

*Gunana Primary School*

Candidate	Votes transmitted by text in SD	Votes scanned by Form 38A	Votes in Original Form 38A in court	Votes in Form 38A in box	Votes as counted in Ballot box
Abdikadir Abdirahman	5	Not scanned	5	5	Not counted
Abikar Adow Mohamed	0	ditto	0	0	ditto
Ali Abdullahi Ibrahim	48	ditto	48	48	ditto
Ali Mahat Salat	361	ditto	361	361	ditto
Registered voters	619	ditto	619	619	ditto
Valid votes cast	459	ditto	459	459	ditto

TABLE 3G

*Johar Primary School*

Candidate	Votes transmitted by text in SD	Votes scanned by Form 38A	Votes in Original Form 38A in court	Votes in Form 38A in box	Votes as counted in Ballot box
Abdikadir Abdirahman	14	Not legible	14	14	Not counted
Abikar Adow Mohamed	3	ditto	3	3	ditto
Ali Abdullahi Ibrahim	55	ditto	55	55	ditto
Barre Hussein Abdi	235	ditto	235	235	ditto

Registered voters	517		517	Not legible	ditto
Valid votes cast	334		334	334	

TABLE 3H

*Kajaja Two Primary School*

Candidate	Votes transmitted by text in SD	Votes scanned by Form 38A	Votes in Original Form 38A in court	Votes in Form 38A in box	Votes as counted in Ballot box
Abdikadir Abdirahman	0	Not legible	Figure cancelled	3	Not counted
Abikar Adow Mohamed	0	ditto	0	0	ditto
Ali Abdullahi Ibrahim	34	ditto	34	34	ditto
Barre Hussein Abdi	455	ditto	458	458	ditto
Registered voters	635		635	635	-
Valid votes cast	495		502		502

135. The following conclusions emerge from the scrutiny exercise conducted by the court:

- a. That the transmission of votes did in fact take place, and specifically that text results were transmitted successfully;
- b. That Form 38A scanned into the KIEMS system and stored in the SD Card could not be enlarged to make it legible, even where the form was clearly in the electronic system but illegible because it could not be enlarged. Although an adverse inference was urged by 1<sup>st</sup> petitioner, I am of the view that no adverse inference against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents is warranted given the totality of the picture emerging from the scrutiny. Indeed, at one point parties decided that the counting of ballots in the opened boxes need not be counted as the results were consistent;
- c. That alleged alterations in forms affecting votes were wholly insignificant in their effect on the ultimate result, if at all;
- d. That differences in votes between those transmitted, those in the Original Form 38A and those counted in ballot boxes (where counted), or those in Form 38A found in the ballot box (where found) were wholly insignificant in the circumstances;
- e. That there were some ballot boxes that had breakages, and in one case the contents of the box could be accessed. This was, however, insignificant because the results tallied with those in the original Forms 38A

136. The scrutiny exercise was conducted, following the 1<sup>st</sup> petitioner's application for scrutiny, in or in respect of stations which the court felt, that most merited scrutiny given the nature of allegations made by the petitioners. Nothing startling or of ill significance emerged from the exercise that gave rise to even a smidgen of an impression that the results contained either in the ballot boxes or in the forms or in the transmitted information did not reflect the will of the voters who cast their votes in those stations.

137. Reverting to the law on electronic transmission of electoral results, it is trite that under **Section 39** of the **Elections Act**, read together with **Regulation 5 1A (d)** and **Regulation 82** of the **Regulations** the only election for which there is a mandatory requirement for electronic transmission of results is the presidential election.

**Section 39** provides as follows:

***“39. (1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.***

***(1A) The Commission shall appoint constituency returning officers to be responsible for—***

***(i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;***

***(ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and***

***(iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.***

***(1B) )The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.***

***(1C) For purposes of a presidential election the Commission shall —***

***(a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;***

***(b) tally and verify the results received at the national tallying centre; and (c) publish the polling result forms on an online public portal maintained by the Commission.***

**Regulation 5(1)(d)** provides for the presiding officer's function of electronic transmission of results to include transmission of only the presidential election results. The provision reads:

***“5 (1A) The functions of a presiding officer shall be—***

***.....***

***.....***

***(d) electronically transmitting presidential results to the constituency, counties and national tallying centers.***

**Regulation 82** provides as follows:

*“82. (1) The presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such manner as the Commission may direct.*

*(2) The results submitted under sub-regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 76”*

138. In the **High Court Election Petition (Kisumu) No 3 of 2017 Jackton Nyanungo Ranguma v IEBC and 2 Others** Majanja J also held a similar view, that electronic transmission is only mandatory in presidential elections:

*“38. A reading of section 39(1C) of the Act shows that electronic transmission and publication of polling result in a public portal is only a statutory requirement for the Presidential election. ... In all other cases, including the county Governor election, the transmission of results contemplated by section 39(1A) and (1B) of the Act is that the votes at the Polling Station are counted and recorded in Form 37A. Each Form 37A is forwarded to the Constituency Tallying Centre. The Constituency Returning officer tallies all the results from all the polling stations and records them in Form 37B. Forms 37B from all the Constituency Tallying Centres are forwarded to the County Tallying Centre where the County Returning Officer tallies all the results from the Forms 37B and announces the election results based on Form 37C.*

*39. Even accepting the errors, omissions and inconsistencies highlighted by PW 4 and the other witnesses, the legal position remains that the votes as recorded in Form 37A are final. Unless Forms 37A are disputed, any errors in electronic transmission of results or publication in IEBC public portal cannot, of themselves and without more, invalidate Forms 37A. Where the results are electronically transmitted from the polling station to any other portal as the IEBC may direct, such results can only be termed as provisional thus underlining the primacy and finality of Form 37A. Regulation 82 of the Elections (General) Regulations, 2012 suggests that these results are provisional”*

139. Similarly, in **High Court (Meru) Election Petition No. 3 of 2017 Mohamed Tubi Bidu v IEBC and Mamo Elema Dano & Abdi Koropu Tepo** Gikonyo,J expressed the view that electronic transmission is only necessary in presidential elections. He stated as follows:

*“[78].... There was no evidence that there was any or total failure in the Process of Relaying and Transmitting Results as alleged. I note that the petitioner alluded to electronic transmission of results in his submissions. In passing, my view is that, at the moment, there is no requirement under section 39 of the Elections Act for electronic transmission of results of election for Member of Parliament. Electronic transmission of results to the national tallying Centre is restricted to presidential elections. And I should think that section 39(1C) was part of the progressive implementation of use of technology in electoral process in Kenya which was envisaged in section 44(2) of the Elections Act*

140. Accordingly, this ground cannot stand and is dismissed.

*Complaints of the 2<sup>nd</sup> Petitioner*

***a. Irregular, unprocedural and unlawful assisted voting;***

141. The petition alleges at paragraphs 25-35 that there was inappropriate assisted voting contrary to **Regulation 72(2)** of the **Regulations** which requires that every presiding officer who aids an illiterate or disabled voter must do so in the presence of agents. The 2<sup>nd</sup> petitioner highlights 15 polling stations as follows: Abakore Girls Boarding School, Abakore Dispensary, Abakore Secondary, Akal-Ar Primary, Meri Primary, Dalsen Primary, Dalsen Primary, Fini Primary, Sabuli Primary, Sabuli Dispensary,

Dagahley Dispensary, Dagahley Primary, Dagahley Old Borehole, Nambaraha Primary, Shidle Primary, Sala Primary and Lafaha Primary

142. The second petitioner Mr Adow Mohamed Abikar, 2PW1 gave evidence via his affidavit dated 6<sup>th</sup> September, 2017. His evidence on this issue is in paragraphs 27, 28 and 30 of his affidavit. He stated that there were reports from his agents that presiding officers consistently inquired loudly from voters as to whom they wished to vote for, and that agents went on to cast ballots on behalf of disabled persons. He highlighted the same stations as cited in his petition.

143. In cross examination, by Ms Lipo for the 3<sup>rd</sup> respondent, he said that most of his agents were locked out of polling stations, but that his chief agent (2PW2) had sworn an affidavit on behalf of his other agents. Shown Forms 38A for some of the polling station he had listed he admitted that they had KANU agents (Sabuli and Abakore Dispensary); and that at both Meri and Abakore polling stations, he had the highest votes. He said he was nevertheless complaining because mistakes had been made. He gave names of his agents who he alleged had been chased away, but admitted that none of them had filed affidavits or been called to testify.

144. The 2<sup>nd</sup> petitioner's Chief Agent was Warsame Ali Hassan, 2PW2. In his evidence, he said that he works with a consultancy firm engaged in business advisory services in Westlands, Nairobi. He had sworn a brief two page, twelve paragraph affidavit. In it he stated that he was appointed as the Chief Agent in Wajir Town. On the issue at hand, the only depositions he made somewhat connected to unassisted voting are at paragraphs 6 and 7 of his affidavit. There, he states that at the polling station – which he later clarified in cross examination was Wajir Girls – he noted that at 2.00 am, on 9<sup>th</sup> August, 2017, there were no IEBC officials and only some agents. That initially he was denied entry into the polling station; that after showing his IEBC badge he was allowed in

145. In cross examination, by Mr Omiti for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, he admitted that although the 2<sup>nd</sup> petitioner had many agents, he didn't know the number. In cross examination by Mr Issa for the 1<sup>st</sup> petitioner, he stated that he was in charge of all agents; that he had an assistant; that he was at Wajir Tallying Centre before results were declared; and that he went round to the polling stations after the results were declared. He admitted that he had not attached a letter of appointment; that he thought that Wajir had 321 polling stations, but could not remember the number; that his party, KANU, had four tallying agents for the constituencies, and that two constituencies had no tallying agents; that KANU was represented in most polling stations; that no other agent swore any affidavit; that he was not confined to Wajir Town and was in touch with the various agents.

146. On the issue at hand, he presented no direct evidence of inappropriate assisted voting, and made no mention of the polling stations identified by the 2<sup>nd</sup> petitioner. One would have expected to find evidence from unassisted voters, from disabled voters, or from agents of the polling stations where presiding officers were alleged to have conducted the inappropriate alleged assisted voting. Instead we have the evidence of the petitioner who does not indicate any station he visited where these events occurred and that of the Chief agent who admitted he only started going round the stations after the results were declared. On the basis of the evidence presently available, I am unable to agree with the 2<sup>nd</sup> petitioner that he has provided proof above the balance of probability but below reasonable doubt level, demonstrating the said irregularity. Accordingly, I dismiss the same.

***b. Incorrect and illegal tallying;***

147. The 2<sup>nd</sup> petitioner's petition deals with this issue at paragraphs 36-39 of the petition. In summary, the petitioner states that there was massive and deliberate failure in operational transparency; that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents delivered pre-conceived and pre-determined computer results interfered with; that the 3<sup>rd</sup> respondent failed to electronically collate, tally and transmit the results accurately in terms of the Court of Appeal decision in **IEBC v Maina Kiai Civil Appeal No 105 of 2017 [2017]eKLR**, and failing to make the results at the polling stations final; that the results were not accurate, verifiable and

accountable by allowing transmission and display of unverified provisional results; that such unverified results released by the 3<sup>rd</sup> respondent were declared before all the results from the polling stations had been received; and that the 3<sup>rd</sup> respondent colluded with the 1<sup>st</sup> and 2<sup>nd</sup> respondents in ejecting the agents of the petitioner from the polling stations.

148. In cross examination, the 2<sup>nd</sup> petitioner admitted that he did not know what the legal requirement regarding transmission of results was, nor did he name the stations in respect of which the results did not comply with the law.

149. His Chief Agent Warsame, 2PW2, in his affidavit at paragraphs 31-34 said that the IEBC failed to electronically collate, tally and transmit results in accordance with the **Maina Kiai** decision. That there was failure to ensure accurate results by IEBC declaring the final results before receiving results from all polling stations. The affidavit was adopted in court.

150. Other than the above assertions, no factual evidence was laid out in support of those assertions. They are bare allegations unsupported by evidence, it did not rise to the level where the respondents' response in terms of the shifting the evidential burden became necessary.

151. I however agree with the respondents' submissions that there is no mandatory requirement for electronic transmission of results for the senatorial election as already found and held on the same issue in respect of the 1<sup>st</sup> petitioner's petition.

**c. Verifiability of the results;**

152. The 2<sup>nd</sup> petitioner's petition on this issue is explained in paragraphs 40 to 47 of the petition. The critical complaint is that the IEBC Returning Officer Mr Gichohi Patrick, 1 RW 15 relied on invalid and unauthenticated results from various polling stations to declare the 3<sup>rd</sup> respondent as the ultimate winner. The petitioner listed six polling stations in respect of which he said invalid results were relied upon as shown in the respective Forms 38A.

153. As earlier mentioned the court had called for all the original Forms 38A and perused them in respect of the complaints made. Below is a list of the complaints and what the original Forms 38A disclose:

**TABLE 4: Stations in the Complaint of the 2<sup>nd</sup> Petitioner**

	<b>Polling station</b>	<b>Complaint on Form 38A</b>	<b>Comparison with Original Form 38A</b>	<b>Court Remarks</b>
1	Aboore Primary School 1 of 2 Wajir South	Form not signed by Presiding Officer	PO and DPO did not sign Signed by agents of CCM,PDR,KANU, Independent	<i>Result cannot be verified</i> <b>269 votes</b> <b>-Offence</b>
2	Hodhan Dispensary polling stn 1of 2 Wajir South	Form not signed or dated by Presiding Officer or DPO	PO and DPO did not sign or date the Form Signed by agents of Jubilee x 2 ; PDR x 2	<i>Result cannot be verified</i> <b>321 votes</b> <b>-Offence</b>
3	Ahmed Liban	No signature of PO or DPO	Signed by PO &DPO	-Nil-

	polling stn 1 of 2 Tarbaj Constituency	though named	Signed by agents of Jubilee and NARC Kenya	
4	Katote Pry School polling stn 1of 1 Tarbaj Constituency	No signature of PO or DPO	PO & DPO signed Signed by agents of Jubilee x 2; PDR	-Nil-
5	Serif Primary School polling stn 1 of 2 Wajir South	Signed by PO and DPO and dated 9 <sup>th</sup> August** whilst in station 2 of 2 they are dated 8 <sup>th</sup> August	Date of Form 38A is 9 August Signed by agents of PDR; KANU and Jubilee <i>Results in P/Stn 2of 2:</i> 1 <sup>st</sup> Pet - 03 2 <sup>nd</sup> Pet- 250 3 <sup>rd</sup> Resp-03	Evidence shows that both dates are possible** <i>Results in P/Stn 1 of 2:</i> 1 <sup>st</sup> Pet – 18 2 <sup>nd</sup> Pet - 260 3 <sup>rd</sup> Resp -00
6	Hadado Waberi polling stn 1 of 2 Wajir West	Form 38A altered suggesting treachery	Overwritten figure is the rejected ballots Signed by PO/DPO NASA agent signed 1 <sup>st</sup> Pet 447 2 <sup>nd</sup> Pet -29 3 <sup>rd</sup> Resp 13	Comment by PO: The rest of the agents went away whilst counting was in process
			<b>Total Unauthenticated results</b>	<b>590 votes</b>

\*\* There were many Forms 38A found to have been signed on 9<sup>th</sup> August, 2017.

154. The 1<sup>st</sup> respondent's evidential responses came through three of their witnesses. Hassan Abdi Hussein, presiding officer at Ahmed Liban polling station gave evidence as 1RW8. He said that counting of ballots ended at about 10.00pm and the agents confirmed the results by signing Form 38A. In cross examination, all he could say about failure of presiding officers to sign was that it was due to human

error. He said no one disputed the results. The court notes that in absence of the signatures of the presiding officer and his deputy, the results cannot be authenticated, and the failure may also amount to a criminal offence.

155. Kassim Billow Adan the Wajir East Constituency Deputy returning gave evidence as 1RW17. In cross examination he stated that results were verified using the KIEMS kit. He stood by the results.

156. Anthony Kimani, County returning officer Wajir South constituency gave evidence as 2RW13. He said he compiled Form 38B based on results entered in Forms 38A. Shown the Forms 38A for Aboore and Hodhan polling stations, he admitted that they were not signed by IEBC officials. He said it is possible to err due to weariness or lack of sleep. With regard to the time of signing the results he explained that it is possible for agents to sign at say, 11.58pm, and presiding officer to sign after midnight, thus the signing dates would be different on the same form. He said he stood by the results

In re-examination, he pointed out that Serif Primary School was not one of the polling stations complained of in the 2<sup>nd</sup> petitioner's petition. On this, he is wrong because the complaint on Serif Primary School is clearly stated in paragraph 41(c) of the petition.

157. The court noted that with regard to Serif Polling station, the Forms 38A in station 1 are dated 9<sup>th</sup> August, 2017 whilst those in station 2 are dated 8<sup>th</sup> August, 2017. There is, however, no adverse inference to make as regards those dates on the different forms because they were generated by different presiding officers at different stations, under different conditions, and it is possible and probable that the counting could have been completed at different times.

158. The 2<sup>nd</sup> petitioner did not seek scrutiny of ballot boxes and other election material for any polling station at all. However from the perusal of the original forms held by the court, I agree with the 2<sup>nd</sup> petitioner that the results of *Aboore Primary School polling station 1 of 2 with 269 valid votes* in Wajir South and *Hodhan Dispensary polling station 1 of 2 in Wajir South with 321 valid votes* cannot be verified for lack of signatures of both the presiding officer and his or her deputy. The said results should not have been taken into account. On the alterations at Hadado Waberi polling station, whilst it would have been prudent to countersign the alterations, nothing unlawful or illegitimate has been demonstrated.

159. The 2<sup>nd</sup> petitioner proved this ground of the petition to the extent that I find and hold that the results in the **two (2)** polling stations identified above could not be verified or authenticated for lack of signatures of both the Presiding officer and Deputy presiding officer. The results thereof amounting to 590 valid votes should not have been taken into account. The court will also file a report that an offence may have been committed in respect of those two stations.

#### ***d, Voting, counting and tabulation of results reflecting the discrepancies;***

160. The 2<sup>nd</sup> petitioner's complaint here was in paragraphs 48-79 of the petition, and states that the votes cast were not counted or tabulated accurately. The petitioner highlighted twelve polling stations and alleged that the results in those stations for the disparate elections of president, senator, member of parliament and women representative were different. He also questioned the disputed and objected to votes.

161. In his affidavit, the 2<sup>nd</sup> petitioner went further and claimed that the IEBC and County Returning Officer or officers under them misconducted themselves by failing to secure ballot boxes, and allowing them to be in the hands of third parties. He attached copies of searches of ownership of vehicles said to have contained unauthorized ballot boxes with unmarked ballot papers.

162. On the claims as to differences in votes across the disparate elections, 2PW1 said that he obtained data from the IEBC portal. Questioned as to the analyses of the alleged disparate results he said that he was the one who downloaded the information from the IEBC portal. He admitted that he had not produced a certificate under the Evidence Act for production of any downloaded computer information,

including alleged screenshots of the portal. He said he did not need one and was unaware of such a requirement.

163. In my view, the court need not go into any depth of analysis on these claims concerning disparate votes for two main reasons. First, no basis is laid out for the petitioner's analyses of the alleged information from the portal, and the production of the computer outputs is unsupported by a certificate of evidence in terms of **section 106 B (1) and (4)** of the **Evidence Act**, which makes it a mandatory requirement for issuance of a certificate of admissibility of electronic records as follows:

***106B. Admissibility of electronic records***

***(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.***

.....

***(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—***

***(a) identifying the electronic record containing the statement and describing the manner in which it was produced;***

***(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;***

***(c) dealing with any matters to which conditions mentioned in subsection***

***(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the shall be evidence of any matter stated in the certificate and for the purpose (2) relate; ...".***

164. Secondly, and fundamentally, the court has no proper basis to engage into an inquiry in relation election results beyond those for the election of the person and constituency whose election is challenged in the petition before it. Obtaining the information relating to the disparate elections which are not the subject of the election contested in this petition would present superlative challenges and possibly attract suits from parties in those elections who have not been enjoined as parties to the petition challenged in court.

165. I also concur with Gikonyo J in the Isiolo South Constituency Member of National Assembly election case of **Mohamed Bidu Tibu** (supra) where the learned Judge stated as follows regarding comparison of votes across disparate election contests:

***"[68] I do not think, in an election such as ours, votes cast for all positions must invariably or necessarily be exactly the same. There could be some differences in the number of votes cast as recorded by the Presiding officers or Returning officers, and various reasons may be responsible thereof. For example, a voter or voters may, inadvertently or for lack of knowledge of the proper voting procedures or for any reason, dip more than one ballot into one ballot box. Such is called stray ballot or ballots. In such case, the stray ballot or ballots will invariably reduce the number of votes cast for the position for which the ballot was meant. Another consideration; recording of votes in the statutory forms may be erroneous. We have seen wrong additions of votes cast in***

*Matagari and Kula Mawe polling station. These errors may occur in any or some or all of the elective positions. When that happens, there will be no uniformity in numbers of votes cast. I should also state that the other elections are not part or subject of this petition. Therefore, it will be a wrong assumption or unfair inference that difference in number of votes cast among the three elections per se amounts to electoral malpractice. Cogent evidence is needed to prove the particular malpractice. I am however aware that it is a red flag if the difference is so huge that it cannot be a result of a simple mistake or error, or it is incapable of any explanation.”* (emphasis supplied)

166. In light of the foregoing statement, with which I concur as I have said, I am unable to agree with the 2<sup>nd</sup> petitioner on this issue and do hereby dismiss it.

167. With regard to the issue of the ballot boxes in vehicles, the 2<sup>nd</sup> petitioner when asked in cross examination how he knew the vehicles had ballot boxes, answered that it was public knowledge. He could not tell how many ballot boxes were in the vehicles, nor their serial numbers or for which stations. He said the serial numbers were with the police. He said his lawyer could provide further information. None was forthcoming.

168. It is for a person who alleges to provide proof. The evidence availed proves none of the allegations and fails.

***e. Making false entries;***

169. In the 2<sup>nd</sup> petitioner's petition at paragraphs 80-88, he specifically accuses the Wajir East Constituency Returning Officer and his deputy of stealing results before feeding them into the KIEMS kit at Wajir High School tallying centre, in favour of the Jubilee Party candidate. That is an election offence contrary to **section 6(a)** of the **Elections Offences Act**. He avers that the Returning officer ran away with the KIEMS kit

170. In his affidavit he clarifies that it is the deputy returning officer who implicated the returning officer, Abdikadir Sheikh Abdi, with the theft. He says that the information was received from an undisclosed person.

171. In cross examination the 1<sup>st</sup> petitioner said that he did not know the officer who stole the KIEMS kit; that he was told that the officer ran away with it, and was traced by the police and brought back; that there was a melee at Wajir Town and there were gunshots.

172. On the basis of the above evidence, I am not satisfied that the petitioner has demonstrated that the KIEMS kit was stolen by one Abdikadir Sheikh Abdi.

173. Abdikadir Sheikh Abdi, the Constituency Returning officer for Wajir East gave evidence as 1RW16. On this issue he said that he did not implicate anyone on the issue of a missing KIEMS kit. He stated that two kits were indeed missing for a period, and were retrieved from their officers. He did not produce evidence of having reported the incident. The kits were finally found among the non-strategic election materials, where they had been misplaced.

174. 1RW18, Kassim Billlow Adan was the deputy returning officer Wajir West constituency. He denied having taken the KIEMS kits. He said the store for non-strategic material was at the tallying centre. The returning officer is the one who told him to look for the kits. He said they were missing for about three hours. The allegation was that the kits had disappeared after voting had been completed and not before.

175. Despite the drama which this issue appears to have generated, the complaint that the results were stolen, manipulated or false entries made at Wajir High School in favour of the 3<sup>rd</sup> respondent were not substantiated. The allegations cannot therefore stand.

**f. Striking coincidences and incredible figures / vote result padding and manipulation;**

176. The 2<sup>nd</sup> petitioner's complaint under this head is found at paragraphs 89-102 of his petition. The essence of the complaint is that the votes garnered by the candidates in several polling stations are so strikingly similar that they lack credibility. The petitioner identified polling stations where, according to him, the results had to have been manipulated because either there were more votes cast than there were registered voters, or the votes were strikingly similar.

177. The petitioner attached to his affidavit an analysis that shows that a large number of polling stations reflected more votes cast than there were registered voters. However, the court having perused all the Forms 38A for the County, did not find a record of any station where the votes were more than the registered voters. I therefore dismiss the allegations under this head.

**Conclusions**

178. Based on the foregoing analysis, I have come to the following conclusions on the petitions herein.

*1<sup>st</sup> Petitioner's petition*

179. All the grounds raised by the 1<sup>st</sup> petitioner have failed for want of substantiation. The exception is with regard to **thirteen (13)** polling stations which had no agents at all, and **five (5)** polling stations where the results could not be authenticated and should not have been taken into account.

180. Subject to what is stated herein, the 1<sup>st</sup> petitioner's petition otherwise fails.

*2<sup>nd</sup> Petitioner's petition*

181. All the grounds raised by the 2<sup>nd</sup> petitioner have failed for want of substantiation. The exception is with regard to **two (2)** polling stations where the results could not be authenticated for lack of signatures and should not have been taken into account.

182. Subject to what is stated herein, the 2<sup>nd</sup> petitioner's petition also fails

**Costs and Quantum:**

183. The court had asked the parties to address it on the following questions: Who bears the costs of the Petition? What is the quantum of the instruction fees that the court should award or cap the costs at? Is there justification for more than one advocate?

184. The court, has power to assess and award costs and make orders on the security deposit. This is done pursuant to **Section 83** of the **Elections Act** and **Rules 30** and **33** of the **Election Petition Rules**. All parties filed submissions as required under the agreed heads.

185. Mr Omwanza's submission for the 2<sup>nd</sup> petitioner was that many irregularities had been established. He further urged the court to apply the test as established in the Namibian case of **Rally for Democracy and Progress & 8 Others vs. Electoral Commission of Namibia & 5 Others, Case No. SA 12/2011**. Counsel further submitted that costs should be granted to the Petitioners and certified for two counsels. He further urged that the costs should not be more than Kshs. 2 Million per party all inclusive since election petitions are matters of public interest. Counsel relied on the case of **Ferdinand Waititu [2013] eKLR** where the court capped the costs at Kshs. 2.5 Million.

186. Mr. Abdulhakim for the 1<sup>st</sup> petitioner submitted, that he was in agreement with Mr. Omwanza. He further stated that the court ought to look at the issue of costs from the perspective of a voter. It was further submitted that the figure of Kshs. 2.5 Million is fair and the same should not be certified to an individual counsel.

187. Mr Omiti submitted that costs should be capped at Kshs. 4 Million, given the input and effort needed in election petitions. He further submitted that costs should mean instruction as well as disbursements for each petitioner. The figure, I was submitted the figure covers the totality of the costs, that is, on party and party costs and advocate client costs.

188. Mr Issa's submission was that each Petitioner stands on their own and as such, the costs ought to be viewed in the same way. Counsel submitted that the instruction fee should be capped at Kshs. 3 Million. The getting up fee on the other hand should be different giving a total of Kshs. 4.5 Million. Counsel urged the court to consider the issue of inflation. The court was urged to follow the precedent set in the case of **Martha Wangari Karua & Another v. Independent Electoral & Boundaries Commission & 3 Others [2017] e KLR** where fees were capped at Shs 10million.

189. I have taken into account the parties representations. I have also perused the Advocates Remuneration Order which, at **Schedule 6 Paragraph (i)** sets instruction fees for election petitions at no less than Kes 500,000/-.

190. This petition was consolidated and most issues in each of the petitions were cross cutting. The level complexity was not high: pleadings in both petitions followed the mould and style of the presidential petition in **Raila Odinga vs Uhuru Kenyatta and IEBC [2017] eKLR**. The petition was heard over 4 days, save for interlocutories and the scrutiny. A total of twenty six persons gave evidence. In my view this case required the constant attention of two counsel for of each party. I would therefore certify for two counsel for each party.

191. Taking all these into account, including the minimum fees under the **Advocates Remuneration Order**, I cap instructions fees at shillings 1,600,000/- per certified counsel.

192. All parties were agreed that the usual order that costs follow the event should apply.

## **Disposition**

### *In respect of the 1<sup>st</sup> Petitioner*

193. Overall, and as shown in Table 2 in this judgment, I find that the critical irregularity demonstrated by the petitioner in this petition is that results were taken into account in respect of **five** Forms 38A in the five polling stations identified in Table 2 herein, which forms had no signatures of both the PO and DPO. The results in these five scrutinized forms cannot therefore be authenticated. The number of valid votes taken into account in obtaining the election outcome from these five forms amount to **1,577 votes**.

194. In respect of thirteen (13) polling stations also identified in Table 2 herein, no agents signed the same and the presiding officer did not comment on the failure to so sign as required by **Regulation 79(4)**.

195. I hold that these omissions or mistakes, viewed in perspective of the overall evidence of wrongdoing, do not support a conclusion that the election was so irregularly conducted that a reasonable tribunal would not uphold the entire election of Senator for Wajir County.

196. However, I am, obliged to make a report pursuant to **section 87** of the **Elections Act**, as to the fact that election offences of not signing forms that mandatorily require signatures under **section 6(f)** of the **Elections Offences Act** may have been committed by the presiding officers in relation to the identified polling stations.

### *In respect of the 2<sup>nd</sup> Petitioner*

197. The 2<sup>nd</sup> petitioner demonstrated that results were taken into account in respect of **Two** Forms 38A in the two polling stations identified in Table 4 herein, which forms had no signatures of both the Presiding Officer and Deputy Presiding Officer. The results in these two scrutinized forms cannot therefore be authenticated. The number of valid votes taken into account in obtaining the election outcome from these

five forms amount to **590 votes**.

198. The court is obliged to make a report pursuant to **section 87** of the **Elections Act**, as to the fact that election offences of not signing forms that mandatorily require signatures under **section 6(f)** of the **Elections Offences Act** may have been committed by the presiding officers in relation to the identified polling stations.

199. The court found that there were mistakes and omissions such as failure to stamp Forms 35A. The cumulative effect of such failure however, does not satisfactorily found a basis for a declaration of irregularity of such magnitude that no reasonable tribunal would uphold it.

200. Accordingly, I hereby **dismiss** both petitions with costs:

- a. Costs shall be borne by the petitioners in equal shares except as otherwise specifically allocated herein or ordered during the proceedings or in interlocutory rulings.
- b. Instructions fees are hereby capped at shillings 1,600,000/- per certified counsel.
- c. Costs shall be taxed by the Deputy Registrar.
- d. Costs may be recovered from the security deposit, and may be paid to the respondents in equal shares-
- e. Costs are certified for two counsel jointly for the 1<sup>st</sup> and 2<sup>nd</sup> respondent and two for the third respondent.

201. The original Forms 37A 37B and 37C deposited in and held by this court are hereby released to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for statutory custody and preservation in accordance with the law.

### **Certificate as to validity of election**

202. The court is required, pursuant to **Section 86** of the **Elections Act**, to issue a certificate as to the validity of the election. Accordingly:

- a. The court hereby certifies that at the conclusion of the hearing of this petition the determination of the court on the date hereof is that the petition herein is dismissed, and the election of Abdullahi Ibrahim Ali is hereby confirmed as valid.
- b. A certificate to this effect shall forthwith be issued by the Deputy Registrar to the Independent Electoral and Boundaries Commission and the Speaker of the Senate.

### **Report on Electoral Malpractices**

203. Pursuant to **Section 87** of the **Elections Act**, this court is, on conclusion of a hearing required to determine, as it hereby does, that the electoral malpractice of failure of presiding officers to sign Forms 38A for the polling stations highlighted in Tables 2 and 4 in this judgment, may be offences of a criminal nature contrary to **Section 6 (f)** of the **Election Offences Act**. The Registrar is therefore hereby directed to forthwith issue this determination, listing out the specific stations implicated herein, as a report of the court to the Director of Public Prosecutions for such action as is lawful.

204. Orders accordingly

**Dated and Delivered at Nairobi this 31st Day of January, 2018**

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**RICHARD MWONGO**

**PRINCIPAL JUDGE**

Delivered in the presence of:

1. Mr Abdulhakim.....for the 1st Petitioner
  2. Mr. Maobe.....for the 2<sup>nd</sup> Petitioner
  3. Mr. Issa h/b for Kubai for.....for the 1<sup>st</sup> & 2<sup>nd</sup> Respondent
  4. Mr Issa, Ms Lipo.....for the 3<sup>rd</sup> Respondent
- Court Clerk:.....Mr. Jeff Omuse