



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MARSABIT
ELECTION PETITION NO. 1 OF 2017

(FORMERLY NAIROBI MILIMANI ELECTION PETITION NO.22 OF 2017)

IN THE MATTER OF: ARTICLE 1(2), 3, 38, 81, 84 ,86 AND 87 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 78 OF THE ELECTION ACT (No.24 of 2011)

AND

IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017, THE ELECTIONS (GENERAL) REGULATIONS, 2012 AND THE ELECTIONS OFFENCES ACT (NO.37 OF 2016)

AND

IN THE MATTER OF: THE WOMEN REPRESENTATIVE ELECTIONS FOR MARSABIT COUNTY HELD DURING THE GENERAL ELECTIONS CONDUCTED ON THE 8TH OF AUGUST 2017

BETWEEN

NASRA IBRAHIM IBREN.....PETITIONER

VERSUS

1. I.E.B.C.1ST RESPONDENT

2. ARNOLD MUTWIRI NJABANI MARSABIT

COUNTY RETURNING OFFICER.....2ND RESPONDENT

3. SAFIA SHEIKH ADAN.....3RD RESPONDENT

RULING

The application dated 12.1.2018 seeks the following orders:

(i) That this Honourable Court be pleased to order for the nullification of the Marsabit County Women Representative to the National Assembly elections held on the 8th of August, 2017 on grounds that the same is not verifiable and as such was conducted in violation of the principles enunciated under Articles 81 and 86 of the Constitution of Kenya.

(ii) That in the alternative, this Honourable Court be pleased to grant an order for the scrutiny and recount of all the ballots cast in favour of all candidates who contested for the position of Marsabit County Women Representative to the National Assembly elections, during the General Elections held on the 8th day of August, 2017 with regard to all the polling stations thereto.

(iii) That corollary to the foregoing, the scrutiny and recount exercise envisaged above do include scrutiny and an analysis of:

(a) Copies of the physically printed voter registers used in all the polling stations in Marsabit County vis a vis the biometric voter registers, as used in the General Elections held on 8th August, 2017.

(b) All the Forms 32 and 32A's as filled by the Presiding officers with regard to assisted voters and the verification & identification of voters respectively in all polling stations in Marsabit County during the General Elections held on 8th August, 2017.

(c) Spoilt ballots, rejected ballots, stray ballots and counted ballots together with packets of the counterfoils thereto in all the polling stations in Marsabit County stemming from the General Elections held on 8th August, 2017.

(d) Polling Station and Tallying Centres in Marsabit County during the General Election held on 8th August, 2017.

(iv) That consequential to the prayers herein sought, the results and/or outcome of the scrutiny exercise do form part of the record having been administered under the supervision of the Honourable Deputy Registrar of the Court.

(v) That such further and/or other orders be made as this honorable court may deem fit and expedient.

(vi) That the costs of this application.

The application is supported by the affidavit of Dr. Noah Akala Oduwo sworn on the same date. The 1st and 2nd respondent replied to the application through an affidavit sworn by **Arnold Mutwiri** on 12.1.2018. The 3rd respondent filed a replying affidavit sworn on 17.1.2017.

Mr. Walukwe, counsel for the applicant submit that several allegations have been made in the petition with regard to how the elections were conducted. The 1st allegation was that the petitioner was not provided with the statutory forms. The other allegation is that out of 384 polling stations in Marsabit County, 286 polling stations had a mismatch in the results for the 6 polls. There is also an allegation that 25 polling stations have no data entered in the Kiems Kit. Further, 6 polling stations had voter turnout which is higher than the registered voters. The petitioners also raised issues with regard to assisted voters among other complaints. An application for scrutiny and recount can be made at any time before the case is closed. It does not need to be pleaded in the petition. The allegations raised herein are contained in the annexures to the affidavit of Dr. Noah Akala that was filed in support of the petition. Counsel contends that in the case of **Nadhif Jama V Abdikhaim Mohamed Osman and 3 others Supreme Court Petition No.13 of 2014 (2014) eKLR**, the court held that the annexures in an affidavit becomes part of the pleadings. Each document filed with the petition is part of the pleadings.

It is further submitted that the court gave orders for the preservation of the ballot boxes. The deputy registrar filed his report. Some boxes had broken seals while others had lids for other elections. Some of the seals were not IEBC branded. There were over 150 boxes which did not indicate the specific polling stations. They only have serial numbers.

On 30th November 2017, the Court gave a ruling on scrutiny of the SD cards and voter registers. The petitioner has not been supplied with Forms 32. The statutory forms were supplied on the very last day of the Court order. The scrutiny revealed that in 121 polling stations, people were allowed to vote after 5.00pm. In some stations most of the people voted after 5.00pm. In most cases it is the 3rd respondent who got the highest votes from those polling stations where voting continued after 5.00pm. In 141 polling stations, the statutory forms had no IEBC stamps. The scrutiny also discovered that about 9,961 voters were identified alphanumerically and 2,000 were identified through search of their documents. If one was not identified through a Kiems Kit, then a form 32A should have been filed. The petitioner has not been provided with any form 32A. In 16 polling stations the votes cast were more than the authenticated voters. That means that the ballots were more than the registered voters. Counsel gave an example of Hellu polling station.

It is further submitted that in 19 polling stations the SD cards were missing. Those stations account for about 20,000 registered voters. In 6 polling stations the SD cards were not readable. Other SD cards were from different constituencies like Migori. 37 polling stations could not be accounted for. Some voter registers were not used while those that were used were not marked. It is submitted that the irregularities are extensive.

Mr. Kabene, counsel for the 1st and 2nd respondents opposed the application and relied on the affidavit of Arnold Mutwiri. Counsel submitted that the petitioner has purported to present a report as a result of scrutiny of the SD cards. The orders of the court allowed access to the SD cards on ready only basis. No report was to be filed. All the manual voter registers and statutory forms were deposited in court. The application is defective. It seeks both scrutiny and recount. A scrutiny goes to the issue of validity of the votes while a recount determines the number of votes garnered by the candidates. The two processes are different. In the case of *Justus Gesito Mugali V IEBC & two others(2013) eKLR* the court held that a party cannot benefit from what he refers to as a flawed process. Counsel further submits that the application has introduced fresh prayers to the petition. This is the prayer for scrutiny and recount which has not been pleaded. No amendment to the pleadings has been sought. The petitioner was all aware of her case. She is bound by her pleadings. The court cannot form an inquiry on matters which are not pleaded.

Mr. Kabene further contends that there is no basis laid for scrutiny and recount. Counsel relies on the case of *Gatirau Peter Munya V Dickson Mwenda Kithinji & two others, Petition No.2B of 2014 (2014)eKLR, Supreme Court* the right to scrutiny and recount is not an absolute right. A party must establish a basis for the court to grant such orders. It is worth noting that the numbers in the requisite forms have not been disputed. The forms are the primary source of data that led to the declaration of the results. The petitioner or her agents were not denied the right for a recount as they did not seek the same. There is no comparison of the numbers in the forms with those in the Kiems Kit. What is being alluded to is discrepancy on the forms and the portal. That alone is not sufficient to invalidate an Election. The orders issued by the court have not been varied or amended. The 1st respondent was not ordered to supply the polling book diaries and forms 32. During the hearing, evidence was adduced that it is not a legal requirement that the seals must have IEBC label. It was also explained that the seals can break. The report by the Deputy Registrar states that all the ballot boxes were intact. The security feature on the ballot boxes is not the name of the polling station but the serial number. It is not an offence to vote after 5.00pm. Those who voted after 5.00pm were on the queue as per the evidence on record. The original forms were supplied to the court and have IEBC stamps. What is being raised is the visibility of a stamp.

Mr. Muganda and Miss Hashim for the 3rd respondent opposed the application. Counsels submit that the orders of 30th November 2017 did not direct the 1st respondent to supply poll book diaries. Only documents indicated in the court order were to be supplied. The Deputy Registrar was not to participate in

the scrutiny of the SD cards. No report was to be filed. The petitioner has opted to file her own documents. Regulations 28 and 29 of the Election Petition Regulations require that a plea for scrutiny has to be clear and specific on the polling stations. A basis must be laid for each polling station. The specific polling stations must be pleaded in the petition. The petitioner has given a general list of polling stations but nothing is being raised on those polling stations. Some of the orders being sought are spent. Fresh matters have been introduced. The petition does not raise any single plea on a ballot box. No one testified about form 32. The petition does not make any reference to forms 32. During the hearing, none of the witnesses testified about form 32A. There is no allegation of variance of the forms 39As, 39Bs and 39C as compared to the results in the Kiems Kits.

Counsel further submit that there is no list giving variance of results between those in the statutory forms and those on the portal. Counsel rely on the case of *Jackton Nyanungo Ranguma V IEBC and two others Kisumu Election Petition No.3 of 2017* in that case the petitioner's contention was based on the portal results. The court held that the results on the portal are provisional and the final results are found on the statutory forms 39As. From 20th December 2017, the petitioner has had the original forms 39As but has not faulted the forms.

What matters on the seals is the serial number and not the IEBC label. Voting after 5.00pm is not an illegality. The petitioner was not prejudiced by the extension of time. Scrutiny is not about ballot boxes but their contents. All the ballot boxes were found to be intact. One missing seal on a ballot box cannot make the ballot box to be defective. The petitioner has not pleaded that she sought a recount and she was denied that right. It is also submitted that the petitioner is not alleging that she deserved more votes at a polling station than those indicated in the forms.

Counsels maintain that a petitioner cannot seek both scrutiny and recount as held in the *Justus Gesito Mugali V IEBC & 2 others (2013)eKLR* case during the preservation of the ballot boxes exercise all the boxes were counted and their general condition indicated. The boxes were sealed and intact. The IEBC gave out all the voting materials. The ballot boxes are serialized. There is no requirements that the seals must be branded. A ballot box can be traced through the use of the seal number. The law does not provide a limit on the extended time. It is difficult to conclude that those who were on the queue after 5.00pm voted for a single candidate. What should be considered is whether those who voted after 5.00pm were allowed to vote and exercised their constitutional right to vote. The annexures by Dr. Akala have been challenged to be raw data with no IEBC logos. The forms 39 were provided and these are the primary source of data. There is no allegation that the results on the forms are false or exceeds the registered voters. Rule 33 of the election Rules provide for particularity and specificity of the polling stations with disputed votes. An order for scrutiny is not a guessing game.

The affidavit in support of the application raises several issues: These are:

- 1. 17 ballot boxes from Laisamis Constituency had seals which are not IEBC labeled.**
- 2. Four ballot boxes had their seals broken.**
- 3. In 67 polling stations, the name of the polling station is not indicated but the boxes are serialized. All these are in Laisamis Constituency.**
- 4. Three ballot boxes in Saku constituency had broken seals**
- 5. 46 polling stations in Saku constituency had their ballot boxes serialized but the names of the polling stations have not been indicated.**
- 6. Two polling stations in Saku constituency had their lids interchanged. These are Olaya Nursery school and Badasa primary school.**
- 7. In Moyale Constituency nine polling stations had ballot boxes with broken seals.**

- 8. Seven polling stations in Moyale had the seal number tags missing.**
- 9. 35 polling stations did not have IEBC labeled seals.**
- 10. 35 polling stations from Moyale had ballot boxes which are serialized but the names of the stations are not indicated.**
- 11. Four polling stations from Moyale had their lids interchanged.**
- 12. In North Horr constituency 3 polling stations namely Maikona Primary school, Horigudha Nursery polling station and Yaa Algana polling station had ballot boxes with broken seals.**
- 13. One polling station did not have the station name indicated on the ballot box but the box is serialized.**
- 14. Four polling stations in North Horr had ballot boxes with seals not from IEBC.**
- 15. 61 polling stations had their ballot boxes serialized but the names of the polling stations are not indicated on the ballot box.**
- 16. Two polling stations had their lids interchanged.**

The supporting affidavit mainly relies on the information which is alleged to have been extracted from the SD cards.

The main issues being raised from the results of the scrutiny of the SD cards as per the annexed report is as follows:

- 1. In 121 polling stations voters were allowed to vote after 5.00pm. The total number of voters in those polling stations are 8,071.**
- 2. 131 forms on the SD cards did not contain IEBC stamp. The total number of voters affected are 20,282.**
- 3. Seven polling stations had unreadable SD cards.**
- 4. 9,969 voters were identified alphanumerically while 2,976 voters were identified through document search.**
- 5. In 16 polling stations the total number of votes cast were more than the total number of authenticated votes. These affect 6,242 votes.**
- 6. The images on the SD cards are not legible.**
- 7. In five polling stations namely Soweto nursery, Loutolia primary, Ulauli school, Merille primary school streams 1 and 2, all in Laisamis constituency, voting was not done on the 8th of August 2017. The SD cards indicate that voting was done on 14th July 2017, 2nd January 2009, and 3rd January 2009.**
- 8. Although the original forms brought to court bare IEBC stamps, the ones on the SD cards do not have stamps.**
- 9. In five polling stations there is a discrepancy between the total valid votes and the tally of the total votes received by each candidate. This affects 1,644 votes.**

10. In two polling stations no voting took place.

11. The use of voter registers in Saku constituency was not consistent in all the polling stations.

The Petitioner maintains that she has laid a basis for the granting of the orders of scrutiny and recount. Mr. Walukwe maintains that the elections were not conducted in accordance with the law. On the other hand, the respondents submit that there is no basis for the Court to grant the orders being sought. The Petitioner was provided with all the original forms 39As, 39Bs and 39C and has not faulted the results from any polling station.

The Respondents contend that an order for scrutiny and recount cannot be granted simultaneously. The Petitioner is bound by her pleadings. The Petitioner did not seek for orders of recount and scrutiny.

It is now settled that for the Court to grant orders of recount and scrutiny, the petitioner has to fulfill certain conditions. These conditions include but not limited to the following:-

- 1. The Petition should include a prayer for recount and scrutiny.***
- 2. A basis must be laid before the Court can grant the orders. This include the taking of evidence.***
- 3. Apart from the pleadings, what is subsequently brought before the Court such as oral evidence or information produced by the respondents should be considered. The Court is not limited to the pleadings only.***
- 4. An order of recount and scrutiny will not be granted as a matter of course.***
- 5. An application for scrutiny and recount can be made at any time before the Court make its decision.***
- 6. The Court can on its own motion make an order for scrutiny and recount.***
- 7. Scrutiny and recount shall be confined to the specific polling stations where the results are disputed.***
- 8. The Court has to be satisfied that in view of the laid basis and available information, such an order will assist the Court in making its final decision.***
- 9. The objective of scrutiny and recount is not to dig in new evidence to assist the Petitioner's case.***

A Petitioner need not satisfy all the above conditions. Each application will be determined on its own merit. The Petitioner has stated that the particulars of the alleged electoral offences, irregularities and malpractices. There are allegations that the results on the portal are different from those on form 39B (paragraph 32 of the Petition). It is also stated that assisted voters were not made to fill forms 32 and were not being assisted in the presence of party agents. The petitioner's agents were denied the right of a recount when sought and they were not given forms 39As at the polling stations. The results transmitted electronically differ substantially with the results on form 39B. Some specific polling stations have been indicated where the results on the portal are said to be different from those on the forms. Other allegations include chasing away of the Petitioner's agents, counting the ballots using light from mobile phones among others.

At this juncture evidence has been taken from all the parties. The Court granted orders allowing the Petitioner to seal the ballot boxes. A report was filed by the Deputy Registrar on that exercise. The Court also granted orders allowing the petitioner to access the SD cards and to have all the original

statutory forms produced in Court. The prayers in the petition does not include one for recount and scrutiny. That in itself does not preclude the petitioner from making an application for scrutiny and recount. The law allows such an application to be made at any time before the case is closed.

While dealing with an application for scrutiny and recount, the Court should take into account the fact that at this stage the main suit is still pending. Consideration of the evidence already adduced should be limited to the issue of scrutiny and recount. The main objective is to assist the court when making its final decision.

From the application and the supporting affidavit, I do find that the application is mainly based on the scrutiny of the SD cards. Some of the allegations are contained in Dr. Noah Akala's initial witness statement. The Petitioner has filed his own report on the SD cards scrutiny exercise. It is true that the court ordered that no report was to be filed. The Court allowed the Petitioner to take notes and to obtain any document of her interest. I will take it that the preliminary report on SD cards scrutiny annexed to Dr. Noah Akala's affidavit is the petitioner's own interpretation of her findings.

The Petitioner's preliminary report raises certain issues. One of the issues is that some polling stations SD cards are not readable. The polling stations have been given. I have gone through the statutory forms involving each of those polling stations and noted as follows:

1. At Scheme Nursery School, the **registered voters** are **211**. The **Petitioner** got **72 votes** while the **3rd respondent** got **102 votes**. There was no rejected vote.
2. At Sakuu Primary School, the **registered voters** are **588**. The **Petitioner** got **119 votes** while the **3rd Respondent** got **160 votes**. There was **1** rejected vote.
3. At Gas Mobile, the **registered voters** are **119**. The **Petitioner** got **4 votes** while the **3rd respondent** got **9 votes**. **Pantoren** got **81 votes**. There was **1** rejected vote.
4. (a) At Yaa Algana, the **registered voters** are **3**. The **Petitioner** got **0 votes** while the **3rd respondent** got **0 votes**. There was no rejected vote.

(b) At Darade AP Post, the **registered voters** are **9**. The **Petitioner** got **0 votes** while the **3rd respondent** got **0 votes**. There was no rejected vote.

(c) At Heilu Social Hall, the **registered voters** are **688**. The **Petitioner** got **473 votes** while the **3rd respondent** got **15 votes**. There were **2** rejected votes.

It is further stated that some polling stations had anomalies on the registered votes and rejected votes. Two stations have been given as examples. These are **GATAB** Primary school and **LOSIKIRIASH** Primary school. The form 39A for Gatab Primary School give the Petitioner's votes as 15 while the **3rd Respondent** got 9 votes. Patoren got 264 votes. The total valid votes are 369 and there was no rejected vote.

At **LOSIKIRIASH** primary school, the total valid votes are 195. There was no rejected vote. The petitioner did not get any vote while the **3rd respondent** got six (6) votes. I see no problem with those results. The petitioner's table at page 044 indicate that there is a discrepancy of -536 votes at Gatab polling station and -212 votes at Losikiriash. These allegations are not supported by the results and the Petitioner has not faulted the two forms **39As** for those polling stations. All the other alleged discrepancies between authenticated voters and total ballots gives negative figures of between **-1 to -8 votes**. None of the forms **39A** provided by the **1st respondent** gives a negative variance. Therefore, the contention that the SD cards are not readable cannot lead to the opening of the ballot boxes in those stations.

The Petitioner also contends that there were **11,978** voters who were assisted. The forms **32A** used have

not been produced. Since the application mainly involves scrutiny and recount, I do find that the above issue mainly deals with the manner in which the election was conducted and does not assist the Court at this time in determining the application. Once the boxes are opened, one may not see the difference between a vote by literate and an assisted voter. All the ballots are marked for the respective candidates. Even if the form 32 is produced it does not indicate in whose favour the voter voted for.

There is also the issue of polling stations opening after 5.00pm. Regulation 66 of the Election (General) Regulations, 2012 states as follows:

(1) Subject to regulation 64, voting shall commence at 6 o'clock in the morning and end at 5 o'clock in the afternoon on the polling day.

(2) Notwithstanding sub-regulation (1), a person who is on a queue for the purposes of voting before 5 o'clock in the afternoon shall be allowed to vote despite the fact that the voting time may extend to after 5 o'clock

It is clear from the above regulation that it is not an offence for one to vote after 5.00pm. The only requirement is that for one to vote after 5.00pm, he/she must have been on the queue at 5.00pm. The above complaint goes to the manner of holding the elections and cannot be a reason to open the boxes.

It is further stated in the report that out of the SD cards that were sampled, **120** had images attached. **91 out of 105** sampled forms were not clear. Since the original forms **39As** are available and there is no dispute that the forms were filled at the respective polling stations, the fact that the forms in the Kiems Kits are not clear cannot be a reason to open up the ballot boxes.

The Petitioner further contends in the report that some polling stations never closed and some had anomalies in opening time. A sample of 10 polling stations has been given where it is alleged that some opened at 1300 hours and were opened for voting in 2009. The Petitioner was granted access to the SD cards by this Court. The idea was to get information relevant to the 2017 elections. If the SD cards were used in 2009, that cannot be relevant to the 2017 elections. There was no election in 2009. In between, there was an election in 2013. It should not be lost that evidence has already been taken and no one testified that there were no elections conducted on 8th of August, 2017 for the ten polling stations namely **Yaa Algaaa, Darade AP Post, Scheme Nur Priamry school, Sakuu Primary School, Gas mobile, Laisamis Priamry school, Lotono Primary school, Merile Primary (both streams) and Ulauli School**. There is evidence from witnesses on Sakuu Primary and Merile Primary schools. There is no evidence that people continued voting for two days non-stop. The respective forms **39As** for all the above polling station have been provided. They were signed on 8.8.2017. The results were declared on 11.8.2017 after going through three stages of tallying. The Form **39A** for Sakuu Primary school was signed by one **JARSON JERO**, a FAP agent. The form 39A for Lotoulo Primary school was signed by a Maendeleo Chap Chap agent, Jubilee and Kanu agents on 8.8.2017. **Naketei Longelesh and Nasumu Lekernyo** signed the forms **39As** for Merile Primary school streams 1 and 2 respectively as FAP agents. This was on 8.8.2017. The form **39A** for scheme Nur polling station was signed by seven party agents including FAP. The petitioner got 72 votes while the 3rd respondent got 102 votes at that polling station. A FAP agent signed the form **39A** for Ulauli school polling station. The 3rd respondent got no vote at that polling station while the petitioner got 2 votes. Pantoren got 94 votes. Therefore the voting process can be traced, is verifiable and the information on votes per candidate is available. There is no reason to open the ballot boxes for these polling stations.

The other contentions provided in the report are that some SD cards for 19 polling stations were not available and SD cards for 38 polling stations were not accounted for. These contentions have not made reference to the forms 39As which give information on the results. I have examined all the forms and the following information can be discerned therefrom:-

Constituency	Forms Signed by FAP	Not Signed By FAP Agent	Not Signed By Any Agent
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	Agent		
LAISAMIS	49	28	2
SAKU	50	15	3
NORTH NORR	79	11	10
MOYALE	107	28	1
TOTAL	285	82	16

Regulations 67 and 81 provides for sealing of ballot box. The procedure is well explained in the two regulations. The basis for sealing the ballot boxes is to preserve the ballot as well as to avoid stuffing of new ballots. This is done on the main reason that there might be need to verify the ballots by way of scrutiny and recount in future. There is no requirement that the seals used to seal the boxes must be branded by the IEBC. **Regulation 67(5)** allows the presiding officer to permit any candidate or agent present at the polling station to affix his or her own seal on the ballot box. Regulation 67(1)(c) states that the ballot boxes should be closed with seals so that they may not be opened without breaking the seals. This is before the voting takes place. The Court gave orders to have the ballot boxes preserved. The Petitioner was allowed to put her own seals. The Deputy Registrar's report is in Court and all the boxes were found to be intact. The boxes have several seals and the mere fact that one seal is broken does not lead to a conclusion that the box was opened. The ballot boxes for specific polling stations can be traced through their serial numbers. This is a more secure form of identification than labeling of the boxes. If the box is labelled with the name of the polling station, unscrupulous interested parties might target it for stuffing of ballots. If the name of the polling station is not indicated, it will require a cross reference with the serial number for one to know the specific polling station.

I have examined the specific forms **39As** for the polling stations where one seal was broken or where the lids were interchanged. At Badasa Primary school stream one, the 3rd respondent got **364 votes** against the Petitioner's **6**. There were **407 valid** votes out of **452 registered** voters. The form **39A** has been signed by eight party agents. Two for Jubilee and two for Nasa. **NABIYU SHANA DUBALE** signed for FAP. In stream 2, the 3rd respondent got **357 votes** against the petitioner's **8**. There were **396 valid** votes out of **452 registered** voters. Ten party agents signed the form 39A. **ADANOOR C. HALEKE** signed for FAP.

At Olayaa Nur School polling station, the petitioner got **1** vote while the 3rd respondent **got 103 votes**. There were 107 valid votes out of the **116 registered** voters. Six party agents signed the form. **HUSSEIN VIBOR** signed for FAP. At Walde Primary, the Petitioner got **28 votes** while the 3rd respondent got **379 votes**. There were **483 valid votes** and **3** rejected votes out of the **597 registered** voters. Five party agents signed the form. Two FAP agents namely **GUYO KESI** and **LIBAN DENGE** signed the forms.

At Nana primary school, the petitioner got **381** votes while the 3rd respondent got **87** votes, **474** people voted out of the total **556 registered** voters. Five agents signed the form. No Jubilee agent signed the form. Two FAP agents namely **OMAR IBRAHIM** and **ABDIMALIK ABUKAR** signed for FAP.

At Fatul Bahri Madrasa polling station (stream 2) the petitioner got **129 votes** against **78** for the 3rd respondent. There were **314 valid** votes and **4** **rejected** votes out of the **415** registered voters. Six agents signed the form **39A**. **A.M. DIDA** signed for FAP. For stream one, the petitioner got **142 votes** while the 3rd respondent got **79 votes**. There were **414 registered** voters. 316 valid votes and one rejected vote. **HALIMA MOHAMED BONAYA** signed the form for FAP.

At Kurashidin Primary school (stream1), the petitioner got **176 votes** while the 3rd respondent got **158** votes. There were **515** registered voters, **410** did cast their votes. In stream 2, the petitioner got **174 votes** against **161** for the 3rd respondent. There were **516 registered** voters, **8 rejected** votes and **407 valid** votes. Agents for FAP namely **SHAMBO NANA** and **KADIR ALA** signed the two forms respectively. The above scenario shows that opening the ballot boxes will not assist this Court. The Petitioner's own party agents signed the statutory forms after the vote counting exercise was complete.

Section 44 of the Election Act provides for the use of technology during elections. **Section 44A** calls upon the IEBC to put in place a complementary mechanism for identification of voters and transmission of election results. Such a system must be simple, accurate, verifiable, secure, accountable and transparent. **Section 39** provides for the determination and declaration of election results. There is the Presiding officer at every polling station who counts the votes per each candidate in the presence of the party agents and other observers. The results are then filled in the forms **39A** for the position of County Women Representative. Those who participated in the election and counting process then sign the forms. The results are transmitted to the constituency Returning officer both electronically and physically. The constituency Returning officer is required under **Section 39 (1A) (ii)** to collate and announce the results from each polling station in the Constituency. At that level, the results are not declared. This is the second stage of tallying. The Constituency Returning officer then fills the form **39B** after tallying the results. Thereafter, the results are forwarded to the County Returning officer whose duties under section **39(1B)** includes tallying, announcing and declaring the results from the Constituencies. Section **39(1C)** requires the IEBC to have the presidential results transmitted electronically to the National tallying centre and publish those results on an online public portal.

Regulation 82 states as follows:

(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. (emphasis added)

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

Regulation 76 provides for the procedure of counting of votes. Once the votes are counted, the final results are documented in the forms 39As. The tallying process is repeated at the Constituency and County tallying centres. All this time each candidate follows the process with his/her agents until the final results for the County Women Representative to the National Assembly is declared. The agents are allowed to make any comments, whether positive or adverse on the forms. The signing of the forms does confirm that the agent signing it did participate in the election process at that particular place, either at the polling station or the two respective tallying centres – Constituency or County.

The application has put much emphasis on the SD cards and differences in results in the forms and the portal. The final results for the position of County Women Representative are contained in the forms 39 series. I do entirely agree with the findings by Justice Manjanja in the case of **JACKTON NYANUNGO RANGUMA V IEBC & 2 OTHERS Kisumu Election Petition No.3 of 2017** (Ruling 2) when he stated as follows:-

“The legal position remains that the votes as recorded in Form 34A are final. Unless Forms 34A are disputed, any errors in electronic transmission of results or publication in the 1st respondent's public portal cannot, of themselves and without more, invalidate Forms 34A. Where the results from the polling station are electronically transmitted from the polling station to any other portal as the 1st respondent may direct, such results can only be termed as provisional thus underlining the primacy and finality of Form 34A. Regulation 82 of the Elections (General) Regulations, 2012 suggests that these results are provisional”.

Scrutiny and recount is meant to assist the court in determining the election dispute at hand. The allegations by the petitioner have to be weighed against the available information. The applicant

contends that in some polling stations, more people voted compared to the registered voters. The available information and evidence on record does not support that allegation. The statutory forms for those alleged polling stations have been provided. Regulation 83(b) provide that a Constituency Returning officer should disregard the results from a polling station where the total valid votes exceeds the total number of registered voters. There is no evidence that such an incident did take place in any of the 384 polling stations.

Apart from stating in the petition that the applicant's agents were denied the right of recount at the polling stations, there is no evidence to that effect. An application for scrutiny and recount cannot be granted for the sole purpose of re-establishing the votes garnered by each candidate. The general presumption is that an election was properly conducted until the otherwise is proved.

An applicant is required to lay a basis for each specific polling station. The applicant herein is calling for scrutiny and recount of all the polling stations. That is not pleaded in the petition. The information that has come to the attention of the parties and the Court after the hearing and scrutiny of the SD cards and statutory forms does not warrant the opening of any single ballot box. The court has to be satisfied that there is need to open some or all the boxes in view of the information at hand. The information at hand is that all the forms **39As** from the 384 polling stations were signed by the Party agents except sixteen. The applicant's agents signed 285 forms **39As**, representing 74% out of the total 384 polling stations. Only 16 forms **39As** representing 4% of the statutory forms **39A** were not signed by any political Party agent. For this Court to open up all the ballot boxes for purposes of scrutiny and recount, it must be satisfied that the applicant's request is based on valid reasons. The scenario presented by the forms **39As** show that the applicant's party agents were actively involved in the election exercise.

The results presented by the 16 polling stations where no party agent signed the forms 39As gives the following picture.

RESULTS IN FORMS 39As NOT SIGNED BY PARTY AGENTS

No.	POLLING STATION	ABDI YAROW FARHIYA	ADAN SAFIA SHEIKH	HALAKE AMINA GUYO	IBREN NASRA IBRAHIM	PANTOREN ELIZABETH PIUS	SEYERE CHRISTINE KOREYA	SHAMA BERNARD OKUTU
1.	YAA ALGANA 1 OF 1	0	0	0	0	0	0	0
2.	DARADE AP POST 1 OF 1	0	0	0	0	0	0	0
3.	LOIYANGALANI PRY. SCH. 3 OF 3	6	33	12	150	118	46	7
4.	SANTUR PRY SCH. 1 OF 1	6	35	15	245	60	19	7
5	SOWETO NURSERY 1 OF 1	4	8	7	12	297	65	2
6.	KARARE MIX SCH. 1 OF 1	0	5	1	22	218	23	0
7.	TAWQA							4

	INTEGRATED MADRASA 1 OF 3	9	196	17	141	18	8	
8.	ALIA BAY WILDLIFE HQS. 1 OF 1	0	2	0	0	1	0	0
9.	BUBISA PRY SCH. 2 OF 2	2	1	0	386	50	13	26
10.	BURGABO PRY SCH. 1 OF 1	0	0	1	177	32	1	12
11.	TURBI PRY SCH. 2 OF 2	0	6	1	326	98	7	33
12.	QILTA MANYATTA 1 OF 1	2	3	0	109	13	0	0
13.	SASALA MANYATTA 1 OF 1	0	1	0	252	0	0	4
14.	FUROLE PRY 1 OF 1	6	6	3	404	10	2	14
15.	RARA MANYATTA 1 OF 1	1	4	0	202	59	2	4
16.	NAGAYO CHIEF'S OFFICE 1 OF 2	3	302	12	72	14	11	2
	TOTAL	39	602	72	2,498	988	269	115

I would have granted the prayer for scrutiny and recount for the above sixteen polling stations. However, the scenario given by the results is that the petitioner got more votes in those stations than the 3rd respondent. The Petitioner got **2,498 votes** while the 3rd respondent got **602 votes**. In three polling stations (Yaa Alгаа, Darade AP Post, and Bubisa Primary school) the 3rd respondent got no votes. It is not prudent to open the boxes in these polling stations for scrutiny and recount. There is no basis laid to the effect that the party agents at those polling stations were prevented from signing the forms 39A.

The results presented in the forms also provide their own peculiar nature. In Laisamis Constituency, the petitioner got **2,909** votes. The 3rd respondent got **1,806** votes. Two other candidates namely **Elizabeth Pius Pantoren** and **Christine Koreya Seyere** got **10,765** and **5,445** votes respectively. It will not be

prudent given the difference in number of votes to open up the ballot boxes for Laisamis constituency to verify the **1,806** votes garnered by the 3rd respondent.

Similarly, in North Horr Constituency the 3rd respondent got **658** votes only. The petitioner got **15,689** votes out of a total of **23,733** valid votes. There were only **20** rejected votes. Pantoren Elizabeth Pius got **5,586** votes. An examination of the boxes can only be to verify the **658** votes garnered by the 3rd respondent. The Petitioner is not contending that the 1st and 2nd respondents were favouring the other candidates who are not parties to this petition.

I am satisfied that most of the complaints raised in the application revolve around the conduct of the election. Such allegations can only be dealt with at the final determination stage and cannot be grounds for granting an order of scrutiny and recount.

No witness informed the Court that a request for recount was made at a specific polling station and it was rejected. No witness testified that more voters than the number of registered voters did cast their votes. The allegations that there was bribing of voters can only be dealt with at the final determination stage. Allegations of bias on the part of IEBC officers goes to the root of the petition and cannot be a ground for scrutiny and recount.

The differences in the results on the portal and those on the forms is not a valid reason for a prayer for scrutiny and recount. Other allegations of counting votes in darkness and sending away of the Petitioner's agents revolve around the entire election process.

The upshot is that I find no basis as to why I should grant the order being sought. The application is devoid of merit and is hereby dismissed with costs.

Dated, Signed and Delivered at Marsabit this 31st day of January 2018

S. CHITEMBWE

JUDGE