



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**ELECTION PETITION NO.13 OF 2017**

**JOSEPH AMISI OMUKANDA .....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL &**

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

**RETURNING OFFICER**

**NAVAKHOLO CONSTITUENCY .....2<sup>ND</sup> RESPONDENT**

**EMMANUEL WANGWE.....3<sup>RD</sup> RESPONDENT**

**RULING**

**1. *Joseph Amisi Omukunda*, the petitioner herein has filed a notice of motion dated 9<sup>th</sup> October, 2017 seeking for orders for:**

- (1) Scrutiny of all the original forms 35A in relation to the 118 polling stations in Navakholo Constituency.**
- (2) A scrutiny and recount of ballot papers to verify the issue of pre-marked ballot papers in some named 43 polling stations.**
- (3) A scrutiny of the KIEMS kit.**
- (4) Scrutiny of the list of agents supplied to the IEBC by the candidates or political parties and a comparison with the names of agents who signed form 35A and form 35B.**
- (5) Scrutiny on form 32 signed by persons who assisted voters to vote.**

**2. The grounds in support of the application are:-**

- 1. That the returning officers and presiding officers have in their own admission in the answer to the petition confirmed that they interfered with election material on 7/8/2017 on the eve of the polling day in the absence of candidates and/or their agents for reasons only known to them.**
- 2. That all the forms 35A produced in court by the respondents are not the authentic**

**statutory forms.**

**3. That form 35B produced in court is not the authentic statutory form 35A in the prescribed form.**

**4. That it is highly in doubt that the said annexed forms 35A and 35B are true copies of the original forms 35A and 35B.**

**5. That it is highly in doubt whether the forms 35A and 35B that were used in this election are the authentic statutory forms as required by the law.**

**6. That it is highly in doubt whether the agents who signed forms 35A and 35B and purportedly by verified the results are the agents appointed by the candidates and political parties for the conduct of this election.**

**7. That it is highly in doubt whether form 32 was even filled in the polling stations.**

**8. That the forms 35A have variance in figures with those the petitioner has managed to get from agents of other candidates.**

**9. That the forms 35A and 35B produced in court do not have the relevant statutory security features as is required by law.**

3. The petitioner avers that he has compared forms 35A filed by the 1<sup>st</sup> respondent with 19 other forms 35A that he managed to gather from agents of other candidates which comparison revealed fundamental discrepancies in the figures that had the effect of increasing the votes for the 3<sup>rd</sup> respondent.

The petitioner is also seeking for verification of results transmitted by the KIEMS kit as the results were not electronically transmitted in the presence of his agents.

4. The application was opposed by the respondents on the grounds that the application is an attempt to amend the petition by introducing a completely new petition and a new line of evidence and claims which were not part of the petition. That the 19 forms 35A that the petitioner is relying on as the basis of his application are strange documents as they were obtained from unknown/unnamed sources. That the petitioner did not call evidence on the said documents. That the documents are forged for the purposes of justifying the application for scrutiny. That none of the petitioner's witnesses has challenged the final results as entered in the forms provided by the respondents. That the petitioner is on a fishing expedition for evidence which is not there in the petition.

Complaints by the petitioner:

5. The petitioner contends that there were a number of irregularities committed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents which had the effect of vitiating the election of Navakholo Constituency. These are:-

(1) That there were pre-marked ballot papers in favour of the 3<sup>rd</sup> respondent

(2) That non-credited agents were allowed to sign forms 35A and 35B

(3) That there was an irregularity in the form used to declare the results - form 35B

(4) That the electronic transmission of the results was not done in the presence of agents

(5) That only agents of the 3<sup>rd</sup> respondent were allowed to assist illiterate voters

(6) That there was a variance of results in the forms 35A filed by the petitioner and those filed by

the 1<sup>st</sup> respondent

(7.) That there were some irregularities in forms 35A

(8) That presiding officers refused to issue copies of forms 35A to the agents of the petitioner.

(9) That there was stuffing of ballot boxes in favour of the 3<sup>rd</sup> respondent.

(10) That there was irregularity in the counting of ballots.

(11) That the returning officer and presiding officers intererred with election materials.

## **SUBMISSIONS:-**

### **6. Submissions by the advocates for the petitioner:-**

The advocates submitted that the irregularities and illegalities pointed out have laid a basis for an order for scrutiny. That no party in the petition will be prejudiced if an order for scrutiny is granted.

### **7. Submissions by advocates for 1<sup>st</sup> and 2<sup>nd</sup> respondents:-**

The advocates submitted that the petitioner is not entitled to the prayers sought as he has not validly pleaded and/or formed a basis for the request. That the application seeks to bring amendments to the pleadings and should therefore be rejected. That the petitioner seeks for scrutiny of all forms 35A in relation to 118 polling stations in Navakholo Constituency which is contrary to what was stated by the petitioner in his petition dated 7<sup>th</sup> September, 2017 at paragraph 4 of his affidavit where he enumerated the polling stations that had complaints of irregularities and discrepancies to wit Lutaso Primary School, St Joseph Primary School, Kochwa Primary School, Namirama Primary School, Shinoyi Primary School, Shikomari Primary School and Chebuyusi High School tallying centre. That this therefore rules out all other polling stations subsequently mentioned. That even among the 7 polling centres said to have had issues, St. Joseph Primary School as a polling centre did not exist while Chebuyusi High School was a tallying centre and not a polling centre. That the only leaves 5 polling centres. That the witnesses that the 1<sup>st</sup> and 2<sup>nd</sup> respondents called in the case dispelled any allegations of there having been irregularities and illegalities at the 5 polling stations.

The advocates further submitted that the order for scrutiny is not sought in the petition itself and that therefore it amounts to a fishing expedition.

8. That the petitioner has not specified the various polling stations to which scrutiny of forms 32A need be done. That this makes it difficult for the order to be granted.

Further that most of the copies of form 35A filed together with the petition has all the security features. That a comparison of the forms filed by the petitioner in the application and that of the IEBC shows that the number of votes indicated have no difference at all in the above stated polling stations.

That the petitioner has not laid out a basis in the petition in support of the request for scrutiny.

That the issue of counting or tallying of votes has not been disputed by the various witnesses of the petitioner. That the prayer is misconceived as it was not among the prayers sought in the petition.

### **9. Submissions by Advocates for 3<sup>rd</sup> respondent:-**

The advocates submitted that the petitioner has not shown any irregularity in the tallying of votes cast at any polling station nor has he shown any alternative results. That there was no proof of pre-marked ballots. That the presence of print-marks on a few ballots did not have any effect on the election and did

not benefit any candidate. That there was no evidence to show any tampering with the validity of the votes cast. That the claim as to numerical inconsistencies was not testified to in court by any particular witness as to affect any polling station. That all the petitioner's witnesses confirmed that the results in the IEBC form 35A reflected the actual votes cast and upon production of the original form 35B, it was confirmed that the entries therein were in total consonance with the entries in form 35As.

The advocates submitted that the documents the petitioner is relying on as the basis of his application were given to him by the chief agent of the petitioner who declined to come before the court to testify. That the people who gave the documents to the chief agent are not disclosed. That therefore the court cannot rely on such documents which are not owned by any person.

#### **10. Guiding Principles applicable in scrutiny and recount:**

The statutory basis for scrutiny and recount is *section 82(1)* of the Elections Act 2011 that provides that:-

***“An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.”***

11. The purpose for an order of scrutiny and recount was stated by the Supreme Court in the case of *William Maina Kamanda vs Margaret Wanjiru Kariuki, Election Petition No.5 of 2008* cited in *Gatirau Peter Munya vs Dickson Mwendu Githinji & 2 others* (2014) eKLR where it was held that the purpose is to:-

**(1)assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.**

**(2)assist the court in determining the valid votes in favour of each candidate.**

**(3)assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process.**

12. It is now settled law that an order for scrutiny and recount cannot be made as a matter of course and a basis has to be laid for the same. The Supreme Court had occasion to render itself on the issue in the case of *Gatirau Peter Munya* (supra) where it stated that:-

***“The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request to the satisfaction of the trial Judge or Magistrate; Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition ... On the contrary, judicial opinion distinctly favours a view that commends itself to us: that, an application for scrutiny and recount must be couched in specific terms, and clothed with particularity, as to which polling stations within a constituency are to attract such scrutiny. If a party lays a clear basis for scrutiny in each and all the polling stations within a constituency, then the order ought to be granted. Otherwise, a prayer pointing to a constituency but lacking in specificity is not to be entertained.”***

13. It is also settled law that an application for recount and scrutiny should not be used as a fishing expedition to procure evidence. In *Raila Amolo Odinga & Another vs Independent Electoral & Boundaries Commission & 2 others* (2017) eKLR 2017 case, the Supreme Court stated that:-

***“Any prayer in the application that would seem to be an expansion of the case for the petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the petition would and must be rejected.”***

14. In the *Gatirau Peter Munya* case (supra) the Supreme Court quoted with approval the decision of

Odunga J in **Gedion Mwangangi Wambua & Another vs IEBC & 2 others** (at paragraph 26) where the learned Judge stated that:-

**“26. The aim of conducting scrutiny and recount is not to enable the Court [to] unearth new evidence on the basis of which the petition could be sustained. Its aim is to assist the court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings. In other words a party should not expect the Court to make an order for scrutiny simply because he has sought such an order in the petition. The petition ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support thereof in order to justify the court to feel that there is a need to verify not only the facts pleaded but the evidence adduced by the petitioner in support of his pleaded facts. Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to Rule 21 of the Rules, the Court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition.”**

15. A court must act judiciously when determining an application for scrutiny and recount and may order partial scrutiny or full scrutiny as was stated by the Supreme Court in the **Gatirau Munya** case (supra) that:-

**“The authority granted to the election Court is discretionary in nature. In this regard, the court may order for scrutiny on its own motion or upon application by a party to the election petition. This necessarily entails that the court may decline to grant an order for scrutiny following an application seeking one. The court may also grant an order for partial scrutiny, even where a party has applied for scrutiny in wider electoral area. In exercising this discretion, however, the court must act judiciously. An order for scrutiny must be rationalized on the basis of evidence, or sufficient account in the pleadings. As we have noted, the purpose of recount and scrutiny is to determine who actually won the election, the validity of votes, and the integrity of the election. Therefore, it is only logical that recount and scrutiny follows ‘disputed results’, or ‘impugned electoral processes.’ If an election court were to order for scrutiny and recount in the absence of a specific dispute, then such order would amount to an abuse of discretion and an act in vain”**

16. If an order of scrutiny is granted, the scrutiny is to be confined to the polling stations in which the results are in dispute – **Rule 29(4)** of the Elections (Parliamentary and County Elections) Petition Rules 2017 – see **Supreme Court in the Garitau Munya** case (supra) and **Richard Kalembe Ndile & Another vs Dr Patrick Musimba Mweu & others** (2013) eKLR.

#### **ANALYSIS AND DETERMINATION:**

17. Five witnesses testified for the petitioner four of whom were his agents at 4 polling centres while the fifth one was an agent for one of the candidates. Julia Khaemba PW1 was the agent for the petitioner at Kochwa polling station. Yusuf Mayende Wamani PW2 was the agent at Lutaso polling centre stream 3. Charles Ong’ayo PW3 was the agent at Shikomari polling centre while Josphat Alusumba PW4 was the agent at Shinoyi polling centre. Wilson Wachakana PW5 was an agent at Namirama polling centre for one Mayende Leonard who was standing on Ford Kenya Party. The petitioner was PW6 in the petition.

18. The five witnesses for the petitioner variously testified that there were numerous irregularities at their respective polling centres. The returning officer and her presiding officers together with the 3<sup>rd</sup> respondent and his witnesses on the other hand denied that there were any irregularities in the election. The court is now called upon to consider the evidence and the pleadings of the two opposing sides and determine where the truth lies. The court has framed out the questions before it as thus:

- (1) Whether the application for scrutiny and recount is an amendment of the petition; and
- (2) whether the petitioner has laid a basis for an order for scrutiny and recount;

**Whether the application is an amendment of the petition:**

19. In his petition dated 7<sup>th</sup> September, 2017, the petitioner complained of irregularities at 5 polling stations and the tallying centre (one of the polling stations complained of does not exist). He called five witnesses who were agents at those polling stations. In response, the respondents called witnesses in respect of those five polling stations. In his application for scrutiny and recount the petitioner has sought for scrutiny of forms 35A for the entire constituency and re-count of ballot papers in 38 polling stations. The advocates for the respondents submitted that this was not pleaded in the petition and amounts to an amendment of the petition.

20. The Supreme Court in the ***Raila Amolo Odinga*** case (supra) held that an application for scrutiny that seems to be an expansion of the case for the petitioner must be rejected. The said court also approved the decision of ***Odunga J*** in ***Gedion Mwangangi Wambua vs IEBC & 2 others*** (supra) that a petitioner ought to plead his case with sufficient clarity and particularity and should not seek to expand his case outside the scope of his pleadings.

21. The main complaint at the 5 polling stations mentioned in the petition was pre-marking of ballots. In the application for scrutiny the petitioner included 38 other polling stations where he says there were also issues of pre-marked ballots. No witness claimed that there was pre-marking of ballots at those 38 polling stations. The inclusion of the 38 polling stations therefore amounts to an expansion of the petition in search for evidence to support the petition and must be rejected.

**Whether the petitioner has laid a basis for an order for scrutiny:**

22. ***Rule 29(2)*** of the ***Elections (Parliamentary and County Elections) Petitions Rules 2017*** require an election court to make an order for scrutiny or recount if it is satisfied that there is sufficient reason to do so. I will thereby consider whether the petitioner has established sufficient reasons to warrant an order for scrutiny.

**(1) Pre-marked ballots:-**

23. The petitioner contends that the 2<sup>nd</sup> respondent has in her response admitted that there were numerous and widespread incidents of ballot paper “accidental markings” which she and the presiding officers discovered on the 7<sup>th</sup> August 2017 and consequently directed that voting be done in red pen and that all voters voted in red pens. The petitioner contends that these markings were in fact pre-marked ballot papers in favour of the 3<sup>rd</sup> respondent. That therefore that there is need for scrutiny to ascertain whether there were any ballot papers that were pre-marked.

24. All the witnesses for the petitioner testified that there were pre-marked ballots at their respective polling centres. That they became aware of the pre-marked ballot papers after midday. That on raising complaints with their respective presiding officers, the presiding officers contacted the returning officer who gave instructions that the ballot papers henceforth be marked with red pens to distinguish the pre-marked ballots from the voters’ marks. However that the instructions were given after mid-day by which time very many people had voted. That as a result of the pre-markings and the voters markings there were many spoilt votes.

25. The returning officer and the presiding officers denied that there were incidents of pre-marked ballots. They said that what was there was accidental print marks on some ballot papers. That these were discovered at the tallying centre on the eve of the election i.e on the 7<sup>th</sup> August 2017 when the presiding officers were being issued with the election materials. That the said accidental print marks were not confined to the ballots for the election of the Member of Parliament but involved all the six elective posts. That on that discovery the returning officer gave instructions that the ballot papers be marked in red pen so as to distinguish any foreign mark on the ballot papers with the voters’ marks. That on the voting day the ballots in the entire constituency were marked by use of red pens for all the elective posts.

26. The presiding officer at Lutaso 2 polling centre (IEBC witness No.1 Festus Wangwe) stated that at his station he only came across one ballot paper with accidental ink marks. That the ballot paper was marked spoiled and was not used.

The presiding officers at **Shikomari** and **Shinoyi 2**, IEBC witnesses No.3 (Roselida Wandera) and No.5 (Peter Wakhanu) stated that they did not come across any such ballot papers at their respective polling stations.

27. Though the witnesses for the petitioner claimed that there were many rejected votes as a result of pre-marking of the ballot papers this was not supported by the results from their polling stations. Kochwa had 2 spoiled votes. Lutaso had 12. Shikomari had 3. Shinoyi had 9 and Namirama had 4 spoiled votes. These cannot by any standard be said to be a high number of spoiled votes. There was no evidence that the rejected votes were outside the accepted range of percentage of rejected votes. If the evidence was true that there were many spoiled votes, the question is why the pre-marked ballots were not found during the counting. Why would the number of rejected votes be very low yet the witnesses claimed that the number was huge?

28. The witnesses for petitioner claimed that the instructions to mark the ballots in red pen were given in the early afternoon. The petitioner in his evidence stated that he voted at a different polling centre. That he voted before 10 am. That during the voting he was instructed to mark the ballot papers with a red pen. There were no complaints of pre-marked ballots at the polling centre where the petitioner voted. How then could the petitioner have marked the ballot papers in a red pen before 10 a.m if the instructions were given after midday? Why would the ballot papers have been marked in red at a polling station where there were no complaints of pre-marked ballots? The fact that the petitioner himself marked the ballot papers in red pen supports the evidence of the IEBC witnesses that the instructions had been given earlier and that they applied to the whole constituency. The petitioner did not call any witness who marked the ballot papers with any pen other than red.

29. The petitioner at first stated in his evidence in court that he did not see any pre-marked ballots at the station that he voted. Later in his evidence he changed this story and said that he saw a mark of a dot on the ballot paper that he was given. Later he said that the mark he saw was a tick. The contradictions are a clear indication that the evidence was a fabrication.

30. Though Yusuf Mayende petitioner's witness No.2, claimed to have been the agent for the petitioner at Lutaso stream 2, his supporting affidavit states that he was his agent at Lutaso stream 3 which stream did not exist. His letter of appointment as an agent for Maendeleo Development Party that he filed with his supporting affidavit was not signed by the party, yet the letters of other agents were signed. To make matters worse, the witness did not sign any of the IEBC documents to indicate that he was an agent there. He was not appearing in the IEBC list of agents. Instead, it is a lady called Ziprosa who was appearing on the list as the agent for the petitioner at Lutaso 2. Ziprosa is the one who signed the said documents as the agent for Maendeleo Development Party at Lutaso 2. She is the one who signed form 35A in that stream. It is then clear that the witness is lying that he was the agent for the petitioner at Lutaso stream 2.

31. Mr Wachakana, petitioner's witness No.5 stated in his supporting affidavit that the instructions to mark the ballot papers in red pen were given at 12 noon which was after a ballot booklet No.6 went missing. That he and other agents raised concern with the presiding officer. That the presiding officer then gave instructions that the ballot papers be henceforth marked in red pens. That he realized that voters were being issued with pre-marked papers.

32. In his evidence in court the witness stated that the booklet went missing between 11 am and noon. That would mean that they discovered about the pre-marked ballots after 11 am. However the witness stated that he had arrived at the polling centre at 8 am. That on arrival he was told of some pre-marked ballot papers that were placed at some place at a corner. The question then is whether the issue of pre-marked ballot papers was discovered after 11 am after one booklet went missing or whether the pre-marking was going on when the witness arrived at the polling centre at 8 am. In face of the contradictory evidence by the witness on the issue, the conclusion of the court is that the witness is lying that there were

pre-marked ballots in favour of the 3<sup>rd</sup> respondent.

33. The witness further stated that 7 voting booklets were used at the polling centre. Each booklet has 50 polling papers. Therefore that the votes cast should not have exceeded 350 in number. That according to him the number of votes that were cast at the polling centre were 327 but that the count indicated 384. He suspected that the extra votes were from the missing booklet. However the witness signed the IEBC record of the sealing of packets after count that indicated the counterfoil of used ballot papers as 384 which matched with the votes cast. Why would the witness have signed the certificate if the votes cast were actually 327 and not 384? This evidence is further proof that the witness is lying.

34. Three witnesses for the petitioner – Julia Khaemba PW1, Charles Ong’ayo, PW3, and Josphat Alusumba PW4 all signed form 35A for their respective polling centres though they still claimed that there were irregularities of pre-marked ballots. They did not raise any complaints in the said forms. The mere act of signing the form meant that they agreed with the results captured therein. The claim about pre-marked ballots is all hot air. The evidence is dismissed. There is thereby no ground for scrutiny based on allegations of pre-marked ballot papers.

## **(2) Assistance of illiterate voters:-**

35. The petitioner contends that only agents of the 3<sup>rd</sup> respondent were allowed to assist illiterate voters. That forms 32 were not filled as there was collusion between the agents of the 1<sup>st</sup> respondent and those of the 3<sup>rd</sup> respondent. That an order for scrutiny will confirm whether any such forms were filled.

36. Assistance of illiterate voters is provided for by **Regulation 72** of the **Elections (General) Regulations, 2012**. **Regulation 72(2)** provides as follows:-

***“where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter in the presence of the agents.”***

37. The witnesses for the petitioner who claimed that the presiding officers denied them opportunity to assist illiterate voters but only allowed the agents for the 3<sup>rd</sup> respondent to do so were Julia Khaemba, the agent at Kochwa polling centre and Yusuf Mayende, the purported agent at Lutaso 2 polling centre. Julia stated in her supporting affidavit that the presiding officer only allowed the agent of the 3<sup>rd</sup> respondent to assist illiterate voters. However in her evidence in court she only gave one instance where one person called Daniel Wafula came with his two wives who required assistance to vote. That the presiding officer marked the ballots without any agent being there to witness the marking. The witness did not give any instance where the presiding officer only allowed the agents of the 3<sup>rd</sup> respondent to witness the marking of ballot papers for the illiterate voters.

There is doubt whether Yusuf Mayende was an agent at Lutaso polling station. His evidence is not credible.

38. The petitioner has not proved the allegations that only agents of the 3<sup>rd</sup> respondent were being allowed to witness the marking of ballot papers for illiterate voters. No such illiterate voter was called to support the petitioner’s case on the issue. The allegation can only be a fabrication since there is no evidence to support it. The application to scrutinize forms 32 can only be a fishing expedition. There is no ground for scrutiny based on allegations that there was bias on the petitioner’s agents in respect to assistance of illiterate voters.

## **(3) Non-credited agents signing forms 35A and 35B:**

39. The petitioner contends that a huge number of forms 35A were signed by agents on behalf of parties which did not field candidates in the election for Member of Parliament for Navakholo Constituency. That this will be ascertained by an order for scrutiny on the list of agents supplied to the 1<sup>st</sup> respondent by candidates or political parties and a comparison with the names of agents who signed the said forms.

The petitioner in his supporting affidavit to the application for scrutiny enumerated the polling stations where agents of parties who had not fielded candidates for Member of Parliament for Navakholo Constituency verified the results in forms 35A. These parties include the Federal Party of Kenya (FPK), the Peoples Party of Kenya (PPK), the Labour Party of Kenya (LPK) and the Agano Party. This evidence was not responded to by the respondents. In his evidence in court the petitioner stated that these 4 parties did not have candidates in the election of Member of Parliament. The returning officer in her evidence admitted that the Federal Party of Kenya did not have a candidate for Member of Parliament, though their agent signed one of the forms 35A.

40. It was not disputed that some agents of parties which had not fielded candidates signed form 35A (and 35B). The court cannot make an order for scrutiny when there is no dispute in issue – see *Gatirau Munya* case (supra). In my considered view this issue should form part of the final submissions by the advocates for the parties. There is no basis to issue an order for scrutiny on this ground.

**(4) Numerical inconsistencies in forms 35A filed by the petitioner and those filed by the 1<sup>st</sup> respondent.**

41. The petitioner says that his agents were not issued with forms 35A by the presiding officers. That he however managed to get copies of some forms from the agents of other candidates. That a comparison between the forms he obtained from the said agents with those filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondent reveal a massive variance between the results and that votes were being deducted from the other candidates and credited to the 3<sup>rd</sup> respondent. His own tabulation of the documents indicated that the 3<sup>rd</sup> respondent was credited with 2190 votes that he did not deserve. That it is therefore prudent that an order for scrutiny be done to ascertain whether there was such a variance.

42. The petitioner filed 19 forms 35A in support of his application for scrutiny. He says that he was given these copies of documents by his chief agent who had obtained them from agents of other political parties as his agents had not been issued with copies of the same by presiding officers. The IEBC filed its own copies of forms 35A in their response to the petition.

43. The returning officer testified that the forms 35A contained in their response are scanned copies from the KIEMS kit. That the original forms 35A were sent to IEBC headquarters. That before the original documents were transmitted to headquarters, scanned copies of the same were uploaded into the KIEMS kit. That it is from these scanned copies that they made the copies of forms filed in court.

44. The court did order the IEBC to file the original copies of the 19 forms 35A filed by the petitioner. The same were filed. The original documents contained different serial numbers from those filed by the petitioner. The returning officers for Shikomari, 1<sup>st</sup> respondent witness No.2 (Roselida) and for Lutaso, 1<sup>st</sup> respondent witness No.1 (Festus Wangwe) stated that the copies of documents filed by the petitioner are forgeries. The other 3 presiding officers were not questioned on the authenticity of the documents.

45. The source of the 19 forms 35A that the petitioner filed with his petition is unknown. The chief agent for the petitioner who gave him the documents did not testify. The documents had different serial numbers from the documents filed by IEBC. The petitioner cannot use documents whose source has not been established to challenge the documents filed by IEBC. The documents cannot thereby be used to show that there was any variation in the number of votes garnered by candidates.

46. The witnesses for the petitioner who signed forms 35A filed by the IEBC did not raise any issue on the votes garnered by the candidates. They did not complain of any irregularity in the said forms. They did not complain that there were any votes meant for any candidate that was credited to the 3<sup>rd</sup> respondent. As agents for the petitioner they must have captured the number of votes garnered by the petitioner at their respective polling stations. The petitioner did not call a single witness who claimed of such a variation.

47. The evidence that there were variations in the number of votes garnered by candidates has not been

established by credible evidence. No basis has been laid that the forms filed by the petitioner in support of the application for scrutiny are genuine documents. The court cannot make an order for scrutiny based on documents which have not been established to be genuine. This ground of the application must fail.

**(5) Irregularities in forms 35A:-**

48. The petitioner contends that some of the forms 35A filed in court by the respondents were not stamped by and/or signed by the presiding officers and the deputy presiding officers. That some were not signed by agents of the candidates. That all forms 35A and the form 35B do not have the required security features. That all the forms 35A produced in court by the 1<sup>st</sup> and 2<sup>nd</sup> respondents are photocopies that do not have the anti-copy features. That it is therefore in doubt if indeed they are true copies of the original forms 35A. Therefore that it is prudent to scrutinize the original forms 35A from the 118 polling stations to ascertain their authenticity both in form and in substance.

49. The petitioner is seeking for scrutiny of all the forms 35A in relation to the 118 polling stations to verify the authenticity of the said forms and to establish whether:-

*(i) They have security features required in forms 35A*

*(ii) They have been stamped by IEBC*

*(iii) To confirm the serial numbers and to establish whether they match the serial numbers of the forms produced in court.*

*(iv) To verify names of agents who signed against the list of agents for candidates and political parties given to IEBC.*

50. The Court of Appeal in **Independent Electoral and Boundaries Commission vs Stephen Mutinda Mule & 4 others** (2014) eKLR held that a presiding officer is only required to sign form 35A and is not obligated to stamp it. The fact that some of the forms 35A were not stamped cannot thereby be a basis for an order for scrutiny.

51. The 1<sup>st</sup> respondent, IEBC, has already produced 19 of the original forms 35A. The advocates for the respondent have had opportunity to cross-examine on those 19 original documents. The petitioner is only seeking to establish whether the original documents have the required security features, whether they are stamped by IEBC and to confirm whether the serial numbers match the serial numbers of the forms filed in court. This information can be ascertained from the 19 documents that are already before court. In **Raila Odinga** case (supra) the Supreme Court sampled 4,299 of forms 34A to draw its own conclusions on the contents of the documents. It is therefore not necessary for a scrutiny on all the forms to be done for certain conclusions to be made. There is no need for scrutiny of further original documents to ascertain what can be ascertained from the 19 documents that are already before court. The application for scrutiny of all the 118 documents can only be a fishing expedition in search of evidence to support the petition. There is no basis to issue an order for scrutiny on this ground.

**(6) Electronic transmission of results:-**

52. **Regulation 82(d)** of the **Elections (General) Regulations 2012** require the presiding officer to before ferrying the actual results of the election to the returning officer at the tallying venue, to submit to the returning officer the results in electronic form in such manner as the commission may direct.

53. The petitioner contends that electronic transmission of the results was required to be done in the presence of all agents of the candidates. That in some polling stations his agents were denied the chance to witness the vote transmission process and that some were ejected from polling stations. That there is need to compare the electronically transmitted results and the original form 35A.

54. An application for scrutiny must be coached in specific terms and clothed with particularity as to

which polling stations are to attract scrutiny – see *Gitarau Munya* case (supra). The petitioner herein has not particularized in which polling stations his agents were denied the chance to witness the electronic transmission of the results. A court cannot make a blanket order for scrutiny where there are no particulars of the stations complained of.

55. The petitioner's witnesses Nos.3, 4 and 5 stated that the presiding officers did not allow them to witness the electronic transmissions of votes. Witnesses Nos.3 (Ong'ayo) and 4 (Alusumba) signed the forms 35A of their respective polling stations. The witnesses did not raise any complaints in court that the votes captured in those forms are not the ones transmitted to the tallying centre and captured in form 35B. Witness No.5 (Wachakana) is the discredited witness. There is no evidence that what was captured in forms 35A is not what was declared at the polling centre. There is thereby no ground warranting the scrutiny of the electronic transmission of the votes.

**(7) Form used to declare the results:-**

56. The petitioner contends that form 35B that was used to declare the results is not the statutory form prescribed by the *Elections (General) Regulations 2012*. That instead the 2<sup>nd</sup> respondent doctored the presidential form 34A in handwriting and purported to convert it to form 35B. That this is a matter that warrants scrutiny of the original form 35B to confirm whether the same was indeed the prescribed statutory form.

The original form 35B was filed among the documents that the court ordered the 1<sup>st</sup> respondent to file together with the 19 original forms 35A. There is thereby no basis for scrutiny on this ground as the original form 35B is already before court. Any issues concerning the said form should form part of the final submissions for the petitioner.

**(8) Stuffing of ballot boxes:-**

57. The witnesses for the petitioner who claimed that there was ballot stuffing were Julia (PW1) and Wilson Wachakana (PW5). Wachakana claimed in his supporting affidavit that after the close of voting, he and other agents were thrown out of the polling station. That when they returned, they noted that the seals to the ballot boxes had been broken and more ballot papers stuffed into the ballot boxes. However when the witness testified in court he retracted his evidence that they were thrown out of the polling room. He instead stated that they had been given a break after the close of polling. He also retracted the evidence that they had observed that the ballot boxes had been broken and said that the ballot boxes had not been broken. The refractory evidence of this witness is further proof, as already noted by the court, that he is not a credible witness. He wanted the court to believe that agents were thrown out, ballot boxes broken into and ballot papers stuffed into the ballot boxes. This is a most untrustworthy kind of a witness whose evidence cannot be relied upon to hold that there was ballot stuffing.

58. Julia claimed in her supporting affidavit that pre-marked ballots were stuffed into the ballot boxes. She however did not explain why she signed form 35A if there was such a serious irregularity. The evidence by the witness is thereby not credible. I find no evidence that there was ballot stuffing.

**(9) Refusal of presiding officers to issue agents with copies of forms 35A:**

59. The petitioner says that he had agents in all the 118 polling stations but that the presiding officers declined to issue forms 35A to them and that he only managed to collect a few of them from the agents of other candidates. The witnesses for the petitioner who testified on the issue were Julia PW1 and Wachakana PW5. They stated that the presiding officer did not issue them with copies of forms 35A. Julia did not state in her supporting affidavit that the presiding officer refused to issue the form to her as she only said that she was not issued with the form. This is not sufficient evidence on which the court can hold that presiding officers refused to issue the said forms to the agents.

60. The court has found Mr Wachakana to be an unreliable witness. The court cannot rely on the evidence of the witness to hold that presiding officers refused to issue copies of forms 35A to the agents

of the petitioner.

61. It is surprising that the presiding officers would issue copies of the forms to the agents of other candidates and not to those of the petitioner. The petitioner managed to collect 19 forms from the agents of other candidates but not a single one was availed by any of his 118 agents. The fact that the petitioner managed to obtain such a number of the forms from the agents of other candidates is clear proof that the presiding officers were issuing copies of the forms to the agents of the candidates. The evidence that agents of the petitioner were not issued with even a single copy of the form is unbelievable. It is likely that the petitioner has deliberately kept away those documents from the court so as to use documents from unknown source in an attempt to build a case against the respondents. The evidence that the petitioner's agents were not issued with copies of forms 35A is thereby suspect.

**(10)Irregularities in counting of ballot papers:-**

62. *Regulation 76(2)(a) and (b) of the Elections (General) Regulations 2012* require the presiding officer during the counting of ballot papers to announce the candidate in whose favour the vote was cast and to display to the candidates or agents the ballot paper sufficiently for them to ascertain the vote.

63. The five witnesses for the petitioner stated that they were not allowed to verify the counting of the ballot papers and that the ballot papers were not being displayed to them to allow them verify the marks on them. The petitioner's witnesses No.1 (Julia) and No.5 (Wachakana) further stated that they requested for recount but that their requests were declined.

64. The witnesses for the petitioner Julia and witness No.3 (Ong'ayo) signed forms 35A for their respective polling stations. The act of so doing meant that they were satisfied with the manner the counting was done and the end results declared. They cannot now turn around and claim that there was irregularity in the counting. I therefore do not believe their evidence that there was irregularity in the counting of the ballot papers.

Petitioner's witness No.5 is the same discredited witness. His evidence on the issue is therefore dismissed.

There is thereby no evidence to prove that there was irregularity in the manner the ballots were counted. There is no evidence that any of the agents was denied a request for re-count of the votes.

**(11) Interference with election materials:**

65. The petitioner contended that the returning officer and the presiding officers interfered with the election materials on the 7<sup>th</sup> August 2017 in the absence of the candidates and/or their agents.

66. The returning officer testified that the election materials were received on 6<sup>th</sup> August 2017. That on the same day the sealed packages were opened in the presence of agents for the candidates. That on evening of 7<sup>th</sup> August 2017 the election materials were being distributed to the presiding officers.

67. The petitioner did not dispute that agents of candidates witnessed the unsealing of the packages on 6<sup>th</sup> August 2017. He only complained that the distribution of the election materials by the returning officer was done in the absence of the candidates or their agents. He did not cite the regulation that requires that agents and/or their candidates be present when the returning officer is distributing election materials to the presiding officers. This complaint is thereby unfounded and cannot be a ground for scrutiny.

**The application for re-count and tallying of votes:-**

68. *Rules 28(a) and (b) of the Elections (Parliamentary and County Elections) petitions Rules 2017* provides that a petitioner may apply to an election court for an order to recount the votes or examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the

candidates.

69. A re-count determines the number of votes a candidate received in an election – see **Justus Gesito Mugali M'Mbaya vs Independent Electoral & Boundaries Commission & 2 Others (2013) eKLR**. In interpreting the equivalent of the above rule, Dulu J in **Benjamin Onguyo Andama vs Benjamin Andola Andayi & 2 others, Kakamega High Court Election Petition No.8 of 2013** cited by the Supreme Court in the Gatirau Peter Munya case (supra) held that:-

***“In my view, the process of recount of votes or examination of tallies may apply to all polling stations in a constituency. The court may allow a recount or examination of the tallies in all polling stations whether complained of or not. However, that has to be the only issue for determination in the petition as required in the rules and the petitioner must state so in the petition.”***

Therefore for a court to make an order of recount, that has to be the only issue in the case. In this case that was not the only issue. In any case there was no dispute on the counting and tallying of votes. An order for re-count cannot thereby issue.

70. In the foregoing and for the above said reasons, I have come to the conclusion that the petitioner has not laid out a basis or given sufficient reasons to warrant an order for scrutiny and re-count being made. The application is no more than a fishing expedition in search of evidence and as was held by **Majanja J in Wavinya Ndeti vs IEBC & 4 others (2013) eKLR** that

***“the petitioner must not be permitted to launch a fishing expedition under the guise of an application for scrutiny in order to discover new evidence upon which to foist his or her case to invalidate the election,”***

the petitioner should not be allowed to do so. The application is thereby dismissed with costs to the respondents.

**Delivered, dated and signed at Kakamega this 25th day of January, 2018.**

J. NJAGI

JUDGE

In the presence of:

No appearance for petitioner

Obilo holding brief Abok for 1 & 2 respondents

Mulanya for 3<sup>rd</sup> respondent

George court assistant

Parties:

Petitioner – absent

2<sup>nd</sup> respondent – absent

3<sup>rd</sup> respondent – present