



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KAJIADO**  
**ELECTION PETITION CASE NO.2 OF 2017**

**JOSIAH TARAYIA KIPELIAN KORES.....1<sup>ST</sup> PETITIONER**

**BENJAMIN TIPATET.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**JOSEPH JAMA OLE LENKU.....1<sup>ST</sup> RESPONDENT**

**MARTIN MARTINE MOSHISHO.....2<sup>ND</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION (IEBC).....3<sup>RD</sup> RESPONDENT**

**SAADI NOOR ODOWA COUNTY RETURNING**

**OFFICER KAJIADO COUNTY.....4<sup>TH</sup> RESPONDENT**

**AGNES SIYIATO NANKEYAI RETURNING**

**OFFICER KAJIADO NORTH CONSTITUENCY.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. In exercise of their inalienable Constitutional Right to democratically elect leaders of their choice through universal suffrage, registered voters of Kajiado County like other Kenyans, took part in the election exercise held country wide on 8<sup>th</sup> August 2017. Among the elective posts at stake requiring free, fair and regular elections as envisaged under Article 38(2) of the Constitution, was the Governor's position. Offering their candidature for this coveted position were three contestants namely; Dr. David K. Ole Nkedianye (hereinafter referred to as the "original petitioner") sponsored by ODM party, Joseph Jama Ole Lenku (herein referred to as the "1<sup>st</sup> respondent") representing Jubilee Party, and Daniel Livondo Mpute Nina sponsored by PNU Party.

2. Upon conclusion of the election exercise conducted by the Independent Electoral and Boundaries Commission (IEBC) (herein referred to as the "3<sup>rd</sup> respondent"), the first respondent was announced and declared the victor on 10<sup>th</sup> August 2017 by the County Returning Officer Mr. Saadi Noor Odowa the 4<sup>th</sup> Respondent herein. Having garnered a total of 174,982 votes against 146,634 votes for Dr. David Kapue

Ole Nkedianye and 3,012 votes for Daniel Mpute Nina Livondo, the 1<sup>st</sup> respondent and his running mate Martin Martine Moshisho (herein referred to as the “2<sup>nd</sup> respondent”), were gazetted on 18<sup>th</sup> August 2017 vide Gazette Notice No. 7845 as Governor and Deputy governor respectively Kajiado County.

3. Aggrieved by the said results, Dr. David Ole Nkedianye through the firm of Kanchory & Co. Advocates, lodged a petition dated 6<sup>th</sup> September 2017 but filed on 7<sup>th</sup> September 2017 seeking to nullify the said results on grounds that, elections were marred with several illegalities and irregularities inter alia; manipulation of electronic results; irregularities in statutory forms used to declare results; obstruction and harassment of party agents. He further contended that, the election was not conducted in a free and fair manner as contemplated under Articles 86 (a) and (d), 81(e) (iv) and (v), 38(2), 1 (1), (4)(a) and (b) of the Constitution of Kenya 2010, Sections 25 and 30 (1) of the Independent Electoral and Boundaries Commission Act No. 9 of 2011, Sections 83, 44(1)(3) of the Elections Act (No. 24 of 2011 revised 2016), Regulation 17 of the Elections (Technology Regulations 2017) and Sections 6(5) (k) (i), 13(d) and 17(b) (c) (d) (f) (h) of the Election Offences Act (No. 37/2016). I will deal with the specific particulars of each ground later in this judgment in detail when addressing petitioners’ case.

4. Based on the aforesaid allegations, and convinced that the electoral process in relation to gubernatorial position of Kajiado County was shambolic, the petitioners sought the following reliefs:

**a. A declaration that the election for Governor of Kajiado County held on 8<sup>th</sup> August 2017 was not conducted in accordance with the principles set out in the Constitution of Kenya and applicable electoral laws and the same was thus null and void ab initio.**

**b. A declaration that the election for Governor of Kajiado County held on 8<sup>th</sup> August 2017 was not credible, free, fair and transparent and the same is thus null and void.**

**c. A declaration that the election for Governor of Kajiado County held on 8<sup>th</sup> August 2017 was so poorly conducted by the 3<sup>rd</sup> respondent (IEBC) that it could not possibly produce a credible winner and therefore the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not validly elected Governor and Deputy Governor respectively of Kajiado County.**

**d. That the declaration of results for Governor Kajiado County made on 10<sup>th</sup> August 2017 and certificate issued pursuant thereto and subsequent gazette of 18<sup>th</sup> August 2017 of the 1<sup>st</sup> and 2<sup>nd</sup> respondent as Governor and Deputy Governor be quashed and nullified.**

**e. That a fresh election for Governor, Kajiado County be conducted in strict adherence to the constitution and applicable electoral laws.**

**f. That the 3<sup>rd</sup> and 5<sup>th</sup> respondents bear the costs of this petition.**

**g. Such other orders and directions as the Honourable court shall deem fit, just and expedient.**

5. Having been duly served in compliance with rule 10 of the Elections (Parliamentary and County Elections) Petition Rules, 2017, the 1<sup>st</sup> and 2<sup>nd</sup> respondents through the firm of Waweru Gatonye & Co. Advocates filed their response on 19<sup>th</sup> September 2017 vehemently challenging the petition, arguing that the election exercise was conducted in a free and fair manner, credible, transparent, and in conformity with the Constitution and all electoral laws governing elections.

6. Equally, the 3<sup>rd</sup> and 4<sup>th</sup> respondents and one Agnes Siyato Nankeyai returning officer Kajiado North constituency (herein referred to as the “5<sup>th</sup> respondent”), filed their late response through the firm of Mohammed Muigai & Co. Advocates on 2<sup>nd</sup> October 2017 pursuant to court’s leave after the parties agreed by consent to admit the same. They also denied allegations that the election exercise was not

conducted in a free and fair manner. They generally denied any wrong doing during the election exercise thereby dismissing the petitioners' claim that the election exercise was a sham.

7. When the matter came up for pre-trial conference, the original petitioner Dr. David Nkedianye citing unity and the need to enhance cohesion among the people of Kajiado County, sought leave to withdraw the petition. Consequently, application for withdrawal of petition was filed on 11<sup>th</sup> October 2017 subject to rules 21 and 22 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

8. However, on 16<sup>th</sup> October 2017, through the firm of Otieno Ogola & Co. Advocates, two voters by the names of Josiah Tarayia Kipelian Kores (herein referred to as the "1<sup>st</sup> petitioner") and Benjamin Tipatet (herein referred to as the "2<sup>nd</sup> Petitioner"), filed application seeking to substitute the original petitioner pursuant to Rule 24 of the aforesaid Parliamentary and County Elections rules, 2017, asserting that, the election petition being a public interest litigation could not be defeated or compromised at the altar of personal interest by the original petitioner who had in any event defected to the ruling party (Jubilee Party).

9. Convinced by the reasons advanced by the petitioners, the court allowed the said application on 6<sup>th</sup> November 2017 and consequently directed the substituting petitioners to deposit requisite security for costs and file further supporting affidavits in support of the petition which they did on 8<sup>th</sup> November 2017.

### **Interlocutory Application**

10. Before the matter could proceed for pre-trial conference, the petitioners filed a Notice of Motion dated 7<sup>th</sup> November 2017 seeking preservation and scrutiny of all election materials, submission of Forms 37A & 37B and all SD cards to the Deputy Registrar for safe custody. However, this application was compromised by consent on 14<sup>th</sup> November 2017 with the prayer for scrutiny being abandoned. Instead, parties by consent agreed on the submission to the Deputy Registrar for safe custody of 19 SD cards in respect to the disputed stations, Forms 34B from all Kajiado Constituencies, original Forms 35B, 36C, 37C and 38C and that the petitioners to submit a list of the 670 polling stations reflected in Dr.Noah Akalas's affidavit sworn on 6<sup>th</sup> September 2017.

### **Pre-trial Conference**

11. During pretrial conference held on the 17<sup>th</sup> November 2017, the petitioners elected to give their testimony without calling any witness. The 1<sup>st</sup> and 2<sup>nd</sup> respondents proposed to call three witnesses besides their testimony and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents indicated that they were to call one more witness in addition to the evidence of the 4<sup>th</sup> and 5<sup>th</sup> respondents. Parties filed a joint list of 10 issues for determination but the court reduced the same to six. They also agreed to file their submissions at the close of the hearing.

### **Petitioner's Case**

12. The petitioners herein enumerated various grounds on which the petition sought anchorage thus setting out several allegations against the respondents and particulars in support of the petition. Originally, the petition was supported by the affidavits of the original petitioner and Dr. Noah Akala sworn on the 6<sup>th</sup> September 2017. Unfortunately, after withdrawal of the petition, the two were not called to testify. During the hearing, the petitioners adopted as evidence and heavily relied on their affidavits in support separately sworn on 7<sup>th</sup> November 2017 but filed on 8<sup>th</sup> November 2017. The petitioners' affidavits being a replica of the original petitioner's supporting affidavit, listed four broad grounds challenging the election exercise as below:

#### **(i) Manipulation of electronic results.**

**(ii) Irregularities in statutory forms**

**(iii) Obstruction and harassment of authorized agents.**

**(iv) Elections not being transparent, free or fair but rather complete and utter sham.**

13. The specific allegations identified by the petitioners were therefore particularized as hereunder:

**a. That following the Supreme Court's ruling in Presidential Election Petition No. 1 of 2017 (Raila Amolo Odinga and Another vs IEBC & others), access to the IEBC server was ordered and as a result it was discovered that there were numerous irregularities, anomalies and illegalities (see para.37 of the petition).**

14. It is the petitioners' contention in Paragraph 37 of the petition and paragraph 16 of the 1<sup>st</sup> petitioner's affidavit that a scrutiny ordered by the Supreme Court in the said Raila Amolo Odinga's Presidential Election Petition had revealed shocking, disturbing and numerous irregularities and illegalities affecting Kajiado County Governor's election. However, during the hearing in which they adopted their supporting affidavits, they admitted that, they did not have the said scrutiny report from the Supreme Court though the same was downloaded from the Judiciary website and analyzed by their consultant one Dr. Noah Akala who did not testify. Nevertheless, both petitioners admitted on cross examination by Mr. Khaseke for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents that they could not account for Dr. Akala's analysis since they were not the authors. It was further admitted on cross examination that, the purported Dr. Noah Akala's analysis had neither a title nor the name of the author.

**b. That Voter turnout in five polling stations exceeded registered voters (see Paragraph 37 (i) of the petition).**

15. In Paragraph 37 of the petition and paragraph 16 of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners' affidavits, the petitioners alleged that, in five polling stations voter turnout exceeded registered voters. The five stations cited are as follows:

(i) Ongata Rongai Open Air Market polling station 017, Ongata Rongai Ward, Kajiado North Constituency where 1104 votes were allegedly cast against 696 registered voters in favor of the governor's post.

(ii) AIC Primary School Polling Station 029, Ngong Ward, Kajiado North Constituency where 1115 cast votes were recorded for the governor's post against 614 registered voters.

(iii) Namunyak Primary School, Kaputiei North Ward, Kajiado East Constituency with 288 registered voters but 520 votes were cast for the governor's position.

(iv) Noonkopir Secondary School, Ole Sirkon Ward, Kajiado North Constituency with 663 registered voters but 1116 votes were cast for the governor's position.

(v) Olchorro Primary School, Entonet Ward, Kajiado South Constituency with 571 registered voters but a total of 1063 votes were cast for the governor's position.

16. It was the petitioners' testimony that, the excess votes were as a result of manipulation hence yielding unexplained extra 4978 votes which in their opinion was used to tilt results in favor of the 1<sup>st</sup> respondent hence putting the legitimacy and credibility of the voting system into question.

17. During cross examination by Mr. Matemu Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the 1<sup>st</sup> petitioner responded that, he was not aware that the five contested stations had more than one stream (polling station) hence was not able to explain whether the number of registered voters referred to represented a polling station (stream) or a polling center.

18. Further, while being cross examined by Mr. Matemu, the second petitioner also admitted that he had not attached any Form 37A to prove that more votes were cast than registered voters since they had relied on data collected from the Judiciary website with regard to the said presidential petition wherein Kajiado County featured. He too confirmed that, he was not able to explain whether the registered voters referred thereto represented a polling center with many streams or a stream (polling station).

**c. That 64 out of 797 polling stations with a total of 32,889 registered voters did not have their results declared (see paragraph 37(iii) of the petition).**

19. The other serious allegation levelled against the 3<sup>rd</sup> respondent in Paragraph 37 (iii) of the petition, is to the effect that, 64 polling stations did not register any results. Among the affected stations was; Oloosurutia ACK Church, Nkama Primary School, Kiserian Primary School, Deliverance Church, Arap Moi Primary school, Ongata Rongai Open Air Market, Ongata Academy, Ngong Township, PCEA Enchorro Emuny Primary School, Lemelepo Water Project, Paranae Primary School, AIC Girls Secondary, Nadungro Nursery school, Saina Primary School, St. Monica nursery to name but a few. On cross examination by Mr. Matemu for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, PW1 admitted that he did not attach or see Form 37As from the 64 polling stations and that he relied on the analysis prepared by Dr. Noah Akala. He nevertheless acknowledged that, he had since been shown Form 37C attached to the respondents' response confirming that there were results entered and declared in respect to those stations. The same answer was given by PW2 during his cross examination by Mr. Khaseke for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents. Both petitioners on cross examination admitted that they did not know the specific 64 polling stations save for the 15 they had quoted among others.

**d. That in 670 out of 797 Polling Stations, there was inexplicable variance in the total number of votes cast for the six electoral posts (see Paragraph 37 (iv) of the Petition).**

20. The petitioners took issue with discrepancies in terms of votes cast for the six electoral posts yet each voter was entitled to six ballot papers. To prove this allegation, they purported to rely on the analysis prepared by Dr. Akala Noah being data collected from Judiciary website after Supreme Court had concluded Presidential Election Petition No. 1/2017. On cross examination by counsels for the respondents, they said that, they were not able to list the 670 polling stations with discrepancies as they relied on Dr. Noah Akala's analysis annexed to his affidavit at pages 60 – 63 of the petition.

**e. That there were 167 illegal deletions and manipulations of Form 37A from various stations (see Paragraph 37 (v) of the petition).**

21. In regard to this allegation, the petitioners in paragraph 16(v) of their respective affidavits in support, claimed that 167 Form 37As were illegally deleted from the server in respect to Kajiado North Constituency by the 5<sup>th</sup> respondent (Returning officer) using her password thus affecting a total of 32,642 votes in favor of the 1<sup>st</sup> respondent, hence proof of manipulation of results electronically and therefore a treasonable criminal act punishable under the Election Offences Act. Upon cross examination by the respondents' counsels, the petitioners admitted that they were not in a position to specify the specific polling stations with such deletions as they relied on a summary of analysis prepared by Dr. Akala, their consultant.

**f. That not a single Form 37B from any of the 5 constituencies in Kajiado County was uploaded onto the IEBC server (see para 37(vi) of the petition).**

22. Concerning this ground, the petitioners asserted that, Form 37Bs used to collate results for the position of governor by Constituency Returning Officer were not uploaded in the public portal hence could not be accessed and therefore rendering the credibility and integrity of the announced results questionable as the same was fictitious and fraudulent.

**g. Irregularities in Forms (see Paragraph 45 of the petition).**

23. Regarding the use of illegal and irregular Forms, it was alleged in paragraphs 23 of the respective petitioners' affidavits and in their testimony in court, that many of the Forms 37A and 37B relied on to collate results lacked security features such as water marks and anti-copy proof and that they bore different formats; that Form 37B from Kajiado South was not signed by the Returning Officer and party agents; Form 37Bs from Kajiado East and West were not stamped by the Returning Officers; that many Forms 37A obtained by the petitioner were not stamped or signed by party agents; that Form 37B from Kajiado North was not available to the petitioners and lastly, names of candidates on Form 37B were not as they appear in Form 37A. On cross examination, the petitioners confirmed that they had not attached any of the forms complained of to prove their allegation. They however stated that, they confirmed the said anomaly later after perusing forms attached to the respondents' responses and further reference to Dr. Akalas's analysis.

#### **h. Obstruction and harassment of authorized party agents (see Paragraph 46 of the petition).**

24. At paragraph 25 of the petitioners' affidavits in support, it was alleged that, ODM agents were harassed, obstructed or literally hindered by presiding officers from performing their duties. They singled out Kajiado South Constituency where ODM agents were allegedly locked out of the polling stations until 10.00am and that some agents were made to sign blank Forms 37A and others prevented from witnessing announced results.

25. In his testimony, PW1 said that, he was a super-agent of ODM Party and that after voting, he decided to traverse most of the polling stations within Kajiado County. That in most stations, agents complained of being harassed by Presiding Officers. He basically made reference to a bundle of documents filed by the respondents showing Forms 37A with no party agents having signed, presiding officers' signatures missing and IEBC stamp not used. However, on cross examination, they admitted that they had not called any of those agents as witnesses. They further confirmed that they did not witness those witnesses being harassed.

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

26. In response to the petitioners' case, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their joint response dated 19<sup>th</sup> September 2017 together with an affidavit of even date sworn by the 1<sup>st</sup> respondent on his own behalf and that of the 2<sup>nd</sup> respondent arguing that, the election exercise was free and fair and the same was conducted in accordance with the Constitution and other electoral laws and that his election as Governor was a reflection of the free will and sovereign power of the people. They averred that, the 1<sup>st</sup> respondent was validly declared as the winner and that the elections were devoid of any irregularities or illegalities as claimed.

27. They therefore adopted their affidavit as their evidence urging the court to ignore any reliance on the analysis allegedly prepared by Dr. Noah Akala based on the presidential election petition's scrutiny orders which was not applicable in Kajiado County as no scrutiny was ordered in this petition.

28. With regard to voter turnout in excess of registered voters in five polling stations and results from 64 polling stations not declared, they gave a breakdown of registered voters in each disputed polling station against votes cast arguing that the petitioners had confused a center for a polling station. To buttress their claim, they attached a bundle of Forms 37A (JLL- 4) and 37B "JLL-3" to prove that in those stations, votes cast were not in excess of the registered voters and that results were declared contrary to the petitioners' assertion that Form 37Bs from five constituencies were not available to the IEBC public portal. Their evidence was corroborated by constituency chief agents Jubilee party; Daniel Kanchori (DW3) Kajiado East, Jonathan Olibi Shukare (DW4) Kajiado South and Alvin Joseph Kimani (DW5) Kajiado North, who swore their respective affidavits on 19<sup>th</sup> September 2017 confirming that there were no excess voters in any of the five stations complained of. They each attached Form 37Bs from their respective constituencies duly signed by the returning officers reflecting the actual number of registered voters against votes cast thus disapproving the petitioners' allegation.

29. In answer to the claim of illegalities and irregularities of the forms used in declaring results, they averred that the same were signed and stamped by presiding and returning officers and that where there was any failure, it was out of human error which was minimal and cannot vitiate an election. Concerning harassment and obstruction of the party agents who were denied the opportunity to sign forms, the 1<sup>st</sup> and 2<sup>nd</sup> respondents denied that claim arguing that there was no proof or complaint lodged to any lawful authority and that signing of results declaration forms was not mandatory. To bolster their assertion, they attached a bundle of Form 37As reflecting various agents having signed declaration forms.

30. To counter the allegation that agents were harassed and obstructed from performing their duties, DW3, DW4, DW5, who were Jubilee party chief agents, stated in their testimony that, as they traversed various polling stations during the election day, they never came across any agents complaining of any harassment or obstruction. As to the alleged variance in the number of votes cast in each elective post, DW6 in his examination in chief stated that, there was negligible variation occasioned by stray or spoilt votes.

### **3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' Case**

31. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents filed their joint response and affidavits in reply deponed by Saadi Noor Odowa (4<sup>th</sup> respondent) (DW6) sworn on 17<sup>th</sup> September 2017, Agnes Siyato Nankeyai (5<sup>th</sup> respondent) (DW7) and Benson Nchoe (DW8) also sworn the same day. The three respondents adopted similar defense just like the 1<sup>st</sup> and 2<sup>nd</sup> respondents' and attached common documents to prove that elections were free, fair and credible.

32. They denied the averments of the petitioners with regard to manipulation of the results as reflected in the public portal. It was their testimony that results captured in Form 37C was a true reflection of the collection of all results as declared in all polling stations in Kajiado County being a product of Form 37A as the primary document.

33. Regarding the alleged illegal deletions, DW7 and DW8 (IEBC ICT expert), stated in their testimony that the deletions complained of were less than 20 and not 167. DW7 (Returning Officer Kajiado North) explained in paragraph 17 of her affidavit that, the said deletions occurred in the course of archiving Forms 37A on 15<sup>th</sup> August 2017 much later after declaration of results but by mistake transmitted it to national tallying center in place of Form 34A meant for presidential results. She contended that, the governor's Forms 37A were only uploaded to Electronic Data Management Systems (EDMS) for storage purposes. DW6 and DW7 denied there were cases of election manipulation or harassment of party agents as none complained.

### **Issues for determination**

34. As stated earlier, during the pretrial conference, parties agreed on a joint list of issues for determination but the court reduced them to six as follows:

- a. Whether the elections for position of Governor Kajiado County was conducted in accordance with the Constitution, Electoral Laws and Regulations;**
- b. Whether the gubernatorial elections for Kajiado County held on 8<sup>th</sup> August, 2017 was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the constitution and all relevant provisions of the Electoral laws;**
- c. Whether non-compliance with the Constitution and Electoral laws affected the validity of the results of Governor Kajiado County;**
- d. Whether the illegalities and irregularities complained of affected the results;**
- e. Whether the first respondent was validly elected as Governor and if not, whether this court**

**can nullify the results;**

**f. Whether this court can issue any other relief including costs.**

35. Upon conclusion of the hearing, both counsels agreed to file their rival submissions which they did and thereafter highlighted on the same. The firm of Otieno Ogola & Co. Advocates appearing for the petitioners filed their submissions on 13<sup>th</sup> December 2017, whereas Gatonye Waweru & Co. Advocates counsels for the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed theirs on 2<sup>nd</sup> December 2017. Equally, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents through the firm of Mohammed Muigai & Co. Advocates filed their submissions on 2<sup>nd</sup> December 2017. From the submissions filed which were detailed and quite illuminating in legal context, and after considering the petition in its entirety, affidavits and annexures thereof plus testimony of both parties, it is prudent that I first put into perspective certain salient legal principles governing electoral process in Kenya which provisions the petitioners are alleging were violated during the impugned elections.

**The Law governing Elections**

36. In any democratic and progressive society, the rule of law is the bedrock of good governance, social justice, economic and political stability. Any deviation from due process governing electoral process shall be a recipe for anarchy as the will and sovereign power of the people shall be compromised and undermined. It then follows that, any amount of defiance to clear constitutional provisions or Electoral laws, would amount to disobedience and an attack on the electorate who are the donors of powers exercised by leaders or public bodies such as IEBC. While underscoring the supremacy of the constitution and government vis a vis the governed, the Court of Appeal in the case of **Njoya and Others vs AG and others (2004) IEA 194 – 195 observed and held as follows:**

**“the Constitution of Kenya which is the supreme law of this country is the will of the people and the mandate they give to indicate the manner in which they ought to be governed”.**

37. In Kenya, the law governing electoral process is anchored in the constitution, various statutes, Regulations and rules, breach of which will void or vitiate an election. Besides, great strides and immense contribution have been made through judicial pronouncements (case law) in terms of jurisprudence especially in virgin areas not adequately or clearly covered by the Electoral laws. Although there are several provisions governing the conduct of elections in one way or the other, I wish to refer to the most basic and salient provisions in this context.

38. Underpinning the sovereignty of the Kenyan people, **Article 1 (1) of the Constitution provides that;** All sovereign power belongs to the people of Kenya and shall be exercised in accordance with this Constitution. **Sub-Article 2** goes further to state that; Authority is donated to the people of Kenya to exercise their sovereign power either directly or through their democratically elected leaders. In other words, the calibre of leadership elected must be a true reflection of the will and sovereign power of the people (electorate). It is the petitioners’ contention that, the results declared were not free and fair as they were manipulated by IEBC in conjunction with the 1<sup>st</sup> respondent to achieve pre-determined results against the will of the people.

39. On the political arena under the Bill of Rights, **Article 38 of the Constitution** truly underscores the centrality of our electoral process thus providing as follows:

**Sub-Article (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.**

**Sub-Article (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.**

**Sub-Article (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.**

40. Equally important in so far as election process is concerned is Article 81 which provides thus – **the electoral system shall comply with the following principles:**

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

**b. ....**

**c. ....**

**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.**

According to the petitioners, Kajiado County Governor's election exercise was not transparent, impartial, accurate and accountable due to improper influence calculated at achieving fictitious and fraudulent results.

41. From the wording of Articles 38 and 81, the success of any election process squarely lies on the crucial role played by the referee in this case the Independent Electoral and Boundaries Commission established under Article 88 of the Constitution. The central role played by the IEBC is clearly encapsulated in the case of **William Kabogo Gitau vs George Thuo & 2 Others (2010) e KLR** where the Learned Judge expressed the view that:

**“If there is any statutory body whose actions should be considered to be above the board and which should perform its duties to the required standard or integrity and probity, it should be the electoral commission. The electoral commission has a duty to inculcate and imbue confidence in the electorate that its process is transparent, free and fair. I would be speaking for many Kenyans when I state that the events subsequent to the 2007 elections made many**

**Kenyans stand up and take note that an electoral process cannot under circumstances be compromised. Many Kenyans were ashamed when our country was referred in similar terms and in the same breath with a neighboring failed state. Kenya is not, and cannot be considered as a banana or a groundnut**

**Republic. This court will stand up and be counted as not Countenancing or tolerating electoral irregularities and malpractices.”**

42. Essentially, IEBC must at all times uphold and exercise high standards of integrity and transparency to ensure credible elections as captured under Article 86 of the constitution which provides as follows:

**“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 is put in place, including the safe keeping of election materials.**

43. For purposes of executing their mandate, Article 87 gave parliament authority to enact legislation to establish mechanisms for timely electoral dispute resolution. Based on this authority, parliament enacted various statutes inter alia, Elections Act No. 24 of 2011, Election offences Act number 37 of 2016, Parliamentary and County Elections Petitions Rules, 2017 and Elections General Regulations 2012 among others for orderly management and administration of election exercise and dispute resolution mechanism.

44. It is therefore a clear demonstration from Articles 86 and 88 that the IEBC has a critical and noble constitutional responsibility to ensure that elections are conducted in compliance with the constitution and any written law governing elections which mandate cannot be delegated or shifted.

45. Before a court is invited to vitiate an election, certain parameters must be met. The court must however be satisfied with sufficient proof that, the elections exercise ought to be nullified where there is proof that the same was not conducted in compliance with the constitution or any other written law or that non-compliance did affect the results.

46. Underscoring the requirement for proof of grounds upon which a party seeks to void an election, Section 83 of the Elections Act No. 24/2011 sets out the conditions as hereunder:

**“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 principles laid down in the constitution and in that written law or that non-compliance did not affect the results of the election.”**

### **Burden of Proof**

47. It is trite law and basic rule of evidence that he who alleges must proof. The petitioners have alleged multiple violations of electoral laws and massive irregularities allegedly occasioned by the respondents hence sought to nullify election results. It is incumbent upon the petitioners to prove those allegations to the required degree. The principle regarding burden of proof is a statutory requirement clearly spelt out under Section 107 of the Evidence Act Cap 80 which provides as follows:

**“Sub-Section 1 – whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**Sub-Section 2 –when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

**Section 108 of the evidence Act further provides that:**

**“the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”**

48. To emphasize and underscore the nobility of discharging the requisite burden of proof, the Supreme Court in **Raila Amolo Odinga and another vs Independent Electoral and Boundaries Commission & 3 others SCK Petition No. 5 of 2013 (2013) eKLR** held that:

**“A petition seeking to nullify an election should clearly and decisively demonstrate that the conduct of the election was 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.”**

Making reference to this particular case, Mr. Waweru Gatonye for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that, the burden of proof laid out by the Supreme Court has not been discharged by the petitioners in that they have not proved any constitutional violation or breach of any written law governing elections or any irregularities as claimed.

49. The highest court in the land went further in the same case at Paragraph 196 to state as follows:

**“where a party alleges non-compliance 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. Omnia 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 prescriptions of the law”**

50. It is now settled law that election petitions are no ordinary civil suits but rather sui generis (unique in nature) (**See Joho vs Nyange (2008)eKLR**). In that context, the degree or standard of proof laid upon the person alleging any omission or commission so as to vitiate an election must prove the same not on a balance of probability like in an ordinary civil suit, or beyond reasonable doubt as required in a criminal case, but above proof on a balance of probability and below proof beyond reasonable doubt. The degree therefore required is intermediate in nature. In this regard, the Supreme Court in **Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & Others SCK Presidential Petition No. 1 of 2017 (2017) eKLR**, held at Paragraph 152 that:

**“we maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal in nature are made, it is proof beyond reasonable doubt.”**

Similar position was held in the case of **M’nkiria Petkay Miriti vs Ragwa Samuel Mbae and 2 Others civil appeal No. 47/2013 (2014)eKLR** and **Khatib Abdalla Mwashetani vs Gideon Mwangangi Wambua (2014)eKLR** where the Court of Appeal held:

**“-----it is now settled beyond peradventure that the standard of proof where an election offence or such conduct is alleged, is proof beyond reasonable doubt.”**

51. What does non-conformity with Section 83 of the Election Act mean?

The applicability of Section 83 has succinctly been resolved by the Supreme Court's express pronouncement in the **Raila Amolo Odinga and another vs IEBC and others (Supra)** in which the court clarified on the disjunctive application of the said provision. At Paragraph 192, the court observed that:

**“there are clearly two limbs to all the above quoted provisions; compliance with the law on elections and irregularities that may affect the result of the election.**

**The issue in the interpretation of the provisions is whether or not the two limbs are conjunctive or disjunctive”**

52. The court went further to state at Paragraph 193 thus:

**“-----the use of the word “or” clearly makes the two limbs disjunctive under our laws. It is, therefore, important that, while interpreting Section 83 of our Elections Act, this distinction is borne in mind. In the circumstances, authorities from many commonwealth countries, such as Nigeria, Ghana, Zambia, Tanzania and Uganda whose provisions are not in sync with or exact parri Materia with ours may not be useful.”**

53. Based on the foregoing, it is incumbent upon the petitioners to not only make wild allegations, but also endeavor to prove either; violation of the law governing elections, or any acts of non-compliance that would substantially affect the results. A party can therefore prove any of the two limbs or both in order to void an election. However, the burden can shift to the respondents who are under obligation just like the petitioners to discharge their burden of proof. Having held as such, I will now turn to the issues at hand for determination.

### **Analysis and Determination**

54. From the manner and style in which the petition is drafted and considering the issues already framed, the petitioners are alleging violations of the law and commission of several irregularities. I wish to first deal with issues number one, two and three together as they are intertwined.

**1) Whether elections were conducted in accordance and compliance with the constitution, electoral laws and Regulations and whether non-compliance, if any, affected the validity of the election results.**

#### **a. Manipulation of electronic results**

55. Under this ground, the petitioners averred that, following the Supreme Court's ruling in presidential petition **No. 1 of 2017, Raila Amolo Odinga and Another vs IEBC and others (Supra)** which ordered partial scrutiny and limited access of the IEBC server, the credibility, integrity and accuracy of the election data and results and by extension the entire election of Governor Kajiado County was put to question after the shocking and indeed disturbing discovery of numerous irregularities, anomalies and illegalities.

56. To advance their argument, the petitioners stated that they had relied on a summary report or analysis prepared by their expert one Dr. Noah Akala whose report is reflected in Pages 60 – 63 of the petition. Having perused the so called analysis by Dr. Noah Akala who did not testify, it is clear from the face of it that it does not have the author's name, not signed or dated. It is a plain document whose authenticity is unascertainable. The petitioners conceded that the said analysis was done by Dr. Noah Akala after downloading the Supreme Court scrutiny report. In the absence of Dr. Noah's testimony and the reasons for his absence having not been explained, his affidavit remains untested on cross examination hence not of any evidential value (**see Noah Makhalang'ang'a Wekesa v. Albert Adome and 3 others(2013) eKLR and Ahmed Abdullahi Mohamad and another v Mohamed Abdi Mohamed and 2 others**)

**(2018) eKLR.**

57. In his submissions, Mr. Khaseke opined that, before any expert opinion like that of Dr. Noah is admitted, the same must comply with the law of evidence which in this case is lacking. Admission of expert opinion evidence is clearly covered under the Evidence Act Section 35 which provides:

**“(1) – In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say-**

**a. If the maker of the statement either-**

**(i) had personal knowledge of the matters dealt with by the statement; or**

**(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and**

**(b) If the maker of the statement is called as a witness in the proceedings.**

58. I entirely agree with the submission of Mr. Khaseke, counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, that a scrutiny exercise ordered in the presidential petition before the Supreme Court and some analysis whose author has not been ascertained or testified is not applicable in this petition as no scrutiny exercise had been ordered following the abandonment of that prayer by the petitioners. It is therefore common knowledge that the scrutiny report ordered by the Supreme Court has no relevance in this case.

**(c) That there were more votes cast than registered in five polling stations:**

**(i) Ongata Rongai Open Market Polling Station in which 696 were registered voters but 1164 votes were cast.**

59. It was the petitioners’ contention that, more votes than registered were cast hence yielding excess votes calculated in favor of the 1<sup>st</sup> respondent. To counter this allegation, the 1<sup>st</sup> and 2<sup>nd</sup> respondents relied on their response at Paragraph 12 of the 1<sup>st</sup> respondent’s affidavit confirming that Ongata Rongai Open Air Market had 25 streams with a total of 17,392 registered voters and 12,362 votes were cast. The affidavit and testimony of Alvin Kimani (DW5) supported by Forms 37A and 37B annexed thereto further confirmed that Ongata Rongai polling center did not have more registered voters than votes cast and therefore the claim of excess votes cast than registered voters does not arise hence not proved. I have perused the relevant Forms 37A in respect to that center and could not see or find a polling station out of the 25 streams with 696 registered voters against 1164 votes cast. It therefore follows that, the allegation by the petitioners is imaginary and unsubstantiated.

60. Further, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, through the 4<sup>th</sup> respondent’s affidavit at paragraph 15 and 16, corroborated the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ testimony by attaching Forms 37A from all the 25 polling stations of Ongata Rongai polling center and Form 37B to prove that the allegation by the petitioners was unfounded. In any event, the petitioners admitted on cross examination by the respondents’ counsels that, they did not see or attach Forms 37A or 37B and that they did not know the difference between a center and a polling station. They actually did not know what those figures represented in the first place. For those reasons, that ground is hereby dismissed.

**(ii) AIC Primary School Polling Station with alleged 1115 cast votes against 614 registered voters.**

61. The respondents demonstrated in their responses and affidavits of the 1<sup>st</sup> and 4<sup>th</sup> respondents at paragraphs 12 and 13 respectively, that, AIC Primary School had 3,068 registered voters and 2,505 cast their vote. They also attached Forms 37A and 37B to prove that the petitioners did not have any proof of the figures they quoted. On their cross examination by Mr. Matemu for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Mr. Khaseke for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, the petitioners admitted that they did not have proof of that allegation as they relied on Dr. Akala's analysis. To that extent, this claim is not proved.

**(iii) Namunyak Primary School where petitioners claimed that there were 288 registered voters but 520 votes were cast.**

62. The respondents challenged this claim by attaching Forms 37A and 37B to prove that Namunyak Primary School polling center had one stream with 288 registered voters and 232 cast votes. Again, the petitioners did not attach any proof on how they arrived at the figures they referred to. I have had the advantage of going through Form 37A in respect to that station (at page 48 of the 4<sup>th</sup> respondent's supporting affidavit) which shows that there were 288 registered voters and 232 votes cast. I do not understand where the figure 520 votes cast came from. Equally, that ground is not proved and the same must fail.

**(iv) Noon Kopir Secondary School where petitioners claimed that 1116 votes were cast out of 663 registered voters.**

63. Relying on the same response, the respondents stated that, in this polling center, there were 18 streams with a total of 11,942 registered voters against 8,428 cast votes. Once again, the petitioners had no proof either through Form 37A or 37B to ascertain the source of their figures which appears to have been plucked from an unknown source which even the petitioners did not know. Having gone through the relevant Forms 37A attached by the respondents in respect to this center, the figures quoted by the petitioners are foreign. Again, that ground is unproven and the same is without basis.

**(v) Olchorro Primary School: The petitioners alleged 1063 votes were cast against 571 registered voters.**

64. From the aforesaid responses and annexures of Forms 37A and 37B attached to the 1<sup>st</sup> and 4<sup>th</sup> respondents' affidavits at paragraphs 12 and 13 respectively, it is clear that this polling center had three polling stations with a total of 1712 registered voters against 1063 cast votes.

65. In a nutshell, the petitioners have not discharged their burden of proof to the required degree as the allegations made are farfetched and not based on verifiable source of information. Had the petitioners taken their time in consultation with their agents or IEBC, they would have verified the results and perhaps arrived at a different conclusion. For the above reasons stated, the entire ground of excess voters than registered voters fails.

**d. That 64 out of 797 polling stations with a total of 32,889 registered voters did not have results.**

66. Although the petitioners did make this claim, they did not attach any documentary proof or even list the specific affected stations. Unfortunately, they only listed 15 of them among others. We do not know which stations the word 'among others' represents. They merely claimed that, they relied on Dr. Noah Akala's analysis which was not adduced as evidence in court. To the contrary, the 1<sup>st</sup> and 2<sup>nd</sup> respondents gave a breakdown in their response through Paragraph 13(f) of their affidavit in support showing the number of streams in the 15 listed stations with the number of registered voters and votes cast reflected. The 4<sup>th</sup> respondent whose affidavit is attached to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents' response at Paragraph 15, attached Forms 37A from the 15 listed polling stations as well as Form 37C (See annexure SND-3) to confirm that results from all 797 polling stations in Kajiado County were declared. I have perused the attached Forms 37A and 37C all of which have results entered contrary to the petitioners' allegation. Once again, I find this allegation baseless and therefore not proved.

**(e) 167 Illegal deletions**

67. Concerning this allegation, the petitioners averred that, based on the Supreme Court's case of **Raila Amolo Odinga and another vs IEBC and others** quoted above, results from 167 polling stations from Kajiado North Constituency were illegally deleted hence manipulating results in favor of the 1<sup>st</sup> respondent. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents filed very detailed response through the 5<sup>th</sup> respondent's affidavit attached to their response explaining circumstances under which the results from less than 20 polling stations were deleted on the 15<sup>th</sup> August 2017. In her affidavit sworn on 21<sup>st</sup> September 2017 at Paragraph 17, DW7 denied that there were 167 deletions. In her testimony, DW7 told the court that, on 15<sup>th</sup> August 2017, while uploading Forms 34A for the presidency to the national tallying center, she by mistake uploaded Form 37As for Governor from 20 polling stations and sent the same to the national tallying center through File Transfer Protocol (FTP) instead of archiving them by way of Electronic Data Management Systems (EDMS). Her testimony was corroborated by that of Ben Nchoe (DW8) 3<sup>rd</sup> respondent's IT expert who also swore an affidavit in support.

68. As the returning officer Kajiado North Constituency, DW7 asserted that, the exercise of File Transfer and archiving of Form 37A on 15<sup>th</sup> August 2017 was of no consequence to the governor's result which had been announced and declared on 10<sup>th</sup> August 2017. Mr. Waweru Gatonye for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Khaseke for 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents submitted that, the allegation of 167 deletions was baseless as there was no proof. Indeed, from the testimony of the petitioners on cross examination, they were unable to specify the affected stations but instead chose to rely on an amorphous Dr. Noah Akala's analysis which was not tendered as evidence in court.

69. Pursuant to Regulation 17 of the Elections (Technology) Regulations 2017, IEBC is duty bound to retain and archive all electronic data relating to an election in safe custody for a period of three years after the results of the elections have been declared. There is no proof tendered by the petitioners as to whether the alleged deletions were done before or after results were declared. The respondents having given their explanation which has not been controverted and which sounds convincing in the circumstances, I am persuaded sufficiently to accept the explanation.

70. In any event, Section 39(1) (c) of the Elections Act only requires transmission of tabulated results for presidential elections to the national tallying center and not any other position. For avoidance of doubt, Section 39(1) (c) provides as follows:

**“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 center and to the national tallying center.**

71. From the wording of that provision, there was no requirement for transmission of governor's results Kajiado County to the National Tallying Center. In arriving at this conclusion, I am persuaded by J. Majanja's finding in **Jackton Nyanungo Ranguma vs IEBC & 2 Others (2018)eKLR** where he held that:

**“Even accepting the errors, omissions and inconsistencies highlighted by PW4 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 the primacy and finality of form 37A.”**

72. It is apparent that, there is no requirement for transmission of governor's tabulated results to the national tallying center hence the error committed on 15<sup>th</sup> August 2017 while archiving Forms 37A was a

mistake which has been adequately addressed and the petitioners were not disenfranchised in any way. That ground therefore fails for lack of proof.

73. The allegation that the 5<sup>th</sup> respondent committed a treasonable criminal offence by deletion of some data has not been proved beyond reasonable doubt. Assuming the alleged deletions were true, which is not, the petitioners had the liberty under Section 6 (j) of the Election Offences Act No. 37 of 2016 to lodge a complaint that an offence had been committed by an officer of the IEBC (DW7) for prosecution which if proved would attract a fine not exceeding 1 million shillings or to imprisonment of a term not exceeding three years or both. In the case of **Onalo vs Ludeki and 2 Others (2008) 3KLR (EP 3) 614**, Justice Rawal as she then was, held that, the burden of proof that a person is guilty of an election offence is on the petitioner and his witness. Similar position was held in the case of **Raila Amolo Odinga & Another vs IEBC & 2 Others (2017) (Supra)**.

74. Having considered allegations of violation of the constitution and other electoral laws and non-conformity thereof made against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents in the petition, the petitioners have not demonstrated whether any voters were denied the right to exercise their free will in electing leaders of their choice through universal suffrage by way of secret ballot in compliance with Art.38 (2) (3) of the Constitution. In the same vein, allegations of transmitting fictitious, fraudulent and unverified results in compliance with Article 86 of the Constitution have not be established. It has not been proved either, that the voting method used was not simple, accurate, verifiable, secure, accountable or transparent. Having arrived at the aforesaid finding, I will now turn to the next item regarding commission of irregularities and the attendant consequences thereof.

## **2) Whether irregularities and illegalities complained of affected the validity of the results.**

### **(a) Alleged irregularities in Forms 37B from five constituencies not uploaded to the IEBC portal, lack of security features, not signed by the agents and returning officers (see Paragraph 45 of the petition)**

#### **(i) Form 37B Kajiado East**

75. The allegation that Form 37B for Kajiado East Constituency was not uploaded to the IEBC public portal is contained in Paragraph 37 (vi) of the petition. However, I have noted that this particular form is attached to the 1<sup>st</sup> petitioner's affidavit at Page 36. The petitioners did not explain when and how they got their Form 37B which they attached as an exhibit. The respondents equally attached the same form in their responses with the 4<sup>th</sup> respondent confirming that all forms were uploaded to IEBC public portal. The court has no way of ascertaining whether that form was in the public portal or not as at the time results were announced.

76. Nevertheless, during cross examination of the 4<sup>th</sup> respondent (DW6), Mr. Oginga for the petitioners picked the issue of the form(37B) not being stamped and that the same did not have handing over notes and that it was not the standard statutory form recommended for declaration of results. The petitioners further took issue with the discrepancy reflected in that form when compared with Form 37B from the same constituency attached at Page 16 of the affidavit by the 4<sup>th</sup> respondent Saadi Noor Odowa (DW6) in which the one attached by the 1<sup>st</sup> petitioner does not have the handing over notes while the one attached by the 4<sup>th</sup> respondent has. Counsel also raised concern that the said form was not stamped and submitted that, with all those irregularities, the election was not properly conducted and ought to be nullified.

77. I have looked at the two forms which are similar in format but with some information like handing over notes missing and lack of the IEBC stamp. The form is duly signed by Jubilee agent and NASA by extension ODM being a coalition party. During cross examination by Mr. Oginga, DW6 admitted that he forgot to stamp the form and make handing over notes. I will later in this judgement deal with the issue regarding failure to stamp statutory result declaration forms and entry of handing over notes when dealing with similar allegations in Form 37As.

78. In his endeavor to explain why Form 37B without security features was used, DW6 stated that, during the election exercise, each returning officer was supplied with four statutorily prescribed copies of Form 37B. He however stated that, due to its poor texture (low grammage), the form supplied was exposed to damage (being “chewed”) every time they tried to print. Upon consultation with their bosses, they were advised to generate the form by computer using size A-3 type of paper which would then automatically generate a serial number. He explained that, the problem was widespread as it affected several stations in the country and that all parties had no objection hence the reason why they signed.

79. Despite using A-3 type of paper to generate Forms 37B, DW7 Agnes Siyiato Nankeyai, told the court on cross examination that, the form which was specially generated was secure with all the security features like water mark and IEBC logo hence the only difference was the format. There is no dispute as to the results collated in that form. Forms 37A which is a primary document giving rise to results collated in Form 37B signifying the will of the people has not been questioned. The explanation given by the Returning officer was in the circumstances and in my considered view plausible and apt thing to do and has nothing to do with the validity of the results.

80. I have looked at this particular form and others from other constituencies within Kajiado County. They have the IEBC water mark, bar code and a logo. The form attached by the 4<sup>th</sup> respondent in his affidavit has the name of the returning officer, it is dated, signed by both the constituency and County returning officers and party agents from Jubilee, ODM/NASA. We cannot rubbish the entire constituency or county results because of that excusable omission. It is now settled that an election is a process embodying several stages right from registration as a voter, verification of registration, nomination of candidates, voting after due identification, tallying of results, authentication of results by presiding officers/returning officers, party agents signing, results announced and a winner declared in this case using Form 37A. The petitioners have not sufficiently impugned the entire process not even Form 37A which is the primary and final document in the declaration of the results. The claim that the Form 37B was not of the right size and format on its own without proof of other irregularities cannot invalidate an election, which in any event is a reflection of the will of the people. For those reasons, that ground must fail.

#### **(ii) Form 37B Kajiado North Constituency**

81. In relation to this form, the petitioners claimed that the same was not uploaded in the IEBC public portal. They however confirmed that the same was attached in the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents’ response and that it was signed by the returning officer and only two agents from Jubilee Party. I have looked at the form and the same is signed by two Jubilee agents and it has handing over notes indicating that 201 Forms 37A were received. However, the content in terms of the results is not contested. Confirming that the results reflected in Form 37B were not manipulated, DW7 returning officer Kajiado North Constituency stated that, in collating results to Form 37B, she used Form 37As and thereafter printed Form 37B from an excel spreadsheet in A-3 paper size which was authorized and therefore no anomaly or illegality committed. The court is therefore left to determine whether failure to sign by other party agents was fatal. I will later in this judgment address the issue of failure by party agents in signing statutory result declaration forms after considering some other forms with similar complaint.

#### **(iii) Form 37B Kajiado Central**

82. In his submissions, Mr. Oginga for the petitioners again took issue with Form 37B Kajiado Central annexed at Page 9 – 11 of the 4<sup>th</sup> respondent’s affidavit in that, it did not indicate the number of Forms 37A received and that the same is signed by an agent for a party indicated as “JP”. In response, Mr. Khaseke for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that, that allegation was not proved since the petitioners did not attach Form 37B from the constituency. However, Mr. Khaseke’s assertion is not sustainable given that the 4<sup>th</sup> respondent is the one who introduced that particular form hence forms part of the court’s record to which the petitioners, although having not attached it to the petition, have an opportunity to cross examine on it thus entitled to make remarks on the same.

83. A court cannot shut its eyes from evidence already presented before it simply because they did not come from the petitioners. The initials representing a party known as “JP” was explained in the evidence of DW6 that “JP” stands for Jubilee Party. I take judicial notice that, the initials “JP” was widely used during campaigns as representing Jubilee Party hence a minor error which should not be an issue. In any event, an agent known as Jeremiah Ncharo, with his I.D card number clearly indicated, has signed as an agent for “JP” party whereas, Saitabao Kanchory signed for ODM. The petitioners have not established how the initials “JP” will affect the regularity of the results.

#### **(iv) Form 37B Kajiado South**

84. With regard to this form annexed at Page 38 to 39 of the 1<sup>st</sup> petitioner’s affidavit, the same is blank hence the plain paper attached is not of any evidential value. However, the 4<sup>th</sup> respondent in his affidavit in support at Page 6 to 8 attached the actual form. Using the form attached by the 4<sup>th</sup> respondent, the petitioners took issue during cross examination of DW6 that the form did not have IEBC stamp impression, had a candidate one Livondo representing a nonexistent (moribund) party known as URP, no security features and that it was only signed by an agent from the 1<sup>st</sup> respondent’s party. Mr. Oginga for the petitioners submitted that these were glaring irregularities capable of voiding an election. Mr. Khaseke for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents also submitted that the form has an official stamp and that Mr. Oginga’s submissions were misleading. With regard to failure by ODM agent to sign the Form 37B, Mr. Khaseke submitted that it was not mandatory.

85. As concerns the existence of URP party which did not sponsor any candidate, DW6 stated that it was an error since Mr. Livondo was sponsored by PNU and not URP. Mr. Khaseke further submitted that, the inclusion of URP party in the declaration form was excusable anomaly which is not prejudicial and therefore did not affect the results in any way. I have carefully looked at the form and also noted that the same has the IEBC stamp and therefore the submission by Oginga is not correct. Regarding the inclusion of the URP party in the results declaration form, I do concur with Mr. Khaseke that that was a minor error well explained by DW6 the County returning officer and therefore not fatal in any way. Regarding lack of security features, I will address the issue shortly when addressing similar complaints in other forms. Concerning use of wrong forms with wrong format similar explanation given above with regard to Form 37B Kajiado North Constituency was tendered and I still hold that the explanation was satisfactory and plausible in the circumstances.

#### **(v) Form 37B Kajiado West**

86. The complaint levelled in respect to this form attached to the 4<sup>th</sup> respondent’s affidavit at Page 17 is that; no party agent signed; no handing over notes were made; it was illegible; that the same was different from the one attached by the petitioner and that it was not signed by agents. Mr. Oginga again submitted that it is a serious omission capable of vitiating an election. However, none of the respondents’ counsels ever specifically submitted on this item. I have looked at the form in question. It is duly signed by the returning officer and somebody Sakuda although not indicated in what capacity and then stamped. It has IEBC logo with a bar code at the extreme right top corner and IEBC watermark. The same has no handing over notes although the tabulated results is not contested. Again, I will address failure to sign forms by agents later.

87. Concerning handing over notes, DW6 (4<sup>th</sup> respondent) admitted that it was an omission although the results were duly declared using Form 37A which is the primary document and that nobody has challenged the same. Save for the Form 37B for Kajiado North Constituency, forms 37B from the other four constituencies do not have handing over notes as correctly pointed out by Mr. Oginga for the petitioners. Does failure to make handing over notes in Form 37B alone without proof of any other irregularities collectively invalidate an election? As stated earlier, election is a lengthy process which entails extensive details right from registration as a voter, nomination, voting and declaration of results. Once again, petitioners are not challenging the results emanating from Form 37A which is the final result declaration form used to collate results in Form 37B. During the hearing, the petitioners acknowledged that they had been supplied with all Form 37As. The authenticity and results entered therein have not

been sufficiently challenged. Failure to make handing over notes in the circumstances in my view is not fatal and therefore that ground fails.

**(b) Anomalies and discrepancies in Forms 37A – use of irregular forms, forms not stamped or signed by Presiding Officers, Deputy Presiding Officers, Party Agents and some signed by strangers (See Paragraph 45 of the Petition)**

88. In his submissions, Mr. Oginga for the petitioners identified 15 polling stations without presiding officers or deputy presiding officers' signature, 26 polling stations containing altered figures and results, 6 forms without the IEBC stamp impression, 3 forms bearing the IEBC rejected stamp, 5 forms not stamped by any party agent, 14 forms signed by only Jubilee agents, 51 forms not signed by ODM agents.

89. Mr. Oginga further stated that, the aforesaid omissions amounted to serious irregularities capable of vitiating an election in compliance with Section 83 of the Elections Act. Counsel submitted that the said irregularities confirms that the governor's results were not accurate, verifiable, secure, accountable and transparent. Learned Counsel referred the court to the Ugandan Supreme Court case of **Joy Kabatasi Kafura vs Anifa Kawooya and Another Election Petition No. 25 of 2005(unreported) as quoted in William Kabogo Gitau vs George Thuo (Supra)** wherein the Supreme Court of Uganda held that, election is a process of activities starting from nomination to declaration of results and any failure to comply with the applicable law the same is flawed affecting the quality of the electoral process and depending on the gravity, it is bound to affect results. Mr. Oginga further submitted that, a court of law should not appear to condone illegalities in the election process. He referred the court to **Moses Masika Wetangula vs Musikari Nazi Kombo and 2 others (2015) eKLR** in which the Supreme Court held that:

**“.....the court cannot appear to condone illegality in election process and would therefore investigate any alleged breaches of the law, even where these were not in the pleadings but arose in the course of the trial...”**

90. Referring to **Raila Amolo Odinga and Another vs IEBC & Others (Supra)**, learned counsel opined that, election results is not about numbers but the process also. Underscoring the importance of electoral process vis a vis numbers, the Supreme court had this to say at paragraph 371;

**“-----therefore, whether it be about numbers, whether it be about laws, whether it be about process, an election must at the end of the day, be a true reflection of the will of the people, as decreed by the constitution, through its hallowed principles of transparency, credibility, verifiability, accuracy and efficiency.”**

91. In response to the petitioners' submissions, Mr. Waweru Gatonye for the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not submit on the specific allegations concerning illegalities and irregularities contained in both Forms 37A and 37B. Counsel simply termed the allegations as generalized and unfounded claims which were not pleaded in the petition in the first place. Mr. Gatonye referred the court to the case of **M'Nkiria Petkany Miriti vs Ragwa Samuel Mbae & 2 Others (Supra)** in which the court stated that:

**“The election petitions are limited in time and scope.**

**The petitioner must present his petition within 28 days and he/she cannot be allowed to amend the same thereafter.**

**The respondents are given time to respond to the petition and in their response the law states clearly that they too cannot introduce any issues or contests outside those raised by petitioner in his pleadings. The petitioner cannot have a free hand to add to polling stations outside those specified in the petitioner's pleadings.....”**

92. On his part, Mr. Khaseke adopted a similar approach just as Waweru Gatonye submitting that, the petitioners had not proved that the irregularities complained of were substantial in nature so as to invalidate the results. Learned counsel referred the court to the case of **Mercy Kirito Mutegi vs Beatrice**

**Nkatha Nyaga & 2 Others (2013) eKLR** in which the court stated that:

**“----as stated earlier, in this judgment, not every**

**Non-compliance or every act of omission or breach of that elections regulations or procedure can render an election invalid.”**

93. After carefully evaluating the illegalities and irregularities complained of in Form [\[WU1\]](#) s 37B and 37A with regard to the absence of security features, lack of the IEBC stamp, use of non-statutory forms, presiding officers ,deputy presiding officers and agents not signing, alterations ,discrepancies in votes entered in Forms 37A, 37B and 37C and therefore not in conformity with Section 83 of the Elections Act , and after careful consideration of counsels’ submissions, I would like to address the issues raised as hereunder:

**(i) Forms not being signed by Presiding Officers, Deputy Presiding Officers and Agents**

94. The law governing signing of statutory forms for declaration of results, is provided under Regulation 79 of the Elections (general) Regulations 2012 which provides:

**Sub-regulation (1) – The presiding officer, the candidates or agents shall sign the declaration in respect of the elections.**

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

**a. Presidential election results shall be in Form 34A set out in the schedule; and**

**b. National Assembly, County Women representatives, Senator, Governor and County Assembly elections shall be in Forms 35A, 36A, 37A, 38A and 39A set out in the schedule.**

**Sub-regulation (2A) – the presiding officer shall:**

**a. Immediately announce the results of the voting at the polling station before communicating the results to the returning officer;**

**b. Request each of the candidates or agents present to append his or her signature;**

**c. Provide each political party, candidate, or their agent with a copy of the declaration of results; and**

**d. ....**

**Sub-regulation 3 – Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.**

**Sub-regulation 4 – Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.**

**Sub-regulation 5 – Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence.**

**Sub-regulation 6 – The refusal or failure of a candidate or an agent to sign a declaration form under sub-regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation (2)**

(a).

**Sub-regulation 7 – The absence of candidate or an agent at the signing of a declaration form or the announcement of results under sub-regulation (2) shall not by itself invalidate the results announced.**

**Sub-regulation 8 - .....**

95. Regarding Form 37A not being signed by presiding and deputy presiding officers, the petitioner cited 15 stations. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents challenged the assertion claiming that they were all signed. Mr. Khaseke went further to respond to the specific forms with regard to presiding or deputy presiding officers not signing stating that there was no requirement that both must sign. He went further to state that, the allegation of 15 polling stations lacking presiding or the deputy presiding officers' signature was not true as they either had the presiding or the deputy presiding officer's signature.

96. Learned Counsel further stated that, even if Regulation 79(1) provides for signing of Form 37A by a presiding officer, the same did not provide sanctions for failure to sign. In support of his argument, Mr. Khaseke quoted the case of **McCoy vs Fisher 136 W. Va. 447 (W. Va. 1951), where it was held:**

**“-----when, however a statute provides that certain things shall be done in connection with the preparation of an election ballot, but does not prescribe what results shall follow if they are not done, the statute is merely directory, and the test of the legality of a ballot is whether the voters are given an opportunity to express their will and fairly expressed it.”**

97. Indeed Regulation 79(1) of Elections (General Regulations) of 2012 requires only a presiding officer to sign the declaration in respect of the elections. The claim by Mr. Oginga that both the deputy and presiding officer should sign is therefore unfounded. (See the case of **John Murumba Chikati vs R.O. Tongaren Constituency and 2 Others (2013) eKLR EP No. 4 of 2013** where J. Gikonyo held that, it was not mandatory for the presiding and deputy presiding officers to sign the declaration form concurrently and hence the signature of either of them is sufficient.

98. However, Regulation 5 Sub-Regulation 4 recognizes the fact that a Deputy Presiding Officer may perform any acts a presiding officer is required or authorized to perform. It is common practice that the functions of a deputy in any organization or body is to perform those duties and or functions which his or her boss is required or authorized to do and the performance of such acts by either the boss or the deputy is as good as the other. There is no mandatory legal requirement that the two must sign at the same time and where they do not, the same is not fatal.

99. As to how many forms were not signed either by the presiding or deputy presiding officer, the number given by Mr. Oginga is exaggerated. I have perused the Forms 37A attached by both respondents in support of their responses and out of the 15 named, only three polling stations were affected i.e. Ongata Rongai polling station 4 of 25, Noon Kopir Secondary Polling Station 14 of 18 and Lemelepo Water Project polling station 6 of 9. It is worth noting that, the petitioners did not attach to the petition any Forms 37A as proof of those anomalies.

100. The importance of signing electoral statutory forms by presiding or returning officer cannot be over emphasized. It is through signing such forms that the author or maker can authoritatively acquire authentic ownership. In the absence of that, the document shall be deemed to be worthless and ownerless hence not of any probative value for submission as evidence in a court of law. Realizing the significant role Forms such as 37A and 37B play in the electoral process, the Supreme Court in the **Raila Amolo Odinga and another vs IEBC & Others 2017 (Supra)** held at Paragraph 377 as follows:

**“.....why would a returning officer, or for that matter a presiding officer fail or neglect to append his signature to a document whose contents he/she has generated? Isn't the appending of signature to a form bearing the tabulated results the last solemn act of assurance to the voter by such officer, that he stands by the “numbers” on that form.”**

101. It is therefore clear from the Supreme Court decision that, failure to sign the requisite statutory forms by a returning or presiding officer will render them null and void ab initio. In the instant case, there are three stations affected with a total of 1988 registered voters which is quite a minimal margin compared to the difference of 28,348 votes between the winner and the second candidate. Even if we were to remove the votes cast in the three stations from the 1<sup>st</sup> respondent's votes, the margin will still be wide and there will be no substantial effect to warrant invalidation of results in this petition. In arriving at this finding, I am guided by **Judge Majanja's reasoning in Jackton Nyanungo Ranguma vs IEBC and 2 others (2018) eKLR** where he stated that:

**“At the end of the day, the failure to record the results of the 5 polling stations within Kisumu East Constituency on form 37B and 37C would not in any way affect the results as the petitioner was the winner of the election even assuming that the petitioner would have garnered all the votes in those stations..... I find that this irregularity would not have affected the ultimate result given the margin of votes and the fact that the irregularity occurred in only 5 out of 1000 polling stations in the county.”**

102. It would be a travesty of justice and indeed an affront on the electorate, a mockery of the will and sovereign power of the people, if a court was to vitiate an election result because of an irregularity committed in only 3 polling stations with a total of less than 2000 votes out of 797 polling stations with over 500,000 registered voters on account of a presiding officers' failure to sign 3 Forms 37A.

103. Although failure to sign such forms may be genuine out of fatigue or negligence, there could be a possibility where a losing candidate could compromise a presiding or deputy presiding officer in specific areas so as to lay a ground for a successful petition. I am aware that Section 6(j) of the Election Offences Act makes it an offence for any of the IEBC officers who omits or fails to perform his or her duties to be liable to a fine of 1 million or three years imprisonment. Unfortunately, that Section has not been utilized sufficiently to deter such criminal acts which would deprive a genuine winner victory. It is high time the Director of Public Prosecution and other investigative agencies preferred such charges so as to deter officers who are indolent from subverting the natural course of electoral justice.

#### **(ii) Lack of Security Features**

104. The petitioners claimed that Forms 37B used to declare results from the five constituencies did not have necessary security features. The respondents admitted this allegation but justified the use of the computer generated A-3 paper Form 37B as the copies they were given were “chewed” by the printer due to poor paper texture. There is no dispute on the results posted in the said form. Can failure to use standard statutory Form 37B invalidate results? The respondents claimed that there is no legal requirement that Form 37B must be of a given standard format and that such forms must have security features. It is not however denied that such standard statutory forms were in existence and that they were of poor quality and upon consultation with their seniors they were advised to use computer generated Form 37B using A-3 size of paper. These were the remarks of DW6 although different from what DW7 said that they were allowed to generate Form 37B from an excel spreadsheet which was pre-installed using size A-3 paper.

105. There is no proof that Forms 37A used to tabulate results entered in Form 37B did not exist or that the results were not valid. Nobody claimed that Forms 37A did not have necessary security features. On the same note, not a single Form 37A was attached by the petitioners as a sample to establish lack of security features. If the Form 37A, which is the primary document, is not challenged and the same had been supplied to the petitioners during the pendency of this case, can the use of a computer generated Form 37B per se void results of a whole constituency? Will that reflect the will and sovereign power of the people? The explanation given by the Constituency Returning Officer (DW7) and County Returning Officer (DW6) which I have already addressed above regarding the non-use of standard statutory Form 37B in tabulating results is plausible and convincing. And, as long as results from Form 37A which is the final result is not tampered with, the mode of transposition of results in Form 37B with reasonable explanation cannot on its own, void results from the entire constituency. In arriving at this conclusion, I am guided by the case of **Independent Electoral and Boundaries Commission vs Maina Kiai & 5**

**Others Nairobi CA Civil Appeal No. 105/2017 (2017) eKLR** where the court held:

**“it is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters’ will. The counting of the votes as elaborately set out in the Act and regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with finality not to be exposed to any risk or subversion. It sounds ill that a contrary argument that is so anathema and antithetical should fall from the appellant’s mouth.”**

106. For those reasons, I do not find the use of computer generated Form 37B due to failure of printing machine in using the standard form sufficient enough to overturn the valid results captured in the standard Form 37A in the entire constituency. In fact, in the **Raila Amolo Odinga & another vs IEBC and others (2017) (Supra)**, the Supreme Court held at Paragraph (362) that:

**“...As pointed out by the petitioners, there is a reasonable expectation that all the forms ought to be in a standard form and format; and though there is no specific provision requiring the forms to have watermarks and serial numbers as security features, there is no plausible explanation for this discrepancy more so when Immaculate Kassait deponed that all forms had those features.”**

107. In the instant case, DW6 and DW7 both returning officers gave a convincing and what I considered as a plausible explanation in the words of the Supreme Court whose facts and circumstances in the aforesaid presidential petition was different from this particular case. This omission was not of a substantial nature to invalidate the results considering the explanation given. In any event, and as admitted by both parties, there is no mandatory legal requirement that Form 37B must have certain security features.

### **(iii) Forms not signed by Agents**

108. As stated earlier, the requirement for a candidate or party agents to sign result declaration forms is provided under Regulation 79(1) above quoted. Petitioners’ counsel submitted that it was mandatory for agents to sign and that in 14 polling stations only jubilee agents signed Form 37A, and in 51 polling stations Forms 37A were not signed by any ODM candidate or agents and that in 5 stations no agent signed. Having perused the forms in question, it is not true that in 51 polling stations ODM agents did not sign. Upon perusal of the said forms, out of 51 stations named against a total of 161 forms provided both by the 1<sup>st</sup> and 4<sup>th</sup> Respondent, 15 forms are either signed by NASA, ODM, Wiper or ANC all referring to one party on account of their coalition relationship hence the allegation by Mr. Oginga that ODM agent did not sign 51 Form 37As is not correct. The remaining 25 forms against a total of 161 translating into 15% is not substantial enough to annul election results. In the same vein, 5 forms in which not a single agent signed out of a sample 161 attached against 797 total number of polling stations, is not a substantial anomaly to warrant vitiation of an election taking into account the wide margin of votes garnered between the winner and the second candidate.

109. It was alleged that agents were either obstructed or chased away and that no remarks were made as to why they did not sign. The respondents argued that, it was not a mandatory requirement for the agents to sign as the form prescribed makes it optional. Mr. Khaseke admitted that some forms were not signed by either the candidate or party agents. He referred the court to Regulation 74(1) (4) and 79 (1) which provides that agents present during tallying of votes should sign and that it was not mandatory. Counsel asserted that, failure to make remarks for absence of agents’ signature is not fatal.

110. The objective of Regulation 79 requiring a candidate or party agent to sign statutory declaration forms is meant to have an all-inclusive exercise authenticated so that parties can own the results announced and in case of a dispute, they will be available to assist the court. It is also one way of conferring checks and balances on key players in the electoral system and the means to ensure integrity and credibility, instill confidence and transparency to the general public and other stake holders thereby affirming that the election exercise is conducted in an accountable, credible and transparent manner. Sub-

regulation 4 requires that, where a candidate or an agent refuses or fails to sign the declaration form, the presiding officer shall record reasons. It is admitted that, in some polling stations, not all agents signed and that the presiding officers did not make any statutory remarks regarding the failure to sign. It is true that, it is not mandatory for a candidate or an agent to sign, but it is a requirement that a presiding officer must make remarks for such failure. Regulation 79 (6) – goes further to state that, failure by an agent or candidate to sign such forms does not invalidate the results. What is the effect of failure by a presiding officer in making those statutory remarks? In the case of **John Murumba Chikati vs R.O. Tongaren Constituency & 2 others (Supra)**, the court found that, although signing of statutory forms by agents or candidates is crucial, failure to do so cannot alone vitiate an election unless there are other reasons or factors.

111. Although it is a matter of local notoriety that some candidates or parties do not normally have agents for various reasons including lack of finances, not filling agents in areas they do not have support or generally agents not waiting for results to be announced for some reasons including sensing defeat, it is no excuse for the presiding officer not to indicate reasons for the absence or failure for an agent not to sign. However, I do agree with Gikonyo J's finding in John Chikati's case above quoted that failure by candidates or agents not to sign declaration statutory forms should not alone be applied to vitiate a validly conducted election depending on the facts and circumstances of individual case and more particularly where the effect of such omission is not of a substantial nature. In this case, I am not convinced that that ground is sufficient enough in the circumstances to vitiate an election considering the negligible number in which only five stations were affected hence not sufficient enough to affect the validity of the results.

#### **(iv) Forms not stamped**

112. According to the petitioners, out of the five Forms 37B from five constituencies, Form 37 B for Kajiado East Constituency and six Forms 37A did not bear the IEBC stamp impression. Despite admitting this allegation, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents argued that, there is no mandatory legal requirement for the forms to be stamped. Whereas I agree with the respondents that there is no mandatory legal requirement for stamping of results declaration forms, the introduction of that administrative guideline by the IEBC was meant to safeguard and authenticate the form. Can failure to stamp a declaration form be a ground to vitiate the results? Mr. Khaseke submitted that there was no legal requirement that Form 37A must be stamped save for Regulation 78 which provides for rejected votes to be stamped. According to the learned counsel, the said omission was not fundamental enough to void the election.

113. Confronted with similar predicament, the court of appeal in the case of **Independent Electoral and Boundaries Commission and another vs Stephen Mutinda Mule and 3 Others (2014) eKLR** held that:

**“There is no stamping requirement in the case of the form 35. All that is required to form 35 as provided for in Regulation 79 is the signature of the presiding officer and the agents of the candidates. We agree on the submission on behalf of the appellant that it is the signatures of the presiding officers and the agents that authenticates the form 35. If any forms were stamped, it was a gratuitous and superfluous discretionary or administrative act incapable of creating a statutory obligation, less still the invalidation of the forms 35 that did not contain the stamp. On this score the appeal succeeds.”**

114. In this particular case, only one Form 37B and 6 Forms 37A were not stamped and which the returning officer said was an omission out of a total of 797 Forms 37A. From this sample, the act of not stamping was neither collective, systemic, systematic nor widespread hence justifying a possibility of human error and therefore not sufficient enough to nullify an election.

#### **(v) Alteration of Figures**

115. The element of alteration of Forms 37A in some 26 polling stations as submitted by Mr. Oginga was not a ground of the petition. However, the same did arise during cross examination of DW6 by Mr. Oginga. Counsel unilaterally introduced this aspect of alteration of figures during submission. The

petitioner did not attach any forms of altered figures. Learned counsel seemed to have picked this ground from a total of 161 Form 37As attached by the 1<sup>st</sup> respondent in his response. Mr. Gatonye submitted that the cancellations complained of in Form 37A were not so substantial enough as to invalidate the election. He referred the court to the case of **Joel Nyabuto Omwenga & others vs IEBC & another (2013) eKLR and Hosea Mundui Kiplangat vs Sammy Komen Mwaita & 2 Others (2003) eKLR** where J. Achode held:

**“As a matter of principle, it is not enough to say that, since there were cancellations in electoral forms, the results contained in those forms were by that fact invalid. There must be solid evidence to show that the integrity of those results has been substantially compromised as a result. No such evidence was submitted to this court. An election will not be vitiated merely because of minor irregularities which did not go to the root of or substantially affect the outcome of the election....”**

116. I have however had occasion to go through the forms one by one. The alterations claimed are minor being arithmetic errors affecting only 25 forms out of a total of 161 translating to 15%, a figure that is not widespread, hence cannot change the outcome (result) at all. They are mere human arithmetic errors not substantial enough to void an election. Majority of them are countersigned. It is common knowledge that, while conducting a huge demanding exercise like an election process with strict time lines and competing interest plus fatigue, it is possible arithmetic mistakes are bound to occur. Although not encouraged, it is not enough to look at a single alteration of say a figure and then conclude that an irregularity has been committed without considering the entire document and the effect on the final result. In this case, the petitioners have not demonstrated how those minor alterations in 26 Forms 37A against 797 forms affected the outcome. Human beings are not machines, hence to expect 100% mathematical precision in every detail would not be possible and achievable. In this case, I am satisfied that the arithmetic errors pointed were not substantial enough to invalidate the election exercise (**See Hosea Mundui Kiplangat vs Sammy Komen Mwaita & 2 Others (Supra)**).

#### **vi) Discrepancies in the entries in Form 37As, 37Bs and 37Cs**

117. In his submissions, Mr. Oginga for the petitioners submitted that there was significant variance in the entries in Form 37As, 37Bs, 37Cs in Ongata Rongai Open air market polling station 2 and 14, Olgumi primary school 1, Enkoireroi primary, Enkijape primary school 2 and Kimuka. In response to this allegation, Mr. Khaseke also submitted that, the allegation herein is a new ground which was not raised in the petition and therefore urged the court to ignore the same. I do not agree with Mr. Khaseke that this is a new ground being raised through submission by the back door. The same issue arose during cross examination of DW6 who dismissed the claim arguing that the differences may have occurred as a result of human error while entering results and that in any event, the votes affected were minimal. I have looked at the results of the affected six stations out of the 797. The discrepancies complained of are quite minimal and therefore not significant to invalidate the results. The variance in question does not appear to systematically favour any particular candidate in any manner so as to imply manipulation.

#### **vii) Forms stamped ‘rejected’**

118. Mr. Oginga for the petitioners submitted that Forms 37A from 3 polling stations namely AIC primary school 1(at page 43 of the 4<sup>th</sup> respondent’s affidavit), Kiserian primary school 3(affidavit of 4<sup>th</sup> respondent) and Ongata Academy New 4 (page 98 of 1<sup>st</sup> respondent’s affidavit) bore IEBC stamp indicating ‘rejected’. Counsel asserted that, the irregularity reflected therein is grievous as it affects the validity of the results in question. Mr. Khaseke for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents submitted that there is no requirement for Form 37A to be stamped with IEBC’s stamp marked ‘rejected’ as the same is only applicable to rejected ballot papers in compliance with Regulation 78. I have looked at the forms in question; Ongata academy new has two stamp impressions, one marked IEBC and the other ‘rejected’ implying that someone must have made a mistake and tried correcting using the right stamp. In respect to AIC primary school, there is no stamp impression on that form leave alone the ‘rejected’ stamp impression. Its true Kiserian primary school Form 37A has a stamp impression marked ‘rejected’.

119. The law governing use of rejected stamp is in Regulation 78 which is only applicable in respect of rejected ballot papers. The use of rejected stamp on Form 37A was definitely an error which is not fatal or prejudicial to the overall outcome of the election results.

**viii) Discrepancies in the number of votes cast in different electoral positions**

120. It is the petitioner's case that the votes cast in respect of the six electoral positions yielded different figures which could not be explained hence raising the question on the validity and legality of the results announced. However, the petitioners did not attempt to demonstrate the affected stations and by what margin. I find the claim to be too general which in the absence of scrutiny could not be proved hence, no need to delve into this particular item as the same lacks merit.

**(ix) Harassment or obstruction of Agents**

121. The petitioners made allegations of ODM agents being harassed or denied opportunity to witness announcement of results. During the hearing, the petitioners admitted that they did not call any such agent to testify to confirm their claim. They also admitted that no complaint was made to any lawful authority. Ordinarily, agents are not employees of IEBC hence at liberty to report or leave a polling station anytime at will without any restrictions. Nobody knows the time, specific polling stations affected with such harassment or even the name of the particular agent who was harassed or obstructed. Whereas the law and more particularly regulations 69,72,73,75,76,78,79,80,81,83 and 87 underscores the crucial role an agent plays during the electioneering period, the duty to ensure due performance of that responsibility is complimentary between the IEBC and the parties concerned. I do not find the claim herein sustainable as the same lacks merit being a general allegation without basis or proof. For those reasons, that ground fails.

122. Having analyzed extensively each and every specific irregularity alleged by the petitioners, the question that arises is whether the petitioners have proved to the satisfaction of the court that the said electoral irregularities and other malpractices were of such a substantial nature so as to vitiate the results of Governor Kajiado County. I must however state that, in determining electoral disputes, a court should exercise due vigilance and extra caution not to be held hostage by technicalities courtesy of minor procedural and administrative inadequacies arising before, during or after voting to overturn an election. To conduct an election exercise is such an expensive venture to tax payers hence should not be dismissed on flimsy grounds with the ultimate effect of undermining the sovereignty of the people (electorate). It is now settled law that not every minor infraction amounts to an illegality or irregularity capable of voiding an election (**See Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others (2014)eKLR EP No.2B/2014**). It is common knowledge the world over that, elections are managed by human beings who are prone to imperfection in one way or the other and to expect 100% performance in every act or assignment will be a toll order in the history of mankind. Affirming this position, the Supreme Court in **Raila Amolo Odinga & Another Vs IEBC & others (2017) (Supra)** held at paragraph 372 as follows:

**“.....At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it”.**

123. The Supreme Court went further to state at paragraph 374 that:

**“.....In view of the interpretation of Section 83 of the Elections Act that we have rendered, this inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the Constitution or in that law. But even where a Court has concluded that the election was not conducted in accordance**

**with the principles laid down in the constitution and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.”**

124. In the instant case, the petitioners were duty bound to satisfy the court that by reason of non-compliance with the law relating to the elections, the election was not conducted in accordance with the principles laid down in the constitution and in that written law or that the non-compliance did affect the results of the election. The petitioners have not met the conditions set by the constitution and Section 83 of the Elections Act. There is no proof that the elections were not free from improper influence or corruption, administered in an impartial, neutral, efficient, accurate and accountable manner and that the voting method used and the system was not simple, accurate, verifiable, secure, accountable and transparent, and that the irregularities were of such a magnitude to have affected the general results. For those reasons, I do find that the elections were held in compliance with the law and any minor irregularities, imperfections be it procedural or administrative errors, cannot warrant nullification of the results herein.

### **3) Whether the 1<sup>st</sup> respondent was validly elected as the governor Kajiado County**

125. Having made a finding that the elections for the position of governor Kajiado county was held in conformity with the law, and that the irregularities cited were not capable of nullifying the results, the will and sovereign power of the people of Kajiado county who woke up on the 8<sup>th</sup> August 2017 to elect a leader of their choice through universal suffrage must be respected, preserved and loudly pronounced. It was not in vain for them to have woken up in the wee hours of the day with the ultimate desire to exercise their democratic right as enshrined in Articles 1, 38, 81 and 86 of the constitution. This right is definitely inalienable and cannot be taken away on generalized allegations which do not withstand the test laid down in the Constitution and other electoral laws. Based on my determination herein above, I do hereby make a finding that the 1<sup>st</sup> respondent was validly elected as governor Kajiado County on 8<sup>th</sup> August 2017. Consequently, the petitioner’s reliefs and/or prayers one to five are hereby dismissed.

### **4) Whether this court can issue any other reliefs including an order for costs**

126. Besides the prayer for costs, parties herein did not seek any other relief hence this court is not bound to consider such other reliefs that are not specified or did not arise in the cause of the proceedings save for costs. Section 84 of the Elections Act provides that, an Election court shall award the costs of and incidental to a petition and such costs shall follow the cause. Pursuant to Rule 30 of the Elections (Parliamentary and county Elections) Petitions Rules, 2017, an Election court may at the conclusion of a petition make an order specifying the total amount of costs payable, the person to pay and whom to be paid. Considering the history of this petition, whereby the respondents were forced to face two sets of petitioners; the original petitioner and the current petitioners, the respondents must have spent some substantial sum of money which they may not fully recover. As a consequence, am inclined to direct that the petitioners shall meet the costs of this petition capped at Ksh 2.5 million to the 1<sup>st</sup> and 2<sup>nd</sup> respondents as one set and similar amount to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents as another set.

## **Conclusion**

127. During the hearing of this petition, one unfortunate thing that came out clearly was, the petitioners purely attempted to prove their case dependent on the Supreme Court’s petition finding on scrutiny exercise which was totally irrelevant in this petition. They came to court totally unprepared and unaware of what the petition entailed and their role thereof. They simply took over a petition which had no supporting documents but sought to fish and build their case out of the respondent’s responses. I must commend the respondents and their counsels for having played an open game by submitting all necessary documents which eventually assisted the court in arriving at a fair and just decision. Lastly, I wish also to commend Mr. Oginga advocate for the petitioners, for having done an excellent job in representing his clients despite having a post-admission experience of less than one year.

128. Having made the above determination, I will now make the following declaration orders:

- a. That the gubernatorial elections held on 8<sup>th</sup> August 2017 in Kajiado County were constitutionally and validly held.
- b. That the 1<sup>st</sup> respondent herein, Joseph Jama Ole Lenku, was validly elected and gazetted as the Governor of Kajiado County.
- c. That the certificate of elected county governor for Kajiado County issued in the name of Joseph Jama Ole Lenku on the 10<sup>th</sup> August 2017 was constitutionally and legally issued to the said Joseph Jama Ole Lenku as Governor Kajiado County.
- d. That the petitioners shall bear the costs of the petition.
- e. That the bill of costs shall be taxed and certified by the deputy registrar.

**JUDGMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT KAJIADO THIS 25<sup>TH</sup> DAY OF JANUARY 2018.**

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**J.N. ONYIEGO**

**JUDGE**

In the presence of:-

Ms Achieng holding brief for Mr. Oginga .....Counsel for the petitioners

Mr. Waweru Gatonye.....Counsel for 1<sup>st</sup> and 2<sup>nd</sup> respondents

Mr. Khaseke.....Counsel for 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents

Ms. Catherine.....Court Assistant

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