



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

ELECTION PETITION NO. 1 OF 2017

IN THE MATTER OF ARTICLE 1, 86 AND 87

OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF REGULATIONS 74, 75, 76, 77 & 78, 81,82,83,84,85,

86 AND 87 OF THE ELECTION(GENERAL) REGULATIONS, 2012.

IN THE MATTER OF SECTIONS 80(4) OF THE ELECTIONS ACT NO. 24 OF 2011

AND

IN THE MATTER OF RULES 28 OF THE ELECTIONS (PARLIAMENTARY

AND COUNTY ELECTIONS) PETITION RULES, 2017.

AND

IN THE MATTER OF THE GENERAL ELECTIONS HELD ON 8TH DAY OF AUGUST, 2017

AND

THE ELECTION FOR THE MEMBER OF THE NATIONAL ASSEMBLY FOR

NORTH IMENTI CONSTITUENCY CODE NO. 056, MERU COUNTRY

SILAS MURIUKI RUTEERE.....PETITIONER

VS

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

ABDI SHIEKH MOHAMED/RETURNING OFFICER

FOR NORTH IMENTI CONSTITUENCY.....2ND RESPONDENT

ABDUL RAHIM DAWOOD.....3RD RESPONDENT

JUDGEMENT

BACKGROUND

1. On 8th of August 2017 the people of North Imenti Constituency like most Kenyans woke up to go and exercise their political rights as enshrined in Article 38(2)(b) to elect a member of National Assembly to exercise their sovereign authority as provided under Article 1(1), (2) and (3) of the Constitution of Kenya 2010. In conducting these elections the IEBC is required to comply with the general principle enshrined under Article 81(e) (i)-(v) and Article 86 of the constitution of Kenya.

Article 81:

The electoral system shall comply with the following principles;

(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.**

Article 86:

At every election the Independent Electoral and Boundaries Commission shall ensure that –

- a. Whatever voting method is used the system is simple, accurate, verifiable, secure, accountable, 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 Station are openly and accurately collated and promptly announced by the Returning Officer.**
- d. Appropriate structures and mechanisms to eliminate electoral malpractice are put in place including the safe keeping of election materials.**

2. Upon conclusion of the voting exercise in 177 polling stations within Imenti North constituency, the Returning Officer received the results in forms 35 As and collated them into form 35 B and consequently into form 35 C which was used to declare the results as follows.

NAME OF CANDIDATE	NUMBER OF VOTES
1. Abdul Rahim Dawood	29,042
2. Silas Muriuki Ruteere	28,894

3. Rajesh Valji Hirani	3950
4. Kenneth Muriuki Muketha	2618
5. Beatrice Karwitha Kiragu	1822
6. Isaac Kinoi Marete	411
7. Paul Murangah Muga	369
8. Kanyamu Douglas Mwiti	340
9. Tedd Gatobu Rimbere	264
10. Patrick Mwongera Mwenda	78

The Honourable Abdul Rahim Dawood was returned as duly elected member of the National Assembly for North Imenti Constituency by Gazette Notice 8239 of 22nd August 2017.

3. Following this declaration Hon. Silas Muriuki Ruteere filed this petition on 4th September 2017 concurrently with an application dated – 4.9.2017 seeking preservation of electoral materials as well as supply of all forms 35 As for each of the polling stations leading to the election of Member of National Assembly for North Imenti Constituency code number 056 – Meru County on 8th August 2017.

4. The Hon. Justice Mabeya on 6th September 2017 allowed the application for supply of the forms 35 As as well as affixing of additional seals to the 177 ballot boxes from the 177 polling stations which was done under the supervision of the Deputy Registrar on 8th September 2017. The application dated 4th September 2017 also sought an order for recount but the hearing of application for recount was deferred to be heard interparties 16th October 2017.

5. When the application by the Petitioner for recount came up on 16th October 2017 Mr Mwanzia Advocate for the Petitioner intimated and it was recorded by consent of parties and their advocates that the application for recount was to be heard concurrently with the main petition by way of viva voce evidence before the court could make a determination of the same.

6. The relief that the Petitioner sought from this court which is similar to the prayer in his application was:

- a. An order for immediate recount of the ballots cast in all the 177 polling centres for the Member of National Assembly for North Imenti constituency in Meru County code Number 056.
- b. Upon recount of the ballot cast, the 1st and 2nd Respondent be ordered in this to issue a certificate to the winner apparent and notify the speaker of the National Assembly of the decision.
- c. Costs of and Incidental to this petition.
- d. Such other alternative/ further or better relief or incidental orders as this court may deem just and expedient in the interest of justice.

7. The Petition is supported by the grounds at paragraph 8 of his petition which are to the effect that the petitioners agents reported to him that the 1st and 2nd Respondents had brought the exercise into disrepute through acts of omission and commission which constitutes election malpractices which materially affected the outcome of the election by

8. As reported to him by his agents and also experienced during the tallying of the votes at the Tallying Centre the Petitioner averred that the 1st and 2nd Respondents brought the exercise to disrepute through acts of omission/commission which constitutes election malpractices which materially affected the outcome of the election.

- i. Denying the agents access to the information in forms 35 A by giving illegible copies.
- ii. In some areas like Nkabune Primary School polling station 3 not giving the form at all to agents.
- iii. Intimidating and harassing the Tally agent when performing his duties.
- iv. Causing the arrest of the Chief Agent one Nicholas Mugambi Mugwiria at the Constituency Tallying centre without reasonable cause.
- v. Ensuring the Petitioners Tally Agent is charged vide Meru CMC Election Offence No. 4 of 2017 for the offence of hindering an election officer in the execution of his lawful duty contrary to section 13(1) of Elections offences Act No. 37 of 2016 which charges were arbitrary and oppressive.
- vi. Refusing to divulge information to the Tally Agent at the Tallying Centre.
- vii. The 1st Respondents public portal for North Imenti constituency showed inaccurate results and had no data display in the polling stations listed.
- viii. Presented fraudulent count as the case obtaining in Gachanka Primary School where the number of rejected votes exceeded the votes cast from the 1st and 2nd Respondent's Public Portal.
- ix. Failing to ensure that the technology in use as provided by Section 44(3) of the Elections Act No. 24 of 2011 is simple, accurate, verifiable, secure, accountable and transparent. That the absence of data was in breach of said provisions.

9. At paragraph 10 the Petitioner avers that the credibility of elections which had began smoothly was subverted during Count and Tally and can't be said to be accurate and open in line with the principles of the Constitution of Kenya 2010.

10. At paragraph 11 of the petition the Petitioner said the arrest of his political party agent was orchestrated by the 1st and 2nd Respondent with a view to manipulate the tally to the advantage of the 3rd Respondent. He contended that his victory was denied at the behest of the Respondents.

11. The petition was also supported by the affidavit of the Petitioner sworn on 31st August 2017 giving details of the grounds of the petition. The affidavit of Nicholas Mugambi Mugwiria sworn on 4th September 2017 also supported the petition and detailed the happenings at the Constituency Tallying Centre that allegedly led to his arrest. Ann Nkirote Nteere in her affidavit sworn on 4th September 2017 said she vied for position of Member of County Assembly Ntima West ward as a member of Mazingira Greens party of Kenya. She said in paragraph 2 that voting went on smoothly on 8.8.2017 but the Chief Tally Agent for Mazingira was arrested at the Constituency Tallying Centre and due to threats and intimidation they had no one to follow up the Tally for them.

12. Ruth Kinya Ikunyua was agent for Mazingira Greens Party at Nkabune Primary School polling station 1. She said that voting exercise went as well except she was not allowed to verify the contents of form 35 A.

- That The Presiding Officer didn't give her a copy of form 35 A because there were only 3 copies.

- That she was not allowed to append her signature on Form 35 A. She claimed the results submitted at the tallying centre cannot be ascertained as correct as he didn't sign form 35 A and she was not allowed to see and verify content. She averred that she called the Tally Agent Mr Mugambi and also talked to the Petitioner to express her concerns. She averred that the presiding officer interfered with her duty to verify final count and she can't therefore vouch for the vote count.

13. Genesio Mugambi Murithi also swore an affidavit in support of the petition. He was appointed by Mazingira Greens Party of Kenya as Polling Agent at Munandene Market polling station for the elections that were conducted on 8.8.2017. He said voting went on smoothly and we signed form 35 A but he was not allowed to retain a copy and he could not therefore verify whether the same form sent to the Tallying Centre was same one he signed. He said he had nothing to dispatch to his Tallying Agent to use in verifying the Tally.

14. In response to the petition the 1st and 2nd Respondents, through 2nd Respondent stated that the 3rd Respondent was validly declared the winner upon garnering the majority votes cast and that they discharged their constitutional and statutory mandate by ensuring that elections of the Member of National Assembly for North Imenti Constituency together with all the other elections were free, fair, credible and transparent and no intimidation and/or harassment of agents was witnessed as alleged or at all. The 1st and 2nd Respondents denied the contents at paragraph 8 that any agent was denied access to form 35A.

- No agent was harassed as alleged and/or at all.
- They denied causing arrest and/or prosecution of any individual as alleged or at all.
- It was 1st and 2nd Respondents contention that the results declared at all the polling stations and in the Tallying centre were accurate, correct, transparent, and verifiable and all the candidates directly and through their agents had opportunity to seek and obtain any information and documentation as would have been permissible under the law. It was also the 1st and 2nd Respondents contention that the technology employed by 1st Respondent was simple, accurate, verifiable, secure, accountable and transparent. It was argued in the response that form 35 B contains the accurate tally of the results declared at the Constituency Tallying Centre. It was further contended that the entire election was free, fair, transparent and accurate and the sovereign will of the people prevailed. It was argued the petition presented was hollow, an afterthought and is incompetent for want of mandatory particulars as provided under the law.
- That the petition as drawn and presented discloses a petitioner who is on a fishing expedition particularly on his prayer for an order of recount at large which is destitute of the degree of precision set out under the law.

15. The 1st and 2nd Respondents prayed that the court declares that the 3rd Respondent Abdul Rahim Dawood was duly elected the Member of National Assembly Imenti North Constituency during elections held on 8th August 2017 the said election was valid and the petition be dismissed with costs to the Respondents.

16. The 2nd Respondent also swore an affidavit in response to the petition and averred that no malpractices were brought to his attention as the Returning Officer for North Imenti Constituency by either by the Petitioners agents nor was there any incidences of malpractice at the Tallying Centre at Kaaga Methodist Church Hall. It was averred that to reinforce the transparency of the voting, counting and Tallying process the Petitioner had opportunity of deploying his agents in all polling stations and at the tallying centre an option which admittedly are exercised. The 2nd Respondent averred that neither the Petitioner nor any of his agents made any complaint to him of failure of any Presiding Officer to supply copies of forms 35 A whether formally or verbally. He claimed that allegations of denial of Forms 35 As

are unsubstantiated and malpractices alleged by the petitioner in his affidavit is nothing but a fabrication and absolute lies since no such information was laid before him by the Petitioner who had an opportunity to do so at the Tally Centre. He contended that allegations of Ruth Kinya Ikunyua and Genesio Mugambi Murithi are false and baseless. He annexed form 35 As and 35 B to his affidavit. He denied that he engaged inappropriately with the 3rd Respondent and that such allegations are outrageous and absurd as the entire election process which includes voting, counting and tallying was open, transparent and accurate.

17. In response to averment in Nicholas Mugambi's affidavit, 2nd Respondent said it was replete with falsehoods and unsubstantiated facts. The 2nd Respondent averred that Nicholas Mugambi the Petitioner's Tallying Centre Agent unlawfully and repeatedly interrupted the tallying process at the centre on 10th August 2017 and at 9.30 pm he was arrested by the security personnel attached at the Tallying Centre. He said the 1st Respondent had no control over the arrest of the Petitioner's Tallying Agent. He said the Agent repeatedly disrupted the tallying process up to an extent whereby his conduct was unbearable leading to his arrest.

18. He said the Petitioner on 9th August 2017 at 5.00 p.m while tallying was going on ferried hundreds of his supporters to the tallying centre and attempted to pull down the main gate of the Tallying Centre while celebrating an imaginary victory before the tallying process was concluded. That the conduct of the Petitioner and his supporters caused unnecessary anxiety calling for intervention of the security officers and he was puzzled by the conduct on the part of the Petitioner given that it was contrary to the electoral code of conduct which the Petitioner had subscribed to.

19. Fidelis Karwirwa for the 1st and 2nd Respondents swore an affidavit on 14th September 2017 and she was presiding officer at Munandene market polling centre. She said the election process at her polling centre was transparent, orderly and peaceful and all the polling agents who were present were afforded an opportunity of verifying the process. She said she presided over the counting of votes and filled the necessary declaration of results being Form 35 A which was duly signed by the Deputy Presiding Officer, herself and all agents present. She said that Genesio Mugambi Murithi signed form 35 A and she was amazed by the contents of his affidavit. She said in addition to the Form 35 A supplied to the agents she did affix a copy of the same on the tent which served as the polling centre and all agents were at liberty to further verify the results. She averred that the results on Form 35 A of Munandene polling centre are accurate, credible and verifiable.

20. Bessy Kawira also swore affidavit on 14th September 2017 as Presiding officer at Nkabune Primary School polling station centre 1 in response to Ruth Kinya Ikunyua affidavit to the effect that after voting process was concluded she presided over the counting of votes and filled the necessary declaration of results form 35 A which was duly signed by the Deputy Presiding officer, an agent and herself. She said that the correct results for North Imenti constituency in Nkabune Primary School polling station centre 1 are the ones set out in form 35 A. She said that Ruth Kinya Ikunyua lied in saying she was not allowed to check and verify the contents of Form 35 A because Ruth Kinya Ikunyua was not at the polling station when form 35 A was being filled. She said that for every elective position she had 16 forms produced and it was a lie for Ruth Kinya Ikunyua to claim there were only 3 copies when she was the one who was not at the station.

21. The 3rd Respondent also filed a response to the petition and sought that the petition be dismissed as he was duly elected as Member of National Assembly of North Imenti Constituency and the election was valid. He also filed a 24 paragraph affidavit sworn on 13th September 2017 which he averred inter alia that voting process conducted peacefully and shortly thereafter tallying process began in the polling stations and continued until the early hours of 9th August 2017 when the Presiding Officers of various polling stations began returning the ballot boxes to Kaaga Tallying Centre – The Constituency Tallying Centre. He averred that the tallying process was also procedural save for some sideshows where petitioner imposed on himself the duties of the 2nd Respondent and purported to declare himself the winner of the parliamentary election.

22. That on 10th August 2017 the Petitioners agent Nicholas Mugwiria Mugambi also known as Kibanga seemingly with intention to disrupt the tallying process crossed the boundary that separated the IEBC officials from the agents. That upon seeing the disorder caused by the said Nicholas Mugambi the police officers who are on standby had to intervene to restore order at the centre. That Nicholas Mugwiria Mugambi resisted the police officers and confronted them. Consequently the agent was taken away from the area to enable the tallying process to continue peacefully. He averred that at the time of arrest Nicholas Mugambi was not carrying any documents and it is not true that the documents got lost or were taken by arresting officers. He also claimed that Nicholas Mugambi was being assisted by another agent namely Mr Razak Mbogori.

23. The 3rd Respondent at paragraph 9 of his affidavit averred that he had the right to consult the 2nd Respondent in the same way petitioner was consulting him even more frequently during the tallying as 2nd Respondent sat between the petitioner and his daughter at the Tally Centre.

24. At paragraph 11 he averred that he didn't engage the 2nd Respondents or police in an illegal or fraudulent manner and that police involvement at the Tallying Centre was in keeping with their mandate to ensure law and order is observed at all times during the election process and was as a result of the unwarranted disorder caused by the Petitioners agent Nicholas Mugambi Mugwiria.

25. He averred that the Petitioner was allowed to be present during the remainder of the process and his voluntary decision to leave the centre before the end of the process cannot discredit the tallying process.

26. The 3rd Respondent also alluded to alleged threats and caution to the Asian Community and the Kikuyu community in event he was announced the winner of the elections. That the petitioner had also been threatening to evict all Asians and Kikuyus from the constituency upon his victory that the threats had caused the 3rd Respondents Meru supporters especially those who hail from petitioners home area in Chiugu Loation, Nyaki West ward to live in fear after an attack on the homestead of Jacob Mugambi Mugwika by Petitioners' supporters which was reported vide OB No. 11/11/08/2017.

27. He urged that the court finds that the threats constitute an election offence and make a determination contemporaneously with the petition.

28. The 3rd Respondent also averred that the results in the public portal does not constitute the official results as the primary document with official results is original form 35 A. He said that he and his agents collected all the forms 35 As from all the five wards of North Imenti constituency and from his analysis he confirmed he garnered the majority of the votes.

29. He said that his analysis of the forms 35 As he got from agents shows the results are consistent with those entered in form 35 B. The 3rd Respondent averred that the Petitioner had not demonstrated how the will of the electorate was disturbed. That the petitioner has not made any case to warrant the court to issue any orders sought in the petition.

30. Hearing of evidence in this petition proceeded as from 27th, 28th, 29th and 30th November 2017 and submissions were filed on 8th January 2018.

31. In consideration of the evidence on record for the Petitioner and the Respondents as well as the pleadings as filed by the parties and the authorities and exhibits/Documents annexed to the pleadings/Affidavits in court record, together with the submissions the issues that arise for determination as framed by the parties and consolidated by this court are:

i. Whether the impugned elections conducted by 1st and 2nd Respondents on 8th day of August 2017 for Member of National Assembly for North Imenti Constituency code No. 056 were free and fair as provided for under Article 81(e) of the Constitution of Kenya 2010.

- The Petitioner’s issues No.s 2, 3 and 4 all fall under issue number 1 above. The 1st and 2nd Respondents 2nd and 3rd issues would also fall under the 1st issue framed by the court – whether there was any infraction/violation of the law as to infringe the provisions of Article 81 (e).
- The Petitioners issue No. 5; 1st and 2nd Respondents issue No. 4 and 3rd Respondents issue No. 3 – whether in consideration of the margin of 148 votes the Petitioner has laid a basis and whether is entitled to an order of recount.

ii. Whether the 3rd Respondent was validly elected as Member of the National Assembly for North Imenti Constituency.

iii. Whether the court should issue a certificate of election to the winner apparent should there be a recount of votes cast in line with Section 80 (4) of the Election Act No. 4 of 2011.

iv. Who shall bear the Costs of the Petition and the application dated 4th day of September 2017?

32. In determining whether the Petitioner has proved his claims to the required standards this court is alive to the fact that election petitions are causes of a kind and that the acts of IEBC in conducting such elections are presumed to have been done rightly and regularly unless the Petitioner raises firm and credible evidence of their departures from the prescriptions of the law. This was the finding at paragraph 196 of **Supreme Court Presidential Election No. 5 of 2013 Raila & Other vs IEBC & 3 Others**.

33. The reluctance of courts to nullify election petitions has been expressed in many authorities for reasons they are disputes of great public importance (**See Benard Shinali vs Bonny Khalwale EP. No. 2 of 2008 [2011]eKLR**) and that when successfully challenged they not only cause the country colossal sums of money to stage but also disrupt constituents social and economic activities.

34. Therefore, the burden is on the Petitioner to establish allegations of electoral malpractices and misconduct which would result in election being declared invalid and the standard of proving the allegations is not an ordinary one like in civil cases. This standard was set in the highest court of the land in **SCPP No. 5 of 2013** where it was held inter alia:

“..... but at the same time a petitioner is under the obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle be above the balance of probability though not as high as beyond reasonable doubt- save that this would not affect the normal standards where criminal charges linked to an election are in question.”

35. It therefore follows that the Petitioner has to establish that there were malpractices, irregularities, violation of constitution provisions and/or election offences in the conduct of elections of Member of National Assembly of North Imenti Constituency on 8th of August 2017 and that they affected the results of the elections. He has to prove that the will of the electorate has been affected materially.

36. In considering the first issue for determination whether the North Imenti Constituency Member of National Assembly election was held in accordance with the constitution and electoral law or whether they were electoral malpractices and irregularities which affected the outcome of the election, the Petitioners claims are specific and are in paragraph 8 (i)-(x) and 9, 10 and 11. He claimed that his agents were denied access to information in form 35 A by giving ineligible copies.

37. Petitioner in his testimony said voting at polling centres went on very smoothly but trouble started when it came to counting, transmitting of results and tallying of votes. He said that the Agents were not allowed to witness counting, they were kept at a distance. However, the only 2 agents who testified in court in support of the petition are PW4 – Ruth Kinya Agent at Nkabune Primary School polling station 1 of 2 and PW5 Genesio Mugambi Murithi – Petitioners part Agent – i.e Mazingira Greens Party of Kenya

at Munandene Market polling station 1 of 1. It was also the evidence of the petitioner, PW1 and his Tally agents PW2 that out of 177 polling stations only 52 Agents were given forms 35 A. PW4 in her affidavit sworn on 4th September 2017 claimed the presiding officer did not allow her to check and verify the contents of form 35 A; The Presiding Officer didn't supply her with a copy of Form 35 A and that she was not allowed to append her signature on form 35 As. In her examination in Chief she said counting was correct, but the votes counted at the polling station was not what she was shown in form 35 A produced in court – she was not certain the 281 votes which the petitioner is shown to have garnered were correct. In cross examination she said she didn't have a notebook to record results of votes counted as she knew she would be given Form 35 A which was to contain results.

38. The Results for Nkabune Primary School polling station 1 of 2 are contained at page 157 of the 1st and 2nd Respondents Response to petition and Bundle of documents showing Petitioner garnered 281 votes. 3rd Respondent garnered 94 votes. PW4 confirmed the Form is stamped and duly signed by both the Presiding Officer and Deputy Presiding Officers who have duly dated it. The form shows David Muthomi for National Vision Party signed the form as the only agent.

39. The Presiding Officer at Nkabune Primary School polling station 1 of 2 Bessy Kawira Kaburu testified RW3 and confirmed she was Presiding Officer at Nkabune polling station 1 of 2 and said that if Ruth Kinya was present at the polling station at the time filling of form 35 A she could have signed it because she was one of the most active agents at the polling station. She said she had 16 forms and only needed the original for the Returning Officer, one for the ballot box and the other to be affixed at the door to the polling station and she retained one copy while the rest which were excess she gave to the agents. She said if she didn't give them out, the only thing she could do is return to the tallying centre. She said majority of the candidates for the different elective positions had agents. She said she had no reason to refuse PW4 to sign Form 35 A and failure by an agent to sign doesn't invalidate results.

40. RW3 said that 3rd Respondents agent didn't also sign form 35 A. She said she could not stop an agent who wished to leave the polling station. She also said if an agent declined to sign form 35 A she would indicate the reason for refusal in form 35 A. She said she didn't know when PW4 left the polling station and when she returned if she ever returned. She said there were many agents and she gave them the forms 35 As and remained with 4. In re-examination, The Presiding Officer says that if PW4 was available she could have gotten the form and if she was not there he should have come back to the polling station to see the form pinned at the entrance to polling station. She said there is no time PW4 demanded for the form.

41. The law governing and reasons for presence of agents at the polling stations, the signing of forms by the agents at the polling stations and the supply of copies of the A series forms to agents at the polling stations is in Regulations 74,75, 76, 78, 79,80,81. Respondent witness No. 3 did not record in her comments pursuant to provisions of Regulations 79 (5) that Ruth Kinya Ikunyua was absent at the time results were being counted and therefore could not be issued with Form 35 A. Her comments are that tallying went on well with great cooperation from both clerks and agents present when it is apparent only one agent signed form 35 A bearing results from Nkabune Primary School polling station 1 of 2.

42. RW3 does not account for 12 copies of Form 35 A that she claims were supposed to be supplied to agents. Although failure to comply is excused under Regulation 76(6) and 7 of the rules, the provision in the rules that candidates and/or agents be in a polling stations during voting and counting of votes is meant to assure that the exercise is carried out and/or conducted in accordance with and complies with values intended in Article 86(a) of transparency, accuracy, accountability and credibility of an election. RW 3 ought therefore to have taken a more keen interest and atleast given an explanation as to why only one agent out of the possible 9 signed the crucial form 35A. Regulation 79(a) (b) provides in mandatory terms that the Presiding Officer shall request each of the candidates or agents present to append their signature on the form in which results have been entered and shall also provide copies. It is a responsibility bestowed on the presiding officer and it was not proper or in good taste for her to say that PW4 did not demand for the form. What I find illogical with the complaint raised by PW4 is that although she claims she is not certain with results as declared in favour of the Petitioner, she has not given any other results which she could say she heard being announced after she attended the counting

which she said was correct. In the circumstances I do find that her claim has not been proved to the required threshold which is that known in election petitions as “intermediate standard of proof.” A standard higher than the standard of balance of probability and lower than the beyond reasonable doubt standard.

43. Looking at the evidence of PW5 Genesisio Mugambi Murithi – Petitioners party Agent –at Munandene Market polling station 1 of 1 he said voting went on well and votes were counted but he was denied an opportunity to have form 35 A. He said he called Chief Agent to say he had been denied form 35 A and not that Petitioner garnered 314 votes. Without considering the evidence of RW2 – Fidelis Karwiriwa Mwarama I wish to say with due respect that the Petitioner has not discharged the burden of proof required to show alleged failure to supply form 35 A to PW5 affected results in that station where the petitioner garnered 314 votes and 3rd respondent garnered on 21 votes. If it was true that the form had not been supplied to PW5, the Petitioner should have sought for corroboration of PW5 evidence from the 2nd agent for Mazingira Greens Party of Kenya Gladys Kanario who is shown to have appended her signature on the form in question. The claim by the Petitioner and his witnesses at paragraph 8(i) (ii) and (vi) cannot therefore be sustained for the reasons that only 2 agents testified in respect of those allegations and they failed miserably to prove their allegations against 1st and 2nd Respondents.

44. The allegation at paragraph 8 of the Petitioners affidavit in support of the petition sworn on 31st August 2017 that only 52 agents out of 177 agents were issued with ineligible copies of forms 35 As has also not been proved. As I said earlier the only agents who have testified are PW4 and PW5. The other 50 who are alleged to have been supplied with ineligible copies of forms 35 A have not been identified. Those who are alleged not to have been supplied have also not been identified. Of the 52 who are alleged to have been supplied, this court has not been told any discrepancies in the copies of forms they were allegedly supplied with, with the copies that are now in court. In fact from the 2 polling stations. Where PW4 and PW5 were agents, the Petitioner garnered the majority votes in each. The results at CCM Primary School polling station 1 of 1 which copy of form 35 A the Petitioner claims was ineligible, the photocopy attached to his petition is signed by the Deputy Presiding Officer Phineas Mutua only on 8.8.2017 and is not signed by the presiding officer but the carbon copy in the 1st and 2nd Respondents bundle is signed by both officers and it is possible the Presiding Officer signed later on unknown date because she had not put the date she signed but the votes garnered in both forms produced by Petitioner and the one produced by the 1st and 2nd Respondents are similar. The Petitioner does not dispute the votes entered as having been garnered by different candidates listed and his agent Morris Ndereba Gatimba signed the form 35 A confirming the results were authentic. The Petitioner is shown clearly as having garnered 84 votes whereas votes garnered by the 3rd Respondent is shown clearly as 264.

45. In reference to Petitioners ground No. 8 (vii), 8(viii), 8(ix) that the 1st and 2nd Respondents brought the election and voting exercise into disrepute through acts/omissions which constitutes election malpractices which materially affected the outcome of the elections in that the 1st Respondents public portal for North Imenti Constituency showed inaccurate results and had no data display in some polling stations as listed; that the 1st and 2nd Respondents presented fraudulent count as the case obtaining in Gachanka Primary School where the number of rejected votes exceeded the votes cast from the 1st and 2nd Respondents public portal; that the 1st and 2nd Respondents failed to ensure that the technology use as provided in section 44 (3) of the Elections Act No. 24 of 2011 was simple, accurate, verifiable, secure, accountable and transparent. And that the absence of data therefore was in breach of the said provisions.

46. What the Petitioner annexed to his affidavit in support of the petition as information he got from the 1st Respondents Public Portal in respect of polling centres within Imenti North Constituency “SRM 4” at paragraph 13 which is indicated as last update on Saturday 26 August 2017 was only marked MFI-P4 and not produced for reasons they didn’t meet the conditions under Section 106 B of the Evidence Act as to productions of Electronic evidence. Be that as it may be, the Petitioner and his witnesses PW2 and PW3 who claimed that the results shown were either wrong, or percentages wrong; or other stations did not have data in the public portal, did not tell the court against what they compared the alleged results in the public portal to claim that they were wrong. PW2 – Nicholas Mugambi Claims that he didn’t get 125

Forms 35 As to confirm what the 1st and 2nd Respondent used to tally results. PW2 in cross examination by 1st and 2nd Respondents Advocate said that he got the 52 forms 35 As after his arrest which brings us to the question as to what records he was claiming were taken from him which made the Petitioner and PW3 as well as Petitioners daughter and Personal Aid Razak Mbogori incapable of following up the tally. PW2 says his work/function was to deal with public portal. He confirms he didn't have forms 35 As while at the constituency Tallying Centre. PW3 in cross examination also confirmed she had not specified any polling station whose results were not in tandem with the results in public portal.

47. The legal regime governing transmission of election results is found in **Article 86 of the Constitution Section 39(1c)? of Elections Act, Regulation 82 of Elections (General) Regulations 2012?** The interpretation of this laws and regulations was ably and clearly made in the case of **IEBC vs Maina Kiai & 5 others 2017** by the Court of Appeal and cited with approval by the Supreme Court in Raila Petition 2017 to the effect :-

“It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters will. The counting of votes of 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 a finality not to be exposed to any risk of variation or subversion. It sound ill that a contrary argument that is so anathema and antithetical to integrity and accuracy should fail from the appellants mouth.”

48. In Election Petition No. 1 of 2017 at the High Court of Kenya at Kisumu – Jackton Nyarungo Ranguma vs IEBC and 2 others Hon. Justice Majanja held and rightly so that results in form 37 A (in our case form 35 A) forms the basis of determining the will of the people.

49. The issue of electronic transmission of results from the polling stations to the Constituency, County and National Tallying Centre is only applicable in relation to results of an election for the President and not in the case of member of National Assembly and the other elective positions.

50. The use of technology applicable in electoral process for Member of National Assembly such as in the case of Petition herein is merely for voter registration and identification and the results scanned and transmitted to the tally centres are merely provisional and have to be verified using the original form 35 A before the Returning Officer can collate the results in Form 35 B and declare in Form 35 C. The claim in Petitioners grounds 8(vii), 8(viii) and 8(ix) concerning inaccurate results and lack of data on public portal can't therefore stand for reasons there was no slightest proof of inaccurate data;

51. There was also no proof technology failed because the Petitioner and his witnesses testified that voting process went on well and this could not have been true if they had not been identified using the Biometric voter identification Machine before voting. This grounds fails.

52. The complaint that the Petitioner had in reference to Gachanka Primary School polling station was that the number of rejected votes as displayed in the 1st and 2nd Respondents public portal exceeded the number of votes cast. The Petitioner in being cross examined by the 3rd Respondents advocate Mr Kibicho admitted that he was aware prior to filing his petition that the public portal is for purposes of Presidential Election Results and not results for Member of National Assembly. He conceded that his ground 8(vii) can't be sustained in supporting an order for recount. The submission by the Petitioners Advocate that contents of form 35 A from Gachanka Primary school polling station 2 of 2 was not clear, was not pleaded in the petition and the petitioners agent at Gachanka polling station 2 of 2 did not testify to confirm that the photocopy of form 35 A annexed to the Petitioners affidavit was the same one that was supplied to them. Petitioner did not prove that the results at Gachanka Primary School had any problems. As stated above, the results in the public portal were provisional results and the primary and final results are to be found in form 35 A. The Petitioner ought to have established the variance between the results in the form 35 A with what he alleges to have been an anomaly.

53. The evidence supporting ground 8(iii) (iv) and (v) as well as ground 11 of the petitioners petition was tendered by the Petitioner - PW1, his Chief Agent PW2 Nicholas Mugambi and PW3 Anne Nkirote

Nteere. PW2 was Mazingira Greens Party of Kenya, Chief Tally Agent and according to the Petitioner his work at the Centre was to verify results being brought from polling stations and compare with results gotten from their agents. He was to ensure fairness and transparency and consulted agents from polling stations and also frequently consulted the Constituency Returning Officer – RW1 – 2nd Respondent herein. It was evidence of Petitioner and PW2 that his inquiries to 2nd Respondent in respect of results from Mulathankari where it was announced the petition garnered no vote at one point brought about commotion and tallying stopped but it was clarified that the Petitioner got 157 votes in the particular station. When the KIEMS kit into which the form 35A was scanned and stored was logged into. The court confirmed that form 35 A for this particular polling station Mulanthankari showed Petitioner had 157 votes.

54. The Petitioner, PW2 and PW3 claimed PW2 was arrested so that results could be manipulated because even the records he had made were taken away on his arrest. The Petitioner's Chief Agent said he was arrested when he questioned why the DCIO and the OCPD had crossed the line designating the area cordoned off for IEBC personnel when the Returning Officer was outside the Tallying Centre. The 3rd Respondent played a video of the incident at MCK Kaaga Tallying Centre in which it is seen the Police officers talking to PW2 and the Petitioner and his daughter are also present but say nothing; the Chief Agent also said nothing. The 2nd Respondent is seen and heard shouting how the Chief Agent has become too much. The video also showed police officers outside the Tallying Centre trying to quell a protest using tear gas canisters. It was explained by 3rd Respondent that the Petitioner had mobilised his supporters to celebrate an imaginary win before results were announced and when it turned out that he is the one who had won the supporters started causing chaos and wanted to storm the Tallying Centre. This court actually saw the Chief Agent carrying some black file as he was walking to the police vehicle. Petitioner said the Chief Agent was pushed, manhandled and taken out of the Tally Centre with all his files and he only returned the next day 11.8.2017 at 6.00 p.m.

55. He said he remained with his daughter at the Tallying Centre. From evidence of 3rd Respondent and from the video clip as well as from evidence of PW3 Anne Nkirote Nteere after PW2's arrest, other Mazingira Greens Party of Kenya members remained at the Tallying Centre. It is claimed that after arrest of the Chief Agent those who remained at the Tallying Centre could not follow the results as Mr Nicholas Mugambi went with all records. From the Video clip which was the only evidence of the incident of PW2's arrest at the Tallying Hall the court didn't see PW2 being pushed or mishandled. The officer who arrested him cautioned him and requested him to accompany them to the police station.

56. The Petitioner as well as PW2 and PW3 didn't say what information was in the file that PW2 carried which could have helped in ascertaining results that were transmitted from the polling stations to the Tallying Centre because in his own admission in cross examination, even the 52 forms 35 As that he alleges were the only ones he got from his agents, he got them after his arrest and not while at the Tallying Centre where results were streaming in from different polling stations. Again from the evidence of the Petitioner and his witnesses as well as the 2nd Respondent the last ballot box – the 177th – with results arrived at the Tally Centre around 5.30 a.m and 6.00 a.m on 10th August 2017. It means he was arrested long after the announcements of the last results that arrived at the tallying centre and the announcement having been made publicly all that were at the centre including the petitioner, his daughter, PW3 and other Mazingira greens Party of Kenya members could have recorded the information.

57. The Chief Agent PW2 was arrested on 10th August 2017 at about 9.30 p.m. He was arraigned in court on 11th August 2017 and released on bond and at 6.00 p.m. he returned to the Tally Centre where he signed results in form 35 B. He says his signing of the form 35 B was not voluntary but it was because there were many security agents at the centre and it was because of his experience. PW2's allegations of fear is not consistent with his voluntary return to the Tallying Centre. No remarks were made in form 35 B that PW2 did not agree with the results he was appending his signature to. His conduct of going back to the Tallying Centre was not of that someone who had any fear of security agencies at the Tallying Centre.

58. The Petitioner and his witnesses have not established how tallying was manipulated in the absence of

the Chief Agent. They have not established how PW2's absence affected results that had arrived from the polling stations long before he was arrested. The contents of the documents that PW2 had at the time of his arrest were not divulged to the court and no evidence was adduced to prove there was any discrepancies between the contents of the alleged documents and the results that the 2nd Respondent announced at the tallying centre. He said he believed results were altered but could not confirm results from which polling stations were altered. He contradicts himself when he says the records he collected were taken away from him while at the same time saying he only received 52 forms 35 As after his arrest. It means by the time of arrest he had not received any form 35 A. He has no record of when and from whom he received the 52 forms 35 As. The polling station agents for Mazingira Greens Party of Kenya didn't swear affidavits to confirm if results as counted at the polling stations in favour of PW1 were different from those entered into form 35 B.

59. The only inquiries that PW2 confirmed having made are in respect of results for Mulanthakari polling station where Petitioner garnered 157 votes and issue of IEBC officials cordoned area. According to 2nd Respondent as results streamed in he could take the form 35 A and read out results after which give out the form to the Tally Clerks to enter into form 35 B.

60. This means that by the time of arrest of PW2 at 9.30 p.m on 10.8.2017 the exercise of announcing results had long been completed and every diligent/prudent person should have taken records of results announced for reference or even keep a few in ones memory. This court finds that the arrest and charging of PW2 is pending trial and the prosecution will have the onus of proving their case during the trial but for this election petition the court finds that the arrest and charging of PW2 had no effect on the results announced declaring the 3rd Respondent as winner. There is no proof PW2 was intimidated and harassed. Whether arrest of PW2 was for no reasonable cause will be determined during trial in the criminal case. There is no proof results were manipulated as a result of arrest of the Chief Agent –PW2.

61. In the course of hearing of this petition Mr Mwangi Advocate for 1st and 2nd Respondents submitted that he would cross examine the Petitioner on all evidence adduced but that some facts were never contemplated in the petition and even in the framing of issues. He said that Rule 12(i) (a) of the Elections (Parliamentary and County Elections) Petitions Rules 2017 requires affidavits in support of petition to set out all facts and grounds relied upon by the Petitioner. In that regard the Petitioner was questioned about results in Kithoka Primary School Station 1 of 2 which he said were altered in favour of 3rd Respondent. He said that his party agent Japheth Murithi signed the form 35 A in respect of this polling station. He said the agent didn't file an affidavit disputing the results for Kithoka 1 of 2 and that he didn't have the carbon copy of form issued to his agent. Petitioner said that the form shows he garnered 119 votes but his agent told him he got more votes.

62. The Petitioner was cross examined on election results for Munithu Primary School polling station 1 of 1 although he did not plead it in his petition but he raised it in his examination in chief. The form was not signed by the Presiding Officer and the Deputy Presiding Officer. It was not dated and the names of the Presiding/Deputy Presiding officers are also not indicated. It is only the IEBC stamp which is on the form. 4 agents including Mary Karema for Mazingira Greens Party of Kenya have signed the form 35 A in question. In respect to Munithu polling station the excuse that was given by 2nd Respondent for failure to sign is that the IEBC officials were conducting 6 elective positions concurrently and that they must have failed to sign due to fatigue as a result of the complex elections. He said that there was no law which prohibited him from accepting even unsigned results. He said he accepted because the results had IEBC stamp. He said the Petitioner didn't plead challenging lack of signature in the results for Munithu 1 of 1.

63. Section 39 of the Elections Act provides for the duties and responsibilities of Presiding Officers Deputy Presiding Officer and constituency and County Returning Officers in an election process including and not limited to counting votes, tallying votes, announcing results, declaration of results and submissions of final results in a prescribed form in an election for the various elective positions. **Regulations 5 (1A) Elections (General) Regulations 2012** provides that the Presiding Officer shall be:-

- a. **Presiding over elections at an assigned polling station.**
- b. **Tallying, counting and announcing of results at a polling station.**
- c. **Submit polling station results to the Constituency Returning Officer.**
- d. **Electronically transmit results to the constituency, County and National Tallying Centres.**

64. **Regulation 79** requires the Presiding officer alongside candidates or agents to sign the declaration in respect of the elections. Where a Presiding Officer or any other election officer of IEBC fails to sign statutory forms as provided in the Elections Act and Regulations, the **Election offences Act at section 6** makes it an offence doing or omitting to do anything in breach of official duty without reasonable cause.

65. Pronouncements have severally been made on the effect of election officials failure to sign statutory forms and in **Manson Oyongo Nyamweya vs James Omung'o Magara & 2 others [2009]eKLR Kisii HCEP No. 98 of 2008** at page 39, **Musinga J (as he then was)** had this to say;

Infact it is an election offence for a Presiding Officer without a reasonable cause, to fail and/or refuse to sign and stamp a form 16 A including completing all the parts as required of him under the said regulation. These include statistical part just above the names of the candidates; reason for refusal and/or failure of a candidate and/or his agents to sign the form and any necessary statutory comments such an officer is liable to imprisonment for a term not exceeding 5 years.

66. S.4(g) Election Offences Act where a Presiding Officer presents to a Returning Officer on form 16 A which is neither signed by that Presiding Officer and/or, any of the candidates, agents, that declaration is of no value and cannot be used or authenticate any declared results.

67. In **Abdikhaim Osman Mohammed & Another vs IEBC & 2 Others [2014]eKLR** the Court of Appeal held that the 12 forms 35 which had neither the seal of the 2nd Respondent nor the Presiding Officers signature should have been excluded on the ground that their authenticity could not be vouchsafed. The position in **AbdiKhaim Osman Mohammed** was upheld by the Supreme Court in the subsequent appeal.

68. The Court of Appeal at Kisumu upheld the decision of the High Court in **Manson Nyamweya and 2 others vs Omingo Magara** in Appeal No. 8 of 2010 to the effect that when a document is not signed by its author, it means that the author does not own it. It follows therefore that in this case the form 35A for **Munithu Primary School** polling station 1 of 1 without the Presiding Officers signatures were worthless and their results should have been excluded from the final tally.

69. Most recently in **Raila Amolo Odinga & Another vs IEBC & 2 others [2017]eKLR SC.P.P No. 1 of 2017** the majority decision of the supreme court held:

.....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 a 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 ?.....

70. The latest authority by my brother **Hon Justice A. Mabeya** that fortifies the requirement that a statutory form is authenticated by the signature of the maker was made **in High Election Petition No. 14 of 2017 – at Nairobi Ahmed Abdullahi Mohammed & Another vs Hon Mohammed Abdi Mohammed** where he held;

“ From the foregoing, it is clear that while the non signing of the statutory form by a candidate or his agent is excused under Regulation 79(6), it is not so for the Presiding Officer

or the Returning Officer Statutory forms that are not signed by the said officers are worthless pieces of paper whose contents would not count in the final tally of results. It is the signing of those statutory forms by the said officers that gives the forms credence and make the results therein accountable and verifiable. Failure to sign form is not a mere or nor it is a grave irregularity that destroys the credibility and authenticity of the results contained therein.

71. From the foregoing it is instructive that the results in Munithu Primary School polling station 1 of 1 should not have formed part of the aggregate results for North Imenti Constituency. The 170 votes allegedly garnered by the 3rd Respondent and 286 votes garnered by the Petitioner should have been discounted from their total votes to come up with authentic results.

Petitioners votes 28894 -286 =28608

3rd Respondent votes 29042-170=28872

72. The 2nd Respondent ought not to have received those results at the constituency Tallying Centre from the Presiding Officers without a signature. As it stands now it is not known who made the entries in this particular form because neither the Petitioner nor the Respondents called agents or Presiding Officer, Deputy Presiding Officer to authenticate the, results entered in that form. The petition didn't plead any breaches at this particular polling station probability because he garnered more votes.

73. Evidence was led in regard to Kithoka Primary School polling station of 1 of 2 in which the petitioner said that the results for 3rd Respondent were altered to read 137 instead of 127. The Chief Agent PW2 also said that the 3rd Respondents results were altered from 08 to 137. The 2nd Respondent denied there was an alteration but went ahead to qualify that even if there was an alteration in Form 35 A he had no authority to correct it. His duty was to lift the information in Form 35 A to 35 B the way it is.

74. The Petitioner didn't complain about the 3rd Respondents alleged altered results but claimed the agent told him he got more votes than those shown in the form 35 A – 119 votes. The form is duly signed by both the Presiding Officer and Deputy Presiding Officer together with 3 agents including Japheth Muriithi. Muriithi who signed as agent for Mazingira Greens Party of Kenya, The Petitioner not only failed to question the alleged alteration in his pleadings but he also failed to call Japheth Muriithi to confirm or dispute that the results which he signed are true results. The Petitioner is also doubting results awarded to him without providing any other alternative results and so his claim is not supported by any tangible evidence. Indeed the Petitioner in his petition and affidavit in support didn't complain of any alterations despite the fact that he made an application for supply of the forms early enough and could have applied for leave to adduce more evidence or even annex more exhibits to his petition and affidavit.

75. Although the Petitioner didn't plead specifically the alleged alteration at Kithoka Primary school polling station 1 of 2 and failure to sign the form 35 A at Munithu Primary school polling station 1 of 1 these two polling stations were extensively canvassed at the hearing of the petition and that is why it is incumbent upon the court to render a determination on the evidence raised.

76. In response to submissions that the court should close its eyes to issues that were not pleaded in the petition but which evidence was tendered I wish to state that election petitions are suits of a kind that cannot be subjected to strict rules of procedure. In any case the issue that this court has addressed above was interrogated exhaustively by all parties and therefore no prejudice would be suffered by any party. Refer to the authority of **Odd Jobs vs Mumbia [1970] EA 476. Makhandia J (as he then was) in Justus Mongumbu Omiti vs Walter Enock Nyambati Osebe and 2 others [2011] KLR and Justice Edward M.Muriithi's holding in Peter Kimori Maranga & Another vs Joel Omagwa & 2 others [2013]eKLR** have given circumstances under which unpleaded issues may be considered by the court. Where an arises in the cause of a hearing in an election petition a determination has to be rendered as to whether or not that issue has an effect on the results of the election.

Has a basis been laid for Recount of votes in all the polling stations?

77. The law on recount is set out in sections 80(4)(a) and 82 of the Elections Act 2011 as read with rules 28 and 29 of the Elections (Parliamentary and County Elections Petitions) 2017. The principles guiding the court in making an order for scrutiny and recount has been given by the Supreme Court in **Gatirau Peter Munya vs Dickson Mwendu Kithinji & 2 others [2014]eKLR** in the following terms;

“.....an application for scrutiny and recount must be couched in specific terms and clothed with particularity as to which polling stations within a constituency are to attract such scrutiny if a party lays a clear basis for scrutiny in each and all the polling station within constituency. Then order ought to be granted. A prayer lacking specificity is not to be entertained”

78. The dictum of **Odunga J in Gideon Mwangangi Wambua & Another vs IEBC & 2 others MSA EP No. 4 of 2013 and Kimaru J in Rishad Hamid Ahmed & Amana & Amana & Others – Malindi EP No. 6 of 2013** were cited with approval by the Supreme Court Judges in **Gatirau Munya case (supra)** where they stated ;

“ It is clear that the constitution requires that for one to be declared a winner he/she needs to garner a majority of votes. This is the logical meaning to be attributed to the words “greatest number of votes.” It matters not how wide or small the margin of victory is.victory however narrow is immaterial as a fact in the proper election outcome.....in the circumstance the mere description of percentage of margin as “small or wide” is of no legal import unless it is inextricably linked to a definite uncertainty, an unresolved doubt as to who won an election.”

79. The major ground that the petitioner relies on to ask the court to make an order for recount of all the votes in all the polling stations in North Imenti Constituency is the margin of votes between him and the 3rd Respondent. It is true that the Margin of 148 votes between the winner and the loser of the elections for Member of National Assembly for Imenti North is prima facie very narrow and had the Petitioner prosecuted his initial application for recount without giving evidence the court would have probably allowed the application on the ground of narrow margin. However, the Petitioner having chosen to tender evidence to lay a basis for recount was liable to discharge that burden based on his petition and affidavits in support of the petition. He had to lay a basis for the recount by specifying the polling stations in which he disputed results as provided by Rule 29(4) of Election(Parliamentary and County Elections) Petitions Rules 2017. Reliance was made to the authority on **John Oyoo oyioka & Another vs IEBC [2013]eKLR** where the judge held that due to the narrow margin an order of recount was to be made in all the polling stations in order to cast the net wide so that no stone is left unturned. In that case all votes were required to be subjected to interrogation so that the court was assured that the 3rd Respondents win and the petitioner loss were informed by correct figures of votes cast for them & for the other candidates who were in the same race. The determination in **John Oyoo Oyioka case** is overruled by the Supreme court decision in **Gatirau Peter Munya case**.

80. The authority relied upon by the petitioner in the case of **Richard Kalembe Ndile vs Patrick Musimba & others E.P 1 & 7 of 2013**, the Petitioners gave particulars of the polling stations where results were disputed. They gave particulars of the irregularities and malpractices that they thought affected results. The particulars of those polling stations are on paragraph 7 at page 3 and paragraph 10 at page 4 of the Learned Judges determination. Carolyne Mwilu Mwandiku the 2nd Petitioner averred that the results announced by the Returning officer differed with those recorded by her agents at 14 polling stations and she gave the particulars of those stations as well as the results recorded by her agents. It was therefore incumbent upon the Petitioner to prove that he won by margin of over 500 votes and identify the polling stations from where the court could establish by a recount that indeed his votes were stolen. Such evidence could have been obtained from the 177 agents that the Petitioner had in the 177 polling station within North Imenti constituency. Only 2 of those agents testified.

81. The court has gone through all the grounds and analysed the evidence in support of the grounds as

well as submissions by the petitioner and the Respondents and the conclusion is that even the basic standard of balance of probability has not been attained by the petitioner. He has failed to establish a basis for a recount of the votes in any of the polling stations.

82. It will not do for Petitioner to aver that he desires scrutiny and recount in all the polling stations without pleading sufficient details why he requires courts intervention to order for such a recount. To order for a recount of votes in all the 177 polling stations without the Petitioner adducing any evidence to show that the results as announced were either more or less than the actual tally in forms 35 As would be tantamount to allowing the petitioner to chance on evidence as to invalidity of the election when he did not plead the same in his petition.

83. **The Supreme Court of India in the case of Arikala Narasa Reddy vs Venkata Reddy Reddygari & Anor Civil appeals nos. 5710-5711 of 2012** held that the court cannot exercise the discretion of ordering recount of ballots just to enable the petitioner to indulge in a roving inquiry with a view to fish material to invalidate the election as this would prejudice the Respondents who will not have an opportunity to respond or file an objection. The Petitioner has not specified in the petition the polling stations in which the results are disputed. He has not stated what the dispute was concerning the votes he wants to be recounted. Out of 177 agents who were at the polling stations only 2 testified casually as to uncertainty of results which were counted in their presence. This court finds that no basis has been laid at all to warrant the unsettling of the results for the election of Member of National Assembly for North Imenti Constituency.

84. In conclusion this court finds that the Petitioners petition for an order for recount in all polling station cannot be sustained for reasons the petitioner has not established that there was non-compliance with the constitution and law governing elections or that there were elections malpractices and irregularities that took place during the election and that those alleged malpractices and irregularities were of such magnitude that they substantially and materially affected the results of the elections. **The Petition is therefore dismissed with costs and the court finds that the 3rd Respondent was validly elected as Member of National Assembly for North Imenti Constituency and the certificate issued in respect of that win by the 1st Respondent on 11th of August 2017 is upheld.**

85. In regard to costs of the petition, section 84 of the Elections Act provides that;

“An election court shall award costs of and incidental to a petition and such costs shall follow the cause.”

86. Regulation 30(1)

“The Election Court may, at the conclusion of an election petition make an order specifying

- a) The total amount of costs payable” and
- b) The maximum amount of costs payable.
- c) The person who shall pay the costs under paragraph (a) or (b)
- d) The person to be paid

87. The parties didn't address the court on the issue of amount of costs expected, but in consideration of the work that had to be done by parties counsels and in consideration of the decision in Election Petition between Elizabeth Ongoro vs IEBC & 2 others where the Petitioner was condemned to pay Ksh. 1.5 Million to the 1st and 2nd Respondents jointly and to the 3rd Respondent separately and in consideration of EP No. 3 of 2017 – HC at Kisumu where costs were capped at 2.5 m instruction fees in gubernatorial petitions and EP No.14 of 2017 – HC-Nairobi where Justice Mabeya capped instruction fees at Kshs 2,000,000 this being an election petition arising from elections of Member of National Assembly where documentation was obviously less than those of a County election I do find that the Petition was fairly

straight forward being there was only one relief sought. The instruction fees for 1st and 2nd Respondents is capped at Ksh. 1,000,000 instruction fees for 3rd Respondent capped at Ksh. 1,000,000. The costs shall be taxed and total costs certified by DR of this court. The security deposited in court to be utilised to pay part of the costs to Respondents.

HON. A.Ong'injo J

JUDGMENT SIGNED DELIVERED AND DATED THIS 25th DAY OF JANUARY 2018.

In the presence of:

Mr Mwanzia Advocate for Petitioner

Mr Thuku Advocate for 1st & 2nd Respondent

Mr Ngige Advocate for 3rd Respondent

Mr Mwanzia

I wish to ask for certified copies of judgment and proceedings.

Order

Certified copies of Judgment and proceedings to be supplied to Petitioners counsel and any party who wishes at their costs

HON. A.ONG'INJO J