



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
ELECTION PETITION NO. 3 OF 2017
IN THE MATTER OF:
Article 105 of the Constitution Of Kenya, 2010;
The Elections Act No. 24 Of 2011

And

Elections (Parliamentary and County Elections) Petition Rules, 2017

And

Election for Member of National Assembly, Isiolo South Constituency

MOHAMED TUBI BIDU.....PETITIONER

Versus

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

MAMO ELEMA ADANO.....2ND RESPONDENT

ABDI KOROPU TEPO.....3RD RESPONDENT

JUDGMENT

2017 yet another historic election year

[1] The year 2017 was yet another historic year in our electoral process: for the first time, a general election was held on the second Tuesday in August, i.e. 8th August 2017. Perhaps you will remember the decision of the Court of Appeal in the case of **CENTER FOR RIGHTS EDUCATION AND AWARENESS AND ANOTHER vs. JOHN HARUN MWAU& 4 OTHERS [2012] e KLR** on election dates under the Constitution of Kenya, 2010. And you may see the opinion of Maraga JA. (as he then was) that:-

I therefore concur with the High Court’s second option that the first general election under the current Constitution shall be held on a date within sixty days after 14th January 2013.It follows therefore that the date of “the second Tuesday in August in every fifth year” of each Parliament

contained in Article 101(1) of the Constitution relates general elections subsequent to the first general election under the current Constitution.

Of importance, however, is the election for Member of Parliament for Isiolo South Constituency held on 8th August, 2017 where the 3rd Respondent was declared the winner having garnered 3676 votes. The Petitioner herein garnered 3038 votes. The results thereof as declared is as shown in the table below:-

ITEM NO.	CANDIDATE	VOTES
1.	ABDULLAHI JAIDESA BANTICHA	2475
2.	HUSSEIN TENE DABASSO	765
3.	SHANO HUSSEIN GUYO	688
4.	IBRAHIM NUH MOHAMED	1489
5.	ABDUBA MOLLU IDO	1734
6.	ABDI KOROPU TEPO	3676
7.	JATTAN OMAR WAKO	750
8.	MOHAMED TUBI BIDU	3038

The Petition

[2] The Petitioner was aggrieved by the declaration of results by the 1st and 2nd Respondent and also by the manner in which the entire election for Member of Parliament for Isiolo South was conducted, and he filed this petition seeking for the following orders:-

a. That it be determined that Abdi Koropu Tepo was not validly elected or declared as the Member of National Assembly for Isiolo South Constituency and the Certificate of Results of Member of the National Assembly Election for Isiolo South Constituency in the name of Abdi Koropu Tepo issued on the 9th August 2017 be and is hereby declared unconstitutional, illegal, null and void ab initio and quashed;

b. That it be determined that Abdi Koropu Tepo was not validly gazetted as the Member of National Assembly for Isiolo South Constituency and his gazette as the elected Member of National Assembly for Isiolo South Constituency be and is hereby declared unconstitutional, illegal, null and void ab initio and quashed;

c. That it be determined that Mohamed Tubi Bidu was the validly elected and declared as the elected Member of National Assembly for Isiolo South Constituency and that the 1st and 2nd Respondents be and are hereby declared to issue him with a certificate and gazette him as elected Member of National Assembly for Isiolo South Constituency.

d. The Respondents be condemned to pay your Petitioner's costs of and incidental to this petition;

AND IN THE ALTERNATIVE to prayers (a) to (d) hereinabove;

(e) There be a scrutiny of the votes cast and recorded as having been cast in the Member of National Assembly elections in Isiolo South Constituency;

(f) There be a scrutiny of the register of electors;

(g) There be a scrutiny of the register of electors;

(h) There be a scrutiny of the counterfoils of the votes casts and the counterfoils of all the other ballot papers used, rejected or spoilt;

(i) There be a recount of the ballot papers cast at the election, the re-tallying of the totals of votes cast in all the polling stations in the election;

(j) It be determined that the member of National Assembly election held on the 8th day of August 2017 in Isiolo South Constituency was null and void and it be ordered a fresh election be held;

(k) The Respondents be condemned to pay the Petitioner's costs of and incidental to this petition; and

(l) Such further, other and consequential orders as this Court may lawfully make.

Petitioner's gravamen

[3] From the petition, affidavit filed and annexures thereto as well as the oral testimony by the Petitioner, the Petitioner's gravamen is that:

a. The election for Member of Parliament for Isiolo South held on 8th August, 2017 was so badly conducted, administered and managed by the 1st Respondent that it failed to comply with the principles governing elections enshrined in Articles 1, 2, 4, to 18, 81, 82, 86, 88, 138, 163 and 249 of the Constitution; and the Elections Act and Regulations made thereunder including Electoral Code of Conduct and other relevant provisions of the law.

b. There were massive, systemic, systematic and deliberate non-compliance with the Constitution and the law by the 1st and 3rd Respondents which;

(i) Go to the core of the elections and negates expression of the sovereign will and power of the people of Isiolo South Constituency;

(ii) Undermines the freedom of the people of Isiolo South Constituency to exercise their political rights;

(iii) Was a total failure to comply with the constitutional principle of universal suffrage based on aspiration for fair representation and equality of the vote; and

(iv) Go against constitutional principle that elections should be transparent, free from intimidation, improper influence or corruption and be conducted by an independent body in an impartial, neutral, efficient, accurate and accountable manner.

c. That in the conduct and management of the impugned elections, the 1st Respondent abdicated its duty and role to exercise, protect and safeguard the sovereign will of the people of Isiolo South Constituency.

d. That the irregularities and flaws noted above significantly affected the results to the extent that the 1st Respondent cannot accurately and verifiably determine the votes each candidate garnered.

e. That the 1st and 2nd Respondents and or through officers and agents acting under them or their direction breached their official duty and code of conduct, and thus, committed election offences, in particular:

- i. Failing to serve impartially and independently and perform their duties in good faith
- ii. Allowing people whose details could not be biometrically identified to vote without proper filling of Form 32A;
- iii. Illegally exceeding voting time with some polling stations remaining open until early hours of 9th August 2017;
- iv. Allowing results in which votes cast exceeded registered voters or the number of persons who actually voted;
- v. Refusing to provide the Petitioner's polling agents with copies and duplicates of the Form 35A;
- vi. Using security forces to turn away voters from designated polling stations;
- vii. Denying the Petitioner's agents their right to vote;
- viii. Performing their duties under the influence of the 3rd Respondent;
- ix. Declaring result which was at variance with the result announced by the Presiding officers at the polling stations; and
- xi. Declaring result that was inaccurate and unverifiable.

[4] On the basis of the foregoing allegations, the Petitioner concluded in paragraphs 16, 17, 18, 19 and 20 of the petition that:

- a. The 3rd Respondent was the key player and beneficiary of the election offences and breaches of the Code of Conduct herein; and the 1st and 2nd Respondent are liable thereto;
- b. The election was rigged and unfair. Thus, the purported certification and gazette of the 3rd Respondent as the winner of the election was null and void *ab initio* and should be quashed and the Petitioner be gazetted as the winner thereof.
- c. There was no proper counting, tallying, totaling of votes cast in all polling station which could have formed the basis of declaration of result;
- d. There is no true and complete election that took place in Isiolo South Constituency or return of votes for Member of Parliament for Isiolo South Constituency. As a result, the Petitioner was deprived of fair chance and opportunity as provided in law;
- e. The election was not conducted substantially in accordance with the law or principles laid down in law and the breaches, violations, non-compliance and complaints observed, each of them affected the outcome and the result of the election.

Petitioner's oral evidence

[5] On 6.11.2027, the court gave the following directions:

By way of direction, the witnesses shall be sworn, identify themselves, identify his witness statement

and tender in court as his evidence in chief. The witness shall then be cross-examined.

Accordingly, the Petitioner, the only witness for the Petitioner who had filed an affidavit, adduced oral evidence on 6.11.2007. He testified as **PW1**. He tendered his said affidavit as his evidence. He told the court that he believed that no election was conducted or that the election herein was deliberately distorted.

[6] In cross-examination by Tolo, he stated that he was a registered voter at Algani Primary School in 3rd stream where he voted at about 4.00pm and left to see what was going on in all other pooling stations i.e. Algani, Wako Wario, Galma dido, Kina Primary School. He, however, denied that he conducted campaigns on voting day or interfered with voting at any polling station. He only went around all polling stations and talked to his agents especially within Kina Trading Station. While going around, he observed Top Water Polling Station which was not supposed to be at Kina established at Kina. This polling station was established at a social hall. But he did not write a complaint to I.E.B.C on this matter. He only called the 2nd Respondent about it. He said that he also visited B.P Polling Station at B.P Polling Station at around 3.00 p.m. His testimony was that he had polling agents in all the polling stations. According to him, he had received information earlier that B.P. Polling Station was not in its gazzeted place. He told the court that this rumour was doing rounds before the polling day and was rife one week to elections. He said that he did not see the need to confirm the rumour as I.E.B.C ought to inform them of any changes for they are stakeholders.

[7] He was cross-examined further and stated that he confirms contents of paragraph 6 of the petition. But, he stated that he was not at Tallying Centre at the exact time when the declaration was done. He said that he had gone out for a short call. He concluded that he was, however, at the Tallying Centre generally. He eventually confirmed that it was his agents who informed him of the contents of paragraph 6 of the Petition immediately he came back to the Tallying Centre. Of paragraph 14 of the Petition: he stated that his agents were there, but he was not. The other candidates were also not there. He did not know whether the 3rd Respondent's agents were present during the declaration of results. On coming back from the short call, he found everybody had gone out of the tallying Hall. He then made enquiries and was told that declaration of results had been made in the absence of agents and candidates.

[8] He made further claims that some voters were not identified by KIEMS KIT but were allowed to vote. He could not nonetheless give their names. He stated that, where a voter could not be identified by the KIEMS KIT, Form 32A ought to be filled. But none was filled. He gave Gafarsia Primary School Stream 2 as an example of where voters who were not identified voted and no FORM 32A was filled. He firmly believed that election is a process and technology is key in resolving these allegations. He therefore, expected I.E.B.C to give details of the matters he has complained about. He also referred to Paragraph 7.2 of the affidavit in support; of things which were told to him by his agents. Although he did not call his principal agent as a witness, he insisted that he is the one who told him about the matters in that paragraph. He explained why he did not call him as a witness; because technology can be called upon to answer these matters. He confirmed that FORM 35A for Gafarsia at page 29 was signed by his agent, but the agent did not raise these issues at the time. Again, he said that he thought failure to raise the issues by the agent was because of the illiteracy levels at Isiolo which is low. Nonetheless, he was aware that Agents are supposed to be educated. But his agent was illiterate. He opined that I.E.B.C. should educate voters and agents on matters of elections. So he needed not to engage literate agents.

[9] In his opinion, the KIEMS KIT did not work. He did not see the results being screened and there was no transmission of results. This was in all polling stations. He said that all the other elections results were transmitted electronically except for Member of Parliament. He told the court that he complained verbally to 3rd Respondent about these anomalies but he advised him to go to court. He said that his agents did not complain of KIEMS KIT not working. Of Paragraph 15(d) of the petition: he gave Korbasa as an example. He did not have any other incident. Of Paragraph 15 (e) of the Petition: he said that Form 35B shows voters were more than people who voted. He referred to Korbasa as the only polling Station he could identify in that respect. He however told the court that he did not have own independent record of those who voted. He insisted this is why KEIMS KIT was introduced. His evidence was that Form 35B confirms all allegations made in paragraph 15. But he could not identify the particular station where votes cast exceeded voters who voted. Except he had identified many differences in numbers in

Form 35B. Of Paragraph 7.8 and 7.9 of his affidavit in support shows the discrepancies. For Matageni Primary School, what each candidate garnered is correctly recorded in Form 35A and 35B, except the addition in Form 35A is wrong but that in Form 35B is correct i.e. 276 votes were cast. But elections requires I.E.B.C. to be keen when adding. This only shows that they were not serious. This applies to Kula Mawe Primary School.

[10] He continued to answer questions. He stated that voting time was extended unlawfully. He referred to paragraph 7.3 of the supporting affidavit. He averred that voting went on up to 2.00 a.m. In saying this, he had been in all the polling stations. He had listed these in paragraph 7.3. He was, however, aware that voters on the queue at close of polling station will continue to vote till the last person. But he queried how 300 voters could vote up to 2.00 p.m. Nevertheless, he did not know who voted last. To him, that is why he wanted KIEMS KIT to be brought. In response to questions by Tolo, he said that he was not aware of any extension of voting time in any of the polling stations.

[11] The Petitioner stated that the voting day was peaceful. This was his first time to vie. Of Paragraph 7.6 of his affidavit: he stated that 40 voters were turned away by police officer. But, he did not file any written complaint about that. He however called the Returning Officer. He also confessed that he knew that was an offence and that he recorded it at Police station. But not about the 40 voters who were turned away. He did not also have their names. He only saw a group of people who were chased away. He asked counsel to correct the impression he had on the matter to be that he only saw a crowd of people going away at 5.00 p.m.

[12] Cross-examination by Tolo continued. The Petitioner emphasized that he voted in Isiolo Town which was in Isiolo North Constituency. But, this is the 1st time he voted at Alagani. He admitted that Paragraph 15 (h) of his affidavit is in error. And confirmed that the agents voted. He also abandoned paragraph 7.9 of his affidavit as he learned later that I.E.B.C divided the numbers of registered voters into two in order to be within the required 700 per polling station. He insisted that he should be declared the winner. And that he knew that if the boxes are opened today, he will be the winner. He therefore asked I.E.B.C to provide the information and data from KIEMS KITS. To him, the process was faulty and has, thus, infringed on his right to represent people of Isiolo. He had problem with FORM 35A's. At Gorbasa he garnered 6 votes as per Form 35B. But number of voters who voted is higher than those recorded in Form 35A. He does not however deny that he got 6 votes in that station. Baticha Abdulahi got 3 votes but it was recorded as 17 votes in Form 35B. These, he said, are issues of credibility of elections. He did not know whether the 3rd Respondent got 10 votes.

[13] In Cross –examination by Busiega, the Petitioner stated that he had agents in all polling stations. He told the court that he had 55 polling agents. But he was not calling any one of them as a witness for reasons he had given. He said that Gazzeted areas are with I.E.B.C and that he does not have a list thereof except he can get it from the Kenya Gazette. Of Paragraph 10 of the Supporting affidavit: he explained that he kept on telling the Returning Officer of intimidation but he was told to go to court. This is what he called corruption. He said that he was not given proper answers by 1st Respondent. He therefore applied to be given access of KIEMS KITS so that he will have all information of how many voters voted. The 2nd Respondent could not give him answers and so he thought he was under influence of 3rd Respondent. Gafarsa Primary School saw strangers vote. But he said that it was not for him to know their names, instead, IEBC should tell us what happened.

1st and 2nd Respondents' witness evidence

[14] **RW1 HASSAN BORU SHUNE** testified as **RW1**. He was the Presiding Officer for Sayyida Fatimah Girls Educational Complex Polling station. He tendered in evidence his affidavit filed on 15/9/2017 in court as his evidence-in-chief. In cross-examination by Kisaka, he stated that the polling station he presided over had only one stream. And that voting started at 6.00 a.m and ended at 5.0 p.m. as by law. He checked the queue and announced the closing. But there were two queue with many voters. He said that, in the morning people were coming one by one but at 4.00 p.m. they came in large numbers. He stated that, in ordinary circumstances where the identification is smooth, it will take about 5

minutes per voter. But if there are problems with identification it would take longer. There were some instances where identification failed and they filled FORM 32A in that respect. He stated that he signed some few Forms 32A. According to him, about 200 people were on the queue at about 5.00 p.m. when he closed the polling station. And, it took long to clear this queue. As the petitioner stated most of their people are illiterate and so it took even longer to process the voting. Voting went on until about 10.35 p.m. Closing time was 10.35 p.m. and was listed in the Presiding Officers diary.

[15] RW1 went on to answer questions from Kisaka. He said that each candidate had agents. Two agents signed FORM 35A. Others had left after counting. They started counting presidential votes after a brief rest. So counting started at about 11.30 p.m. It went on until the following day. The Form 35A is dated 8/8/17 which was the Election Day. Counting is just a subsequent process. That is why he dated it 8/8/2017. That was his understanding of the law. The form was signed after he announced the result on 9/8/2017. But he understood that the date to be shown there to be that of election as declared by IEBC.

[16] RW1 said that he noted serial number of one disputed vote. But could be an error that he did not indicate it in the other column of disputed vote. He said that the copy Kisaka had had not been stamped. He termed that omission as a human error. He emphasized that he had sworn in his God and so he had not told any lie. He explained that could be he was tired. He stated that 438 people voted in his polling station. Registered voters was 561. Voting can continue from 6.00 to 1.00 p.m. because of illiteracy. Again, people were really pushing and scrambling on the line. That took them a long time to settle and voting was affected.

[17] RW1 was cross-examined by Busiega. He told the court that voting ended at 10.35 p.m. And that no strangers voted as that could not have been possible. In re-examination by Tolo, he stated that registered voters were 561 and valid votes cast was 435. Counting presidential votes took time as they were hungry, tired and exhausted. In the morning of voting day, all agents were in the polling station. But for one reason or other they left one after the other. Some left when they saw their candidates had left, others were tired. He said that he could not force the agents to stay but only reminded them why they were there.

[18] **RW2** is **ABDIRRAK HALAKE DADACHE DULU**, the Presiding Officer for Gafarsa Primary School Polling Station. He adopted his affidavit filed on 15/9/2017 in court as his evidence in chief. In Cross-examination by Kisaka, he said that he was supposed to make reports to the Returning Officer at intervals of every 2 hours. The report is about what is going on in the polling station. For instance, the percentage of persons who have voted or number of persons who have voted. He said that the registered voters in his polling station were 365. Votes count was 315. He confirmed the Form was in his own handwriting. He wrote it. Ibrahim got 75. And he signed Form 35A on 9/8/17 after counting of votes. He did not, however, stamp the form. He said that they did not have a stamp. But they got the stamp from the other stream and stamped the form. He said that Polling station opened at 6.00 a.m. and closed at 5.00 p.m. But, those in the line were allowed to vote until 8.55 p.m. He counted those in the queue at time of close of polling station. But he did not record that in the Presiding Officers Diary.

[19] RW2 was also Cross-examined by Busiega. He stated that voting ended at 8.15 p.m. They closed at 5.00 p.m. but those in the queue continued to vote until 8.15p.m. The actual results are in Form 35A. All agents signed that Form. No strangers voted as alleged. That was not possible because identification was by finger print. KIEMS KIT could not allow that. He termed the process as having been free and fair in his polling station. In **Re-examination by Tolo**, **RW2** confirmed that he could now see clearly and that Ibrahim Nuh got 15 votes not 75 votes as he had stated earlier. Total registered voters was 376, no rejected vote. Votes cast is 312.

[20] The third witness for the Respondents was **ALI DABABA APICHA**, Presiding Officer for Galma Dido Primary School Polling Station, and Stream 1 of 2. He testified as **RW3**. He tendered his affidavit filed on 15/9/17 in court as his evidence in Chief and I tender it to court as such. In Cross-examination by Kisaka, he stated that voting started at 6.00 a.m., and ended at 5.00 p.m. At close time no person was in the queue. They started counting from 5.00 p.m. he could not, however, remember when counting ended. He said that about 14 agents were present during counting of votes. Except, he could not tell

exactly who the agents for petitioner were. Some agents left while in the process of counting. He entered the votes in Form 35A. No voting continued until late. Only counting continued throughout the night. Records, on close of polling station is in KIEMS KIT and POD.

[21] On Cross-examination by Busiega, RW2 told the court that he was Presiding Officer as Galma Dido. And that he did not chase away any voters as alleged. All persons who were in Station by 5.00 p.m voted at 5.00 p.m.

[22] **ADAN RACHO ABDALLA** was the fourth witness for the Respondents. He testified as **RW4** and stated that he was Presiding Officer at Malka-Daka Primary School polling station. He tendered his affidavit filed on 15/9/2017 as his evidence in chief. On being Cross-examined by Kisaka, he stated that registered voters in his polling station were 309. Voting opened at 6.00 a.m. and closed at 5.00 p.m. But, there were few voters on the queue at close time. So they voted up to 6.50 p.m. He could not, however, recall how many these people were. He recorded that fact in the PSD. They were trained on how to conduct an election. Form 35A at Page 25 of Petitioner was authored by him. There were agents in the morning. But they started disappearing as the day grew. Counting started at about 7.00 p.m. For Member of Parliament, they started counting at around 9.00 p.m. They had about 3 agents present during counting. The petitioners agents were present and signed the FORM 35A. Malka-Daka was not relocated. It is the gazzeted polling station. He was sure of and confirmed that fact. He said that they used the KIEMS KIT which worked 100%. H said that there was no manual identification of voters at his station. And that KIEMS KIT had all the information. It is not true that voting continued up to mid night. He said that they were to make reports after every 3 hours. That included voter turnout etc. he said that he made those reports. He stated that the form should be stamped. But, they were advised to stamp the original copy only. They were not to stamp the duplicates. He stated that the form showed to him by Kisaka was a mere photocopy of the duplicate. He said that the forms are in triplicate of 6 copies. He also identified the copy filed by I.E.B.C to be a carbon copy of the original. He said IEBC has the original. He was categorical that voting did not go beyond 7. But counting did. He also stated that they had lanterns as source of light.

[23] RW4 was Cross-examined by Busiega and stated that there was enough light at the time of counting. Form 35A filed carries same information in the original form. Nobody who was not in the register voted as alleged. He stated that KIEMS KIT worked 100%. And according to him, the election was free and fair. There were no disturbances and agents cooperated well. He was clear that the petitioner never complained to him or appear in his station.

[24] On 8.11.2017, **MAMO ELEMA APANO**, the Returning Officer for Isiolo South Constituency for elections held on 8/8/17 testified as **RW5**. He tendered his affidavit filed on 15/9/2017 in court as his evidence in chief. He also stated that he had filed his response to the petition on 15/9/17. He asked the court to consider it. He gave testimony for himself and on behalf of IEBC. On paragraph 7.8 of Petitioner's affidavit (Pg 12) he had this to say: The tallying system for Form 35B does automatic additions of the total votes once you enter the votes for each party. This applies to Kula Mawe Primary School. In August polls, they instructed and trained their P.O.'s to only sign the original Form 35A and not carbon copies. It was mandatory to stamp the original but not carbon copies.

[25] On being Cross-examined by Kisaka, RW5 stated that it was not a mandatory requirement that carbon copies should be stamped. The copies were made from the scanned copies submitted. Presiding officers were scanning original copies. But some scanned carbon copies. Similarly the physical forms brought to IEBC were original but some were carbon copies. He said that he was not aware of a situation where the station was not provided with a rubber stamp. All stations for Isiolo South Constituency were provided with a stamp. Any contrary view is not true. In Dabasiti Primary School Polling Station, total number of registered voters was 371. He referred to Page 41 of Petition. From the Form 35A those voted were 371. This is as per the Presiding Officer but he still had to tally the results. But in Form 35B he indicated the registered voters as per the register to be 489. He said that the Presiding Officer made an error on registered voters. The number of registered voters is from the official polling station register of voters and cannot be changed. Therefore, by indicating registered voters for Dabasiti is 371 the Presiding Officer made an error. He regarded those as human errors. For Wako Wario Primary school at page 55 of

the Petition, he stated that the Presiding Officer did not indicate the number of the registered voters. That was another mistake by the Presiding Officer.

[26] He reiterated that he was duly trained. He said that the Presiding Officers were to transmit to him at intervals information on voter turn-out. The information was recorded on Presiding Officer's Diary. They were sending text messages or calling him on this information. The Presiding Officer also indicated the number of voters on the queue at the close of polling station. They gave information on this and recorded it in Presiding Officer's Diary. He said that in some polling station voting completed at about 10.00 p.m. He could remember Galma Dido Polling Station had long queue in stream 1. And the polling officer called him at 5.00 p.m. on the matter and he advised him that those in the queue at close of station at 5.00 p.m. must be allowed to vote. RW5 said that the Presiding Officer's Diary are normally stored in Constituency offices for IEBC.

[27] According to RW5, Ires Kalicha Madrassa is just a stone throw away from Gafarsa Primary School. And he had posted register of voters for to Ires Kalicha and voting took place at Ires Kalicha Primary School. The polling station was not moved on polling day as was alleged. Ires Kalicha is on the one side while Gafarsa is on the other side of the road. He informed the court that IEBC has coordinates for all polling stations. He stated that Kuro Mumme Polling Station is in Garbatulla Ward. Malka Daka is also in Garbatulla. Kuro Mumme was mobile station while Malka Daka is a centre. He elaborated that Mobile Police Stations refer to stations where voters are not in one area. This is due to the situation in areas where herders live. The nomadic nature of the people determines the location of the station. People were at Malka Daka and so the station was at Malka Daka where voting took place. He also stated that BP Water Station is gazzeted. It is mobile Station and so voting took place at social hall which is within BP Water Polling Station. Social Hall is within radius of BP WATER Polling Station. That was therefore in order- he had explained this in his affidavit. He stated that he has worked for IEBC since 2014 and so information in paragraph 17 of his affidavit is from other IEBC officers who have been there before.

[28] He admitted that sometimes KIEMS KIT may fail to identify a voter. But he did not receive any report for Isiolo where KIEMS KIT failed. Where the voter cannot be identified, Form 32A is filled. And he received some form 32A. But that does not mean that KIEMS KIT failed as the Presiding Officer puts a code to activate the identification of the voter in KIEMS KIT. He, however, categorically confirmed to court that KIEMS KIT did not fail as alleged in paragraph 7.2 of the affidavit in support. The form 32A for Gafarsa are in their custody. He explained that mistake at Korbesa was due to fatigue. He referred to paragraph 22 of his affidavit. He said that registered voters were 32. The Presiding Officer has worked for long hours. Data Clerk at Tallying Centre also worked for long hours and so they were fatigued and made some mistakes. Some forms had small clerical errors which are not substantial. Most of the forms were correctly filled. His evidence was that Form 35A is to be signed after counting of votes. The Presiding Officer should date it. Some Presiding Officer's signed them on 8/8/2017 as counting was completed before midnight at 8/8/17.

[29] He was Cross-examined by Busienga and stated that he did not receive any complaints from the petitioner. But as stakeholders, the petitioner consulted him at the Tallying Centre when they were receiving the ballot boxes. He had demanded that he should declare him as winner even before he had received results from 6 polling stations. He denied that the Presiding Officers or he was under the control of the 3rd Respondent. He stated that they were serving all the candidates and the electoral process. He said that he was not related to the 3rd Respondent. He not even from Isiolo County as his home county is Marsabit. The 3rd Respondent and he were not from the same tribe or clan. He choose to repeat for emphasis: that filling of forms 32A does not mean that KIEMS KIT has failed. If KIEMS KIT fails, the manual register is used but that did not happen in Isiolo as all KIEMS KITS worked well. He also reiterated that the error in not indicating the registered voters correctly does not favour or disadvantage any candidate as the individual votes for each candidate was correctly captured. He referred to page 41 of Petition. He said that no stranger voted. And KIEMS KIT will not even transmit results where the numbers of registered voters has been exceeded. Again, the number of voters identified must equal the votes cast. KIEMS KIT identified all coordinates for each polling station. He also stated that he did not receive any information that any voter was turned away while in the queue at close of polling station. It is not true that he created any atmosphere that was full of intimidation. He was neutral in the area where he

was not resident as he took oath of neutrality which he maintained.

[30] In Re-examination by Tolo on Korbesa Polling Station; he said it is the data clerk at tallying Centre who made a mistake and not the Presiding Officer. The error should be corrected. The error is on Form 35B not 35A. The total number garnered by Banticha was 3 but inadvertently was entered as 17 in Form 35B. That error does not affect the result. But it is regrettable mistake. Form 35B already has the number of registered voters drawing from the gazette notice. The KIEMS KIT has the number of registered voters of this particular station and even if one does not indicate it, the number shall be provided by KIEMS KIT. He reinforced that rubber Stamps were part of the materials distributed to the Presiding Officers- that is the Presiding Officer's stamp. They collected the rubber stamps a day earlier. On 8/8/17, he was not able to visit all polling stations due vastness of the area. What they do is to keep a check list on all supplies given to the Presiding Officer. On 7/8/2017 the check list show that rubber stamps were provided.

3rd Respondent's witness evidence

[31] **HASSAN BOSO** testified for the 3rd Respondent as **RW6**. He was an agent at Gafarsa Primary School stream 1 polling station. He tendered in evidence the affidavit dated 25/9/17. He was cross-examined by Kisaka and stated that results for Gafarsa was announced on 8/8/17 at about 11.00 p.m. They had first counted Presidential votes. Then embarked to count the others. He said that he remained in station until night and that voting commenced at 6.00 a.m. There was no voting at night.

[32] **HUSSEIN ROBA**, an agent at Gafarsa Primary School Stream 2 on 8.8.2017, testified as **RW7**. He tendered in evidence his affidavit sworn on 20/9/2017. On being Cross-examined by Kisaka, he said that he was the agent for 3rd Respondent. Stream 1 and 2 were counted separately i.e. votes. Counting started at about 9.00 p.m. They took about 30 minutes to count the votes. Voting closed at 5.00 p.m. But there were those on the queue at close of station. The last person voted at about 8.00 p.m. They signed some form after counting. He also signed the form at night after voting competed. But he could not remember the exact time of signing. But it was after midnight after all counting had been completed. He said that the agent for the petitioner was also there. His name was Rukia Bana and he signed the form too. He referred to the Form at page 29 of Petition. He said that he was inside and so he could not have known what was happening outside the station. He stated that Ibrahim Mohammed got 15 votes. In Re-examination by Busiega, he said that he signed the Form at midnight.

[33] **RW8** was **MOHAMMED NUH**, an agent at Galma Dido station for an independent candidate for gubernatorial seat called Mohammed Kutu. He swore affidavit on 25/9/17 which he tendered in evidence. He said that no voters were chased away. On Cross-examination by Kisaka, he confirmed that he was not an agent for any Parliamentary candidate but Governor. But, he was inside the polling station at Stream 2, and so he knew what was happening in the polling station. He declared that he had no interest in this matter except to put the record straight that no voter was turned away. I could go outside the classroom. The window of the classrooms were also open. He had to look outside and inside. He had to monitor all that was going on. He said that the polling station was a classroom and there were many agents for MCA, MP, Governor, etc. He could not recall how many voted for MP. The people at the queue at close of station voted. And counting started after voting completed but he could not however recall exact time the voting commenced. But it started before midnight.

[34] **ABDI KORUPU TEPO**, the 3rd Respondent testified as **RW9**. He stated that he is the MP for Isiolo South. His evidence was that no voting took place in places that were not gazzeted. It took place in gazzeted polling stations. He said that he also contested in 2007 and 2013. He said that BP water has been at Social Hall in the last elections. At Dabasiti Primary School, the errors there are minor and should be seen within the kind of work the Presiding Officer does. They travelled all day before the election, keep awake for over 36 hours and are bound to make errors of human fatigue. The error on registered number of voters was mere error out of fatigue. He said that he had no control over the Presiding Officers or Returning Officer. He stated that the Returning Officer does not come from Isiolo or same tribe or clan with him. He did not even know him. He accused the petitioner of making wild statements and allegations against him without proof. He tendered in evidence his affidavit sworn on

25/9/2017.

[35] He was Cross-examined by Kisaka whereupon he stated that the elections were in accordance with the law. He got about 3676. At Page 73 is the tally for Senate. At Barrier village polling station he got 8 votes. He referred to page 68. He was categorical that votes for Senate and for MP are tallying except for Senate there were rejected votes. But if you add the valid votes and rejected votes for Rapus you get 259. The same case applies to Barrier Station. BP Water Station is at Kinna Social Hall. So also Kalucha Madrassa is in Garfasa but voting took place at Kalucha Madrassa. He was also cross examined by Busiega and stated that he will want to know the error and ask whether the errors were intentional and material. To him errors pointed out were not material or intentional. They are human errors which are normal as long as they are not material and malicious.

Submissions

[36] Parties filed their respective submissions on the pleadings, the evidence as well as the applicable law. I shall consider all arguments in those submissions in making my decision on each allegation raised. I need not reproduce them here so as to avoid dull rehashing and repetition of the submissions.

DETERMINATION

Issues

[37] On 3rd of October, 2017, the court settled the following to be the issues for determination in this petition, to wit:-

- 1. Whether the election for Member of the National Assembly Elections for Isiolo South Constituency held on 8th August 2017 was conducted in accordance with the principles laid down in the Constitution and the law relating to elections.***
- 2. Whether there were irregularities and illegalities committed in the conduct of the election for Member of the National Assembly Elections for Isiolo South Constituency held on 8th August 2017 and whether those irregularities and illegalities affected the integrity and the result of the election.***
- 3. Whether the 3rd respondent was validly elected.***
- 4. What order for cost should the court make?***

Evidence was led to prove or disapprove these issues. But before I embark on a journey to find out whether evidence adduced supports or denies the petition, I should first set out the legal and constitutional thresholds attending to election petitions.

General principles governing elections

[38] Political representation of the people is a matter of the Constitution; it is a right which is realized through elections. In their sovereign power, the people of Kenya, under article 38 of the Constitution, proclaimed this right more specifically that, they shall be entitled to free, fair and regular elections of persons to who they shall vest delegated authority of representation of the people. Again, they proclaimed that such election shall be based on universal suffrage and the free expression of the will of the electors through secret ballot. The people of Kenya went ahead to make specific prescription of the general principles that will govern the electoral systems and process. Below are some of the relevant articles of the Constitution towards that end, to wit, article 81, 83, 84 and 86 of the Constitution:

81. General principles for the electoral system

The electoral system shall comply with the following principles—

- (a) freedom of citizens to exercise their political rights under Article 38;*
- (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;*
- (c) fair representation of persons with disabilities;*
- (d) universal suffrage based on the aspiration for fair representation and equality of vote; and*
- (e) free and fair elections, which are—*
 - (i) by secret ballot;*
 - (ii) free from violence, intimidation, improper influence or corruption;*
 - (iii) conducted by an independent body;*
 - (iv) transparent; and*
 - (v) administered in an impartial, neutral, efficient, accurate and accountable manner.*

83. Registration as a voter

(1) A person qualifies for registration as a voter at elections or referenda if the person—

- (a) is an adult citizen;*
- (b) is not declared to be of unsound mind; and*
- (c) has not been convicted of an election offence during the preceding five years.*

(2) A citizen who qualifies for registration as a voter shall be registered at only one registration centre.

(3) Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election.

84. Candidates for election and political parties to comply with code of conduct *In every election, all candidates and all political parties shall comply with the code of conduct prescribed by the Independent Electoral and Boundaries Commission.*

86. Voting

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

- (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;*
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;*
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and*

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

[39] I am glad that learned legal counsels herein stated these principles in sheer clarity in their submissions.

The test

[40] Then comes section 83 of the Elections Act (as formulated at the time) which stated that:-

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

Much was discussed about this section in the submissions by the Petitioner and the respondents. And out of all those arguments, of pointed significance is what the Supreme Court stated in the **SCK PRESIDENTIAL ELECTION PETITION NO 1 OF 2017 RAILA AMOLO ODINGA & ANOTHER vs. IEBC & 3 OTHER [2017] eKLR** that:-

[203] Guided by these principles, and given the use of the word “or” in Section 83 of the Elections Act as well as some of our previous decisions, we cannot see how we can conjunctively apply the two limbs of that section and demand that to succeed, a petitioner must not only prove that the conduct of the election violated the principles in our Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election as counsel for the respondents assert. In our view, such an approach would be tantamount to a misreading of the provision.

[204] Even in the English Court of Appeal decision in Morgan v. Simpson, which has extensively been cited and applied in many cases in this country, both Lords Denning and Stephenson were of the clear view that notwithstanding the use of the word “and” instead of the word “or” in their provision, the two limbs of the section should be applied disjunctively. In his words, Lord Denning asserted:

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected.

2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or mistake at the polls-provided that the breach or mistake did not affect the result of the election.

[41] The Supreme Court of Kenya, however, refused to follow the path taken by Lord Stephenson in **MORGAN VS. SIMPSON** that even trivial irregularities should cause invalidation of an election. They stated clearly that elections are never perfect as they are conducted by human who are fallible beings. Notably, the Supreme Court adopted the concurring opinion of **Justice Professor Lilian Tibatemwa Ekirikubinza** made in the case of **Col. DR Kizza Besigye v. Attorney-General 100 Constitutional Petition Number 13 of 2009** where, notwithstanding the conjunctive nature of the Ugandan provision, opined:

“Annulling of Presidential election results is a case by case analysis of the evidence adduced before the Court. Although validity is not equivalent to perfection, if there is evidence of such substantial departure from constitutional imperatives that the process could be said to have been devoid of merit and rightly be described as a spurious imitation of what elections should be, the court should annul the outcome. The Courts in exercise of judicial independence and discretion are at liberty to annul the outcome of a sham election, for such is not in fact an election.”

[42] Ultimately, upon consideration of Section 83 of the Elections Act (as formulated at the time) the Supreme Court of Kenya held the following:

[211] In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.

[212] Having analyzed the wording of Section 83 of the Elections Act, bearing in mind its legislative history in Kenya and genesis from the Ballot Act and also in light of the need to keep in tune with Kenya's transformative Constitution, it is clear to us that the correct interpretation of the Section is one that ensures that elections are a true reflection of the will of the Kenyan people. Such an election must be one that meets the constitutional standards. An election such as the one at hand, has to be one that is both quantitatively and qualitatively in accordance with the Constitution.

[43] Accordingly, this court is bound by the decision of the Supreme Court of Kenya under the doctrine of precedent enshrined in article 163(7) of the Constitution that:

All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

Therefore, for a petitioner to succeed, he or she must show, either:

a. That the conduct of the election in question substantially violated the principles laid down in the Constitution as well as other written law on elections, or

b. That, although the election was conducted substantially in accordance with the principles laid down in the Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.

Burden of proof

[44] From the foregoing and the many judicial authorities cited by the parties herein, the petitioner bears the legal burden to prove either of the two elements in paragraph 43 above. And legal burden never shifts. I must acknowledge that the petitioner and respondents filed detailed submissions and cited relevant case law, legal provisions as well as eminent literary works on this subject which I will not multiply. However, I am content to cite:-

Black's Law Dictionary which defines burden of proof to be:-

[a] party's duty to prove a disputed assertion or charge...[and] includes both the burden of persuasion and the burden of production."

Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, which provides that:

"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."

And, the Supreme Court of Kenya in the 2013 ***Raila Odinga case***, that:

"There is, apparently, a common thread in...comparative jurisprudence on burden of proof in

election cases...that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner.... This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et 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."

Evidential burden

[45] Except, however, depending on the effectiveness with which a party discharges its legal burden, the evidential burden keeps shifting and its position at any time is on the person who would lose if no further evidence were introduced. Therefore, evidential burden initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. See *Halsbury's Laws of England*, 4th Edition, vol. 17. See also **RAILA ODINGA V IEBC & 3 OTHERS SEPREME COURT OF KENYA ELECTION PETITION NO 5 OF 2013 [2013] KLR** that:-

"...a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden".

Standard of proof

[46] The foregoing discussion naturally leads to the next item: the standard of proof. Again, this subject was discussed at length by the legal counsels for the parties. But, I am pleased to cite the *Black's Law Dictionary* that standard of proof refers to:-

"...the degree or level of proof demanded in a specific case in order for a party to succeed."

And the degree or level of proof required in election petitions is as per the decision of the Supreme Court in the 2013 Presidential Petition by *Raila Odinga* that:-

"...the threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt..."

Except,:-

"...where there are criminal charges linked to an election,...the party bearing the legal burden of proof must discharge it beyond any reasonable doubt."

[46] For emphasis, therefore, for the petitioner to succeed, he must place before the court firm or cogent and credible evidence to support the allegations:

- a. That the conduct of the election in question substantially violated the principles laid down in the Constitution as well as other written law on elections, or
- b. That, although the election was conducted substantially in accordance with the principles laid down in the Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.

ANALYSIS AND FINDINGS

Petitioner: election a sham

[47] The petitioner claimed that there was total violation of the Principles set out in the Constitution, Electoral Laws and Regulations such that the election was shamolic exercise. He submitted that his case as contained in the affidavit in support of the petition is that the citizenry's fundamental political rights

under Article 38 are encapsulated in the principles of free and fair elections in Article 81(e) and IEBC's obligation to conduct elections in a simple, accurate, verifiable, secure, accountable and transparent manner as stated in Article 86 of the Constitution. He argued that, the 1st Respondent is bound by the principle of constitutional supremacy under Article 2(1) of the Constitution and thus in the conduct of any election, any of its acts that violates those principles, are by dint of Article 2(4) of the Constitution, invalid and any election conducted contrary to those principles is nothing but a usurpation of the people's sovereignty under Article 4 as it shall produce leaders who do not represent the people's will and are not accountable to them. According to him, instead of protecting and safeguarding the sovereign will of the people of Isiolo South Constituency, the 1st Respondent flagrantly flouted those principles of a free and fair election under Article 81(e) of the Constitution as read together with the Elections Act, the Election Regulations, and Section 25 of the IEBC Act. Thus, the 1st Respondent did not conduct elections in a simple, accurate, verifiable, secure, accountable and transparent manner as required by Article 86 of the Constitution. It did not also ensure that what was tabulated and tallied at the polling station was accurately, safely and verifiably relayed at the Constituency Tallying Centre. He was convinced that IEBC did not, under Article 88(5) of the Constitution "... **exercise its powers and perform its functions in accordance with the Constitution and national legislation**". The petitioner raised a number of matters which they claim constitutes non-compliance with the Constitution and the electoral law, to wit:-

- a) *That un-gazzeted areas were used as Polling Stations*
- b) *That in most polling stations the KIEMS gadgets failed to work.*
- c) *That voting time was unlawfully extended.*
- d) *That there was Unusual Voter Turnout*
- e) *Of Refusal to Provide Form 35A Duplicates/ Copies to Party Agents*
- f) *That there were several incidents of Police officers turning away voters in certain areas that were perceived to be the petitioner's strong holds.*
- g) *Of incorrect Votes Tallying.*
- h) *Of anomalies on registered voters, for instance:*
 - a. *In Algani Girls Primary school Polling Station there was an incident where the number of registered voters in stream A was 518 while that in stream 2 was 519 and the same was replicated in Galma Dido Primary school.*
 - b. *In Wako Wario primary school Form 35A does not even indicate the number of registered voters within the station. Such glaring omissions put to queuestions the credibility of the entries made in Form 35B across all the Polling Stations.*
- i) *That the total number of votes cast for the Member of National Assembly are significantly higher than that cast for other elective positions of Governor and Senator.*
- j) *That most forms were not stamped*
- k) *That IEBC Officials performed their duties under the influence of the 3rd Respondent*

I will now evaluate each of the matters complained of, the evidence adduced thereto, the submissions of parties as well as the applicable law.

Of alleged use of un-gazzeted areas as Polling Stations.

[48] Although there is no any specific impleading in the petition to the effect that un-gazetted areas were used as polling stations, the Petitioner averred in paragraph 7.1 of the Affidavit in Support of the Petition that un-gazetted areas were used as polling stations. He also submitted on that allegation. He cited the following examples to support his claim:-

- i. That voting at Ires Kalicha Madrassa was inexplicably moved to un-gazetted polling site in a Primary School in Garfassa, which is 3Km away at the last minute. And voters who turned up to vote only came to learn of the change when they arrived prompting such disgruntled voters not to vote.
- ii. That Kuro Mumme Polling was relocated to another un-gazetted site that is 15 KM in Malka Daka.
- iii. That Belgesh was relocated 20 KM to un-gazetted site in a primary School within Garfasa.
- iv. That Bibi Water Polling station was moved 14 KM to a social hall in Kinna. All these changes targeted the Petitioner's areas perceived as strongholds.

[49] In his testimony in court, the Petitioner stated that when he noted that Bibi Water Polling Station was wrongly established at Kinna in a social hall, he did not write a complaint to I.E.B.C on the matter. He only called the 2nd Respondent about it. He also told the court that he had received information earlier that Bibi Water Polling Station was not in its gazetted place. He further informed the court that a rumour was doing rounds before the polling day and was rife one week to elections that Bibi Water Polling Station was going to be established in un-gazetted area. But he did not see the need to confirm the rumour as he thought that I.E.B.C ought to inform them of any changes for they are stakeholders. The court is aware that any change of polling station must be done in accordance with the law and the public must be involved in the process. However, in an election petition, the petitioner bears the burden of proving that there was such illegal change of polling station. Upon examination of the forms filed by IEBC and the Petitioner, each one of them bear the polling station to which the form and the results relate. In the absence of evidence to the contrary, I take judicial notice that the forms relate to the gazetted polling stations thereof and stated in the statutory forma, in particular, Bibi Water Polling Station (page 53 & 54), Kuro Mumme Mobile Polling station (page 26), Ires Kalicha Madrassa Polling Station (page 30), Belgesh Primary School Polling Station and Belgesh Dam (Mobile) Polling Station (page 33 & 71 respectively). Those forms were also signed by the presiding officer and or deputy presiding officer, and agents or candidates present. What is startling is that, although the petitioner told the court that he had agents in all polling stations, and in fact stated that he had 55 polling agents, he did not call any one of them as a witness at least to substantiate where exactly the polling station he represented the petitioner was located. I am aware that he needed not to call plurality of witnesses in order to prove this point. But he could not himself substantiate the claims that illegal polling stations were established in areas other than the gazetted areas. All that the petitioner hoped for was that the KIEMS KIT would reveal the state of things. This is surprising indeed as the petitioner ought to have known that he must first discharge his legal burden of proof before IEBC could be called upon to discharge any evidential burden. The 1st and 2nd Respondents correctly submitted as much as follows:-

We further submit that no voter filed an affidavit in support of this allegation nor did the petitioner call any witness to substantiate this allegation claiming to have been a registered voter at Ires Kalicha Madrassa, Kuro Mumme, Belgesh and Bibi Water Polling Stations and had gone out to vote but found no voting was ongoing on these polling stations.

Other than stating that the polling stations were relocated to some other un-gazetted areas, the petitioner did not give exact detail of the specific un-gazetted areas that were used as polling stations. He gave generalized description in the following terms:

a. ‘...inexplicably moved to un-gazetted polling site in a Primary School in Garfassa, which is 3Km away...

b. ..relocated to another un-gazetted site that is 15 KM in Malka Daka.

c. ...relocated 20 KM to un-gazetted site in a primary School within Garfasa.

d. ...moved 14 KM to a social hall in Kinna.

No specific places or names of specific or known places were given. The general descriptions given are obscure and the court is lost as no any specific location or known place is disclosed. Accordingly, there was no evidence to show that un-gazetted areas were used as polling stations for Bibi Water Polling station, Kuro Mumme, Ires Kalicha or Belgesh. The allegation is rejected.

[50] In reaching the above conclusion I also considered the evidence by the 2nd Respondent and who was the Returning Officer for the elections for Member of Parliament for Isiolo South Constituency held on 8th August 2017. He stated that Ires Kalicha Madrassa is just a stone throw away from Gafarsa Primary School. According to him, and that fact was not disputed, Ires Kalicha is on the one side of the road while Gafarsa is on the other. He also told the court that he had posted register of voters for Ires Kalicha to Ires Kalicha Polling Station. He was categorical that voting took place at Ires Kalicha Primary School. According to him, no polling station was moved on polling day as was alleged. He informed the court that IEBC has coordinates for all polling stations. There is nothing to disapprove this information. I believe the witness.

[51] I also note that Kuro Mumme and Belgesh Dam were mobile polling stations. In this respect, the evidence by the 2nd Respondent, RW5, is relevant. He stated that Kuro Mumme Polling Station is in Garbatulla Ward. Malka Daka is also in Garbatulla. Kuro Mumme was mobile station while Malka Daka is a Centre. He elaborated that Mobile Polling Stations refer to stations where voters are not in one given area especially due to the nomadic nature of herders. The location of the polling is determined by the location of the people. People were at Malka Daka and so the station was at Malka Daka where voting took place. He also stated that Bibi Water Station is gazetted polling station. And voting took place at social hall which is within BP Water Polling Station. The Social Hall is within radius of Bibi Water Polling Station. This evidence was not controverted.

Of KIEMS KIT failing

[52] The Petitioner alleged in his affidavit specifically at paragraph 7.2 thereof as well as in his evidence in court and submissions, that, in most polling stations the KIEMS gadgets failed to work making it necessary for the respective Presiding Officers to resort to manual voter identification. According to his submissions, there was a total *failure in the Process of Relaying and Transmitting Results which is contrary to the law that requires the 1st Respondent* to obtain and operationalize the Kenya Integrated Electoral Management System (KIEMS) to be used in voter registration, voter identification and the transmission of results. The system is intended to ensure that no malpractices and or manipulation happens during the elections and that the election results are secure, accurate, verifiable, accountable and transparent as required by Article 86 of the Constitution. He urged that Section 39(1C) of the Elections Act provides for simultaneous electronic transmission of results from the polling stations to the Constituency Tallying Centre (CTC) and the National Tallying Centre (NTC) immediately after the counting process at the polling station. Here I should state that electronic transmission of results to the national tallying station is limited to presidential elections under section 39(1C) of the Elections Act. Perhaps, this is part of the progressive implementation and use of technology in electoral process envisaged in section 44(2) of the Elections Act.

[53] The petitioner continued to submit: that, when KIEMS KIT failed to identify voters, the Presiding Officers failed to comply with the legal requirement of filling Form 32A before allowing those voters to cast their vote. He gave an example of Gafarsa Primary School stream 2 where he alleged that his agent witnessed voters whose details could not be ascertained being allowed to vote without filling of Form 32A. Yet again, the petitioner has referred to his agents as the source of information. But, no agent filed any affidavit or was called to verify the information. During cross-examination, the Petitioner stated that he expected I.E.B.C to give details of the matters he has complained about including those in Paragraph

7.2 of the affidavit in support. He insisted that his principal agent is the one who told him about the matters in that paragraph. But he did not call him as a witness for the reason given. At this point, I must state that the petitioner was so pre-occupied with the belief that I.E.B.C will give details of the matters he has complained about including those in Paragraph 7.2 of the affidavit in support, until he forgot his legal duty of proof. Of significance also is that, the petitioner confirmed two important details: (1) that Form 35A for Gafarsa at page 29 was signed by his agent; (2) that the said agent did not raise the issues of failure of KIEMS KIT and use of manual identification of voters at Gafarsa polling station. He, however, blamed the failure by agents to raise such important issues on the illiteracy levels at Isiolo which is low. He was, however, aware that Agents are supposed to be educated.

[54] Admittedly, KIEMS KIT being an electronic gadget may fail. But the affidavit as well as oral testimony in court by **RW2, ABDIRRAK HALAKE DADACHE DULU**, the Presiding Officer for Gafarsa Primary School Polling Station stream 2 show that KIEMS KIT in this polling station worked perfectly well and that there was no manual identification of voters. The witness stated that identification of voters was done by KIEMS KIT using finger prints. He also stated that agents signed Form 35A after counting of votes. This evidence remained unshaken in cross-examination. RW5 also told the court that he did not receive any report of any incident in Isiolo South Constituency where KIEMS KIT failed. He also explained that, where a voter cannot be identified by KIEMS KIT, Form 32A is filled. And that he received some form 32A duly filled where such was the case. But he was careful to elaborate to the court as well as parties about what it means to fill Form 32A. He stated that does not mean that KIEMS KIT failed; it means that the Presiding Officer puts a code to activate the identification of the voter in the KIEMS KIT. He, however, categorically confirmed to court that KIEMS KIT did not fail as alleged in paragraph 7.2 of the affidavit in support. Based on all these pieces of evidence, I should find that there was absolutely no evidence to prove that KIEMS KIT failed and that there was manual identification of voters which was done at Gafarsa. The ground fails.

Of illegally extended voting time.

[55] At paragraph 7.3 of the Affidavit in Support of Petition, and the submissions thereof, the petitioner pleaded and argued that:

Whereas the law contemplates voting between 6.00 a.m. and 5.00 p.m. with allowance being made to compensate for areas that opened late, voting in several stations were inexplicably allowed to continue to the early hours of 9th September, 2017.

In Gafarsa stream 2 with only 376 registered voters, voting went on up to 2.00 a.m. as was Malka Daka, Sayyidah Fatimah Girls Educational Complex and Kulamawe Primary School stream 2. The night voting in these areas most of which are without electricity coupled with absence of proper voter identification allowed for people who were not in the register to vote and thus compromising the integrity of the whole process.

[56] In his testimony, the petitioner stated that voting time was extended unlawfully. He also averred that voting went on up to 2.00 a.m. He said that he had been in all the polling stations. He was, however, aware that voters on the queue at close of polling station should continue to vote till the last person. His major quarrel was, however, how 300 voters could vote up to 2.00 p.m. Nevertheless, he did not know who voted last. To him, that is why he wanted KIEMS KIT to be brought. Surprisingly, in response to questions by Tolo, the petitioner said that he was not aware of any extension of voting time in any of the polling stations. The court is perplexed that the petitioner could raise such serious matters yet he fails to call for evidence in support thereof. He made hollow allegation that voting time was extended unlawfully. As such, there is no prima facie evidence that was adduced as to call upon the Respondents to discharge any evidential burden. That notwithstanding, the presiding officers who testified were clear on opening and closing time of polling stations, when voting started and ended. They stated that they did not extend any voting time and that only persons on the queue at close time were allowed to vote until the last person. See evidence by RW1, 2, 3, 4 and 5. Particularly, RW5, the Returning officer clearly stated that the Presiding Officers were transmitting to him at intervals information on voter turn-out. The information was also recorded on Presiding Officer's Diary. He said the Presiding Officers were sending

text messages or calling him on this information. The Presiding Officer also indicated the number of voters on the queue at the close of polling station and recorded the information in the Presiding Officer's Diary. He said that in some polling station voting completed at about 10.00 p.m. He could specifically remember Galma Dido Polling Station had long queue in stream 1. And the polling officer thereto called him at 5.00 p.m. on the matter after which he advised him that those in the queue at close of station at 5.00 p.m. must be allowed to vote. That kind of operation is permitted in law. The evidence by the witnesses for the respondents was not controverted in cross-examination or by some other independent evidence. Accordingly, by allowing those in the queue to vote up to the last person, the presiding officer did not breach the law. What would be illegal is to allow persons who were not on the queue at close time to vote. I find it quite useful what Mabeya J. stated in **ABDINASIR YASIN AHMED & 2 OTHERS V AHMED IBRAHIM ABASS & 2 OTHERS [2013] ECLR** that:

“...clerks....also play the critical function of ensuring that it is only the people on the queue by the official closing time of the polling station that are allowed to vote as provided for in Regulation 66 of the Regulations.”

Let me also reproduce Regulation 66 of the Election (General) Regulations, 2012 which states:

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

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

(3) The voting by Kenyan citizens residing outside Kenya shall be carried out during the Kenyan time specified in sub regulation (1).”

The petitioner did not adduce any cogent evidence to show that people not in the queue at close of voting time voted or that there was unlawful extension of voting time. In particular, the petitioner did not prove that:

In Gafarsa stream 2 with only 376 registered voters, voting went on up to 2.00 a.m. as was Malka Daka, Sayyidah Fatimah Girls Educational Complex and Kulamawe Primary School stream 2. The night voting in these areas most of which are without electricity coupled with absence of proper voter identification allowed for people who were not in the register to vote and thus compromising the integrity of the whole process.

The ground fails.

Unusual Voter Turnout

[57] The petitioner urged that there were several instances where the total valid votes cast exceeded the registered voters in certain polling stations. He cited:

a. Korbasa where the registered voters as per Form 35A stood at 32 yet the total valid votes cast and captured in 35B was 35.

b. Dabasiti Primary School Polling Station, where the number of registered voters was 371 which was the same number of valid votes cast. That in essence means the voter turnout was an incredible 100%.

[58] In Paragraph 15(d) of the petition, the petitioner pleaded that in some areas, votes cast exceeded registered voters. The petitioner in his testimony said that the only incident of this kind was at Korbasa Polling Station. He also gave Korbasa as an example of votes cast exceeding the people who voted as pleaded in Paragraph 15 (e) of the Petition. He referred to Form 35B on Korbasa to prove his claim. He

however told the court that he did not have own independent record of those who voted. He insisted this is why KEIMS KIT was introduced. On Korbesa, this court had directed as follows:

With the consent of all the parties, original Form 35A for KORBESA PRIMARY SCHOOL, POLLING STATION 1 of 1 ISIOLO SOUTH CONSTITUENCY KINA WARD be availed to this court by IEBC by 7/11/2017.

The original Form was not produced. Parties, however, agreed that they will tackle the issue of the form in the application for scrutiny. The court determined the application for scrutiny and stated that there was no basis for scrutiny. From Form 35B the registered voters at Korbesa Polling station was 32 while votes cast was indicated to be 35. The petitioner submitted that this was a serious error which show that the system used by IEBC was not credible, accurate and verifiable. He however queried the entry in Form 35B only. He did not dispute the result in form 35A for Korbesa which showed that Banticha got 3 votes and not 17 votes. He cited the cases of ***William Kabogo Gitau v. George Thuo & 2 Others*** (2009) eKLR and ***Benard Shinali Masaka v. Boni Khalwale & 2 Others*** (2011) eKLR to the effect that an election is a process and the Court should look at the entire electoral processes rather than results alone.

[59] RW5, the Returning Officer explained that the mistake was made by the data clerk at tallying Centre in entering the data in Form 35B and not by the Presiding Officer. He said that the error should be corrected as it is in Form 35B and not 35A. He clarified that the total number of votes garnered by Banticha as recorded in Form 35A was 3 but was inadvertently entered in Form 35B as 17. According to him, the error did not favour the winner and does not affect the result nonetheless. But it is regrettable mistake. I find that was an irregularity. However, it is the only incident of such nature and was not widespread or massive phenomenon in the election for Isiolo South Constituency. Therefore, it cannot be said to be proof of material non-compliance with the Constitution and the election law in the conduct of the elections herein. In fact the result in Form 35A for Korbesa were not challenged and they did not exceed the registered voters. According to the Maina Kiai case, the result at the polling station are final. Accordingly, although the petitioner placed preponderant weight on this anomaly, I do not think it is of a nature that would invalidate an election. When I apply the other alternative test; the irregularity would not affect the results even if the entire result at Korbesa was left out altogether. Those are the findings of the court in respect of the claim on Korbesa Polling Station.

[60] As for Dabasiti Primary School Polling Station, RW5 told the court that the total number of registered voters was indicated in Form 35A to be 371. Again, according to Form 35A those who voted were 371. But, he had to tally the results. And, he indicated the correct number of registered voters in Form 35B to be 489- which he said is in accordance with the register of voters for Dabasiti. At this juncture, I wish to address the question of Register of Voters. According to the interpretation section 2 of the Elections Act:

“Register of Voters” means a current register of persons entitled to vote at an election prepared in accordance with section 3 and includes a register that is compiled electronically;

The substantive section dealing with the Register of Voters is section 4 of the Elections Act which provides as follows:-

4. Register of Voters

(1) There shall be a register to be known as the Register of Voters which shall comprise of—

- (a) a poll register in respect of every polling station;***
- (b) a ward register in respect of every ward;***
- (c) a constituency register in respect of every constituency;***
- (d) a county register in respect of every county; and***

(e) a register of voters residing outside Kenya.

(2) The Commission shall compile and maintain the Register of Voters referred to in subsection (1).

(3) The Register of Voters shall contain such information as shall be prescribed by the Commission.

Accordingly, the official and authoritative source of number of registered voters is the Register of Voters prepared in accordance with section 4 of the Elections Act. In this case, the relevant Register of Voters is the poll register. Therefore, the statutory forms, whether Form 35A or 35B are not the authoritative source of the number of registered voters. Errors in entering number of registered voters in the statutory forms could be made. And any such error should be reconciled by reference to the poll register. Applying this legal reality, RW5 acknowledged that the Presiding Officer made an error in recording the number of registered voters as 371 in Form 35A. But, such error is not a major deviation from the principles of free and fair election. I agree with RW5 that the error was human error. This parity of reasoning applies to Wako Wario Primary school (at page 55 of the Petition) where the Presiding Officer did not indicate the number of the registered voters. Such was yet another mistake by the Presiding Officer which is not fatal. Taking all factors into account, the petitioner did not produce any evidence to show that the registered voters for Dabasiti primary School Polling Station was 371. The evidence by the Returning Officer, according to the poll register for Dabasiti polling Station was 489 was not controverted. I also find nothing to disbelieve that it was 489. Therefore, an error in stating wrong or not stating the number of registered voters by the Presiding Officer, in my view, is not a substantial error or irregularity on which alone, an election could be nullified. The error cannot be said to be substantial non-compliance with the Constitution and the election law; or one that affects the results. But as for this case, it is notable that the results for each candidate as entered in the forms were not queried; and in line with the decision in the case of **IEBC vs. MAINA KIAI & 5 OTHERS NBI CA CIVIL APP NO 105 OF 2015 [2017] eKLR** which was cited with approval in the **SC PRESIDENTIAL PETITION NO 1 OF 2017**, such results as was recorded at the polling station is an impression of finality of votes cast as well as an expression of the will of the people thereto. The results therefore for Dabasiti and Wako Wario are not invalid. However, I should state once again that where such variance or errors are noted, the Returning Officer should accordingly record them in his tally and collation of results in order to abide by the law and also obviate such arguments as the ones I am faced with. The ground therefore fails.

Refusal to Provide Form 35A Duplicates/Copies to Party Agents.

[61] The Petitioner claimed that the Presiding Officers in all the Polling Stations refused to provide the party agents with copies of the duplicate **Forms 35A** or display them on the doors of the Classrooms where voting had taken place as required by the law. Thus the agents could not countercheck whether the results had been altered or verify them. In the end, he claimed that the results that were announced by the 2nd Respondent were not what had been announced at the Polling Stations. The Petitioner made this allegation in paragraph 7.6 of his affidavit in support of the petition. He stated that he had agents in all the polling stations. But he did not call any one of them to prove that they were not provided with duplicate or copies of Form 35A as required in law. Again, I should state that such allegation which relate to what another person said, or saw or observed or perceived should be reinforced by direct evidence of the person rather than leave it to the vagaries of the rule against hearsay. I should note however, that the Petitioner filed this petition with copies of Form 35A and 35B as annexures. Therefore, I find nothing on which the allegation of non-provision of duplicate copies of Form 35A stands. I let it to fall off.

Turning away of voters

[62] Another complaint by the petitioner was that there were several incidents of Police officers turning away voters in certain areas that were perceived to be the petitioner's strong holds. He pleaded that, police officers on the instructions of the Presiding Officer at Galma Dido Primary school of KINNA ward turned away 40 voters without any reason being offered. See paragraph 15(g) and 7.6 of the petition and supporting affidavit respectively. The Petitioner in his oral evidence stated that the voting day was peaceful. And of Paragraph 7.6 of his affidavit: that 40 voters were turned away by police officer. He stunned the court when he said that he did not file any written complaint about this serious breach of the

law. He told the court that he simply called the Returning Officer on the matter. Interestingly, he confessed that he knew such was an offence and that he reported other incidents at Police station except the one about the 40 voters who were turned away by security agents. In addition, although he had knew of the exact number of voters allegedly turned away by the police, he did provide the name of any or names of some or of the 40 voters allegedly turned away by the police or call any one of them as a witness. In cross-examination, the petitioner ultimately admitted that he only saw a group of people who were chased away, and asked counsel to correct the wrong impression which seems to have been created out of his statements. He stated that he only saw a crowd of people going away at 5.00 p.m. In these circumlocutions, I observed two things: (1) that the petitioner was non-committal on this matter; and (2) he did not state categorically that the group of people he saw going away at 5.00PM were chased by police so as to prevent them from voting. These could be just voters who had completed voting and were going away as by law required. I expected the petitioner to treat such matters as are of a criminal nature with the seriousness they deserve and offer cogent evidence that would satisfy the high standard of proof thereto if the court is to make a determination on whether an electoral malpractice of a criminal nature has occurred. See section 87 of the Elections Act. There was no specific evidence provided by the petitioner to show that the security officers turned away voters. The allegation remains bare and unsupported by any or any cogent or credible evidence. It fails therefore.

Of incorrect Votes Tallying.

[63] Amongst the allegations by the petitioner was that, in certain instances the results announced by the Returning Officer were different from that announced by the Presiding Officers at the polling stations. He gave a catalogue of instances where results announced were different from those declared at the polling station as follows:

i. At Korbesa Primary school Abdullahi Banticha Jaldessa was awarded 17 votes by the Returning Officer in 35B yet he had 3 votes indicated in Form 35A. Interestingly that Form 35A for Korbesa is not the same as the one given by IEBC which is not legible clearly showing that it has been tampered with.

ii. In Matagari Primary School stream 2, the total valid votes cast were 274 in Form 35A but the Returning Officer changed the figure to 276 in Form 35B.

iii. At Kula Mawe Primary stream 1 where the valid votes at the Polling station were 411 but the Returning Officer recorded the same number as being 410 votes.

The petitioner saw these discrepancies to be contrary to the Court of Appeal decision in ***Independent and Electoral Boundaries Commission v. Maina Kiai & 5 Others [Maina Kiai case]*** as the 1st Respondent failed to electronically collate, tally and transmit the results accurately thus failing to recognize the finality of the results at the polling stations.

[64] Of Korbesa polling station, I have already found that there was an irregularity in the recording of the results in Form 35B. But, the results for Korbesa as recorded by the presiding officer in Form 35A was not challenged and did not exceed the registered voters. The error was explained by RW5 and it is regrettable. Nonetheless, given the number of votes involved, I have made a finding that the result will not be affected even if the entire result was disregarded. I also made a finding that this was the only incident of the kind; it was not massive or widespread phenomenon as to be a substantial non-compliance with the Constitution and the election laws in respect of the election for Member of Parliament for Isiolo South Constituency held on 8th August, 2017.

[65] Of ***Matagari Primary School stream 2***, RW5 explained to the court that tallying system for Form 35B carries out automatic additions once you enter the data from Form 35A. I have examined the particular Form 35A for Matagari Primary School Stream 2 and the total votes assigned to each candidate adds up to 276 and not 274 as was indicated by the presiding officer. This was merely a wrong addition of votes cast and does not affect the votes garnered by each candidate. Counsels and the court were taken through the additions by RW5 and there is no doubt it was a simple error in the addition of total votes cast

by the presiding officer. Form 35A was signed by the presiding officer, deputy presiding officer and agents or candidates present. The individual results for each candidate was not queried in this trial. Accordingly, the error is not of any substantial effect on the process of tallying and collation of votes for the election of Member of Parliament for Isiolo South Constituency held on 8th August 2017. But let me remind that the Returning Officer ought to have noted the variance in his tallies to avoid such arguments as these. But as an election court, I find that the total valid votes cast at Matagari Primary School Stream 2 is 276 and not 274 as was recorded in Form 35A. Similar arguments apply to ***Kula Mawe Primary stream 1***. Except, however, for Kula Mawe Stream 1, there was one rejected vote. And I suspect that he added the rejected vote to the valid votes and found a figure of 411. The total valid votes is actually 410 when one adds the individual votes for each candidate as recorded in Form 35A. I so find. The error is of a venial nature. It is however, embarrassing as the statutory form has clear provision for the type of entry that should be made in the specific column therein. Nevertheless, the errors do not constitute substantial non-compliance with the Constitution and election law. It does not even affect the results thereof. Therefore, the ground is not potent enough to invalidate this election on any of the limbs in section 83 of the Election Act.

Almost equal number of registered voters

[66] The petitioner pleaded that in Algani Girls Primary school Polling Station the number of registered voters in stream A was 518 while that in stream 2 was 519 and similar scenario was replicated in Galma Dido Primary school. In his oral testimony in court the petitioner abandoned this ground as he came to learn later that IEBC split the registered voters into two streams in order to abide by the law which requires that a polling station should have not more than 700 registered voters. I say no more on that ground as it is not up for determination.

Comparison with votes for other seats

[67] According to the petitioner, the total number of votes cast for the Member of National Assembly are significantly higher than that cast for other elective positions of Governor and Senator. He argued that from the announced total results for the Member of National Assembly, **14,681** voted; for the Senator, **14,619** voted while for the Governor's position, **14,605** voted. He opined that given that each of the voters was given the same number of ballots it would be expected that there will be uniformity in the total votes cast for the various elective positions. To him, the discrepancy in the number of total votes cast is a clear indication that the Returning Officer manipulated the figures announced.

[68] I do not think, in an election such as ours, votes cast for all positions must invariably or necessarily be exactly the same. There could be some differences in the number of votes cast as recorded by the Presiding officers or Returning officers, and various reasons may be responsible thereof. For example, a voter or voters may, inadvertently or for lack of knowledge of the proper voting procedures or for any reason, dip more than one ballot into one ballot box. Such is called stray ballot or ballots. In such case, the stray ballot or ballots will invariably reduce the number of votes cast for the position for which the ballot was meant. Another consideration; recording of votes in the statutory forms may be erroneous. We have seen wrong additions of votes cast in Matagari and Kula Mawe polling station. These errors may occur in any or some or all of the elective positions. When that happens, there will be no uniformity in numbers of votes cast. I should also state that the other elections are not part or subject of this petition. Therefore, it will be a wrong assumption or unfair inference that difference in number of votes cast among the three elections *per se* amounts to electoral malpractice. Cogent evidence is needed to prove the particular malpractice. I am however aware that it is a red flag if the difference is so huge that it cannot be a result of a simple mistake or error, or it is incapable of any explanation. The differences herein as quoted by the petitioner is small. That notwithstanding, during cross-examination, the 3rd Respondent was able to show that there was no difference between the votes cast in the election for Member of Parliament and for the Senate in areas which counsel for the petitioner had picked to prove the allegation by the petitioner of marked difference in votes cast for the two positions. On this matter, the 3rd Respondent correctly stated the following;

Cross-examined by Kisaka – The elections were in accordance with the law. I got about 3676.

At Page 73 is tally for Senate. At Barrier village polling station I got 8 votes. See page 68. These for Senate and for MP votes are tallying except for Senate there were rejected votes. But if you add the voted votes and rejected votes for Rapsu you get 259. The same case applies to Barrier Station. BP Water Station is at Kinna Social Hall. So also Kalucha Madrassa is in Garfasa but voting took place at Kalucha Madrassa. If there are errors I will ask about them.

The record supports what the 3rd Respondent stated about Barrier and Rapsu. Accordingly, I find that there is no evidence to show that tallying of the results of the election for Member of Parliament for Isiolo South Constituency was erroneous or the election was rigged.

Some Forms not stamped, not signed

[69] The petitioner argued that he demonstrated to the court that the results announced by the Returning Officer were not openly and accurately collated and there were several instances where the results tabulated in Forms 35A differed significantly from those captured in Form 35B. He argued that during the hearing of this Petition that most forms supplied by IEBC had fatal and irredeemable irregularities with some Form 35A lacking the IEBC authentication stamp; some were not signed by the candidates' agents and no reasons were given for that failure; some Forms 35A were altered and tampered with; and some forms were illegible. The petitioner was not satisfied with the explanation by the Returning Officer on the absence of the IEBC rubber stamp when he claimed that only the original was stamped and thereafter was put in the ballot boxes and sealed. And that the other forms which were mere duplicates did not require stamping. He urged that this explanation cannot be said to be credible because some forms have the authenticity IEBC stamp yet others have none. The petitioner insinuated that IEBC may have different set of forms.

[70] Before I delve deeper into this issue, let me first respond to the following submission by the 1st and 2nd Respondent on the matter that:-

“... the issue of most forms not bearing the IEBC authentication stamp was introduced by the petitioner during the hearing and was not pleaded in his petition and thus should not be entertained by this Honourable Court. We urge this Honourable Court not consider this issue when writing the judgment.

As a rule of procedure and law, parties should plead all matters complained of in a proceeding. However, there are matters which arise out of pleadings subsequent to the originating pleading. In a purely civil proceeding which is governed by the Civil Procedure Act and Rules, such matters may be addressed through a reply to defence or defence to counter-claim. But, in election petitions there is no such provision or its equivalent although parties may file additional affidavits with leave of court. That side, election petitions are governed by special procedure and IEBC may be required to furnish to court such electoral materials as may be ordered by the court. In any event, in filing its response, IEBC should file all the statutory forms used in the election in dispute. And, issues may arise out of those forms during trial and the court will not block interrogation of such issues on the basis of the general rule that a party ought to plead all matters it intends to rely upon in his petition. That would be an onerous, myopic and insensitive to the principle of justice in the Constitution. I could be wrong on that view, but I am convinced it is the correct approach and I shall determine the merit or otherwise of lack of rubber stamps on some of the forms.

[71] I turn to the real issues. The Respondents' responses to the claim that some forms did not bear IEBC Stamp were similar. Specifically, the 1st and 2nd Respondent submitted thus:

We submit that it is not mandatory even for the statutory forms to bear the IEBC authentication stamp. The fact that some of the Form 35A filed with the court do not bear this stamp, was an issue exhaustively explained by the Returning Officer during the hearing. The Returning officer explained that the original copy is the one stamped and not the carbon copies and thus not all the copies of Form 35A filed in court were made from the originals.

It is our submission that what is mandatory is that the Presiding Officers sign the Forms 35A. Regulation 79 of the Elections (General) Regulations, 2012 requires that the Presiding Officer signs the statutory form. Once signed by the Presiding officer, the statutory form is valid. All the Forms 35A have been signed by either the Presiding Officer or the Deputy Presiding Officer.

We rely on the case of John Murumba Chikati v Returning Officer Tongaren Constituency & 2 others [2013] eKLR where your Lordship held as follows:-

“What about Form 35A which had not been stamped? The court takes the view that affixing the official stamp is important, but, lack of it does not invalidate the Form. The requirement of the law under regulation 79 of the Elections (General) Regulations, 2012 (hereafter General Regulations) is that the Presiding Officer signs the statutory Form. Under Regulation 5 of the General Regulations, Presiding Officer includes the Presiding officer and Deputy Presiding Officer duly appointed by IEBC. The statutory Form is valid once it has been signed by the Presiding officer; both the Presiding Officer and the Deputy Presiding Officer or by either of them. The Forms were signed by the Presiding Officers appointed for the polling stations in question and therefore, lack of the official rubber stamp does not invalidate the Form or the results thereto. It is only one Form 35 for Milele FYM Primary School which had not been signed by either the Presiding Officer or Deputy Presiding Officer. The Form had been stamped, but that is not sufficient in law. The results for Milele FYM Primary School were invalid and should not form part of the overall results. The question, however, is if the exclusion of those results would affect the results announced. Certainly it does not. In the same vein, Regulation 79 does not require that the statutory Form must be signed by agents. It states clearly in Regulation 79 (6) & (7) that absence of candidates or agents or failure to sign the Form by candidates or agents does not invalidate the results declared in the Form. In sum, the allegations impinging the Form 35 on grounds of lack of a stamp, signatures of all agents and statutory comments fall short of the required thrust for it to be a basis for nullification of an election results. Much more is needed say, how the lapses affected the results. That is lacking in this case. The ground is not proven and it fails.”

We further submit that failure by party agents to sign form 35A and failure to record the reasons for the failure does not in itself invalidate the results announced. Section 79 (6) and (7) of the Elections (General) Regulations, 2012 provide as follows:-

(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).

(7) The absence of a 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.

[72] I will sum up this subject by citing the decision of the Court of Appeal **IEBC vs. STEPHEN MUTINDA MULE & 3 OTHERS [2014] eKLR** that:-

We agree with the submission on behalf of the appellant that it is the signatures of the presiding officers and the agents that authenticate the Form 35. If any such 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 too, the appeal succeeds.

I have perused the forms provided by IEBC as well as those by the Petitioner. The forms were duly signed by the presiding officers and or the deputy presiding officer. They were also signed by candidates and or agents present. The petitioner did not adduce cogent evidence that any of these forms provided by IEBC was not the official form used in the election in question. I therefore, reject the argument that the forms are invalid.

Of influence

[73] The petitioner made generalized accusation that the IEBC officials performed their duties under the influence of the 3rd Respondent. He so suspected because; when he complained of electoral malpractices, the IEBC officers told him to go to court. According to the law, improper influence of IEBC officials by a candidate or some other person is a serious electoral offence under the Election Offences Act. It is also an affront to free and fair election. On this consider the purport of the expression in article 81(e) of the Constitution:-

(e) free and fair elections, which are—

(i)

(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.

Therefore, I adopt the view taken in *Khatib Abdalla Mwashetani v. Gideon Mwangangi Wambua & 3 Others [2014] eKLR*, by the Court of Appeal that:

“Purely from the consequences that flow from the finding that a person is guilty of improper influence, we must conclude that improper influence is serious conduct that has attributes akin to those of an election offence. It is now settled beyond peradventure that the standard of proof where an election offence or such kind of conduct is alleged, is proof beyond balance of probabilities.”

[74] There was absolutely no evidence to show that the 3rd Respondent influenced IEBC officials before, during or after the elections of 8th August 2017. In the absence of prima facie evidence, the 3rd Respondent or the IEBC officials bear no evidential burden to rebut the allegations. However, the 3rd Respondent defended himself of the accusation and stated that he and the 2nd Respondent were not from the same area, or tribe or clan. And that he did not know him personally. The 2nd Respondent also defended himself of these accusations and stated that he acted impartially in service of the people of Isiolo South- a place far from home. Therefore, the allegation has not been proved and it fails.

Conclusions and findings

[75] It has been stated earlier, and I will repeat here, that, election of peoples’ representation is a right as well as the expression of the will of the people. It has also been said before in times not one, that election petition is a serious litigation not only involving the petitioner but also the public at large. Therefore, any person who applies for annulment of the election must meet the required high standard of proof which is above balance of probabilities but not as high as beyond reasonable doubt. And, where allegations of quasi-criminal or of criminal nature have been made, the proof is beyond reasonable doubt. Thus, in an election petition nothing will be worse than to inflate trivial errors in the hope that they will pass the test of the law. Having said that, upon taking the totality of the evidence adduced, the submissions of the parties and the applicable law, the following represent the overall impression of the court on each of the allegations made herein.

Of alleged use of un-gazetted areas as Polling Stations.

[76] The petitioner did not provide evidence the averments in paragraph 7.1 of the Affidavit in Support of the Petition that un-gazetted areas were used as polling stations. In particular, he did not prove that:-

- i. Voting at Ires Kalicha Madrassa was inexplicably moved to un-gazetted polling site in a Primary School in Garfassa, which is 3Km away at the last minute. Kuro Mumme Polling was relocated to another un-gazetted site that is 15 KM in Malka Daka.
- ii. Belgesh was relocated 20 KM to un-gazetted site in a primary School within Garfasa.
- iii. Bibi Water Polling station was moved 14 KM to a social hall in Kinna. All these changes targeted the Petitioner's areas perceived as strongholds.

Of KIEMS KIT failing

[78] The Petitioner failed to prove the allegations in paragraph 7.2 of his affidavit, and more specifically, that, in most polling stations the KIEMS gadgets failed to work making it necessary for the respective Presiding Officers to resort to manual voter identification. There was no evidence that there was any or total failure in the Process of Relaying and Transmitting Results as alleged. I note that the petitioner alluded to electronic transmission of results in his submissions. In passing, my view is that, at the moment, there is no requirement under section 39 of the Elections Act for electronic transmission of results of election for Member of Parliament. Electronic transmission of results to the national tallying Centre is restricted to presidential elections. And I should think that section 39(1C) was part of the progressive implementation of use of technology in electoral process in Kenya which was envisaged in section 44(2) of the Elections Act which provides as follows:

The Commission shall, for purposes of subsection (1), develop a policy on the progressive use of technology in the electoral process.

That aside, Form 35A for Gafarsa at page 29 was signed by his agent; (2) but the agent did not raise the issues of failure of KIEMS KIT and use of manual identification of voters at Gafarsa polling station. The result thereto was not challenged and was declared in the manner provided in law. There was also no manual identification of voters, as alleged. There was also no evidence of reports that there manual identification of voters Based on all the pieces of evidence adduced, I should find that there was absolutely no evidence to prove that KIEMS KIT failed.

Of illegally extended voting time.

[79] The testimony by the petitioner on paragraph 7.3 of the Affidavit in Support of Petition, that voting time was extended unlawfully was unsubstantiated. The evidence available show that only persons who were on the queue at close of station voted after 5.00pm. the law is that any such person must be allowed to vote and that is not unlawful extension of voting time. The ground fails.

Unusual Voter Turnout

[80] I have already held that the anomaly in form 35A on Korbesa is not of a nature that would affect the results or amount to substantial non-compliance with the principles governing elections under the Constitution and the law. Indeed, the error was in Form 35B and not in Form 35A. I also found that as for Dabasiti Primary School Polling Station, the anomaly in recording the number of registered voters by the presiding officer was not fatal as registered voters are as per the register of voters and not what the presiding officer may erroneously indicate in Form 35A. Therefore, this grounds fail.

Refusal to Provide Form 35A Duplicates/Copies to Party Agents.

[82] On the allegation that the Presiding Officers in all the Polling Stations refused to provide the party agents with copies of the duplicate **Forms 35A** or display them on the doors of the Classrooms where voting had taken place as required by the law: I found no evidence to support that claim. The relevant agents were not even called as witnesses to substantiate the claim. 64. A persuasive decision in the case of **FATUMA ZAINABU MOHAMED vs GHATI DENNITAH & 10 OTHERS [2013] eKLR** by Muriithi J is on point that:-

“No agents were called to testify on the alleged harassment of the petitioner’s agents. The witness said the information in his affidavit was reported to him by agents who had not sworn affidavits to confirm the allegation. This is obviously hearsay.”

Thus, the ground fails.

Turning away of voters

[83] Again, the complaint by the petitioner that there were several incidents of Police officers turning away voters in certain areas that were perceived to be the petitioner’s strong holds was devoid of support or merit. It was bare allegation without foot on which to stand. Such serious matter of a criminal nature ought to have been reported to IEBC or the police or any other relevant authority. The ground collapses.

Of incorrect Votes Tallying.

[84] Korbasa was yet again the example give to support his ground. I have already determined that the ground is not potent. As for Matagari and Kula Mawe polling stations, the auto-correct on mathematical additions is not changing of results. The mistake was apparent on Form 35A. Except, I should state that Returning Officers should always record and state any variance they find during collation and tallying of results so that arguments as I have seen here will be avoided. Likewise, this ground one fails.

Almost equal number of registered voters

[85] The petitioner pleaded that in Algani Girls Primary school Polling Station the number of registered voters in stream A was 518 while that in stream 2 was 519 and similar scenario was replicated in Galma Dido Primary school. In his oral testimony in court the petitioner abandoned this ground as he came to learn later that IEBC split the registered voters into two streams in order to abide by the law which requires that a polling station should have not more than 700 registered voters. I say no more on that ground as it is not up for determination.

Comparison with votes for other seats

[86] Votes cast for all positions need not necessarily be uniform. There could be various reasons which would account for any difference that may be realized. Therefore, unless cogent evidence is adduced, mere difference of numbers in votes cast in various positions is not per se proof of electoral malpractice. Except, where the difference is so huge that it cannot be said to be a result of a mistake or error, or it is incapable of any explanation, questions abound and backed with other evidence it may be a profitable argument in an election petition. See **Presidential Election Petition No 1 of 2017**. In this case, there is no evidence to show that tallying of the results of the election for Member of Parliament for Isiolo South Constituency was erroneous or the election was rigged.

Some Forms not stamped, not signed

[87] Failure to sign a form is not fatal. What matters is that the Form is signed by the Presiding Officer and or the Deputy Presiding Officer. See the decision of the Court of Appeal **IEBC vs. STEPHEN MUTINDA MULE & 3 OTHERS [2014] eKLR** that:-

We agree with the submission on behalf of the appellant that it is the signatures of the presiding officers and the agents that authenticate the Form 35. If any such 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 too, the appeal succeeds.

I have perused the forms provided by IEBC as well as those by the Petitioner. The forms were duly signed by the presiding officers and or the deputy presiding officer. The petitioner did not adduce cogent evidence that any of these forms provided by IEBC was not the official form used in the election in

question. Therefore, the ground is reject.

Of influence

[88] The petitioner made generalized accusation that the IEBC officials performed their duties under the influence of the 3rd Respondent. Conduct which insinuates improper influence of IEBC officials by a candidate or any other person is a serious electoral offence under the Election Offences Act. It is also considered to be an affront to free and fair election under article 81(e) of the Constitution. Therefore, it ought to be proved on a standard beyond balance of probabilities. No cogent or credible evidence that was adduced by the petition towards that end. The allegation is hollow and it fails.

[89] Now let me give my final finding on each of the issues framed for determination.

ISSUE 1: Whether the election for Member of the National Assembly Elections for Isiolo South Constituency held on 8th August 2017 was conducted in accordance with the principles laid down in the Constitution and the law relating to elections.

[90] Despite the few minor irregularities and errors I have specifically stated in this judgment, the overall impression on the manner in which the elections were conducted is that, the election for Member of the National Assembly Elections for Isiolo South Constituency held on 8th August 2017 was conducted substantially in accordance with the principles laid down in the Constitution and the law relating to elections.

ISSUE2: Whether there were irregularities and illegalities committed in the conduct of the election for Member of the National Assembly Elections for Isiolo South Constituency held on 8th August 2017 and whether those irregularities and illegalities affected the integrity and the result of the election.

[91] The errors or irregularities in respect of Korbessa polling station, Dabasiti Primary school. *Matagari Primary School stream 2*, and *Kula Mawe Primary stream 1* were not of a substantial nature that would have cumulative effect on the integrity of the process or the result of the election. In reaching this conclusion, much help came from the various judicial decisions but I am content to cite the case of *Joho v. Nyange (No.4) (2008) 3 KLR 500*, (supra) where it was stated that:-

“Error is to human. Some errors in an election are nothing more than what is always likely in the conduct of human activity. If the errors are not fundamental, they should be excused or ignored.”

“It is not every non-compliance or every act in breach of the election regulations or procedure that invalidates an election for being non-compliant with the law. As I have said minor breaches will be ignored.”

“...the result of an election is affected when the cumulative effect of the irregularity reverses it.”

At this stage, I am also constrained to cite what was stated in the case of *WANGUHU NGANGA & ANOTHER vs. GEORGE OWITI & ANOTHER, ELECTION PETITION NO. 41 OF 1993*, that:-

“...election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are not the kind of evidence required to prove election petitions. As I said, they should be proved by cogent, credible and consistent evidence.”

ISSUE3: Whether the 3rd respondent was validly elected.

[92] The above recapitulation of my findings in respect of each allegation raised, points to only one conclusion: that the 3rd Respondent was validly elected as Member of Parliament for Isiolo South

Constituency in the election held on 8th August, 2017. I so hold.

ISSUE 4: What order for cost should the court make?

[93] On costs two pieces of law are relevant. **Section 84** of the **Act** which provides that:-

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

And **Rule 30 (1)** of the Election Petition Rules which provide as follows:

30 (1) The Court shall, at the conclusion of an election petition, make an order specifying –

- a) the total amount of costs payable; and***
- b) the person by and to whom the costs shall be paid.***

From these provisions, it is discernible that: (1) In the exercise of court’s discretion to award costs in an election petition, the court shall be guided by the rule of thumb thereto that costs shall follow the cause: And (2) the election court has the power to cap the costs awarded. However, rule 31 of the Election Rules has always caused trouble to Registrars where the election court has capped costs. Some argue that rule 30 seems to make it mandatory for the election court, at the conclusion of the petition to specify the total amount of costs payable, and by whom. And that it is only where the election court has made a general order for costs that the Registrar should tax costs thereto under rule 31 of the Election Rules. Other learned minds and jurists seem to suggest that the election court should merely cap the instruction fee but leave the taxation of the actual costs to the Registrar. Both arguments are valid and are based on a legal provision. Nonetheless, I should think that clarity is needed in these rules. However, in these arguments, what should not be lost, is that: the Registrar is well equipped with the tools for taxation, i.e. the Remuneration Order and the advocates Act; and parties should never be denied a say in the taxation of costs if the process of taxation is to produce fair compensation for work done. See the case of ***Kalembe Ndile and Another v Patrick Musimba and Others Machakos HC EP No. 1 and 7 of 2013 [2013] eKLR*** where that,

“...Costs awarded should be fairly adequate to compensate for work done but at the same time should not be exorbitant as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politic by undermining the principle of access to justice enshrined in Article 48 of the Constitution.

[94] On my part, this petition was not complex and the issues were fairly straight forward. Accordingly, I will cap instruction fee at Kshs. 1,000,000 for 1st and 2nd Respondents, and Kshs. 1,000,000 for the 3rd Respondent. The costs shall be taxed and certified by the Registrar.

Appreciation

[95] Before I close, I wish to thank all counsels herein for their industry and service to the court. I also wish to thank the court staff for acting in accordance with their duties and oath of office in service to the consumers of justice.

Final orders

[96] The final orders of the court are as follows;

- (a) The petition is hereby dismissed.***
- (b) The respondents are awarded costs on the following terms:***

(i) Instruction fees for 1st and 2nd respondent are capped at Kshs. 1,000,000.

(ii) Instruction fees for the 3rd respondent are capped at Kshs. 1,000,000.

(iii) The costs shall be taxed and the total costs certified by the Deputy Registrar of this court.

(iv) The money deposited as security herein shall be applied in the payment of taxed costs on a pro-rata basis.

(c) A certificate of this determination in accordance with section 86(1) of the Elections Act, 2011 shall issue to the Independent Boundaries and Electoral Commission and the Speaker of the National Assembly.

Orders accordingly.

Dated, signed and delivered in open court at Meru this 24th day of January 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Muriuki/Kisaka for Petitioner

Mr. Busiega Advocate for Mr. Tolo for 1st and 2nd Respondent

Mr. Busiega Advocate/Ms. Kiome advocate for 3rd Respondent

Petitioner – present

3rd Respondent – present

2nd Respondent – present

F. GIKONYO

JUDGE